



**Monday, October 19**  
**9:00 am–10:30 am**

## **401 363 Sales in Bankruptcy- A Chance to Make Lemonade from Lemons?**

**Raymond Agran**

*Partner, Business*

Saul Ewing, LLP

**Teresa Currier**

*Partner, Bankruptcy and Restructuring*

Saul Ewing, LLP

**Juliette Pryor**

*Executive Vice President, General Counsel and Chief Ethics Officer*

U.S. Foodservice, Inc.

**J. Scott Victor**

*Managing Director and General Counsel*

SSG Capital Advisors, LLC

## Faculty Biographies

### Raymond Agran

Raymond D. Agran is a partner in Saul Ewing LLP's business department in Philadelphia. He focuses his practice on domestic and international mergers and acquisitions, securities, venture capital, joint ventures, partnerships and strategic alliances, intellectual property licensing, distribution agreements and general commercial law, with emphasis most recently on mergers and acquisitions transactions in bankruptcy, particularly Section 363 sales. In his private practice, Mr. Agran has represented a wide variety of clients, from publicly traded and private companies, to start-up entrepreneurs, in all manner of corporate, securities and acquisition-related transactions, from the simple to the complex, from tender offers, to private negotiations, to bankruptcy reorganizations.

Prior to joining Saul Ewing, Mr. Agran was a partner at Ballard Spahr Andrews and Ingersoll, LLP and Wolf, Block, Schorr and Solis-Cohen, two Philadelphia-based law firms, at which he was a partner in their respective business and finance departments and their mergers and acquisitions and securities practice groups.

Mr. Agran received his BA, magna cum laude, from Yale University and earned his JD from Columbia University School of Law, where he was named a Chancellor Kent Scholar (highest honors) and a Harlan Fiske Stone Scholar (very high honors) and served as the associate editor of *Columbia Journal of Transnational Law*.

### Teresa Currier

Teresa K.D. Currier is a partner in Saul Ewing LLP's bankruptcy and restructuring department in Wilmington, DE, where she concentrates her practice in the areas of corporate bankruptcy and restructuring. Her practice includes active representation of debtors, creditors' committees, equity security holders' committees, trade creditors, secured creditors, indenture trustees and bondholders, unsecured creditors, and asset purchasers, primarily in the U.S. Bankruptcy Court for the District of Delaware.

Prior to joining Saul Ewing, Ms. Currier was a partner with Klett Rooney Lieber & Schorling PC in its Wilmington, DE office. She has handled bankruptcy appeals to the U.S. District Court for the District of Delaware and the Third Circuit Court of Appeals, and was selected by U.S. District Court Judge Joseph Farnan, Jr. to serve on his ad hoc committee on bankruptcy issues. She also served on the merit selection panel named by the Third Circuit Court of Appeals to conduct the search for a second Delaware bankruptcy judge.

Ms. Currier is a member of the American Bankruptcy Institute, ABA, and Turnaround Management Association. She has worked with the Delaware District Court judges planning Delaware's annual bench-bar conferences, and serves on the mega case committee for the U.S. Bankruptcy Court for the District of Delaware.



Ms. Currier received her BA, magna cum laude, from Lehigh University and her JD from Dickinson School of Law, summa cum laude, where she was awarded Order of the Coif distinction and served as comments editor of the *Dickinson Law Review*.

### **Juliette Pryor**

Juliette Pryor is executive vice president, general counsel and chief ethics officer, U.S. Foodservice, Inc. In this role, Ms. Pryor is responsible for all legal, risk management and ethics and compliance functions.

Prior to joining U.S. Foodservice, she was counsel in the Washington, DC office of Skadden Arps Slate Meagher & Flom. While at Skadden, she counseled domestic and international corporate clients in various aspects of sales, acquisitions, corporate restructurings, and other insolvency matters. Ms. Pryor also served as debtors' counsel in Chapter 11 reorganizations and advised foreign and domestic creditors defending claims in U.S. bankruptcy cases. Before joining Skadden, she was chief legal officer and corporate secretary for e.spire Communications, Inc., a publicly traded telecommunications company. She oversaw all regulatory, legal and corporate reporting and compliance matters and successfully defended the company against a class action shareholder litigation. Ms. Pryor also helped manage the company through its Chapter 11 reorganization, including an orderly wind down through a series of asset sales. Previously, as a political appointee, Ms. Pryor served as legal advisor to the vice chairman of the U.S. International Trade Commission, providing advice and counsel on antidumping and countervailing duty investigations, and intellectual property rights investigations. Ms. Pryor began her career as in-house counsel with IBM Corporation.

She holds a BA from Fisk University. Ms. Pryor earned a MS from Georgetown University School of Foreign Service, and she received her JD from Georgetown University Law Center.

### **J. Scott Victor**

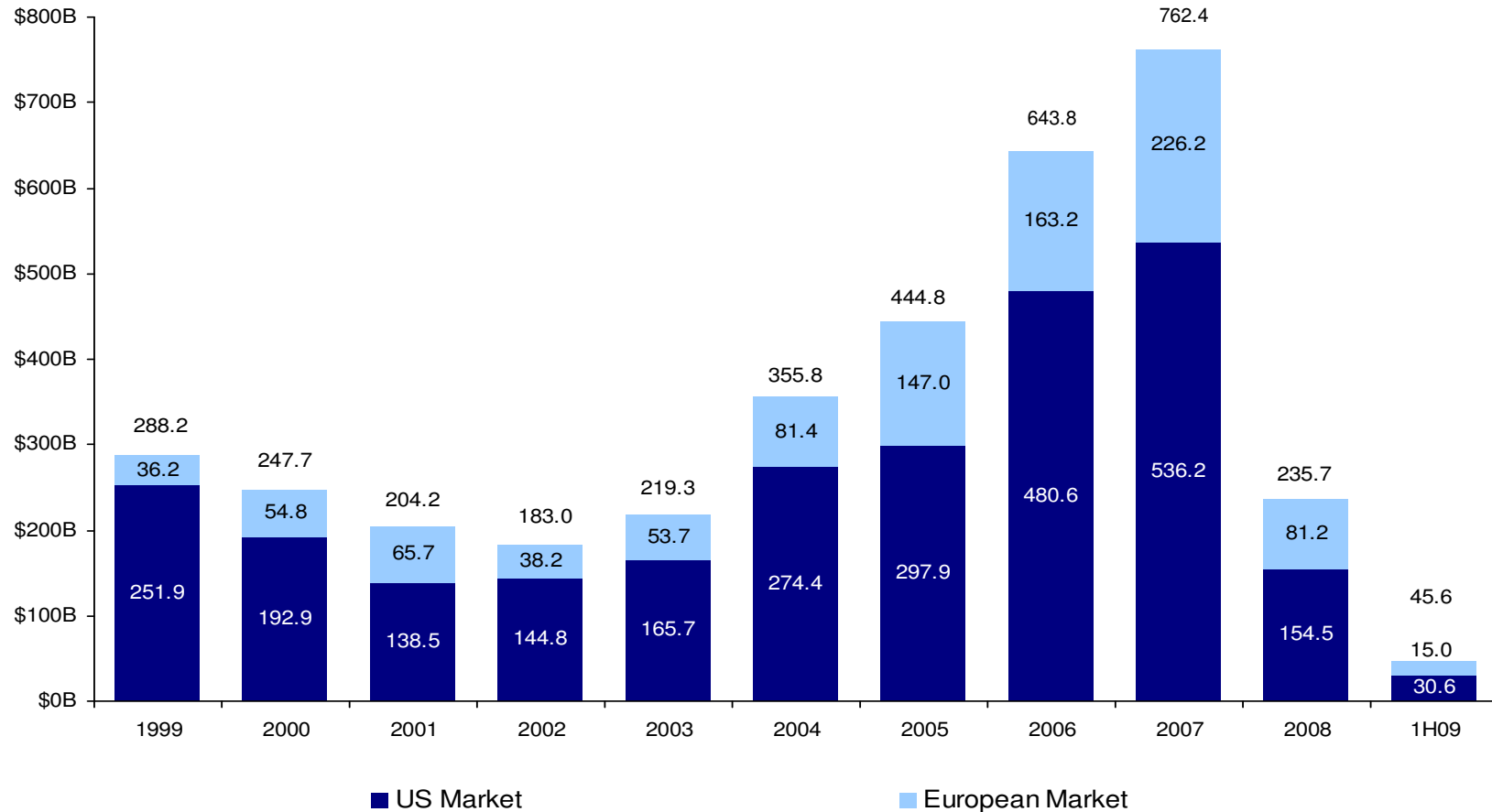
J. Scott Victor is a founding partner and managing director of SSG Capital Advisors, LLC, a leading boutique middle market special situations investment banking firm with offices outside of Philadelphia, PA and in New York, NY. Prior to reacquiring SSG from National City/PNC, Mr. Victor was a senior managing director and co-head of the special situations group of National City Investment Banking, which acquired SSG in August, 2006.

Prior to his transition to investment banking, he was a partner at Saul Ewing, LLP and a senior member of its bankruptcy and reorganization department. With extensive experience in representing companies in Chapter 11 proceedings, workouts, and restructurings, he is an expert in the restructuring, refinancing and sale of distressed middle-market companies. Mr. Victor has lead or participated in well over 125 sale, refinancing and restructuring assignments for distressed middle-market companies both in and outside of Chapter 11 proceedings and has testified as an expert in numerous bankruptcy courts across the U.S. He has given more than 100 presentations around the U.S. and Europe on bankruptcy and insolvency law, distressed M&A and turnaround financing issues.

He is a fellow of the American College of Bankruptcy. He is also an active member of the Turnaround Management Association – immediate past chairman and former president of the Philadelphia Chapter and a former member of the executive committee and current member of the board of directors of TMA International.

# Senior Loan Volume

1999 – 1H 2009

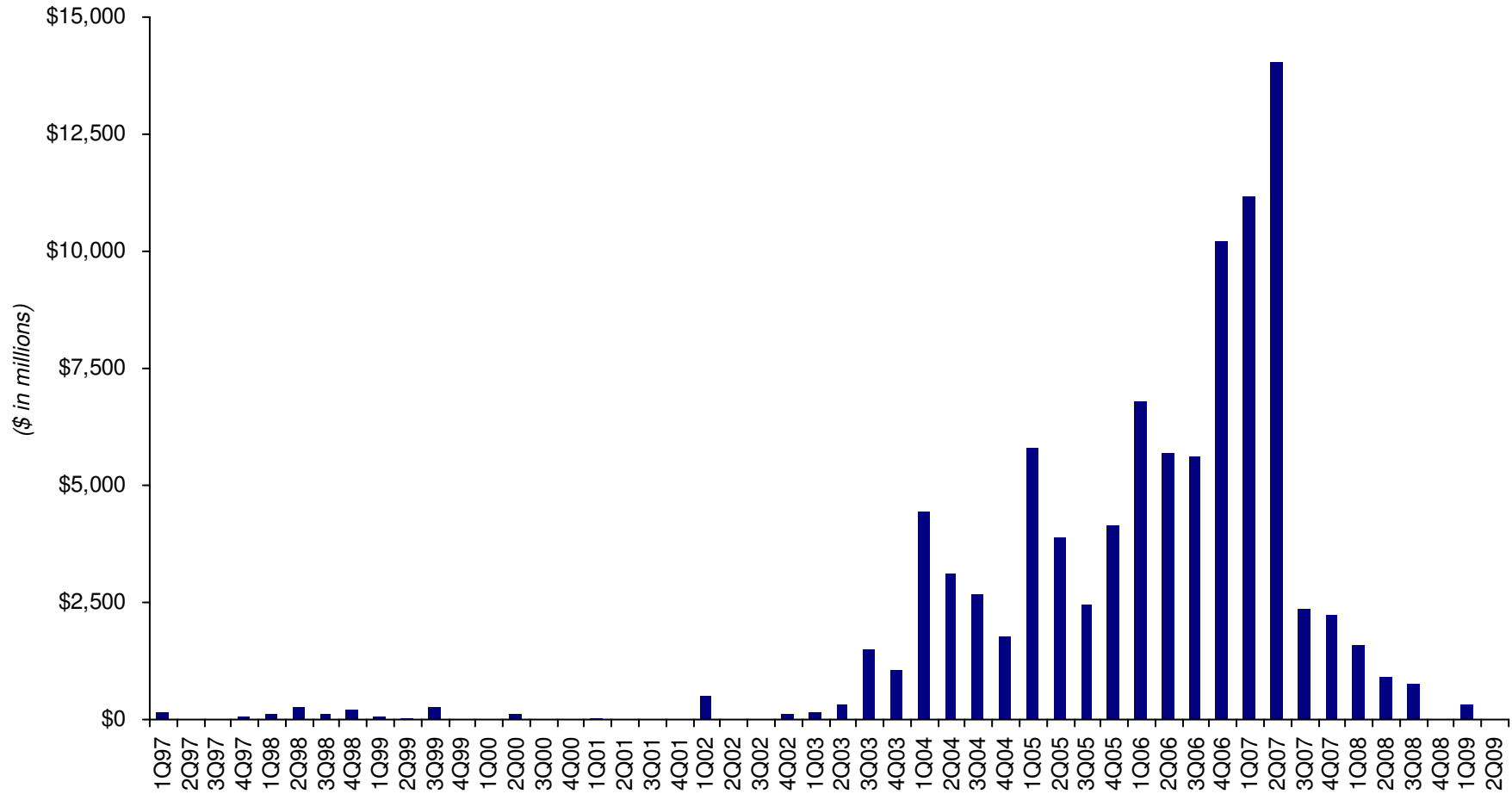


**Note:** This chart reflects the estimated primary volume to the US and European loan markets. The US Market includes tranches denominated in non-USD currencies as well as US dollars. The European Market includes tranches denominated in non-Euro or Sterling currencies as well as Euros and Sterling. Exchange rates from non-USD currencies are based upon date of launch of the individual transactions.

**Source:** Standard & Poor's LCD M&A Stats

# Second Lien Volume

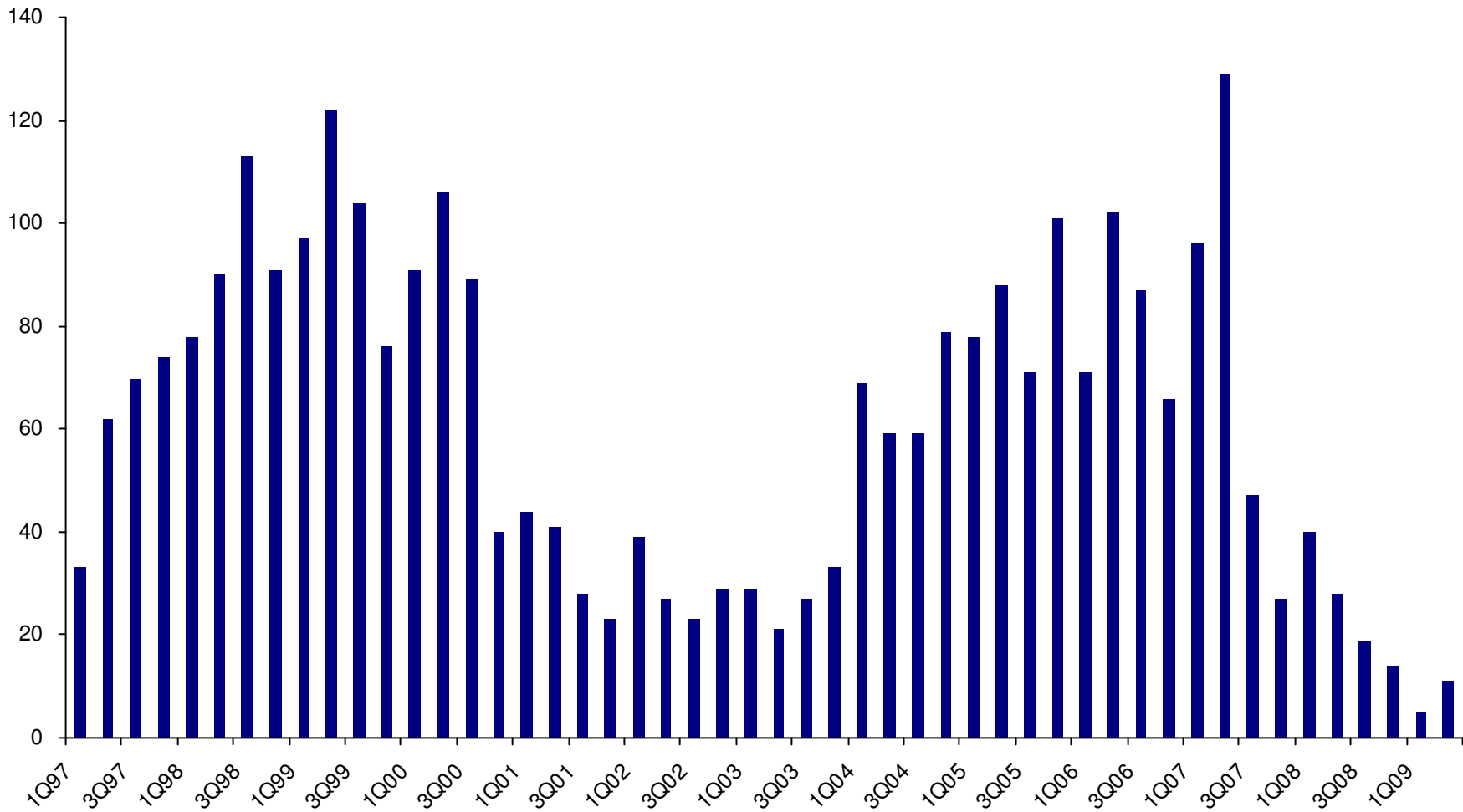
1Q 1997 – 2Q 2009



Source: Standard & Poor's LCD M&A Stats

## Number of Middle-Market Deals By Quarter

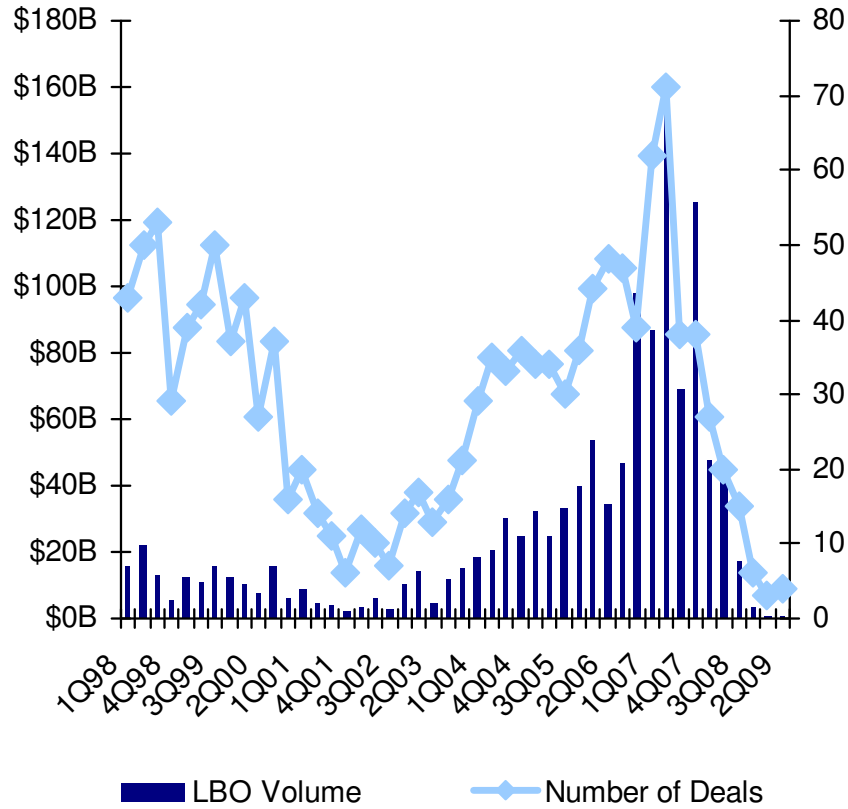
(Defined as Issuers with EBITDA of \$50 Million or Less)  
1Q 1997 – 2Q 2009



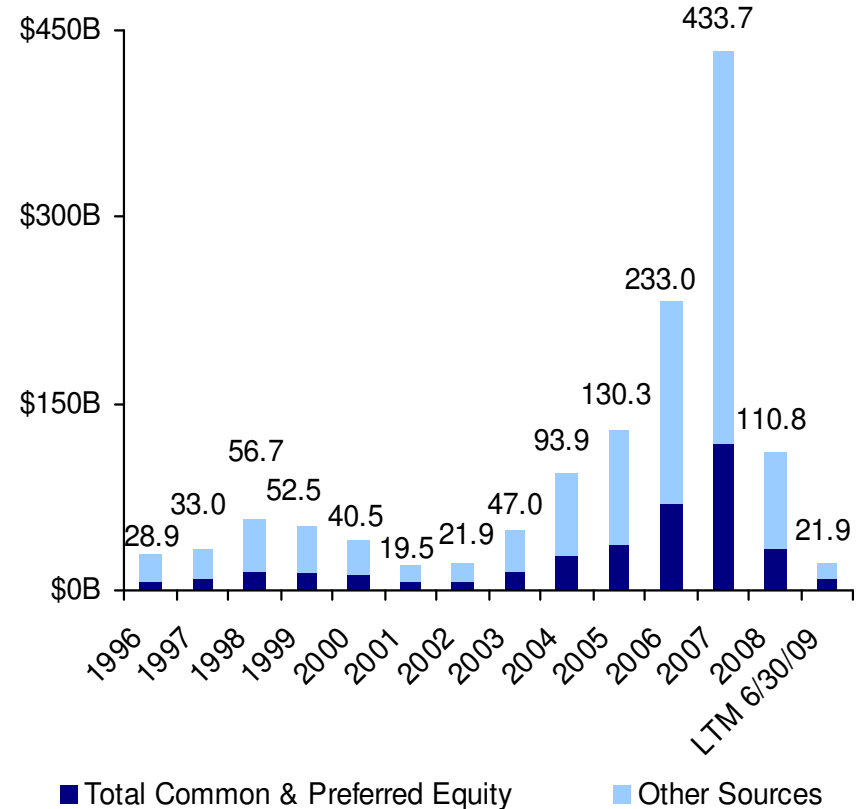
Source: Standard & Poor's LCD M&A Stats

# Total US Leveraged Buyout Volume 1996 – 1H 2009

By Quarter



By Year

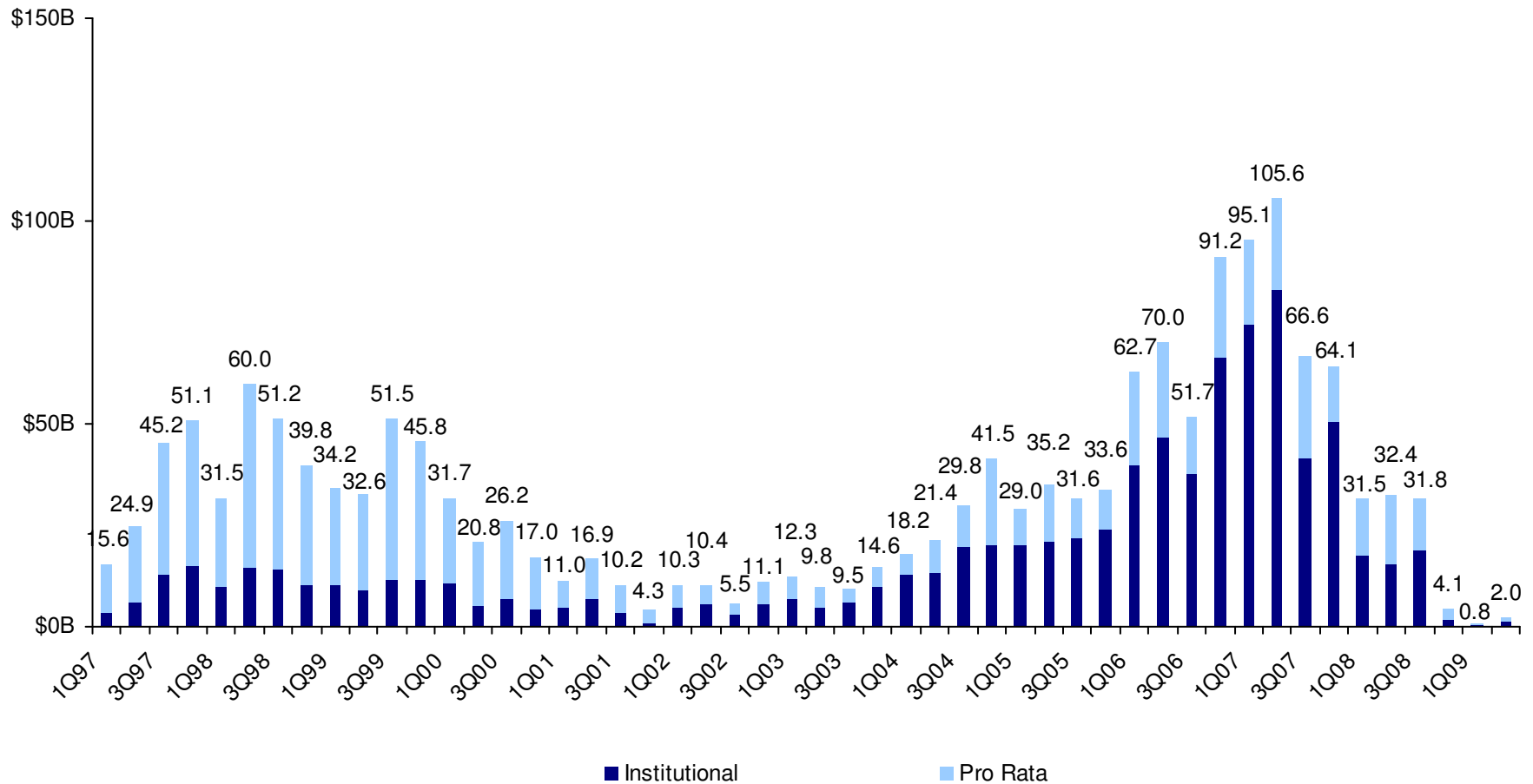


**Note:** The volume on this page includes the Total Sources (loans, secured debt, unsecured debt, sub debt, and equity) involved in Leveraged Buyouts.

**Source:** Standard & Poor's LCD M&A Stats

# M&A Leveraged Loan Volume

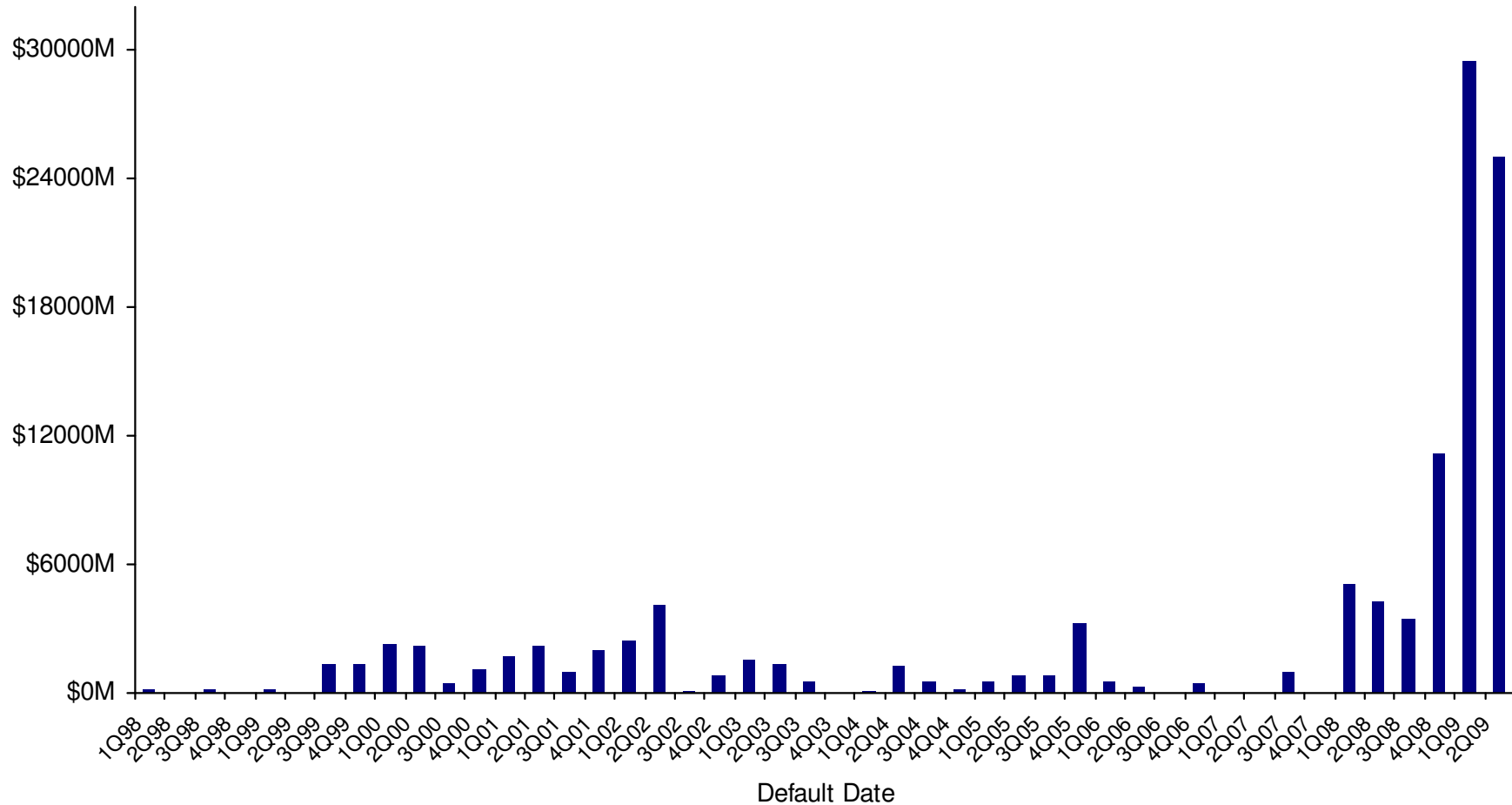
## 1Q 1997 – 2Q 2009



Source: Standard & Poor's LCD M&A Stats

## Initial Institutional Defaults Loan Amounts by Quarter

Comprises Institutional Loans closed between 1995-2Q 2009 for Issuers that File Publicly



Source: Standard & Poor's LCD M&A Stats

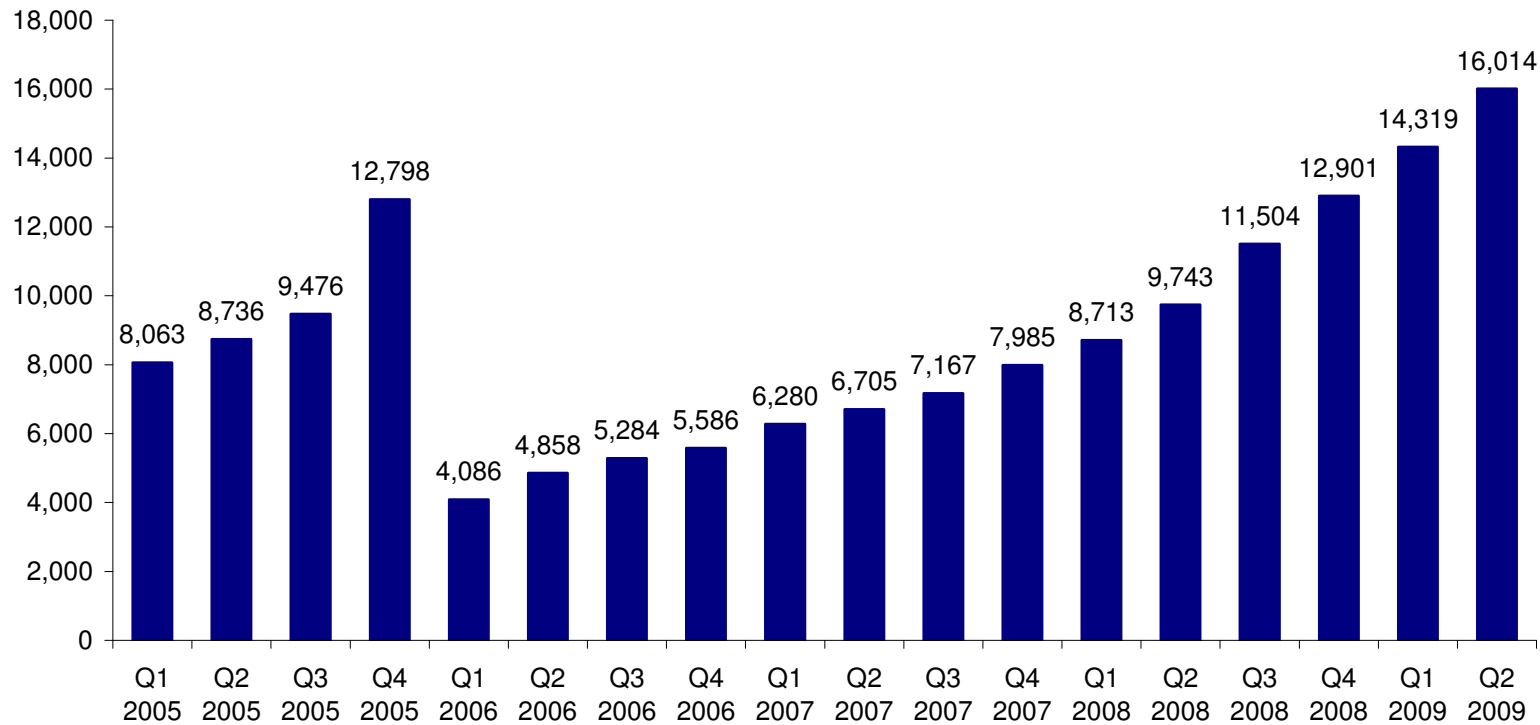


## Business Bankruptcy Filings

- Through the first half of 2008, business bankruptcy filings increased by 5,471 from the first half of 2007 and 9,512 from the first half of 2006

### Quarterly Corporate Bankruptcy Filings

(1Q 2005 - 2Q 2009)



**Note:** Chapter 11 filings for public companies have already exceeded 2007 year end total

**Source:** American Bankruptcy Institute

EXECUTION COPY

**ASSET PURCHASE AGREEMENT**

**dated as of February 8, 2008**

**among**

**ELCO HOLDINGS LTD.**

**and**

**FEDDERS NORTH AMERICA, INC.**

**and**

**EMERSON QUIET KOOL CORPORATION**

NY-568512 v20

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
ARTICLE I PURCHASE AND SALE OF ASSETS .....	2
1.1 Purchase and Sale of Purchased Assets .....	2
1.2 Assumption of Liabilities.....	5
1.3 Consideration for Purchased Assets.....	6
1.4 Further Assurances.....	9
1.5 Assignment of Business Contracts and Business Licenses.....	10
ARTICLE II THE CLOSING.....	10
2.1 Time and Place.....	10
2.2 Closing Deliveries of the Sellers.....	10
2.3 Closing Deliveries of the Purchaser.....	12
ARTICLE III REPRESENTATIONS AND WARRANTIES OF THE SELLERS .....	13
3.1 Organization.....	13
3.2 Authority.....	14
3.3 No Violation; Third Party Consents .....	14
3.4 Government Consents.....	15
3.5 Manufacturing Assets .....	15
3.6 Proprietary Rights.....	15
3.7 Business Contracts.....	15
3.8 Business Licenses .....	16
3.9 Customer and Supplier Information.....	16
3.10 Litigation; Governmental Orders.....	16
3.11 Compliance with Laws .....	16
3.12 Insurance.....	16
3.13 Title to Purchased Assets.....	17
3.14 Taxes.....	17
3.15 Inventory.....	17
3.16 Brokers.....	17
3.17 Affiliated Transactions.....	17
3.18 Sufficiency of Assets .....	17
3.19 Sales Agency Agreements .....	17
3.20 No Other Representations.....	17
ARTICLE IV REPRESENTATIONS AND WARRANTIES OF THE PURCHASER.....	18
4.1 Organization.....	18
4.2 Authority.....	18
4.3 No Violation; Third Party Consents .....	18
4.4 Governmental Consents.....	19
4.5 Litigation.....	19
4.6 Brokers.....	19

4.7 Financing..... 19

ARTICLE V COVENANTS AND AGREEMENTS ..... 19

5.1 Conduct of Business ..... 19

5.2 Access and Information ..... 20

5.3 Confidentiality ..... 20

5.4 Further Actions ..... 22

5.5 Fulfillment of Conditions by the Sellers ..... 22

5.6 Fulfillment of Conditions by the Purchaser ..... 22

5.7 Publicity ..... 22

5.8 Transaction Costs ..... 22

5.9 Retention of and Access to Records; Employees ..... 23

5.10 Insurance ..... 24

5.11 Bankruptcy Court Approval ..... 24

5.12 On-Hand Packaging Materials and Stationery; Others' Use of Intellectual Property .. 25

5.13 Corporate and Trade Name ..... 25

5.14 Data ..... 26

5.15 Delivery of Tangible Manufacturing Assets ..... 26

5.16 Termination of Sales Agency Agreements ..... 26

5.17 Updating Schedules ..... 26

5.18 Segregation of Inventory ..... 26

5.19 Employees ..... 27

ARTICLE VI CLOSING CONDITIONS ..... 27

6.1 Conditions to Obligations of the Purchaser ..... 27

6.2 Conditions to Obligations of the Sellers ..... 29

ARTICLE VII AS IS SALE ..... 30

7.1 AS IS SALE ..... 30

7.2 No Reliance ..... 30

7.3 No Duty of Inquiry ..... 30

7.4 Purchaser's Responsibility ..... 30

7.5 Release ..... 30

7.6 SURVIVAL ..... 31

ARTICLE VIII REPRESENTATIONS, WARRANTIES AND AGREEMENTS TERMINATE AT CLOSING; LIMITATION OF REMEDIES AGAINST SELLERS INDEMNITY BY PURCHASER ..... 31

8.1 Representations, Warranties and Agreements Terminate at Closing ..... 31

8.2 Limitations of Remedies Against Sellers ..... 31

8.3 Indemnification by the Purchaser ..... 32

8.4 Claims ..... 32

8.5 Threshold for Indemnity; Survival ..... 33

ARTICLE IX TERMINATION ..... 34

9.1 Termination ..... 34

9.2 Effect of Termination ..... 35

9.3 Termination Fee; Expense Reimbursement ..... 35

9.4 Good Faith Deposit ..... 35

ARTICLE X MISCELLANEOUS ..... 36

10.1 Notices ..... 36

10.2 Assignment ..... 37

10.3 Amendments and Waiver; Exclusive Remedies ..... 38

10.4 Entire Agreement ..... 38

10.5 Representations and Warranties Exclusive ..... 38

10.6 No Third Party Beneficiary ..... 38

10.7 Governing Law ..... 38

10.8 Neutral Construction ..... 39

10.9 Severability ..... 39

10.10 Bulk Sales Laws ..... 39

10.11 Headings; Construction ..... 39

10.12 Joint and Several Liability ..... 39

10.13 Patriot Act; Executive Order 13224; Anti-Money Laundering Act ..... 40

10.14 Extended Meanings ..... 40

10.15 Counterparts; Facsimile Delivery ..... 40

10.16 WAIVER OF JURY TRIAL ..... 40

ARTICLE XI DEFINITIONS ..... 41

11.1 Certain Definitions ..... 41

11.2 Interpretation ..... 49

Schedules

Schedule 1.1(a)(i)	Assigned Inventory
Schedule 1.1(a)(ii)	Business Licenses
Schedule 1.1(a)(iii)	Manufacturing Assets
Schedule 1.1(a)(iv)	Business Contracts
Schedule 1.1(a)(vii)	Proprietary Rights and Other Intellectual Property and IT Equipment
Schedule 1.1(a)(viii)	Prepaid Expenses
Schedule 1.1(a)(ix)	Telephone Numbers, URLs and Websites
Schedule 1.1(b)(x)	Excluded Outsource Contracts
Schedule 1.1(b)(xiv)	Other Excluded Assets
Schedule 1.2(a)(i)	Excluded Liabilities
Schedule 2.2(a)(v)	Required Consents – Sellers
Schedule 2.3(c)(v)	Required Consents – Purchaser
Schedule 3.1(a)	Qualifications to do Business – Sellers
Schedule 3.3	Third Party Consents - Sellers
Schedule 3.4	Government Consents - Sellers
Schedule 3.7(a)	Material Business Contracts
Schedule 3.7(b)	Material Business Contracts – Exceptions
Schedule 3.8	Material Business Licenses
Schedule 3.9	Customer and Supplier Information – Sellers
Schedule 3.10	Litigation; Governmental Orders
Schedule 3.11	Compliance with Laws/Industry Standards
Schedule 3.12	Business Insurance Policies
Schedule 3.17	Transactions with Affiliates
Schedule 3.19	Sales Agency Agreements
Schedule 4.3	Third Party Consents - Purchaser
Schedule 4.4	Government Consents - Purchaser
Schedule 4.5	Litigation – Purchaser
Schedule 5.1	Ordinary Course of Business
Schedule 5.12	On-Hand Packaging Materials and Stationery; Others' Use of Intellectual Property
Schedule 5.13	Permitted Name Uses

Exhibits

Exhibit A	Form of Escrow Agreement
Exhibit B	Form of Bill of Sale
Exhibit C	Form of Assignment and Assumption Agreement
Exhibit D	Form of Assignment of Proprietary Rights
Exhibit E	Form of Officer's Certificate of Sellers
Exhibit F	Form of Services Agreement
Exhibit G	Form of Officer's Certificate of the Purchaser
Exhibit H	Form of Procedures Order
Exhibit I	Form of Approval Order

**ASSET PURCHASE AGREEMENT**

THIS ASSET PURCHASE AGREEMENT (this "Agreement") dated as of February 8, 2008, among Elco Holdings Ltd., a publicly traded Israeli corporation (the "Purchaser") and Fedders North America, Inc., and Emerson Quiet Kool Corporation (collectively, the "Sellers"; capitalized terms used in this Agreement and not otherwise defined having the respective meanings given them in Article XI below).

**WITNESSETH**

WHEREAS, the Sellers and certain of their Affiliates filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"), in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") on August 22, 2007 (collectively, the "Bankruptcy Case"); and

WHEREAS, the Purchaser desires to purchase from the Sellers, and the Sellers (as debtors and debtors in possession) desire to sell to the Purchaser, certain of the assets, properties, interests and rights owned, used or held for use by the Sellers to conduct the operations of their residential heating, ventilation and cooling business (the "Business"), and in connection therewith, the Purchaser has agreed to assume certain liabilities of the Sellers as set forth in Section 1.2 and relating to the Business as operated by the Sellers, all as more particularly described herein and upon the terms and subject to the conditions set forth herein and with the approval of the Bankruptcy Court pursuant to the Bankruptcy Code; and

WHEREAS, simultaneously with the execution and delivery hereof, (i) an Affiliate of Purchaser in China (the "China Purchaser") and an Affiliate of Sellers in China (the "China R&D Seller") are executing and delivering an asset purchase agreement (the "China R&D Asset Purchase Agreement") pursuant to which the China R&D Seller, subject to certain conditions, will sell to the China Purchaser certain assets associated with the research and development operations of the China R&D Seller (the "China R&D Assets") for a purchase price of Three Million Six Hundred Forty-Seven Thousand Dollars (\$3,647,000), and (ii) the China Purchaser and a different Affiliate of Sellers (the "China Manufacturing Assets Seller") are executing and delivering an asset purchase agreement (the "China Manufacturing Assets Purchase Agreement") and, together with the China R&D Asset Purchase Agreement, the "China Assets Agreements") pursuant to which the China Manufacturing Assets Seller, subject to certain conditions, will sell to the China Purchaser certain manufacturing assets associated with the Business (the "China Manufacturing Assets") and, together with the China R&D Assets, the "China Assets") for a purchase price to be calculated in accordance with the China Manufacturing Assets Purchase Agreement (the "China Manufacturing Assets Purchase Price"), for an aggregate purchase price of Three Million Six Hundred Forty-Seven Thousand Dollars (\$3,647,000) plus the China Manufacturing Assets Purchase Price for the China Assets (collectively, the "China Assets Purchase Price") (calculated in part by using an exchange rate of 7.18 RMB to \$1.00) which, together with the Purchase Price hereunder, results in an aggregate cash consideration of Sixteen Million Eight Hundred Ninety-Seven Thousand Dollars (\$16,897,000) (subject to adjustment as provided below);

NOW, THEREFORE, in reliance upon and in consideration of the representations, warranties and covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound hereby, agree as follows:

**ARTICLE I  
PURCHASE AND SALE OF ASSETS**

1.1 Purchase and Sale of Purchased Assets.

(a) Purchase and Sale. Upon the terms and subject to the conditions set forth herein, at the Closing the Sellers shall sell, convey, transfer, assign, grant and deliver to the Purchaser (or to such assignee or assignees of Purchaser as may be determined by Purchaser pursuant to Section 10.2 hereof), free and clear of all Encumbrances, and the Purchaser (or such assignee or assignees) shall purchase, acquire and accept delivery from the Sellers on the Closing Date, all right, title and interest of the Sellers in and to all of the following assets, rights and entitlements of the Sellers, whether tangible or intangible, real or personal, of every kind and nature (other than the Excluded Assets) (collectively, the "Purchased Assets");

(i) all items of inventory (including, without limitation, all finished goods, spare parts and accessories) pertaining exclusively to the operation of the Business, all of which are more fully described on "List A" of Schedule 1.1(a)(i) to the extent owned by the Sellers on the Closing Date, excluding, therefore, such items on List A which are no longer owned by Sellers on the Closing Date; plus all items of inventory which are returned to Sellers between the date of the preparation of such List A as attached hereto and the Closing Date, and which are of like category and condition as those items which appear on List A, and which are set forth on "List B" to Schedule 1.1(a)(i), to be provided by Sellers to Purchaser on or prior to the Closing Date, pursuant to Section 1.3(c) below (the "Assigned Inventory");

(ii) to the extent Transferable by the Sellers to the Purchaser, all Licenses possessed by the Sellers pertaining exclusively to the operation of the Business or use of the Purchased Assets (each, a "Business License" and, collectively, the "Business Licenses"), and all rights thereunder, and more fully described on Schedule 1.1(a)(ii) (which Schedule also sets forth any limitations on Transferability or any consent which may be required for the Transfer thereof to Purchaser);

(iii) all (x) drawings, specifications, bills of material, know-how and other intellectual property and other intangible assets owned by Sellers and used in the manufacture of the goods for sale in connection with the operation of the Business (the "Intellectual Property Manufacturing Assets") and (y) molds, tools, dies and other tangible assets owned by Sellers and used in the manufacture of the goods for sale in connection with the operation of the Business (the "Tangible Manufacturing Assets"), in each case as more fully described on Schedule 1.1(a)(iii) (collectively, the Intellectual Property Manufacturing Assets and the Tangible Manufacturing Assets being the "Manufacturing Assets");



(iv) all Contracts to which a Seller is a party and which are set forth on Schedule 1.1(a)(iv), and which are designated by Purchaser to Sellers as provided in Section 6.1(f), (which Schedule also sets forth any limitations on Transferability or any consent which may be required for the Transfer thereof to Purchaser and any cure costs ("Cure Costs") associated with any of the Business Contracts) and all rights thereunder (including, without limitation, the rights to any deposits made with respect thereto) (the "Business Contracts") and all purchase orders from customers for the sale of products of the Business ("Purchase Orders");

(v) all marketing, sales support and promotional materials, advertising materials and production, sales and marketing files used for the operation of the Business; provided, however, that certain of the foregoing that Sellers are conveying to Purchaser and used by Sellers in the operation of the Business are not used exclusively for the operation of the Business and therefore copies may be retained by Sellers or sold or otherwise transferred to another Person;

(vi) all current customer lists, supplier lists (to the extent currently in Sellers' possession), production records and credit records, or similar records of all sales of the Business, and all other books and records maintained for, or in connection with, the operation of the Business, provided, however, that certain of the foregoing that Sellers are conveying to Purchaser and used by Sellers in the operation of the Business are not used exclusively for the operation of the Business and therefore copies may be retained by Sellers or sold or otherwise transferred to another Person;

(vii) to the extent of the Sellers' rights therein, (a) all Proprietary Rights exclusively related to the Business, including, without limitation, the trademarks, service marks, trade names or logos of the Sellers or any of their Affiliates, or any of the URLs or domain names associated with the foregoing and any translations, adaptations, derivations or combinations of any of the foregoing and all goodwill associated with the foregoing (including the common law rights therein) all as set forth on Schedule 1.1(a)(vii), and all other Intellectual Property exclusively related to the Business, including, without limitation, as more fully described on Schedule 1.1(a)(vii); (b) all computer hardware and Software (except any Software identified as an Excluded Asset), data rights and documentation, books and records and other written and electronic materials related thereto identified on Schedule 1.1(a)(vii) and located at Sellers' warehouse facility in Effingham, Illinois, and (c) all rights owned by Sellers with respect to the foregoing, remedies against past and current infringement, misappropriation or other unauthorized use thereof and rights to protection of interests therein under the applicable Laws of all jurisdictions;

(viii) all prepaid expenses and charges paid by the Sellers or their Affiliates prior to the Closing Date exclusively in respect of the Business and pertaining solely to periods after the Closing Date and identified on Schedule 1.1(a)(viii) (the "Assigned Prepaid Expenses");

(ix) all telephone numbers, websites and URLs exclusively related to the Business currently in the name of the Sellers and identified on Schedule 1.1(a)(ix); and

(x) to the extent Transferable by the Sellers to the Purchaser and not requiring payment of any fee in connection with such assignment, all currently effective warranties and guaranties, if any, (the "Warranties") given by any contractor, supplier or manufacturer of any Assigned Inventory or Manufacturing Assets or of any work performed on any of the foregoing.

(b) Excluded Assets. Notwithstanding anything to the contrary herein, it is expressly understood and agreed that the Purchased Assets do not include, and the Sellers shall not sell, convey, transfer, assign, grant or deliver to the Purchaser, and the Purchaser shall not purchase, acquire or accept delivery or have any rights to purchase, acquire or accept, delivery of any assets (the "Excluded Assets") of the Sellers other than those specifically set forth in Section 1.1(a). Without limiting the generality of the foregoing sentence, the following shall constitute Excluded Assets:

(i) all cash, cash equivalents and securities of the Sellers including, bank deposits, investments in so-called "money market" funds, commercial paper funds, certificates of deposit, Treasury bills and accrued interest thereon, other than any of the foregoing to the extent arising out of operations of the Business on or after the Closing Date;

(ii) all bank and other depository and investment accounts of the Sellers;

(iii) all Tax, corporate or other organizational records and minute books of the Sellers;

(iv) prepaid Taxes, refunds of Taxes and Tax loss carry forwards including interest thereon or claims therefor, relating to the Business for any period or portion thereof ending on or prior to the Closing Date;

(v) all assets, whether real or personal, tangible or intangible, which are owned, used or held for use by the Sellers to conduct any business operation or activity other than the Business and which are not material to the operation of the Business and are not included in the Schedules under Section 1.1 above;

(vi) all Business Licenses that are not identified in Section 1.1(a);

(vii) all Business Insurance Policies or other insurance policies relating to the Business, any refunds paid or payable in connection with the cancellation or discontinuance of any insurance policies applicable to the Business, and any claims made under any such insurance policies;

(viii) rights in or any assets associated with or allocated to the Benefit Plans;

(ix) all Proprietary Rights (other than as specifically provided in Section 1.1(a) above) and goodwill associated therewith, rights thereunder, remedies against infringements thereof and rights to protection of interests therein under the applicable Laws of

all jurisdictions, in each case whether or not used exclusively for the operation of the Business;

(x) the Business Contracts with respect to the outsourced services provided at Sellers' Effingham facility, as identified on Schedule 1.1(b)(x);

(xi) all rights of the Sellers under this Agreement, the Purchase Price hereunder, any agreement, certificate, instrument or other document executed and delivered by any Seller or the Purchaser in connection with the transactions contemplated hereby, or any side agreement between any Seller and the Purchaser entered into on or after the date of this Agreement;

(xii) any assets transferred or otherwise disposed of by the Sellers in the Ordinary Course of Business prior to the Closing or not otherwise in violation of this Agreement, or with Purchaser's prior written consent;

(xiii) all Contracts to which any Seller is a party and not set forth on Schedule 1.1(a)(iv) and all rights thereunder; provided that the Purchaser may amend Schedule 1.1(a)(iv) at any time on or before one (1) Business Day prior to the date of the hearing before the Bankruptcy Court to approve the Procedures Order in order to exclude from the definition of Purchased Assets any Contract not otherwise expressly excluded hereunder; provided, further, that the Purchaser may not amend such Schedules to exclude any Contract that is noted as not excludable on Schedule 1.1(a)(iv); provided, further, that such exclusion shall not serve to reduce or otherwise affect the amount of the Purchase Price;

(xiv) such other specific assets set forth on Schedule 1.1(b)(xiv);

(xv) all causes of action of the Sellers under Chapter 5 of the Bankruptcy Code; and

(xvi) all personal consumer information (A) relating to or obtained from the purchase of products from Sellers pursuant to internet-based sales and (B) with respect to warranty claims in the possession of or under the control of Sellers as of the Closing Date, whether or not used in connection with the Business, unless the Transfer of such warranty-related personal consumer information would be subject to Bankruptcy Code Section 363(b)(1)(B); and provided further, that if such Transfer would be subject to Bankruptcy Code Section 363(b)(1)(B), Sellers shall use commercially reasonable efforts after the Closing Date to obtain approval of the Transfer of such information without being required to satisfy the conditions of Section 363(b)(1)(B), to the extent Purchaser so requests that Sellers make such efforts, it being understood that such efforts may not succeed.

## 1.2 Assumption of Liabilities.

(a) Assumption. Upon the terms and subject to the conditions set forth herein, at the Closing, upon the consummation of the transactions contemplated by this Agreement, the Purchaser shall assume from the Sellers (and thereafter pay, perform, discharge or otherwise satisfy in accordance with their respective terms), and the Sellers shall irrevocably convey,

transfer and assign to the Purchaser, only the following Liabilities of the Sellers and no others whatsoever (collectively, the "Assumed Liabilities");

(i) except as otherwise explicitly provided in this Agreement, all Liabilities (other than Liabilities that are set forth on Schedule 1.2(a)(i)) in respect of the Business or the Purchased Assets incurred by the Purchaser after the Closing Date which arise on account of the Purchaser's operation of the Business, the Purchaser's use of the Purchased Assets, and/or sale of any products manufactured and/or sold by the Purchaser, in each case after the Closing Date;

(ii) all Taxes related to the operation of the Business by Purchaser attributable to periods or portions thereof beginning after the Closing Date;

(iii) all Liabilities of the Purchaser under the Business Contracts and Business Licenses that are included in the Purchased Assets requiring performance and arising after the Closing Date (other than as a result of default by the Seller or its agents or Affiliates occurring on or prior to the Closing Date); and

(iv) all claims for breach of warranty related to or arising out of the Business or the Purchased Assets if and only if such claims arise from the conduct of the Business by the Purchaser or its assignee successor or successors to the Business after the Closing.

(b) Excluded Liabilities. The Purchaser shall not assume or be obligated to pay, perform, discharge or in any way be responsible for any Liabilities, including, without limitation, all Liabilities set forth on Schedule 1.2(a)(i), other than the Assumed Liabilities, (collectively, the "Excluded Liabilities").

### 1.3 Consideration for Purchased Assets.

(a) Consideration. The aggregate purchase price (the "Purchase Price"), subject to adjustment as set forth in Section 1.3(c) below for the Purchased Assets, shall be Thirteen Million Two Hundred Fifty Thousand Dollars (\$13,250,000), less the amount of the China Manufacturing Assets Purchase Price (which in no event shall be less than the RMB equivalent of \$100,000) in cash (in addition to the China Assets Purchase Price), and (ii) the assumption by the Purchaser of the Assumed Liabilities pursuant to Section 1.2.

(b) Good Faith Deposit. Simultaneously with the execution and delivery of this Agreement, the Purchaser has duly executed and delivered to the Sellers an Escrow Agreement, substantially in the form attached hereto as Exhibit A (the "Escrow Agreement") and deposited with the Escrow Agent Eight Hundred Forty-Four Thousand Eight Hundred Fifty Dollars (\$844,850) in cash and on the date of the entry of the Procedures Order Purchaser shall deposit with the Escrow Agent an additional Eight Hundred Forty-Five Thousand Eight Hundred Fifty Dollars (\$844,850) in cash (collectively, the "Good Faith Deposit"). The Good Faith Deposit shall be held and disbursed in accordance with this Agreement and the Escrow Agreement.

(c) Purchase Price Adjustment.

(i) Estimated List A and List B Statements. Five (5) days prior to the Closing Date, the Sellers shall deliver to the Purchaser an updated List A of Schedule 1.1(a)(i) reflecting the current items remaining in the Assigned Inventory from those appearing in the List A annexed hereto. At the same time as Sellers deliver to Purchaser the updated List A, Sellers shall deliver to Purchaser the "List B" described in Section 1.1(a)(i) above. Purchaser shall have a reasonable right of consultation prior to and following the delivery of such List A and List B with respect to the preparation thereof. The Purchase Price paid at Closing shall be reduced by an amount equal to the aggregate of the "standard cost" as set forth on such Schedule of each item which does not appear on the updated List A but does appear on List A as annexed hereto, multiplied by a fraction equal to eighty-six one hundredths (0.86) (the "Discount Factor") (such aggregate being the "Inventory Price Reduction"). The Purchase Price paid at Closing shall be increased by an amount equal to the aggregate of such "standard cost" of each item which appears on List B (to the extent that Purchaser, acting reasonably, agrees it is of like category and condition as those items which appear on List A), multiplied by the Discount Factor (such aggregate being the "Inventory Price Increase"). The amount obtained by subtracting from Nine Million Six Hundred Fifty Thousand Dollars (\$9,650,000) the Inventory Price Reduction (provided, however, that the net amount obtained by reducing the amount of the Inventory Price Reduction by the amount of the Inventory Price Increase, if any, will not exceed the Holdback Amount for purposes of this calculation) and then adding thereto the Inventory Price Increase, if any, is hereinafter referred to as the "Estimated Inventory Value".

(ii) Initial Inventory Statement. As promptly as practicable, but no later than forty-five (45) calendar days after the Closing Date, the Purchaser shall prepare and deliver to the Seller a statement of what it, acting reasonably, believes List A and List B should contain as of the close of business on the Closing Date, which shall set forth the Purchaser's determination of the increase and decrease of the Purchase Price calculated on the same basis as set forth in Section 1.1(c)(i), and stating what the Estimated Inventory Value (the "Initial Assigned Inventory Value") should have been, if calculated as of the Closing Date (the "Initial Assigned Inventory Statement"). Sellers shall have a reasonable right of consultation following the delivery of such Initial Assigned Inventory Statement with respect to the preparation thereof. During the thirty (30) calendar days immediately following the Sellers' receipt of the Initial Assigned Inventory Statement, the Sellers and their representatives will be permitted during business hours, in a manner which will not unreasonably interfere with the operation of the Business, to review at the Purchaser's offices in Effingham, Illinois, or other U.S. location the Purchaser's working papers (including work papers of accountants and other advisors) relating to the Initial Assigned Inventory Statement, as well as all of the books and records relating to the operations and finances of the Business with respect to the period up to and including the Closing Date, and the Purchaser shall make reasonably available at its offices the individuals responsible for the preparation of the Initial Assigned Inventory Statement in order to respond to the reasonable inquiries of the Sellers related thereto.

(iii) Notice of Disagreement. The Sellers shall notify the Purchaser in writing (the "Notice of Disagreement") within thirty (30) calendar days after

receipt of the Initial Assigned Inventory Statement if the Sellers disagree with it, which Notice of Disagreement shall set forth in reasonable detail the basis for such dispute, the U.S. Dollar amounts involved and the Sellers' good faith estimate of what Sellers believe should have been the Initial Assigned Inventory Value set forth in the Initial Assigned Inventory Statement. Any item not specifically disputed by the Sellers shall be deemed accepted by the Sellers and shall become part of the Final Assigned Inventory Statement. If the Sellers do not deliver a Notice of Disagreement to the Purchaser within such thirty (30) calendar day period, then the Initial Assigned Inventory Statement shall be deemed to have been accepted by the Sellers, shall become final and binding upon the parties and shall be the Final Assigned Inventory Statement, within which the Initial Assigned Inventory Value shall be the Closing Assigned Inventory Value.

(iv) Dispute Resolution. During the thirty (30) calendar day period immediately following the delivery of a Notice of Disagreement, the Sellers and the Purchaser shall seek in good faith to resolve any differences that they may have with respect to any matter specified in the Notice of Disagreement. If at the end of such thirty (30) calendar day period the Sellers and the Purchaser have been unable to agree upon a Final Assigned Inventory Statement, then the Sellers and the Purchaser shall submit to the Independent Accounting Firm for review and resolution any and all matters that remain in dispute with respect to the Notice of Disagreement. The Purchaser and the Sellers shall cause the Independent Accounting Firm to use commercially reasonable efforts to make a final determination (which determination shall be binding on the parties hereto) of the Closing Assigned Inventory Value within thirty (30) calendar days from such submission, and such final determination shall be the Final Assigned Inventory Statement. The cost of the Independent Accounting Firm's review and determination shall be split between and paid by the Purchaser and the Sellers on a proportionate basis, based upon the relative amount by which the determination of the Closing Assigned Inventory Value of each of the Purchaser on the one hand and the Sellers on the other hand differed from that determined by the Independent Accounting Firm. During the thirty (30) calendar day review by the Independent Accounting Firm, the Purchaser and the Sellers will each make available to the Independent Accounting Firm such individuals and such information, books and records as may be reasonably required by the Independent Accounting Firm to make its final determination.

(v) Adjustment. If the Closing Assigned Inventory Value (as set forth in the Final Assigned Inventory Statement) is less than the Estimated Assigned Inventory Value, then the Sellers shall pay in immediately available funds to the Purchaser an amount equal to such shortfall by directing the Escrow Agent to make such payment out of the Holdback Amount (it being understood that in no event, regardless of the amount of such shortfall, shall Sellers be responsible for delivering to Purchaser with respect to such adjustment any amounts in excess of the Holdback Amount). If the Closing Assigned Inventory Value (as set forth in the Final Assigned Inventory Value Statement) is equal to the Estimated Assigned Inventory Value, then the Sellers shall not owe any amount to the Purchaser pursuant to this Section 1.3(c). If the Closing Assigned Inventory Value (as set forth in the Final Assigned Inventory Statement) is more than the Estimated Assigned Inventory Value, then the Purchaser shall pay in immediately available funds to the Sellers an amount equal to such excess, provided, however, that in no event shall Purchaser pay an aggregate Purchase Price in excess of Thirteen Million Two Hundred Fifty Thousand Dollars

(\$13,250,000) less the amount of the China Manufacturing Assets Purchase Price. To the extent that at Closing the aggregate of the "standard cost" of the Assigned Inventory on List A and List B of Schedule 1.1(a)(i) multiplied by the Discount Factor exceeds Nine Million Six Hundred Fifty Thousand Dollars (\$9,650,000), Sellers shall have the right to remove from the Purchased Assets on List B, and to retain and sell to third parties, items of Assigned Inventory appearing on List B ("List B Sales") up to an aggregate value such that the aggregate of the "standard cost" of items set forth on List A and List B multiplied by the Discount Factor shall equal Nine Million Six Hundred Fifty Thousand Dollars (\$9,650,000), provided, however, that prior to making any such sales to third parties, Sellers shall offer Purchaser a right of first refusal to purchase such items on the same payment and quantity terms to Purchaser as are made available to another available purchaser thereof who is willing and able to purchase such items on such terms. Adjustments pursuant to this paragraph shall be made within five (5) Business Days after the Final Assigned Inventory Statement becomes final and binding on the parties hereto. In no event shall the Estimated Assigned Inventory Value or the Closing Assigned Inventory Value be deemed to exceed Nine Million Six Hundred Fifty Thousand Dollars (\$9,650,000).

(vi) Accounting Books, Records, Policies and Procedures. The Purchaser agrees that following the Closing through the date on which payment, if any, is made by either party pursuant to this Section 1.3(c) or if the Final Assigned Inventory Statement indicates that no such payment is required, then through the date on which the Final Assigned Inventory Statement becomes effective, the Purchaser will not take any actions with respect to any accounting books, records, policies or procedures on which the Initial Assigned Inventory Statement or the Final Assigned Inventory Statement is to be based that would make it impossible or impracticable to calculate the Closing Assigned Inventory Value in the manner and the use of the methods required hereby.

(d) Allocation of Purchase Price. Prior to the Closing, the parties shall reasonably agree to the allocation of the Purchase Price and the Assumed Liabilities (to the extent treated as an element of the Purchase Price for Tax purposes), which allocation shall be used for all purposes, including, without limitation, Tax reporting purposes. Each party hereto agrees (i) that such allocation shall be consistent with the requirements of Section 1060 of the Internal Revenue Code and the regulations thereunder, (ii) to complete jointly and to file separately all appropriate Tax forms consistent with such allocation for the Tax year in which the Closing occurs and (iii) that no party will take a position on any income, transfer or gains Tax return, before any Governmental Authority charged with the collection of any such Tax or in any judicial proceeding, that is in any manner inconsistent with the terms of any such allocation without the consent of the other party. In preparing this allocation, due regard shall be given to international and local taxation and accounting considerations relevant to the Purchaser, based upon its review and receipt of professional advice, but in no event shall such allocation not be in accordance with Section 1060 of the Internal Revenue Code and the regulations thereunder.

1.4 Further Assurances. At and after the Closing, and without further consideration therefor, (a) the Sellers shall execute and deliver to the Purchaser such further instruments and certificates of conveyance and transfer as the Purchaser may reasonably request to convey and transfer the Purchased Assets from the Sellers to the Purchaser and to put the Purchaser in operational control of the Business, or for aiding, assisting, collecting and reducing to possession

any of the Purchased Assets and exercising rights with respect thereto, and (b) the Purchaser shall execute, or shall arrange the execution of, and deliver to the Sellers such further instruments and certificates of assumption, novation and release as the Sellers may reasonably request in order to make the Purchaser responsible for all Assumed Liabilities and release the Sellers therefrom to the fullest extent permitted under applicable Law.

1.5 Assignment of Business Contracts and Business Licenses. To the extent that any Business Contract or Business License is not Transferable, this Agreement shall not be deemed to constitute an assignment, an attempted assignment or an undertaking to assign such Business Contract or Business License if such consent or approval is not given or if such an assignment, attempted assignment or undertaking otherwise would constitute a breach thereof or cause a loss of benefits thereunder. The Sellers (and the Purchaser where required) shall use their respective commercially reasonable efforts to obtain any and all such third party consents or approvals under all Material Business Contracts and Material Business Licenses; provided, however, that the Sellers shall not be required to pay or incur any cost or expense to obtain any third party consent or approval other than de minimis administrative costs associated with obtaining such consent and any Cure Costs under Section 365 of the Bankruptcy Code. If any such third party consent or approval is not obtained before the Closing, the Sellers shall cooperate with the Purchaser in any reasonable arrangement designed to provide for the Purchaser after the Closing the benefits intended to be assigned to the Purchaser under the applicable Business Contract, including enforcement at the cost and for the account of the Purchaser of any and all rights of the Seller against the other party thereto arising out of the breach or cancellation thereof by such other party or otherwise; provided that the Purchaser shall (a) undertake to pay or satisfy the corresponding Liabilities for the enjoyment of such benefit to the extent that the Purchaser would have been responsible therefor hereunder if such consent, waiver or approval had been obtained and (b) indemnify and hold harmless the Sellers and their Affiliates for any costs, expenses or Liabilities (including legal fees and expenses) incurred by them at the request of the Purchaser in connection with the enforcement of any Business Contract.

## ARTICLE II THE CLOSING

2.1 Time and Place. The consummation of the transactions contemplated hereby shall take place at a closing (the "Closing") to be held at the offices of Saul Ewing LLP, 222 Delaware Avenue, Wilmington, Delaware 19899 at 10:00 a.m., Wilmington, Delaware time, on the date (the "Closing Date") on which the Approval Order becomes a Final Order and the satisfaction and fulfillment, or waiver, of the conditions set forth in Article VI (other than conditions to be satisfied simultaneously at the Closing), unless the Purchaser, in its sole discretion, elects to waive the condition that the Approval Order becomes a Final Order, in which case the Closing shall occur at such other earlier time, date or place as is mutually agreed upon in writing by the Sellers and the Purchaser.

2.2 Closing Deliveries of the Sellers. At the Closing, the Sellers shall deliver, or cause to be delivered, to the Purchaser the following instruments, certificates and other documents in order to consummate the transactions contemplated hereby, including the transfer of the Purchased Assets to the Purchaser pursuant to Section 1.1:



(a) Instruments of Transfer and Assignment.

- (i) a Bill of Sale, substantially in the form attached hereto as Exhibit B, duly executed by the Sellers (the "Bill of Sale");
- (ii) an Assignment and Assumption Agreement, substantially in the form attached hereto as Exhibit C, duly executed by the Sellers and the Purchaser (the "Assumption Agreement");
- (iii) an Assignment of Proprietary Rights, substantially in the form attached hereto as Exhibit D, duly executed by the Sellers (the "Assignment of Proprietary Rights");
- (iv) copies of all instruments, certificates, documents and other filings (if applicable) necessary to release the Purchased Assets from all Encumbrances, all in a form reasonably satisfactory to counsel for the Purchaser;
- (v) copies of the waivers, consents and approvals set forth on Schedule 2.2(a)(v) if such consents and approvals are required to be obtained by the Sellers to validly transfer and assign any Business Contract or Business License in accordance with its terms after giving effect to the relevant provisions of the Bankruptcy Code, the Procedures Order and the Approval Order;
- (vi) copies of any transfer or sales Tax forms and returns required to be filed by the Sellers prior to or on the Closing Date in connection with the transactions contemplated hereby;
- (vii) a certified copy of the Approval Order in the form filed with the Bankruptcy Court;
- (viii) an electronic copy of the docket from the Bankruptcy Case reflecting the absence of any appeal, stay, or petition for certiorari, rehearing or review of the Approval Order; and
- (ix) such other instruments as shall be reasonably requested by the Purchaser to vest in the Purchaser title in and to the Purchased Assets in accordance with the provisions of this Agreement.

(b) Closing Certificates.

- (i) An officer's certificate, substantially in the form attached hereto as Exhibit E duly executed by an authorized officer of each of the Sellers, which shall certify as to the satisfaction of the conditions set forth in Sections 6.1(a) and 6.1(b); and
- (ii) a copy of the resolutions adopted by the applicable Boards of Directors of the Sellers evidencing their authorization of the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby, certified by an authorized officer of the respective Sellers.

(c) Other Deliveries.

(i) The Services Agreement, substantially in the form attached hereto as Exhibit F, duly executed by the Sellers (the "Services Agreement"); and

(ii) such other documents related to the transactions contemplated by this Agreement that the Purchaser may reasonably request.

2.3 Closing Deliveries of the Purchaser. At the Closing, the Purchaser shall make the payment and deliver, or cause to be delivered, to the Sellers the following instruments, certificates and other documents in order to pay for the Purchased Assets and effect the assumption of all Assumed Liabilities from the Sellers pursuant to Sections 1.1 and 1.2:

(a) Purchase Price. On the Closing Date, the Purchaser or its assignee or assignees shall deliver by wire transfer of immediately available funds, to the account designated in writing by the Sellers at least two Business Days prior to the Closing Date, an amount equal to the Purchase Price (adjusted as provided in Section 1.3(c)(i)) minus the Holdback Amount.

(b) Release of Remaining Holdback Amount. Upon completion of the Purchase Price adjustment required by Section 1.3(c), the parties shall jointly instruct the Escrow Agent to deliver to the Sellers and/or Purchaser such of the Holdback Amount remaining following such adjustment, if any, as applicable.

(c) Instruments of Assumption.

(i) The Assumption Agreement, duly executed by the Purchaser;

(ii) the Assignment of Proprietary Rights, duly executed by the Purchaser;

(iii) copies of any transfer Tax forms and returns required to be filed by the Purchaser prior to or on the Closing Date in connection with the transactions contemplated hereby;

(iv) all other instruments and certificates of assumption, novation and release as the Sellers may reasonably request in order to effectively make the Purchaser responsible for all Assumed Liabilities and release the Sellers therefrom to the fullest extent permitted under applicable Law;

(v) copies of the waivers, consents and approvals set forth on Schedule 2.3(c)(v) if such consents and approvals are required to be obtained by the Purchaser after giving effect to the relevant provisions of the Bankruptcy Code, the Procedures Order and the Approval Order; and

(vi) such other instruments as shall be reasonably requested by the Sellers for the assumption of the Assumed Liabilities by the Purchaser in accordance with the provisions of this Agreement.

(d) Closing Certificates.

(i) An officer's certificate, substantially in the form attached hereto as Exhibit G, duly executed by the Purchaser, which shall certify as to the satisfaction of the conditions set forth in Sections 6.2(a) and 6.2(b); and

(ii) a copy of the resolutions adopted by the Board of Directors of the Purchaser evidencing its authorization of the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby, certified by an officer of the Purchaser.

(e) Other Deliveries.

(i) The Services Agreement, duly executed by the Purchaser;

(ii) payment by the Purchaser of all Taxes (including, without limitation all transfer, sales and similar Taxes) payable pursuant to Section 5.8 in connection with the consummation of the transactions contemplated by this Agreement; and

(iii) such other documents related to the transactions contemplated by this Agreement that the Seller may reasonably request.

(f) Delivery of Manufacturing Assets. Notwithstanding anything to the contrary contained herein, in the event that Sellers cannot deliver at the Closing possession of any item of the Tangible Manufacturing Assets, (it being understood that, in any event, ownership to the Tangible Manufacturing Assets will be conveyed to Purchaser or its assignee at the Closing), Purchaser shall, so long as Sellers shall have complied with their covenants contained in Section 5.15, waive such delivery of possession as a condition to Closing. In any event, Sellers shall use their commercially reasonable efforts to deliver at the Closing possession of all items of the Tangible Manufacturing Assets, and as a condition to Purchaser's obligation to close, shall deliver at Closing, title to and possession of all items of the Intellectual Property Manufacturing Assets.

### ARTICLE III REPRESENTATIONS AND WARRANTIES OF THE SELLERS

The Sellers, to induce the Purchaser to enter into this Agreement and to close hereunder, hereby jointly and severally represent and warrant to the Purchaser as follows:

#### 3.1 Organization.

(a) Sellers. Each Seller is a corporation duly organized, validly existing and in good standing under the Laws of the State of Delaware, each with all requisite corporate authority to own, operate or lease the Purchased Assets as now owned, operated or leased by it, and to conduct the Business substantially as presently conducted by it. Each Seller has delivered to the Purchaser or made available to the Purchaser in the data room true and complete copies of its Certificate of Incorporation and Bylaws, each as amended and in effect as of the date hereof. Each Seller is duly authorized, qualified or licensed to do business as a foreign corporation and is

in good standing in every jurisdiction wherein, by reason of the nature of the Business or the character of the Purchased Assets, the failure to be so qualified would have a Material Adverse Effect and a list of such qualifications to do business is set forth on Schedule 3.1(a).

(b) Subsidiaries and Affiliates. No Subsidiary or Affiliate of the Sellers that is not a party to the Agreement or to the China Assets Agreements is engaged in the Business or owns, leases (other than leases to which a Seller is a party that are Excluded Assets) or otherwise holds and operates any of the Purchased Assets.

3.2 Authority. Assuming the receipt of all necessary approvals of the Bankruptcy Court, each Seller has all requisite corporate power and authority to enter into and deliver this Agreement and the Operative Agreements to which it is a party, to perform its obligations hereunder and thereunder, and to consummate the transactions contemplated hereby and thereby. Assuming the receipt of all necessary approvals of the Bankruptcy Court, the execution and delivery by each Seller of this Agreement and the Operative Agreements to which it is a party, the performance by each Seller of its obligations hereunder and thereunder and the consummation by each Seller of the transactions contemplated hereby and thereby have been duly authorized by all necessary corporate action on the part of each Seller, including, without limitation, all necessary approvals of its Board of Directors. This Agreement and the Escrow Agreement have been duly executed and delivered by each Seller. Assuming the due authorization, execution and delivery of this Agreement and the Operative Agreements by the other parties thereto and all necessary approvals of the Bankruptcy Court, this Agreement constitutes, and each of the Operative Agreements to which each Seller is a party when so executed and delivered will constitute, a legal, valid and binding obligation of the Seller, enforceable against it in accordance with its terms.

3.3 No Violation; Third Party Consents. Assuming the receipt of all necessary approvals of the Bankruptcy Court and assuming that all consents, waivers, approvals, orders and authorizations set forth in Schedule 3.3 have been obtained and all registrations, qualifications, designations, declarations or filings with any Governmental Authorities set forth in Schedule 3.4 have been made, and except as set forth in Schedule 3.3, the execution and delivery by each Seller of this Agreement and the Operative Agreements to which it is a party, the performance by each Seller of its obligations hereunder and thereunder and the consummation by each Seller of the transactions contemplated hereby and thereby will not conflict with or violate, constitute a default (or event which with the giving of notice or lapse of time, or both, would become a default) under, give rise to any right of termination, amendment, modification, acceleration or cancellation of any obligation or loss of any benefit under, result in the creation of any Encumbrance on any of the Purchased Assets pursuant to, or require it to obtain any consent, waiver, approval or action of, make any filing with, or give any notice to any Person as a result of or under, the terms and provisions of (a) the Certificate of Incorporation or Bylaws of any Seller, (b) any currently enforceable Contract to which a Seller is a party or by which any of the Purchased Assets are bound or (c) any Law applicable to such Seller or any of the Purchased Assets, or any Governmental Order by which a Seller or any of the Purchased Assets is in any way bound or obligated, except, in the case of clauses (b) and (c) of this Section 3.3, as would not have a Material Adverse Effect or have a material adverse effect on the ability of such Seller to perform its obligations under this Agreement and the Operative Agreements to which it is a party or to consummate on a timely basis the transactions contemplated hereby or thereby.

3.4 Government Consents. No consent, waiver, approval, order or authorization of, or registration, qualification, designation, declaration or filing with, any Governmental Authority is required on the part of any Seller in connection with the execution and delivery by any Seller of this Agreement and the Operative Agreements to which it is a party, the performance by any Seller of its obligations hereunder and thereunder and the consummation by the Seller of the transactions contemplated hereby and thereby, except (a) as set forth in Schedule 3.4, (b) all applicable approvals of the Bankruptcy Court and (c) where the failure to obtain such consent, waiver, approval, order or authorization, or to make such registration, qualification, designation, declaration or filing, would not, as of the date hereof, have a Material Adverse Effect on the Sellers.

3.5 Manufacturing Assets. The Manufacturing Assets identified on Schedule 1.1(a)(iii), to the Knowledge of the Sellers, have been properly maintained, are in good working order, and are suitable for use in connection with the Business and for the purposes for which they were intended.

3.6 Proprietary Rights. Other than as set forth on Schedule 1.1(b)(x), to the Knowledge of the Sellers, the Proprietary Rights included in the Purchased Assets are all of the Proprietary Rights necessary for the operation of the Business as currently conducted by the Sellers. To the Knowledge of the Sellers, no third party has infringed upon or misappropriated any of the Proprietary Rights included in the Purchased Assets. To the Knowledge of the Sellers, no Seller has infringed upon or misappropriated any Proprietary Rights of third parties. Except as set forth on Schedule 1.1(b)(x), to the Knowledge of the Sellers, no person has any rights whatsoever to the Proprietary Rights included in the Purchased Assets. Except as set forth in this Section 3.6, (i) no Seller makes any representations or warranties as to the usefulness of any of the Proprietary Rights, and (ii) each Seller hereby expressly disclaims the fitness for any particular purpose of any of the Proprietary Rights included in the Purchased Assets. To the Knowledge of the Sellers, no Seller has received written notice of any claim by any third party contesting the validity, enforceability, use or ownership of any Proprietary Rights included in the Purchased Assets that is currently outstanding.

3.7 Business Contracts.

(a) Schedule 3.7(a) contains a list of all of the following: currently enforceable Business Contracts of the Sellers materially related to the Business as currently conducted by the Sellers and currently enforceable Contracts or agreements relating exclusively to the Business or any Purchased Assets and involving future payments made to or by any Seller in any twelve (12)-month period that are reasonably expected to exceed \$25,000 (each, a "Material Business Contract") and, collectively, the "Material Business Contracts").

(b) Sellers have delivered to the Purchaser or made available to the Purchaser in the Data Room a copy of each written Material Business Contract. Subject to the assumption of the Material Business Contracts by the Sellers pursuant to Section 365 of the Bankruptcy Code, and except as set forth in Schedule 3.7(b) or in motions or other pleadings or similar items filed with the Bankruptcy Court, as of the date hereof, each Material Business Contract is in full force and effect and represents a valid, binding and enforceable obligation of the Sellers in accordance with the respective terms thereof and, to the Sellers' Knowledge, represents a valid,

binding and enforceable obligation of each of the other parties thereto other than with respect to any such Material Business Contract which may expire after the date of this Agreement and prior to the Closing Date in accordance with its terms.

3.8 Business Licenses. The Sellers own or possess all right, title and interest in and to all material Licenses which are necessary as of the date hereof to conduct the Business substantially as currently conducted, except for any failures to own or possess any such Licenses that would not, individually or in the aggregate, have a Material Adverse Effect (each, a "Material Business License" and, collectively, the "Material Business Licenses"). Schedule 3.8 contains a list of all Material Business Licenses. As of the date hereof, no loss or expiration of any such Material Business License is pending or, to the Knowledge of the Sellers, threatened, other than the expiration of any such Material Business License in accordance with the terms thereof which may be renewed in the Ordinary Course of Business.

3.9 Customer and Supplier Information. Schedule 3.9 sets forth a true and correct list of all customers of the Business and the twenty (20) largest suppliers to either the Business or to the Sellers' Chinese manufacturing facilities (considered together), together with the annual revenues therefrom or payments thereto for each of the three (3) years immediately preceding the date of this Agreement.

3.10 Litigation; Governmental Orders.

(a) Except for Actions in the Bankruptcy Court and as set forth in Schedule 3.10, as of the date hereof, there are no pending or, to the Knowledge of the Sellers, threatened Actions by any Person or Governmental Authority against or relating to the Sellers which relate to the Business or Purchased Assets or to which any of the Purchased Assets are subject nor have there been any such Actions pending against or affecting any Seller arising out of the Purchased Assets during the three years preceding the Closing (other than Actions relating to employment matters), other than those which would not, in any individual case, as of the date hereof, have a Material Adverse Effect.

(b) Except as set forth in Schedule 3.10, no Seller is subject to or bound by any Governmental Order other than those which would not, in any individual case, as of the date hereof, have a Material Adverse Effect.

3.11 Compliance with Laws. Except as set forth in Schedule 3.11, to the Knowledge of the Sellers, as of the date hereof each Seller is in compliance with each, and has not received any claim or notice that it is not in compliance in any material respect with, any Law or Governmental Order applicable to the Business, and Sellers have been in material compliance with the industry standards set forth on Schedule 3.11, except as would not, in any individual case, as of the date hereof, have a Material Adverse Effect.

3.12 Insurance. Schedule 3.12 is a true and correct list of all insurance policies (the "Business Insurance Policies") maintained by the Sellers (or any of their Affiliates) with respect to all or any portion of the Purchased Assets or the Business, together with a true and correct statement of the loss history for each claim in excess of Fifty Thousand Dollars (\$50,000) filed pursuant to such policy for the three (3)-year period immediately preceding the date of this

Agreement. All of the Business Insurance Policies are in full force and effect and Sellers have not received any notice of cancellation or non-renewal of any material Business Insurance Policy.

3.13 Title to Purchased Assets. As of the date hereof, the Sellers have good, valid and marketable title to all of the Purchased Assets, free and clear of all Encumbrances, except for those Encumbrances that will be removed, released or otherwise rendered unenforceable at or prior to Closing as a condition to Closing.

3.14 Taxes. With respect to Taxes relating to the Business, to the Knowledge of Sellers, the Sellers have filed or will have filed all material Tax Returns in connection with any such Tax required to be filed by each Seller, and each Seller has or will have paid all such Taxes except as contested upon audit and except as the payment of which may be stayed as a result of the bankruptcy filing by Sellers.

3.15 Inventory. The Assigned Inventory consists of all saleable inventory of the Sellers relating to the Business. Except as set forth on List A of Schedule 1.1(a)(i), all of the Assigned Inventory consists of a quality and quantity useable and saleable in the Ordinary Course of Business. All inventories on List A of Schedule 1.1(a)(i) are listed at standard cost. The quantities of each item of Assigned Inventory listed on List A of Schedule 1.1(a)(i) consist only of finished goods, spare parts and accessories and are not excessive, but are reasonable in the present circumstances of the Sellers. Sellers are not in possession of any inventory not owned by Sellers.

3.16 Brokers. All negotiations relative to this Agreement and the transactions contemplated hereby have been carried out by the Sellers directly with the Purchaser without the intervention of any Person on behalf of the Sellers in such manner as to give rise to any valid claim by any Person against the Purchaser for a finder's fee, brokerage commission or similar payment, other than Chanin Capital Partners, LLC and Business Development Asia, LLC, whose fees and expenses shall be borne solely by the Sellers.

3.17 Affiliated Transactions. Except for the China Assets Agreements and as set forth on Schedule 3.17, no Insider is a party to any agreement, contract, commitment or transaction related to the Business with the Seller or has any interest in the Purchased Assets.

3.18 Sufficiency of Assets. The Purchased Assets, together with the China Assets, constitute all of the assets necessary and sufficient to conduct the material operations of the Business in accordance with Sellers' current practices.

3.19 Sales Agency Agreements. Schedule 3.19 is a true and correct list of all sales agency agreements entered into by Sellers or any Affiliate thereof in connection with the Business.

3.20 No Other Representations. Except for the representations and warranties contained in Article III of this Agreement, no Seller nor any of its Affiliates, officers, directors, employees, agents, representatives, nor any other Person, makes or shall be deemed to make any representation or warranty to the Purchaser, express or implied, at law or in equity, on behalf of any Seller, and the Sellers hereby disclaim any such representation or warranty whether by the

Sellers, or any of their Affiliates, officers, directors, employees, agents, representatives or any other Person, notwithstanding the delivery or disclosure to the Purchaser or any of its officers, directors, employees, agents or representatives or any other Person of any other documentation or other information by the Sellers or any of their Affiliates, officers, directors, employees, agents, representatives or any other Person.

#### ARTICLE IV REPRESENTATIONS AND WARRANTIES OF THE PURCHASER

The Purchaser, to induce the Sellers to enter into this transaction and to close hereunder, hereby represents and warrants to each of the Sellers as follows:

4.1 Organization. The Purchaser is a corporation publicly traded on the Tel Aviv Stock Exchange, duly organized, validly existing and in good standing under the Laws of the jurisdiction of its incorporation.

4.2 Authority. The Purchaser has all requisite corporate power and authority to enter into and deliver this Agreement and the Operative Agreements to which it is a party, to perform its obligations hereunder and thereunder, to consummate the transactions contemplated hereby and thereby and to assume and perform the Assumed Liabilities. The execution and delivery by the Purchaser of this Agreement and the Operative Agreements to which it is a party, the performance by the Purchaser of its obligations hereunder and thereunder, the consummation by the Purchaser of the transactions contemplated hereby and thereby and the assumption and performance of the Assumed Liabilities have been duly authorized by all necessary corporate action on the part of the Purchaser. This Agreement has been, and the Operative Agreements to which the Purchaser is a party shall be, duly executed and delivered by the Purchaser. Assuming the due authorization, execution and delivery of this Agreement and the Operative Agreements by the Seller and subject to the effectiveness of the Procedures Order and the Approval Order, this Agreement constitutes, and each of the Operative Agreements to which the Purchaser is a party when so executed and delivered will constitute, a legal, valid and binding obligation of the Purchaser, enforceable against the Purchaser in accordance with its terms.

4.3 No Violation; Third Party Consents. Assuming that all consents, waivers, approvals, orders and authorizations set forth in Schedule 4.3 have been obtained and all registrations, qualifications, designations, declarations or filings with any Governmental Authorities set forth in Schedule 4.4 have been made, and except as set forth in Schedule 4.3, the execution and delivery by the Purchaser of this Agreement and the Operative Agreements to which it is a party, the performance by the Purchaser of its obligations hereunder and thereunder, the consummation by the Purchaser of the transactions contemplated hereby and thereby and the assumption and performance of the Assumed Liabilities will not conflict with or violate, constitute a default (or event which with the giving of notice or lapse of time, or both, would become a default) under, give rise to any right of termination, amendment, modification, acceleration or cancellation of any obligation or loss of any benefit under, result in the creation of any Encumbrance on any of the assets or properties of the Purchaser pursuant to, or require the Purchaser to obtain any consent, waiver, approval or action of, make any filing with, or give any notice to any Person as a result of or under, the terms or provisions of (a) the organizational documents of the Purchaser, (b) any Contract to which the Purchaser is a party or is bound or (c)



any Law applicable to the Purchaser or any Governmental Order by which the Purchaser is in any way bound or obligated, except, in the case of clauses (b) and (c) of this Section 4.3, as would not have a material adverse effect on the ability of the Purchaser to perform its obligations under this Agreement and the Operative Agreements to which it is a party, to assume and perform the Assumed Liabilities or to consummate on a timely basis the transactions contemplated hereby or thereby.

4.4 Governmental Consents. No consent, waiver, approval, order or authorization of, or registration, qualification, designation, declaration or filing with, any Governmental Authority is required on the part of the Purchaser in connection with the execution and delivery by the Purchaser of this Agreement and the Operative Agreements to which it is a party, the performance by the Purchaser of its obligations hereunder and thereunder, the consummation by the Purchaser of the transactions contemplated hereby and thereby and the assumption and performance of the Assumed Liabilities, except (a) as set forth in Schedule 4.4, and (b) where the failure to obtain such consent, waiver, approval, order or authorization, or to make such registration, qualification, designation, declaration or filing, would not have a material adverse effect on the ability of the Purchaser to perform its obligations under this Agreement and the Operative Agreements to which it is a party, to assume and perform the Assumed Liabilities or to consummate on a timely basis the transactions contemplated hereby or thereby.

4.5 Litigation. Except as set forth in Schedule 4.5, there are no pending or, to the Knowledge of the Purchaser, threatened Actions by any Person or Governmental Authority against or relating to the Purchaser (or any Affiliate of the Purchaser) or by which the Purchaser or its assets or properties are or may be bound which, if adversely determined, would have a material adverse effect on the ability of the Purchaser to perform its obligations under this Agreement and the Operative Agreements to which it is a party, to assume and perform the Assumed Liabilities or to consummate on a timely basis the transactions contemplated hereby or thereby.

4.6 Brokers. All negotiations relative to this Agreement and the transactions contemplated hereby have been carried out by the Purchaser directly with the Sellers without the intervention of any Person on behalf of the Purchaser in such manner as to give rise to any valid claim by any Person against any Seller for a finder's fee, brokerage commission or similar payment, other than Compass Advisers, LLP, whose fees and expenses shall be borne solely by Purchaser.

4.7 Financing. The Purchaser has sufficient funds, or at and as of the Closing shall have sufficient funds, in an aggregate amount necessary to pay the Purchase Price and to perform the Assumed Liabilities and to consummate all of the other transactions contemplated by this Agreement and the Operative Agreements to which it is a party.

#### ARTICLE V COVENANTS AND AGREEMENTS

5.1 Conduct of Business. Subject to any obligations of the Sellers each as a debtor-in-possession under the Bankruptcy Code and except as contemplated, permitted or required by this Agreement, at all times during the period commencing upon the date hereof and terminating

upon the Closing or the termination of this Agreement pursuant to and in accordance with the terms of Section 9.1, unless the Purchaser shall otherwise consent in writing (which consent shall not be unreasonably withheld or delayed), the Sellers shall (a) conduct the operations of the Business in all material respects in compliance with the Bankruptcy Code and any applicable orders entered by the Bankruptcy Court and otherwise in the Ordinary Course of Business, except as otherwise set forth on Schedule 5.1, (b) use commercially reasonable efforts to maintain in effect all Business Insurance Policies, all Business Contracts and all Business Licenses held by or on behalf of the Sellers that are necessary to carry on the Business substantially in the manner conducted by the Sellers as of the date hereof and during the most recent six (6) months, (c) maintain the books of account and records of the Business as conducted by it in the usual, regular and ordinary manner and substantially consistent with its past practices, (d) not abandon or fail to take any reasonable action necessary to maintain any registered trademarks which are among the Purchased Assets, (e) consistent with past practice use commercially reasonable efforts to maintain and not abandon the Intellectual Property of the Business included in the Purchased Assets, (f) timely provide any notice of this transaction required by law or collective bargaining agreement, and satisfy all bargaining obligations relating to this transaction, (g) not knowingly take any action that would result in a breach of or inaccuracy in (in each case as of the Closing) any of the representations and warranties of the Seller contained in Article III, or (h) comply with the requirements set forth on Schedule 5.1. Subject to any obligations of the Sellers as a debtor-in-possession under the Bankruptcy Code and except as contemplated, permitted or required by this Agreement without limiting the generality of the foregoing, prior to the Closing, without the prior written consent of Purchaser (which consent cannot be unreasonably withheld or delayed), each Seller shall use its commercially reasonable efforts to cause the Business not to directly or indirectly, except as expressly contemplated by this Agreement, take or omit to take any action that would reasonably be likely to cause a Material Adverse Effect.

5.2 Access and Information. Subject to the terms of the Confidentiality Agreement, at all times during the period commencing upon the execution and delivery hereof by each of the parties hereto and terminating upon the Closing or the termination of this Agreement pursuant to and in accordance with the terms of Section 9.1, the Sellers shall permit the Purchaser and its authorized agents and representatives to have reasonable access, upon prior consultation and coordination with Sellers, regarding timing and extent of such access, during normal business hours, and with Sellers' prior approval, which shall not be withheld unreasonably, to the Purchased Assets and all of Sellers' relevant vendors, suppliers, distributors, third party service providers, customers, employees and other Persons related to the Business, books, records and documents of or relating to the Business and the Purchased Assets and the Sellers shall make reasonably available any senior executives then active in the Business, and shall furnish to the Purchaser such information and data, financial records and other documents in its possession relating to the Business (other than the production-side thereof) and the Purchased Assets as the Purchaser may reasonably request. The Sellers shall permit the Purchaser and its agents and representatives reasonable access to its accountants for reasonable consultation or verification of any information obtained by the Purchaser during the course of any investigation conducted pursuant to this Section 5.2.

5.3 Confidentiality.

(a) Subject to Section 5.11 and the requirements of the Bankruptcy Code and the Bankruptcy Court and except as otherwise explicitly provided in this Agreement, the terms of the Confidentiality Agreement are hereby incorporated herein by reference and shall continue in full force and effect from the date hereof until the Closing, with respect to information pertaining to the Business, in accordance with the terms thereof, such that the information obtained by the Purchaser, or its officers, employees, agents or representatives, during any investigation conducted pursuant to Section 5.2, in connection with the negotiation, execution and performance of this Agreement, or the consummation of the transactions contemplated hereby, or otherwise, shall be governed by the terms set forth in the Confidentiality Agreement; provided, however, that (i) with respect to information received by the Purchaser pertaining to any business unit of the Sellers' ultimate parent company other than the Business or (ii) in the event of the termination of this Agreement, the terms of the Confidentiality Agreement incorporated herein by reference shall survive for the term as provided in the Confidentiality Agreement.

(b) Sellers, on behalf of themselves and their respective Affiliates (which for all purposes of this Section 5.3(b) shall not include any natural Persons), acknowledge that, after the Closing, Purchaser would be irreparably damaged if Sellers' and their Affiliates' confidential knowledge regarding the Business, including without limitation, knowledge regarding the Business' activities, finances, properties, and other assets, marketing, pricing, suppliers, customers, and licensors and licensees, were disclosed to or utilized on behalf of any customer, supplier or competitor of Purchaser with respect to the Business (other than Purchaser or its Affiliates), and each of the Sellers, for themselves and on behalf of their Affiliates, covenants and agrees that it will not, following the Closing, without the prior written consent of Purchaser, disclose (or permit to be disclosed) or use (or permit to be used) in any way any information relating to any such confidential knowledge unless (i) compelled to disclose such confidential information by judicial or administrative process or, in the opinion of its counsel, by other requirements of Applicable Law, including the Bankruptcy Code, and, in any such event, Sellers on behalf of themselves and/or their Affiliates, as applicable, give Purchaser prompt written notice of any such requirement and prior to any such disclosure; (ii) Purchaser has consented to specific disclosure of such information, but this consent shall not excuse Sellers from otherwise performing their obligations under this Section 5.3(b); (iii) such information is lawfully in the possession of the third party recipient before it was disclosed through no fault of Sellers; (iv) disclosure is required as determined by Sellers in their reasonable discretion in order to obtain such approvals, consents or authorizations from the People's Republic of China or other Governmental Authorities as are required to effectuate the transactions contemplated by the China Assets Agreements; or (v) such information is generally available to third parties through no fault of Sellers or their Affiliates. Notwithstanding anything to the contrary contained herein, this Section 5.3(b) shall not affect any of Sellers' rights set forth in Sections 1.1(a)(v) and (vi) above, and Sellers and their Affiliates shall be free to use all such confidential information in connection with Sellers' or their Affiliates' attempts to collect accounts receivable, dispose of their assets and otherwise to conduct activities after the Closing Date related to Sellers' Bankruptcy Case or their conduct of the Business or other businesses operated by Sellers in the Ordinary Course of Business, and Sellers' Affiliates' conduct of their businesses prior to or after the Closing Date (as applicable) or in any connection with any litigation to enforce Sellers' and their Affiliates' sales of the Purchased Assets or any other of their assets or in connection with Sellers' or their Affiliates' filings, reports to, and activities under jurisdiction of the Bankruptcy Court.

5.4 Further Actions. Upon the terms and subject to the conditions set forth in this Agreement (including the terms of Section 5.11) and subject to the requirements of the Bankruptcy Code and the Bankruptcy Court, the Sellers and the Purchaser shall each use their respective commercially reasonable efforts to take, or cause to be taken, all appropriate action, and to do, or cause to be done, and to assist and cooperate with the other parties hereto in doing, all things necessary, proper or advisable under applicable Laws to consummate the transactions contemplated hereby and satisfy the conditions to its obligations to close the transactions contemplated hereby, including, without limitation obtaining all necessary Licenses, actions or nonactions, waivers, consents or approvals, authorizations, qualifications and other orders of any Governmental Authorities with competent jurisdiction over the transactions contemplated hereby and providing all notices of such transactions required by Law.

5.5 Fulfillment of Conditions by the Sellers. Sellers shall not knowingly take or cause to be taken, or knowingly fail to take any action that would cause the conditions to the obligations of the Sellers or the Purchaser to consummate the transactions contemplated hereby to not be satisfied or fulfilled at or prior to the Closing.

5.6 Fulfillment of Conditions by the Purchaser. The Purchaser shall not knowingly take or cause to be taken, or knowingly fail to take, any action that would cause the conditions to the obligations of the Sellers or the Purchaser to consummate the transactions contemplated hereby to fail to be satisfied or fulfilled at or prior to Closing.

5.7 Publicity. Prior to the Closing, and subject to Section 5.11 and the requirements of the Bankruptcy Code and the Bankruptcy Court, the Sellers, on the one hand, and the Purchaser, on the other hand, shall cooperate with each other in the development and distribution of any news releases and other public disclosures relating to the transactions contemplated by this Agreement. Prior to the Closing, and subject to Section 5.11 and the requirements of the Bankruptcy Code and the Bankruptcy Court, neither the Sellers nor the Purchaser shall issue or make, or allow to be issued or made, any press release or public announcement concerning the transactions contemplated by this Agreement without the consent of the other party hereto, except as otherwise required by applicable Law or the rules of any applicable stock exchange, but in any event only after giving the other party hereto a reasonable opportunity to comment on such release or announcement in advance, consistent with such applicable legal requirements, other than customary tombstone-like disclosures after the Closing. Notwithstanding anything to the contrary contained herein, each of the parties may issue one or more public statements with respect to the transactions contemplated herein, provided, however, that each party's statement is first approved in writing by the other party prior to its issuance, such approval not to be unreasonably withheld.

5.8 Transaction Costs. The Purchaser shall pay all transaction costs and expenses (including any legal, accounting and other professional fees and expenses, all title insurance, survey, inspection and appraisal costs and expenses) that it incurs in connection with the negotiation, execution and performance of this Agreement and the consummation of the transactions contemplated hereby. The Sellers shall pay all transaction costs and expenses (including legal, accounting and other professional fees and expenses) that they incur in connection with the negotiation, execution and performance of this Agreement and the consummation of the transactions contemplated hereby. Notwithstanding the immediately

preceding sentence, the Sellers shall pay at Closing any and all transfer Taxes (including use, recording and personal property transfer Taxes) not otherwise exempt or waived by the Bankruptcy Court pursuant to Section 1146 of the Bankruptcy Code and the fees and costs of recording or filing all applicable conveyancing instruments associated with the transfer of the Purchased Assets from the Sellers to the Purchaser pursuant to this Agreement. In the event any party shall fail to pay any portion of the aforementioned transfer Taxes, fees and costs, such party shall indemnify and hold harmless the other party and its respective Affiliates from any and all claims, damages and costs arising therefrom. The Sellers and the Purchaser shall cooperate in the preparation, execution and filing of all Tax Returns regarding any transfer Taxes which become payable as a result of the transfer of the Purchased Assets from the Sellers to the Purchaser pursuant to this Agreement or shall cooperate to seek an available exemption from such Taxes.

5.9 Retention of and Access to Records; Employees. For a period of three (3) years following the Closing Date the Purchaser shall preserve all books and records transferred by the Sellers to the Purchaser pursuant to this Agreement and the Sellers shall preserve all books and records related to the Business or the Purchased Assets not transferred by the Sellers to the Purchaser pursuant to this Agreement. Upon the expiration of such three (3)-year period, the Purchaser shall provide the Sellers a reasonable opportunity to obtain copies, at the Sellers' expense, of any of such books and records and the Sellers shall provide the Purchaser a reasonable opportunity to obtain copies, at the Purchaser's expense, of any of such books and records in the Sellers' possession. Upon the reasonable request of the Sellers, the Purchaser shall deliver to the Sellers such financial information relating to the Business as is reasonably requested to enable the Sellers to prepare its Financial Statements and all Tax Returns of the Sellers relating to periods ending on or prior to the Closing Date. In addition to the foregoing, from and after the Closing, the Purchaser shall afford to the Sellers and their counsel, accountants and other authorized agents and representatives, during normal business hours, reasonable access to the employees, books, records and other data relating to the Purchased Assets, the Assumed Liabilities, and the Excluded Liabilities in its possession with respect to periods prior to the Closing, and the right to make copies and extracts therefrom, to the extent that such access may be reasonably required by the requesting party (a) to assist, facilitate or testify in connection with any investigation, proceeding, dispute, grievance, litigation, arbitration and final disposition of any claims which may have been or may be made against any such party or Persons or their Affiliates, including any proceeding before any arbitral, administrative, regulatory, self-regulatory, judicial, legislative or other body or agency, including, but not limited to, making employees (including, without limitation, Transferred Employees) available as witnesses to the extent such investigations, proceedings, disputes, grievances, litigations or arbitrations relate to such employees' employment with the Sellers, services performed or required to be performed by the employees, or pertinent knowledge possessed by such employees and (b) for the preparation of Tax Returns and audits; provided that other than pursuant to the rules of disclosure applicable in the jurisdiction of such litigation, in no event shall the Purchaser be obligated to provide any such information or access for any purpose involving a (i) proceeding, dispute, grievance or litigation before any administrative, regulatory, self-regulatory, judicial, legislative or other body or agency or (ii) any arbitration, in which the parties hereto have adversarial positions. In addition to the foregoing, Purchaser will also permit, from and after the Closing, representatives of the Official Committee of Unsecured Creditors (including counsel, financial advisors and accountants) and any of their successors (collectively,

the "Committee Representatives") to have reasonable access, in a manner so as not to interfere with the normal business operations of Purchaser, to all premises, properties, personnel, books, records, contracts and documents of or pertaining to any Seller or its Affiliates in order to facilitate the winding down of Seller's operations, including responding to requests for information relating to potential claims by or against any Seller or its Affiliates, and evaluating the calculation of any purchase price adjustment. Purchaser and Sellers shall also notify a Committee Representative of any intent on the part of either party to destroy or otherwise dispose of any books and records related to the Business prior to the Closing.

5.10 Insurance. Effective 11:59 p.m. (Wilmington, Delaware time) on the Closing Date, Purchaser acknowledges and agrees that the conduct of the Business shall cease to be insured by the Sellers' or their Affiliates' insurance policies.

5.11 Bankruptcy Court Approval.

(a) Notwithstanding anything in this Agreement to the contrary, this Agreement and the sale of the Purchased Assets are subject to the entry by the Bankruptcy Court of the Approval Order. The Purchaser also acknowledges that this Agreement is subject to higher and better offers received by Sellers for the Purchased Assets pursuant to, and in accordance with, the Procedures Order.

(b) As promptly as practicable after the execution of this Agreement, but in no event later than three (3) Business Days following the date hereof, Sellers, at their own cost and expense, shall file with the Bankruptcy Court a motion (the "Sale Procedures Motion"), together with appropriate supporting papers and notices, seeking the entry of an order, pursuant to the Bankruptcy Code, in the form attached hereto as Exhibit H (the "Procedures Order"), approving procedures for the Sellers to sell the Business and the Purchased Assets and approving the Termination Fee and Expense Reimbursement provisions set forth in Section 9.3. The Sellers shall obtain the entry of the Procedures Order as soon as practicable after the date hereof, but in no event later than twenty (20) days after the date of the filing of the motion, time being of the essence.

(c) Nothing in this Agreement shall prevent the Sellers from complying with the Procedures Order, including the solicitation of additional offers and the acceptance of another offer to purchase the Purchased Assets.

(d) Subject to Section 5.11(c) above, in compliance with the Procedures Order, the Sellers shall obtain entry by the Bankruptcy Court of an order substantially in the form attached hereto as Exhibit I (the "Approval Order") as soon as practicable, but in no event later than March 31, 2008, time being of the essence.

(e) The Sellers shall serve and file their motion or motions for entry of the Approval Order (the "363 Motion") and the 365 Orders (the "365 Motions"), which may be part of the 363 Motion, on or before February 13, 2008 or such earlier date as may be specified in the Procedures Order and shall, at their own cost and expense, diligently prosecute such 363 Motion and 365 Motions to conclusion and shall defend any appeal thereof, (but shall not be required to prosecute any appeal unless Sellers so elect). The Sellers will promptly deliver to the Purchaser

copies of the 363 Motion, the 365 Motions and all other pleadings, motions, notices, statements, schedules, applications, reports and other papers filed in the Bankruptcy Case relating to the 363 Motion and 365 Motions. Failure by the Sellers to serve or file the 363 Motion and 365 Motions by such date (time being of the essence), or to obtain the Sale Procedures Order or the Sale Order by the dates specified in Sections 5.11(b) and (d), respectively, shall be deemed a material breach by the Sellers of this Agreement.

5.12 On-Hand Packaging Materials and Stationery; Others' Use of Intellectual Property. Purchaser hereby consents to the use and depletion by Sellers and their Affiliates and purchasers therefrom after the date hereof of those on-hand packaging materials and stationery which bear trade names, trademarks and/or service marks acquired by Purchaser hereunder for a period not to exceed three (3) months following the Closing Date, except for those purchasers who have already entered into contracts with Sellers and/or their Affiliates providing for a longer period of use identified on Schedule 5.12, and with respect to those persons Purchaser consents to such longer period. Such use shall be non-exclusive and royalty-free. Unless otherwise agreed between the Sellers and a particular third-party purchaser, and so notified to Purchaser, the users of such on-hand packaging materials and stationery shall use them on a first-use basis (in preference to any other packaging materials and stationery) so as to exhaust such on-hand packaging materials and stationery as soon as possible after the Closing Date. Any and all other use by the Sellers and purchasers therefrom of trade names, trademarks and/or service marks and any other Intellectual Property included in the Purchased Assets is expressly prohibited without the prior written consent of the owner of such Intellectual Property, except for such use by Sellers in connection with any List B Sales pursuant to Section 1.3(c)(v), which shall be permitted, as shall the sale by Sellers and their Affiliates of items not included within the Purchased Assets which shall be permitted for a period of three (3) months after the Closing. Except for the right to use the "Fedders" name as specified in the FDF License (as defined below) and as otherwise set forth in this Section 5.12, and as set forth on Schedule 5.12, to the Knowledge of Sellers, no person has the right to use any such Intellectual Property anywhere in the world. Without limiting the foregoing, no such right has been given by Sellers or any Affiliate thereof in the Bankruptcy Case except as set forth in Schedule 5.12. Following the Closing, Sellers shall not hereafter authorize any Person(s) to use any of the trade names, trademarks and/or service marks and any other Intellectual Property included in the Purchased Assets and, prior to the Closing Date, Sellers, to the extent they have the legal right to do so, shall terminate the agreements set forth on Schedule 5.12. In the event that Sellers are unable to effect the termination of any such agreement, Sellers shall use their commercially reasonable efforts to obtain the rejection of such agreement pursuant to Section 365 of the Bankruptcy Code. Sellers further agree that upon the expiration of the right to use the "Fedders" name as set forth in that certain Trademark License Agreement between Fedders North America, Inc. and Xi'an Fedders Dong Fang Air Conditioner Compressor Co., Ltd. (the "FDF License") dated July 20, 2005 and the supplementary agreement thereto to be entered into by such parties, Sellers shall not extend such agreement in any manner which would permit the continued use of the "Fedders" name by Xi'an Fedders Dong Fang Air Conditioner Compressor Co., Ltd. or any Affiliate thereof beyond the eighteen month extension contained therein.

5.13 Corporate and Trade Name. Except for the rights of Sellers' parent and other Affiliates to continue to use the name "Fedders" in the Bankruptcy Case and for period of three (3) months after the Closing, from and after the Closing, and otherwise as provided on Schedule

5.13, the Sellers will not, directly or indirectly, use or do business under or allow any of their respective Affiliates to use or do business under or assist any other Person in using or doing business under any name or trademark confusingly similar to any names or trademarks included in the Purchased Assets, including, without limitation, any name or trademark including the words "Fedders," or "Emerson Quiet Kool," "Airtemp" or "Climatrol" or any related names. Sellers covenant and agree to change any such corporate names within thirty (30) days after the Closing to eliminate the word "Fedders" and "Emerson Quiet Kool" from such names.

5.14 Data. The Sellers shall reasonably cooperate with the Purchaser to transfer any data exclusively related to the Business to databases of the Purchaser (it being understood that to the extent such data relates to any other business of the Sellers, Sellers shall be permitted to retain a copy thereof).

5.15 Delivery of Tangible Manufacturing Assets. At all times prior to the Closing Sellers shall use their commercially reasonable efforts to ensure delivery to Purchaser of possession of the Tangible Manufacturing Assets on the Closing Date, and shall keep Purchaser fully informed of such efforts and shall give Purchaser a right of consultation with respect thereto, including, without limitation, with respect to discussions between Sellers and the persons in possession of the Tangible Manufacturing Assets. In the event that, notwithstanding such commercially reasonable efforts, possession of the Tangible Manufacturing Assets cannot be so delivered on the Closing Date, the covenant contained in the immediately preceding sentence shall survive as a post-Closing covenant until the earlier to occur of (i) such time as Sellers and Purchaser may agree that any further efforts to obtain possession of the Tangible Manufacturing Assets are futile, and (ii) the date which is ninety (90) days subsequent to the Closing Date.

5.16 Termination of Sales Agency Agreements. Sellers shall reject or, prior to the Closing, the Sellers shall terminate or undertake efforts reasonably calculated to effectuate the termination of each of the sales agency agreements set forth on Schedule 3.19, it being understood that the terminations are not required hereunder to be effective at or prior to Closing.

5.17 Updating Schedules. The Sellers shall update or supplement any Schedule delivered pursuant to this Agreement in writing delivered to the Purchaser at any time on or prior to Closing for the purpose of deleting items from List A and List B of Schedule 1.1(a)(i) as set forth in Section 1.3, or pursuant to sales of inventory in the Ordinary Course of Business, reflecting other matters which occur subsequent to the date hereof, correcting mistakes made or adding information missing in good faith during the Sellers' preparation of such Schedule, in which case the Purchaser shall be required to close the transactions contemplated by this Agreement and waive any claim the Purchaser may have that such modification is a breach of the representations and warranties given in this Agreement on the Closing Date; provided that in the event the matter disclosed in such update or supplement to the Schedules results in reduction or diminution in value of the Purchased Assets in any material respect or in a change in the categories or composition of the Assumed Liabilities or the Excluded Liabilities, the Purchaser shall have the right to terminate this Agreement pursuant to Section 9.1(e)(ii).

5.18 Segregation of Inventory. Following the date hereof and prior to the Closing, Sellers shall use their commercially reasonable efforts to physically separate the items of Assigned Inventory located at the Sellers' warehouse facilities at 415 W. Wabash Avenue,



Effingham, Illinois 62401, and included in the Purchased Assets from all other inventory at the Effingham Facility which will not be included in the Purchased Assets, and to physically keep separate the items of Assigned Inventory appearing in List A from those appearing in List B. All of the Assigned Inventory purchased hereunder shall be kept located at such warehouse facilities through the Closing, however, subject to earlier sale in the Ordinary Course of Business.

5.19 Employees. Prior to or following the Closing and subject to Section 5.2, the Purchaser may, in its sole discretion, extend offers of employment to certain employees of Sellers who are or have been employed in connection with the Business. To the extent the Purchaser makes any such offer or offers, the parties understand and agree that the terms and conditions thereof shall be as agreed between the Purchaser and each such employee, and that the Purchaser shall have no obligation to assume any existing Benefit Plans or other liabilities of the Sellers related to each such employee. Purchaser, in connection with its evaluation of the foregoing, shall be afforded, subject to Section 5.2, reasonable access through direct communication with such employees.

#### ARTICLE VI CLOSING CONDITIONS

6.1 Conditions to Obligations of the Purchaser. The obligations of the Purchaser to consummate the transactions contemplated by this Agreement are subject to the satisfaction or fulfillment at or prior to the Closing of the following conditions, any of which may be waived in whole or in part by the Purchaser in writing:

(a) all representations and warranties of the Sellers contained in this Agreement shall be true and correct in all material respects (except that any representation or warranty that is qualified by materiality or Material Adverse Effect shall be true and correct in all respects) at and as of the Closing with the same effect as though such representations and warranties were made at and as of the Closing (other than any representation or warranty that is expressly made as of a specified date, which shall be true and correct in all material respects (or in the case of any representation and warranty that is qualified by materiality or Material Adverse Effect shall be true and correct in all respects) as of such specified date only);

(b) the Sellers shall have performed and complied in all material respects with all the covenants and agreements required by this Agreement to be performed or complied with by it at or prior to the Closing, including, without limitation, their efforts in respect of the timely entry of the Procedures Order and the Approval Order as set forth in Section 5.11;

(c) there shall be in effect no Law or injunction issued by a court of competent jurisdiction making illegal or otherwise prohibiting or restraining the consummation of the transactions contemplated by this Agreement;

(d) all authorizations, consents, filings and approvals set forth on Schedule 2.2(a)(v) shall have been duly obtained, made or given, shall be in form and substance reasonably satisfactory to Purchaser, shall not be subject to the satisfaction of any condition that has not been satisfied or waived and shall be in full force and effect;

(e) all terminations or expirations of waiting periods imposed (and any extension thereof) by any Governmental Authority necessary for the transactions contemplated under this Agreement, if any, shall have occurred;

(f) a Material Adverse Effect shall not have occurred since the date of this Agreement;

(g) pursuant to the terms of and after the entry of the Procedures Order, the Sellers shall have served notice on all parties (including, without limitation, all parties to the Business Contracts and all Persons who would appear on any search conducted to determine those Persons asserting a lien on the assets of the Sellers) to whom service of the Sale Notice (as defined in the Procedures Order) is required under the terms of the Procedures Order notice, in form and substance as approved pursuant to the Procedures Order, disclosing the salient terms of this Agreement, the Procedures Order, any breakup fees and expense reimbursement and the identity of the Purchaser;

(h) the Procedures Order shall be a Final Order.

(i) Sellers shall have obtained entry of the Approval Order and such order shall be a Final Order (the "Final Order").

(j) Sellers shall have obtained entry of a Final Order or Orders (the "365 Orders") in form and substance reasonably satisfactory to the Purchaser, which 365 Orders shall provide, among other things, that the assumption by the Sellers and assignment by them to the Purchaser of all Business Contracts that are executory contracts, and that Purchaser shall have designated to Sellers within four (4) days prior to the hearing on the 365 Motions it wishes to have Sellers so assume and assign, is approved, and the Sellers shall have complied with all of the provisions of the 365 Orders and Sections 365(b) and (f) of the Bankruptcy Code with respect to the assumption by the Sellers and assignment to the Purchaser of such Business Contracts, including paying or pro-rating for future payment, after resolution of any dispute, all Cure Costs associated therewith, which Cure Costs shall be paid out of the Purchase Price received by Sellers hereunder. The 365 Orders shall also provide that such Business Contracts will be transferred to, and remain in full force and effect for the benefit of, the Purchaser notwithstanding any provisions therein (including those described in Sections 365(b)(2) and (f) of the Bankruptcy Code) that prohibits such assignment or transfer. The provisions of the 365 Order may be contained in the Approval Order, provided, however, that the provisions constituting the Approval Order portion of such order shall nonetheless be in substantially the form annexed hereto as Exhibit I.

(k) Nothing in this Section 6.1, or any other section of this Agreement, shall preclude Sellers or the Purchaser from consummating the transactions contemplated herein if the Purchaser, in its sole discretion, waives the requirement that the Approval Order, 365 Orders or any other orders be a Final Order or Orders. No notice of such waiver of this or any other condition to Closing need be given except to Sellers or the Purchaser, as explicitly required in this Agreement, it being the intention of the parties hereto that the Purchaser shall be entitled to, and shall not waive thereby, the protection of Section 363(m) of the Bankruptcy Code, the

mootness doctrine and any similar statute or body of law if the Closing occurs prior to the time that any such order has become a Final Order.

(l) No Government Order shall be in effect which restrains or enjoins the consummation of the transactions contemplated by this Agreement;

(m) Sellers shall have delivered to the Purchaser all of the certificates, instruments and other documents required to be delivered by it at or prior to the Closing pursuant to Section 2.2.

6.2 Conditions to Obligations of the Sellers. The obligations of the Sellers to consummate the transactions contemplated by this Agreement are subject to the satisfaction or fulfillment at or prior to the Closing of the following conditions, any of which may be waived in whole or in part by the Sellers in writing:

(a) all representations and warranties of the Purchaser contained in this Agreement shall be true and correct in all material respects (except that any representation or warranty that is qualified by materiality or Material Adverse Effect shall be true and correct in all respects) at and as of the Closing with the same effect as though such representations and warranties were made at and as of the Closing (other than any representation or warranty that is expressly made as of a specified date, which shall be true and correct in all material respects (or in the case of any representation and warranty that is qualified by materiality or Material Adverse Effect shall be true and correct in all respects) as of such specified date only);

(b) the Purchaser shall have performed and complied in all material respects with the covenants and agreements required by this Agreement to be performed or complied with at or prior to the Closing;

(c) there shall be in effect no Law or injunction issued by a court of competent jurisdiction making illegal or otherwise prohibiting or restraining the consummation of the transactions contemplated by this Agreement;

(d) the Purchaser shall have delivered to the Sellers the Purchase Price and all of the certificates, instruments and other documents required to be delivered by the Purchaser at or prior to the Closing pursuant to Section 2.3; and

(e) the Approval Order (finding that Sellers have obtained all required consents, which includes the consent of Sellers' debtor in possession lenders under that certain Debtor in Possession Credit and Guaranty Agreement dated as of August 24, 2007) shall have been entered by the Bankruptcy Court, shall be effective immediately upon entry, and no stay of execution, pursuant to Rule 62(a) of the Federal Rules of Civil Procedure, Rules 6004(g) or 6006(d) of the Federal Rules of Bankruptcy Procedure, or otherwise, shall apply with respect to the Approval Order.

**ARTICLE VII  
AS IS SALE**

7.1 AS IS SALE. PURCHASER SPECIFICALLY ACKNOWLEDGES AND AGREES THAT, NOTWITHSTANDING THE REPRESENTATIONS AND WARRANTIES OF SELLERS SET FORTH IN ARTICLE III, (A) SELLERS SHALL SELL AND PURCHASER SHALL PURCHASE THE PURCHASED ASSETS "AS IS, WHERE IS AND WITH ALL FAULTS," PATENT AND LATENT, (B) PURCHASER HAS COMPLETED ITS OWN INDEPENDENT INVESTIGATION OF THE ASSIGNED INVENTORY AND ALL OF THE OTHER PURCHASED ASSETS AND IS ACQUIRING THE PURCHASED ASSETS BASED SOLELY ON SUCH INDEPENDENT INVESTIGATION, (C) PURCHASER IS NOT RELYING ON ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND WHATSOEVER, WHETHER ORAL OR WRITTEN, EXPRESS OR IMPLIED, STATUTORY OR OTHERWISE, FROM SELLERS, OR ANY REPRESENTATIVE OF SELLERS, AS TO ANY MATTER, CONCERNING THE PURCHASED ASSETS, INCLUDING WITHOUT LIMITATION: (i) the quality, nature, habitability, merchantability, use, operation, value, marketability, adequacy or physical condition of the Purchased Assets or any aspect or portion thereof, (ii) the development or income potential, or rights of or relating to, the Purchased Assets, or the use, habitability, merchantability, or fitness of the Purchased Assets, or the suitability, value or adequacy of the Purchased Assets for any particular purpose, (iii) the compliance of the Purchased Assets or their operation with any applicable codes, laws, regulations, statutes, ordinances, covenants, conditions and restrictions of any Governmental Authority or of any other person or entity (including, without limitation, the Americans with Disabilities Act), (iv) the economics of, or the income and expenses, revenue or expense projections or other financial matters, relating to, the operation of the Purchased Assets and of the Business, or (v) the accuracy or completeness of any documents or information provided by Sellers in connection with Purchaser's due diligence in connection with the transactions contemplated by this Agreement.

7.2 No Reliance. Without limiting the generality of the foregoing, Purchaser expressly acknowledges and agrees that, except for the representations and warranties set forth in Article III of this Agreement, Purchaser is not relying on any representation or warranty of Sellers or any of its agents, employees or representatives, whether implied, presumed or expressly provided at law or otherwise, arising by virtue of any statute, common law or other legally binding right or remedy in favor of Purchaser.

7.3 No Duty of Inquiry. Purchaser further acknowledges and agrees that Sellers are under no duty to make any inquiry regarding any matter that may or may not be known to Sellers or any of their respective agents, employees or representatives.

7.4 Purchaser's Responsibility. Any changes, alterations, repairs or work required with respect to the Purchased Assets are the sole responsibility of Purchaser, and Sellers shall have no obligation to make or perform any changes, alterations, repairs or work with respect to the Purchased Assets.

7.5 Release. Without limiting the foregoing provisions, Purchaser, for itself and any of its successors and assigns (including, without limitation, any assignee), waives its right to

recover from, and forever releases and discharges, and covenants not to sue, Sellers, any person or entity which controls, is controlled by or is under common control with Sellers, any agent, employee, officer, shareholder or other representative of Sellers and their respective heirs, successors, personal representatives and assigns, with respect to any and all claims and causes of action, whether direct or indirect, known or unknown, foreseen or unforeseen, in contract, tort, or under statute, that may arise on account of or in any way be connected with the Purchased Assets. Notwithstanding the foregoing, Purchaser does not waive its rights, if any, to recover from, and does not release or discharge or covenant not to sue Sellers for any breach of Sellers' obligations set forth in this Agreement.

7.6 SURVIVAL. THE PROVISIONS OF THIS ARTICLE VII SHALL SURVIVE THE CLOSING (OR, IF THE CLOSING DOES NOT OCCUR, THE TERMINATION OF THIS AGREEMENT) AND SHALL NOT BE DEEMED MERGED INTO ANY INSTRUMENT OF CONVEYANCE DELIVERED AT THE CLOSING. THE RELEASE PROVIDED IN THIS ARTICLE SHALL SPECIFICALLY APPLY WHETHER OR NOT ANY OF THE FOREGOING IS ATTRIBUTABLE, IN WHOLE OR IN PART, TO THE NEGLIGENCE OF SELLERS OR PURCHASER OR ANY OTHER PERSON OR ENTITY WHICH BENEFITS FROM SUCH RELEASE.

**ARTICLE VIII**  
**REPRESENTATIONS, WARRANTIES AND AGREEMENTS TERMINATE AT CLOSING; LIMITATION OF REMEDIES AGAINST SELLERS INDEMNITY BY PURCHASER**

8.1 Representations, Warranties and Agreements Terminate at Closing. Except as otherwise expressly provided in this Agreement, all of the representations and warranties of Sellers contained in this Agreement, or in any schedules, exhibits, agreements or documents attached hereto, in any Ancillary Agreements, or in any certificate delivered pursuant hereto or thereto, are intended only to have induced Purchaser to enter into this Agreement and to consummate the Closing and, upon the Closing and the consummation of the transactions provided for herein, shall terminate and be of no further force or effect whatsoever. To the extent the Closing does not occur because of the termination of this Agreement pursuant to Article IX below, the obligations of the parties hereto shall be governed exclusively by such Article IX.

8.2 Limitations of Remedies Against Sellers. Anything to the contrary contained herein or in the common law notwithstanding, the remedies of Purchaser with respect to any breach of any of the representations, warranties and agreements contained in this Agreement, for all periods prior to the Closing, shall be limited to exercise of Purchaser's termination rights under Article IX and, if the Closing occurs, all representations and warranties of Sellers shall be deemed to have terminated and be without any further force or effect and Purchaser thereupon will have no claim for indemnification against any Seller for any such breach, under this Agreement and this Article VIII is to operate as an absolute limit and bar to recovery by or on behalf of Purchaser regarding any such representations and warranties, under this Agreement, whether or not such claims or recovery arise under this Agreement, or under any statutory or common law cause of action or otherwise whatsoever, and Purchaser acknowledges and agrees

that the termination provisions of this Agreement constitute Purchaser's sole and exclusive remedy with respect thereto.

8.3 Indemnification by the Purchaser. After the Closing, for a period of twelve (12) months after the Closing with respect to (a) and (b) below and for a period of thirty-six (36) months with respect to (c) below in this Section 8.3, the Purchaser agrees to indemnify the Sellers and their Affiliates, officers, directors, employees and representatives (each, a "Seller Indemnified Party") against and hold them harmless from and reimburse them for all Losses which the Seller Indemnified Party may at any time sustain or incur as a result of or arising out of:

- (a) the breach of any representation or warranty of the Purchaser contained herein or the breach of any covenant of the Purchaser contained herein which is to be performed on or before the Closing Date;
- (b) the breach of any covenant or agreement of the Purchaser contained herein which is to be performed after the Closing Date; and
- (c) any of the Assumed Liabilities.

8.4 Claims.

(a) Notice of Claims. A Seller entitled to be indemnified pursuant to Section 8.3 (the "Indemnified Party") shall promptly notify the Purchaser (the "Indemnifying Party") in writing of any claim or demand which the Indemnified Party has determined has given or could give rise to a right of indemnification under this Agreement (such notice, a "Notice of Claim"); provided, however, that a delay or failure to provide such notice shall not relieve any Indemnifying Party of its obligations except to the extent that it has been materially prejudiced by such delay or failure. Any Notice of Claim (i) shall state (to the extent known) the basis on which indemnification is being asserted, (ii) shall set forth (to the extent known) the amount of Losses for which indemnification is being asserted, and (iii) in the case of third party claims, shall be accompanied by copies of any relevant pleadings, demands and other papers served on the Indemnified Party, and (iv) shall be served on the Indemnifying Party within twelve (12) or thirty-six (36) months of the Closing as applicable pursuant to Section 8.3.

(b) Defense of Claims. If the Indemnified Party shall notify the Indemnifying Party of any claim or demand pursuant to Section 8.3 asserted by a third party, the Indemnifying Party shall at its sole cost and expense have the right (i) to employ counsel reasonably acceptable to the Indemnified Party to defend any such claim or demand asserted against the Indemnified Party, (ii) to control and conduct any proceedings or negotiations in connection therewith and necessary or appropriate to defend the Indemnified Party and (iii) to take all other steps or proceedings to settle or defend any such claims, provided that in the case of any settlement that provides for any relief other than the payment of monetary damages as to which the Indemnified Party will be indemnified in full, such settlement may only be made with the prior written consent of the Indemnified Party, which consent will not be unreasonably withheld or delayed. The Indemnifying Party shall notify the Indemnified Party in writing, as promptly as possible after receipt of the Notice of Claim (but in any case within thirty (30) days of receipt by the

Indemnifying Party of a Notice of a Claim or such earlier time necessary to reasonably allow a timely response to the claim (the "Indemnity Notice Period") of its election to defend any such third party claim or demand; provided that the Indemnifying Party shall only be permitted to assume such defense so long as (A) such third party claim or demand involves only money damages and does not seek an injunction or other equitable relief and (B) the Indemnifying Party conducts the defense of the third party claim actively and diligently. In the event that the Indemnifying Party assumes the defense as provided in the preceding two sentences, the Indemnified Party shall have the right to participate in such defense (including, without limitation, with counsel of its choice), at its own expense, and the Indemnifying Party shall reasonably cooperate with the Indemnified Party in connection with such participation. If the Indemnifying Party does not deliver to the Indemnified Party written notice within the Indemnity Notice Period that the Indemnifying Party will assume the defense of any such claim or litigation resulting therefrom with counsel reasonably acceptable to the Indemnifying Party, the Indemnified Party may defend against any such claim or litigation in such manner as it may deem appropriate, at the cost of the Indemnified Party. The Indemnified Party may settle such claim or litigation or consent to the entry of any judgment of such claim or litigation in any manner that the Indemnified Party may reasonably deem appropriate (and the Indemnified Party need not consult with, or obtain consent from, any Indemnifying Party in connection therewith) and the Indemnifying Parties will remain responsible for all Losses resulting from, arising out of, relating to, or caused by such claim or litigation to the fullest extent provided in this Article VIII. In the event that the Indemnifying Party does not assume the defense as provided in the immediately preceding sentence, the Indemnifying Party shall have the right to participate in such defense (including without limitation, with counsel of its choice), at its own expense, and the Indemnified Party shall reasonably cooperate with the Indemnifying Party in connection with such participation, and in all cases the Indemnified Party shall keep the Indemnifying Party reasonably informed as to all matters concerning such third party claim and shall promptly notify the Indemnifying Party in writing of any and all significant developments relating thereto. Notwithstanding anything in this Section 8.4(b) to the contrary, in no event may the Indemnified Party settle any claim or litigation or consent to the entry of any judgment or order which admits or acknowledges that any acts or omissions of a Seller (whether prior to, on or after the Closing Date) were in violation or contravention of any Law, Governmental Order, Contract or License without the prior written consent of such Seller (which such Seller may withhold in its sole discretion).

8.5 Threshold for Indemnity; Survival. Purchaser shall not be required to indemnify or hold harmless any Person with respect to any claim for indemnification by the Seller Indemnified Parties for a breach of any representation or warranty contained herein, until the aggregate amount of Losses of the Seller Indemnified Parties exceeds Fifty Thousand Dollars (\$50,000.00), at which time the Purchaser shall indemnify and hold harmless the Seller Indemnified Parties for the full amount of such Losses in excess of Fifty Thousand Dollars (\$50,000.00). All of the representations and warranties of the Purchaser set forth in Article IV and all covenants of the Purchaser set forth in this Agreement shall survive the Closing for a period of twelve (12) months, other than the covenant to assume the Assumed Liabilities, which shall survive the Closing for a period of thirty-six (36) months.

**ARTICLE IX  
TERMINATION**

9.1 Termination. This Agreement and the transactions contemplated hereby may be terminated and abandoned:

(a) by either the Sellers or the Purchaser at any time prior to the Closing with the mutual written consent of the other and the prior approval of the Bankruptcy Court;

(b) unless the Closing has not occurred as a result of a breach of this Agreement by the party seeking such termination, by either the Sellers or the Purchaser, if the Closing has not occurred on or prior to 5:00 p.m., Wilmington, Delaware time, March 31, 2008 (the "Termination Date"). For the purpose of this Section 9.1(b), if the Approval Order and/or the 365 Orders are not Final Orders and all other conditions to the Purchaser's obligation to close have been satisfied or waived, the Sellers shall be entitled to terminate this Agreement and the transactions contemplated hereby, at any time after the Termination Date, unless the Purchaser completes Closing by the Termination Date;

(c) by either the Sellers or the Purchaser if any Governmental Authority with jurisdiction over such matters shall have issued a final and nonappealable Governmental Order permanently restraining, enjoining or otherwise prohibiting the consummation of the transactions contemplated by this Agreement; provided, however, that neither the Sellers nor the Purchaser may terminate this Agreement pursuant to this Section 9.1(c) unless the party seeking so to terminate this Agreement has used all commercially reasonable efforts to oppose any such Governmental Order or to have such Governmental Order vacated or made inapplicable to the transactions contemplated by this Agreement;

(d) by the Sellers (provided that no Seller nor any Affiliate thereof is in breach of any of the representations, warranties, covenants or other agreements contained herein), but only if the Purchaser shall have breached, in any material respect, any representation or warranty or any covenant or other agreement to be performed by it contained herein, and such breach is incapable of being cured or is not cured within twenty (20) days of receipt of written notice thereof from the Sellers;

(e) by the Purchaser (provided that the Purchaser or any Affiliate thereof is not in breach of any of the representations, warranties, covenants or other agreements contained herein), but only (i) if the Sellers shall have breached, in any material respect, any representation or warranty or any covenant or other agreement to be performed by it contained herein, and such breach is incapable of being cured or is not cured within twenty (20) days of receipt of written notice thereof from the Purchaser and such breach constitutes a Material Adverse Effect; or (ii) if Purchaser is entitled to terminate pursuant to Section 5.17; or

(f) notwithstanding anything in Section 9.1(e) to the contrary, by either the Purchaser or the Sellers, if the Bankruptcy Court has issued an order approving the sale of some or all of the Purchased Assets to another party in accordance with the Procedures Order, or if Sellers have effected some other alternate transaction, with the approval of the Bankruptcy Court, including a plan of reorganization or liquidation (including a Chapter 7 liquidation),



resulting in the disposition to someone other than Purchaser of some or all of the Purchased Assets (in either case, an "Alternative Transaction").

9.2 Effect of Termination. If this Agreement is terminated pursuant to Section 9.1, this Agreement shall become null and void and none of the parties hereto shall have any further liability hereunder except that the provisions of Sections 5.3, 5.7 and 5.8 and Articles VIII, IX and X shall remain in full force and effect.

9.3 Termination Fee; Expense Reimbursement. If this Agreement is terminated pursuant to Section 9.1(e) or (f), the Sellers promptly, and in the event of a termination pursuant to Section 9.1(f) in no event later than three (3) Business Days after closing of an Alternative Transaction contemplated by Section 9.1(f), shall pay the Purchaser a termination fee (the "Termination Fee") of Three Hundred Thirty-Seven Thousand Nine Hundred Forty Dollars (\$337,940), plus reimbursement to Purchaser of documented expenses incurred in connection with this transaction (the "Expense Reimbursement", collectively with the Termination Fee the "Break Up Fee") (provided that Purchaser submits such documentation to Sellers promptly and that such documentation is acceptable as describing expenses incurred by Purchaser in connection with the transactions contemplated herein in the reasonable discretion of Sellers) in an amount not to exceed Eighty-Four Thousand Four Hundred Eighty-Five Dollars (\$84,485) for an aggregate amount of Four Hundred Twenty-Two Thousand Four Hundred Twenty-Five Dollars (\$422,425). Sellers shall also pay to Purchaser the Break Up Fee in the event that all conditions to Closing contained in Section 6.2 have been satisfied and Sellers shall fail or refuse to close within the time provided herein, which payment shall be made to Purchaser upon demand by Purchaser therefor. The payment of such Break Up Fee and the return of the Good Faith Deposit, together with all interest accrued on such Good Faith Deposit, (if any), shall be the Purchaser's sole remedy for a termination of this Agreement pursuant to Section 9.1 (e) or (f) or in the circumstance contemplated in the immediately preceding sentence. The Sellers' obligation to pay such Break Up Fee pursuant to this Section 9.3 shall be joint and several, survive termination of this Agreement, constitute an administrative expense of Sellers under the Bankruptcy Code and be chargeable against the Purchased Assets or the proceeds thereof pursuant to Section 506(c) of the Bankruptcy Code notwithstanding any lien encumbering such Purchased Assets.

9.4 Good Faith Deposit.

(a) If this Agreement is terminated pursuant to Section 9.1(a), (b), (c), (e) or (f), the Good Faith Deposit, together with all interest accrued thereon, shall be returned to the Purchaser and the Sellers shall not be entitled to any damages, losses, or payment from Purchaser, and Purchaser shall have no further obligation or Liability of any kind to the Sellers, any of their Affiliates, or any third party on account of this Agreement.

(b) If this Agreement is terminated pursuant to Section 9.1(d), the Good Faith Deposit shall be transferred to the Sellers as a termination fee and the receipt by the Sellers of the Good Faith Deposit shall be the sole and exclusive remedy of the Sellers (as liquidated damages) and none of the Sellers shall not be entitled to any other amounts for damages, losses, or payment whatsoever from Purchaser, and Purchaser shall have no further obligation or Liability of any kind to the Sellers, any of their Affiliates, or any third party on account of this Agreement.

**ARTICLE X  
MISCELLANEOUS**

10.1 Notices. All notices, requests, demands, claims and other communications that are required or may be given pursuant to this Agreement must be in writing and delivered personally against written receipt, by reputable international overnight courier, by telecopy or facsimile or by registered or certified mail, return receipt requested, postage prepaid, to the parties at the following addresses (or to the attention of such other Person or at such other address as any party may provide to the other party by notice in accordance with this Section 10.1):

if to the Purchaser, to:

Elco Holdings Ltd.  
21 Shaul Ha'melech Boulevard  
Tel-Aviv, 64367  
Israel  
Attention: Mr. Avi Israeli

and

Airwell Air-Conditioning B.V.  
1 bis, Avenue du 8 Mai 1945  
Saint-Quentin-en-Yvelines  
78284, Guyancourt Cedex  
France  
Attention: Olivier de la Borie  
Facsimile: 33 (1) 3944 7879

with a copy to:

Kirkpatrick & Lockhart Preston Gates Ellis, LLP  
599 Lexington Avenue  
New York, NY 10022-6030  
Attention: Edward M. Fox, Esquire  
Attention: Sandy K. Feldman, Esquire  
Facsimile: (212) 536-3901

and with a copy to:

Goldfarb, Levy, Eran, Meiri & Co.  
Europe-Israel Tower  
2 Weizmann Street  
Tel Aviv 64239  
Israel  
Attention: Marc Rabin, Esquire  
Facsimile: +972 3-521-2215

if to the Sellers, to:

Sellers, c/o  
Fedders Corporation  
505 Martinsville Road  
Liberty Corner, NJ 07938-0813  
Attention: Mr. Kent E. Hansen, Esquire  
Executive Vice President and Secretary  
Facsimile: (908) 604-8576

with a copy to:

Saul Ewing LLP  
222 Delaware Avenue  
P. O. Box 1266  
Wilmington, DE 19801  
Attention: Norman L. Pernick, Esquire  
Facsimile: (302) 421-5865

and

Saul Ewing LLP  
Centre Square West, 38<sup>th</sup> Floor  
1500 Market Street  
Philadelphia, PA 19102-2186  
Attention: Raymond D. Agran, Esquire  
Facsimile: (215) 972-1890

Any such notice or other communication will be deemed to have been given (a) if personally delivered when so delivered, against written receipt, (b) if sent by reputable international overnight courier, when so delivered with delivery confirmed by the courier service, (c) if given by telecopier or facsimile, once such notice or other communication is transmitted to the facsimile number specified above and the appropriate answer back or telephonic confirmation is received, provided that such notice or other communication is promptly thereafter delivered in accordance with the provisions of clauses (a) or (b) hereof, or (d) if mailed by registered or certified mail, return receipt requested, postage prepaid and addressed to the intended recipient as set forth above, upon receipt by the recipient. Any notice, request, demand, claim or other communication given hereunder using any other means (including ordinary mail or electronic mail) shall not be deemed to have been duly given unless and until such notice, request, demand, claim or other communication actually is received by the individual for whom it is intended.

10.2 Assignment. Neither this Agreement nor any of the rights, interests or obligations hereunder may be assigned or delegated by the Sellers or the Purchaser without the prior written consent of the other parties and any purported assignment or delegation in violation hereof shall be null and void; provided that Purchaser may assign any of its rights and obligations hereunder

to any Person that is under the Control of Purchaser without any such assignment releasing Purchaser from any of its obligations under this Agreement.

10.3 Amendments and Waiver; Exclusive Remedies. This Agreement may not be modified or amended except in writing signed by the party or parties against whom enforcement is sought. The terms of this Agreement may be waived only by a written instrument signed by the party or parties waiving compliance. No waiver of any provision of this Agreement shall be deemed or shall constitute a waiver of any other provision hereof (whether or not similar), nor shall such waiver constitute a continuing waiver unless otherwise provided. No delay on the part of any party hereto in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, power or privilege hereunder. Whenever this Agreement requires or permits consent by or on behalf of a party, such consent shall be given in writing in a manner consistent with the requirements for a waiver of compliance as set forth in this Section 10.3. The rights and remedies herein provided shall be the exclusive rights and remedies available to the parties hereto at law or in equity.

10.4 Entire Agreement. This Agreement and the related documents contained as Exhibits and Schedules hereto or expressly contemplated hereby (including, without limitation, the Operative Agreements, the Confidentiality Agreement and the Services Agreement) contain the entire understanding of the parties relating to the subject matter hereof and supersede all prior written or oral and all contemporaneous oral agreements and understandings relating to the subject matter hereof. The Exhibits and Schedules to this Agreement are hereby incorporated by reference into and made a part of this Agreement for all purposes.

10.5 Representations and Warranties Exclusive. The representations, warranties, covenants and agreements set forth in this Agreement and the Operative Agreements constitute all of the representations, warranties, covenants and agreements of the parties hereto and their respective shareholders, directors, officers, employees, Affiliates, advisors (including financial, legal and accounting), agents and representatives and upon which the parties have relied in entering into this Agreement and consummating the Closing.

10.6 No Third Party Beneficiary. This Agreement is made for the sole benefit of the parties hereto and their respective successors, executors and permitted assigns, and nothing contained herein, express or implied, is intended to or shall confer upon any other Person any third-party beneficiary right or any other legal or equitable rights, benefits or remedies of any nature whatsoever under or by reason of this Agreement (except to the extent that any Affiliates of the Sellers are expressly covered by an indemnity herein).

10.7 Governing Law. This Agreement will be governed by and construed and interpreted in accordance with the substantive Laws of the State of Delaware, without giving effect to any choice of law or conflicts of Law provision or rule that would cause the application of the Laws of a jurisdiction other than Delaware. Each party irrevocably consents to the service of any and all process in any action or proceeding arising out of or relating to this Agreement by the delivery of copies of such process to each party in the manner required by Section 10.1. Until the closing of the cases of the Sellers and their Affiliates before the Bankruptcy Court, the parties hereto irrevocably submit to the exclusive jurisdiction of the Bankruptcy Court (or any court

exercising appellate jurisdiction over the Bankruptcy Court) over any dispute arising out of or relating to this Agreement or any other agreement or instrument contemplated hereby or entered into in connection herewith or any of the transactions contemplated hereby or thereby. Each party hereby irrevocably agrees that all claims in respect of such dispute or proceedings may be heard and determined in such courts. The parties hereby irrevocably waive, to the fullest extent permitted by applicable law, any objection which they may now or hereafter have to the laying of venue of any such dispute brought in such court or any defense of inconvenient forum in connection therewith.

10.8 Neutral Construction. The parties hereto agree that this Agreement was negotiated fairly between them at arms' length and that the final terms of this Agreement are the product of the parties' negotiations. Each party represents and warrants that it has sought and received legal counsel of its own choosing with regard to the contents of this Agreement and the rights and obligations affected hereby. The parties hereto agree that this Agreement shall be deemed to have been jointly and equally drafted by them, and that no provision of this Agreement should be construed against any party on the grounds that such party drafted or was more responsible for drafting such provision.

10.9 Severability. In the event that any one or more of the provisions or parts of a provision contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect in any jurisdiction, such invalidity, illegality or unenforceability shall not affect any other provision or part of a provision of this Agreement or any other jurisdiction, but this Agreement shall be reformed and construed in any such jurisdiction as if such invalid or illegal or unenforceable provision or part of a provision had never been contained herein and such provision or part shall be reformed so that it would be valid, legal and enforceable to the maximum extent permitted in such jurisdiction, provided that any such reform or construction does not affect the economic or legal substance of the transactions contemplated hereby in a manner adverse to any party.

10.10 Bulk Sales Laws. To the extent the bulk sales laws of any state are applicable to the transactions contemplated by this Agreement, the parties hereby waive compliance with such bulk sales laws.

10.11 Headings; Construction. The descriptive headings of the Articles and Sections of this Agreement are inserted for convenience only and do not constitute a part of this Agreement. It is understood and agreed that neither the specifications of any dollar amount in this Agreement nor the inclusion of any specific item in the Schedules or Exhibits is intended to imply that such amounts or higher or lower amounts, or the items so included or other items, are or are not material, and no party shall use the fact of setting of such amounts or the fact of the inclusion of such item in the Schedules or Exhibits in any dispute or controversy between the parties as to whether any obligation, item or matter is or is not material for purposes hereof.

10.12 Joint and Several Liability. If more than one Person has signed this Agreement as Purchaser, the liability of such Persons shall be joint and several, subject, however, to any limitations on liability set forth in this Agreement.

10.13 Patriot Act; Executive Order 13224; Anti-Money Laundering Act. Purchaser represents and warrants that (a) no Benefited Party is a Prohibited Person, and (b) no Benefited Party is in violation of the Executive Order, the Patriot Act, the Anti-Money Laundering Act, or any order, rule, regulation or recommendation promulgated under or in connection with the Executive Order, the Patriot Act or the Anti-Money Laundering Act. This representation and warranty shall be continuing and shall be deemed remade by Purchaser as of the Closing Date, with the same force and effect as if made on, and as of, the Closing Date. Sellers shall have the right to terminate this Agreement in the event of any breach of the foregoing representation and warranty. "Benefited Party" means and includes any and all of the following: Purchaser; any officer, director, shareholder, partner or member of Purchaser; any direct or indirect holder of any equity interest in Purchaser; and any affiliate of Purchaser. "Prohibited Person" means and includes any person or entity with whom US persons or entities are prohibited or restricted from doing business pursuant to any of the following: the Executive Order and the Annex thereto; the regulations of the Office of Foreign Asset Control of the Department of the Treasury (including the Specially Designated Nationals and Blocked Persons List, as updated from time to time; and, any other statute, law, executive order, rule, regulation or other governmental action. "Executive Order" means Executive Order 13224 signed on September 24, 2001 and titled "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism." "Patriot Act" means the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001. "Anti-Money Laundering Act" means the International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001. Any capitalized terms used in this Section 10.13 but not defined in this Agreement shall have the meaning attributed to them within the Executive Order, Patriot Act or Anti-Money Laundering Act, as applicable.

10.14 Extended Meanings. Words importing the singular include the plural and vice versa and words importing gender include all genders, unless the context otherwise requires.

10.15 Counterparts; Facsimile Delivery. This Agreement may be executed and delivered in one or more counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument. This Agreement may also be executed and delivered by facsimile with the same force and effect as if originally executed copies of this Agreement had been delivered by the parties hereto. If this Agreement is executed and delivered in counterparts or by a facsimile, any party may thereafter require that all parties originally execute and deliver a sufficient number of additional copies of this Agreement so that each party may have two fully executed originals of this Agreement.

10.16 WAIVER OF JURY TRIAL. EACH PARTY HERETO ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY WHICH MAY ARISE UNDER THIS AGREEMENT IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES, AND THEREFORE IT HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT AND ANY OF THE AGREEMENTS DELIVERED IN CONNECTION HERewith OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY. EACH PARTY HERETO CERTIFIES AND ACKNOWLEDGES THAT (A) NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR

OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE SUCH WAIVER, (B) IT UNDERSTANDS AND HAS CONSIDERED THE IMPLICATIONS OF SUCH WAIVER, (C) IT MAKES SUCH WAIVER VOLUNTARILY, AND (D) IT HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION 10.16.

## ARTICLE XI DEFINITIONS

11.1 Certain Definitions. The following terms, when used herein, shall have the respective meanings set forth below:

“363 Motion” has the meaning set forth in Section 5.11(e).

“365 Motions” has the meaning set forth in Section 5.11(e).

“365 Orders” has the meaning set forth in Section 6.1(j).

“Action” means any claim, action, injunction, order, judgment, decree, ruling, charge, suit or proceeding, grievance, arbitral action, governmental inquiry, criminal prosecution, hearing or other investigation.

“Affiliate” means, with respect to any Person, (a) any other Person directly or indirectly Controlling, Controlled by or under common Control with, such Person, (b) any other Person that owns or Controls 10% or more of any class of equity securities (including any equity securities issuable upon the exercise of any option or convertible security) of such Person or any of its Affiliates, or (c) any director, partner, member, officer, manager, agent, employee or relative of such Person.

“Agreement” has the meaning set forth in the preamble hereto.

“Alternative Transaction” has the meaning set forth in Section 9.1(f).

“Ancillary Agreements” means collectively the Assumption Agreement, the Bill of Sale, the Escrow Agreement, and any other agreement, document or instrument executed and delivered by Sellers pursuant to Section 2.2 or otherwise pursuant to this Agreement.

“Anti-Money Laundering Act” has the meaning set forth in Section 10.13.

“Approval Order” has the meaning set forth in Section 5.11(d).

“Assigned Inventory” has the meaning set forth in Section 1.1(a)(i).

“Assigned Prepaid Expenses” has the meaning set forth in Section 1.1(a)(viii).

“Assignment of Proprietary Rights” has the meaning set forth in Section 2.2(a)(iii).

"Assumed Liabilities" has the meaning set forth in Section 1.2(a).

"Assumption Agreement" has the meaning set forth in Section 2.2(a)(ii).

"Bankruptcy Case" has the meaning set forth in the recitals hereto.

"Bankruptcy Code" has the meaning set forth in the recitals hereto.

"Bankruptcy Court" has the meaning set forth in the recitals hereto.

"Benefit Plans" means each funded or unfunded, written or oral, employee benefit plan, contract, agreement, incentive, salary, wage or other compensation plan or arrangement, including, but not limited to, each pension and profit sharing plan, savings plan, bonus, deferred compensation, incentive compensation, stock purchase, supplemental retirement, severance, change of control or termination payment, stock option, hospitalization, medical, life insurance, dental, disability, salary continuation, vacation, supplemental unemployment benefit, union contract, employment contract, consulting agreement, retiree health or life benefit, and each other employee benefit program, plan, policy or arrangement, maintained, contributed to, or required to be contributed to by the Sellers, in each case as provided to the any and/or all employees of the Business.

"Benefited Party" has the meaning set forth in Section 10.13.

"Bill of Sale" has the meaning set forth in Section 2.2(a)(i).

"Break Up Fee" has the meaning set forth in Section 9.3.

"Business" has the meaning set forth in the recitals hereto.

"Business Contracts" has the meaning set forth in Section 1.1(a)(iv).

"Business Day" means any day other than Saturday, Sunday or any day on which banks in Wilmington, Delaware are required or authorized to be closed.

"Business Insurance Policies" has the meaning set forth in Section 3.12.

"Business Licenses" has the meaning set forth in Section 1.1(a)(ii).

"China Assets" has the meaning set forth in the recitals hereto.

"China Assets Agreement" has the meaning set forth in the recitals hereto.

"China Assets Purchase Price" has the meaning set forth in the recitals hereto.

"China Manufacturing Assets" has the meaning set forth in the recitals hereto.

"China Manufacturing Assets Purchase Agreement" has the meaning set forth in the recitals hereto.



"China Manufacturing Assets Purchase Price" has the meaning set forth in the recitals hereto.

"China Manufacturing Assets Seller" has the meaning set forth in the recitals hereto.

"China Purchaser" means an Affiliate of Purchaser in China.

"China R&D Asset Purchase Agreement" has the meaning set forth in the recitals hereto.

"China R&D Assets" has the meaning set forth in the recitals hereto.

"China R&D Seller" has the meaning set forth in the recitals hereto.

"Closing" has the meaning set forth in Section 2.1.

"Closing Assigned Inventory Value" means the aggregate of the List A and List B values of the Assigned Inventory as of the Closing Date, calculated in accordance with the methodology set forth in Section 1.3(c).

"Closing Date" has the meaning set forth in Section 2.1.

"Committee Representatives" has the meaning set forth in Section 5.9.

"Confidentiality Agreement" means that certain Confidentiality Agreement, dated October 11, 2007, between Purchaser and Fedders Corporation.

"Contract" means any contract, agreement, indenture, note, bond, instrument, lease, conditional sales contract, mortgage, license, franchise agreement, concession agreement, insurance policy, security interest, guaranty, binding commitment, purchase order or other agreement or arrangement, whether written or oral.

"Control" (including, with correlative meanings, the terms "controlling", "controlled by" and "under common control with") means, with respect to any Person, the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through ownership of voting securities, by contract or otherwise.

"Cure Costs" has the meaning set forth in Section 1.1(a)(iv).

"Data Room" means the Fedders Corporation Workspace managed by IntraLinks, Inc.

"Discount Factor" has the meaning set forth in Section 1.3(c)(i).

"Encumbrance" means any lien (statutory or otherwise), claim, hypothecation, Liability, security interest, interest, mortgage, pledge, restriction, charge, instrument, preference, priority, security agreement, easement, covenant, encroachment, option, right of recovery, Tax

(including foreign, federal, state and local Tax), or encumbrance, of any kind or nature (including (i) any conditional sale or other title retention agreement and any lease having substantially the same effect as any of the foregoing, (ii) any assignment or deposit arrangement in the nature of a security device, and (iii) any leasehold interest or other right, in favor of a third party or a Seller, to use any portion of the Purchased Assets), whether secured or unsecured, choate or inchoate, filed or unfiled, scheduled or unscheduled, noticed or unnoticed, recorded or unrecorded, contingent or non-contingent, material or non-material, known or unknown.

“Escrow Agent” means Wilmington Trust Company.

“Escrow Agreement” has the meaning set forth in Section 1.3(b).

“Estimated Assigned Inventory Value” has the meaning set forth in Section 1.3(c)(i).

“Excluded Assets” has the meaning set forth in Section 1.1(b).

“Excluded Liabilities” has the meaning set forth in Section 1.2(b).

“Executive Order” has the meaning set forth in Section 10.13.

“Expense Reimbursement” has the meaning set forth in Section 9.3.

“FDL License” has the meaning set forth in Section 5.12.

“Final Assigned Inventory Statement” means the determination of the value of the Closing Assigned Inventory that is final and binding on the parties hereto, either through the agreement of the Purchaser and the Sellers, or as determined by the Independent Accounting Firm in the manner set forth in Section 1.3(c).

“Final Order” means an order, the operation of which has not been reversed, stayed, modified, or amended, and with respect to which the time for filing an appeal or petition for certiorari, rehearing or review has expired, and as to which no appeal, petition for certiorari, rehearing or review is then pending.

“Force Majeure Event” means a disaster, act of God or act of war by or against the United States.

“GAAP” means United States generally accepted accounting principles, as in effect from time to time.

“Good Faith Deposit” has the meaning set forth in Section 1.3(b).

“Governmental Authority” means any government or political subdivision thereof, any governmental entity, quasi-governmental entity, administrative agency, department, commission, board, authority, division, agency or instrumentality, and any court, tribunal or judicial body, in each case whether federal, state, county, provincial, municipal, local or foreign.

"Governmental Order" means any Law, judgment, injunction, decree, stipulation or determination issued, promulgated or entered by or with any Governmental Authority of competent jurisdiction.

"Holdback Amount" means the amount of the Good Faith Deposit.

"Indemnified Party" has the meaning set forth in Section 8.4(a).

"Indemnifying Party" has the meaning set forth in Section 8.4(a).

"Indemnity Notice Period" has the meaning set forth in Section 8.4(b).

"Independent Accounting Firm" means, the nationally-recognized "Big Four" accounting firm, in the order listed below, assuming that such nationally-recognized "Big-Four" accounting firm does not as of the applicable time under this Agreement represent the Purchaser or the Sellers or otherwise has a conflict that would prevent such firm from acting as the Independent Accounting Firm under this Agreement: PriceWaterhouseCoopers, LLP and KPMG LLP. If, as of the applicable time under this Agreement, both of such firms have such a conflict, then each of Purchaser and Sellers shall select one such firm and those two firms shall select a third firm, which need not be a "big four" firm but which shall have offices in the US, Canada, Europe and Asia, in which event "Independent Accounting Firm" for purposes of this Agreement shall mean such third firm as so selected.

"Initial Assigned Inventory Statement" has the meaning set forth in Section 1.3(c)(ii).

"Initial Assigned Inventory Value" has the meaning set forth in Section 1.3(c)(ii).

"Insider" means, any executive officer, director, Controlling stockholder, Controlling partner or Affiliate, as applicable, of any Seller or any individual related by marriage or adoption to any such individual.

"Intellectual Property" means any and all (a) patents, patent applications, patent disclosures and improvements thereto, (b) trademarks, service marks, trade dress, logos, trade names, corporate names and domain names, the goodwill associated therewith, and any registrations and applications for registration thereof, (c) copyrights, and any registrations and applications for registration thereof, and (d) URLs and Internet web sites.

"Intellectual Property Manufacturing Assets" has the meaning set forth in Section 1.1(a)(iii).

"Internal Revenue Code" means the Internal Revenue Code of 1986, as amended, any successor statute thereto and the rules and regulations promulgated thereunder.

"Inventory Price Increase" has the meaning set forth in Section 1.3(c)(i).

"Inventory Price Reduction" has the meaning set forth in Section 1.3(c)(i).

"Knowledge of the Seller", "Sellers' Knowledge" and phrases of similar import mean the conscious awareness of only the following executives of the Sellers as of the date hereof and as of the Closing Date, without any requirement of independent investigation: Michael Giordano, Robert L. Laurent, Jr., Kent E. Hansen.

"Law" means any statute, law (including, without limitation, common law), decree, permit, license, ordinance, order, regulation, rule, code or requirement of any Governmental Authority.

"Liability" means any indebtedness, obligation or other liability with respect to the Business or the Purchased Assets (whether absolute, accrued, matured, contingent, known or unknown, fixed or otherwise, or whether due or to become due), including, without limitation, any fine, penalty, judgment, award or settlement respecting any judicial, administrative or arbitration proceeding, damage, loss, claim or demand with respect to any Law or Governmental Order.

"License" means any franchise, approval, permit, order, authorization, consent, license, registration or filing, qualification, certificate, privilege, variance and any other similar right obtained from or filed with any Governmental Authority.

"List B Sales" has the meaning set forth in Section 1.3(c)(v).

"Losses" means any and all actual losses, liabilities, damages, claims, suits, proceedings, judgments, settlements and reasonable out-of-pocket expenses, including reasonable attorneys' fees and reasonable investigative and consulting expenses, but shall not include any special, indirect, incidental, consequential or punitive damages.

"Manufacturing Assets" has the meaning set forth in Section 1.1(a)(iii).

"Material Adverse Effect" means (I) any change or effect that is or would reasonably be expected to be materially adverse to the Business of the Sellers (including, without limitation, changes in relationships with customers, employees and suppliers), assets, operations, financial condition or results of operations of the Business, taken as a whole with respect to the Sellers, except for any such changes or effects resulting directly or indirectly from (a) the transactions contemplated by this Agreement, (b) the announcement or other disclosure of the transactions contemplated by this Agreement, (c) the mere occurrence of any event of default, regardless of whether or not declared, or any event which, with the passing of time or the giving of notice, might become such an event of default, under the Sellers' current debtor-in-possession financing facility or any refinancing thereof, prior to the Closing; provided, however, that notwithstanding any such occurrence set forth in this clause (c), Seller is not prohibited or prevented thereby from performing all of its obligations hereunder, including its obligation to complete the Closing contemplated under this Agreement, or (d) an event or circumstance or series of events or circumstances affecting (i) the Business generally or the particular segments thereof in which the Business operates in any country in which the Business operates or (ii) the United States economy generally or the economy generally of any other country in which the Business operates; provided that clauses (i) and (ii) shall be applied only so long as the applicable event or circumstance or series of events or circumstances does not disproportionately

affect the Business or Purchased Assets and (II) the occurrence of a Force Majeure Event that has had a material adverse effect on the business, assets, operations, financial condition or results of operations of the Business.

“Material Business Contracts” has the meaning set forth in Section 3.7(a).

“Material Business License” has the meaning set forth in Section 3.8.

“Notice of Claim” has the meaning set forth in Section 8.4(a).

“Notice of Disagreement” has the meaning set forth in Section 1.3(c)(iii).

“Operative Agreements” means, collectively, (a) the Bill of Sale, (b) the Assumption Agreement, (c) the Services Agreement, (d) the Escrow Agreement, and (e) the Assignment of Proprietary Rights.

“Ordinary Course of Business” shall mean the ordinary course of business of the Sellers substantially consistent with current custom and practice.

“Patriot Act” has the meaning set forth in Section 10.13.

“Person” means any individual, general or limited partnership, firm, corporation, limited liability company, association, trust, unincorporated organization, Governmental Authority or other entity.

“Procedures Order” has the meaning set forth in Section 5.11(b).

“Prohibited Person” has the meaning set forth in Section 10.13.

“Proprietary Rights” means (a) Intellectual Property, (b) trade secrets and confidential business information (including ideas, formulas, compositions, proprietary manufacturing processes, alloys, inventions (whether patentable or unpatentable and whether or not reduced to practice), know-how, research and development information, Software, drawings, specifications, designs, plans, proposals, technical data, copyrightable works, financial, marketing and business data, pricing and cost information, business and marketing plans and customer and supplier lists and information), (c) copies and tangible embodiments thereof (in whatever form or medium), and (d) licenses granting any rights with respect to any of the foregoing.

“Purchase Price” has the meaning set forth in Section 1.3(a).

“Purchased Assets” has the meaning set forth in Section 1.1(a).

“Purchaser” has the meaning set forth in the preamble hereto.

“RMB” means Chinese currency in renmenbi.

“Sale Procedures Motion” has the meaning set forth in Section 5.11(b).

“Sellers” has the meaning set forth in the preamble hereto.

“Seller Indemnified Party” has the meaning set forth in Section 8.3.

“Services Agreement” has the meaning set forth in Section 2.2(c)(i).

“Software” means computer programs, including any and all software implementations or algorithms, module and methodologies whether in source code, object code or other form, databases and compilations, including any and all data and collections of data, descriptions, flow charts and other work product used to design, plan, organize and develop any of the foregoing and all documentation, including user manuals, training materials and all other materials related to any of the foregoing, including in each case all versions and improvements thereof.

“Subsidiary” means, with respect to any Person, any corporation, general or limited partnership, limited liability company, joint venture or other legal entity of any kind of which such Person (either alone or through or together with one or more of its other Subsidiaries) owns or controls (by contract or otherwise), directly or indirectly, more than 50% of the stock or other equity interests, the holders of which are (a) generally entitled to vote for the election of the board of directors or other governing body of such legal entity or (b) generally entitled to share in the profits or capital of such legal entity.

“Tangible Manufacturing Assets” has the meaning set forth in Section 1.1(a)(iii).

“Tax” means any federal, state, county, provincial, local or foreign income, gross receipts, sales, use, ad valorem, employment, severance, transfer, gains, profits, excise, franchise, property, capital stock, premium, minimum and alternative minimum or other taxes, fees, levies, duties, assessments or charges of any kind or nature whatsoever imposed by any Governmental Authority (whether payable directly or by withholding), together with any interest, penalties (civil or criminal), additions to or additional amounts imposed by, any Governmental Authority with respect thereto.

“Tax Return” means a report, return or other information required to be supplied to a Governmental Authority with respect to any Tax.

“Termination Date” has the meaning set forth in Section 9.1(b).

“Termination Fee” has the meaning set forth in Section 9.3.

“Transferable” means (a) a transfer of a Business License or Business Contract that is assumable and assignable under the Bankruptcy Code notwithstanding any consent requirement contained in such Business License or Business Contract and (b) in the circumstances where a consent of another Person to the transfer of an applicable Business License or Business Contract is required by such Business License or Business Contract and under the Bankruptcy Code the Bankruptcy Court cannot waive such consent requirement, a transfer in which such required consent is obtained from the required Persons.

“Warranties” has the meaning set forth in Section 1.1(a)(x).

11.2 Interpretation. For purposes of this Agreement, except as otherwise expressly provided herein or unless the context otherwise requires: (a) words using the singular or plural number also include the plural or singular number, respectively, and the use of any gender herein shall be deemed to include the other genders, (b) references herein to "Articles," "Sections," "subsections" and other subdivisions without reference to a document are to the specified Articles, Sections, subsections and other subdivisions of this Agreement, (c) a reference to a subsection without further reference to a Section is a reference to such subsection as contained in the same Section in which the reference appears, and this rule shall also apply to other subdivisions within a Section or subsection, (d) the words "herein," "hereof," "hereunder," "hereby" and other words of similar import refer to this Agreement as a whole and not to any particular provision, (e) the words "include," "includes" and "including" are deemed to be followed by the phrase "without limitation", (f) the word "or" shall not be exclusive, (g) all references to any period of days (other than references to a period of "Business Days") shall be deemed to be to the relevant number of calendar days, (h) all accounting terms used and not expressly defined herein have the respective meanings given to them under GAAP and (i) all references to "\$" shall be deemed to mean U.S. dollars.

[Signature page follows.]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

ELCO HOLDINGS LTD.

By: Avi Israeli  
Name: Avi Israeli  
Title: Vice President

and

By: Eli Vessely  
Name: Eli Vessely  
Title: Chief Financial Officer

FEDDERS NORTH AMERICA, INC.

By: \_\_\_\_\_  
Name:  
Title:

EMERSON QUIET KOOL CORPORATION

By: \_\_\_\_\_  
Name:  
Title:



IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

ELCO HOLDINGS LTD.

By: \_\_\_\_\_  
Name: Avi Israeli  
Title: Vice President

and

By: \_\_\_\_\_  
Name: Eli Vessely  
Title: Chief Financial Officer

FEDDERS NORTH AMERICA, INC.

By: Kent E. Hansen  
Name: KENT E. HANSEN  
Title: Executive Vice President

EMERSON QUIET KOOL CORPORATION

By: Kent E. Hansen  
Name: KENT E. HANSEN  
Title: Executive Vice President

**Substantive and Strategic Differences between  
Standard Asset Purchase Agreements and  
Purchase Agreements for Section 363 Sales**

Raymond D. Agran, Partner  
Saul Ewing LLP  
Centre Square West, 38<sup>th</sup> Floor  
1500 Market Street  
Philadelphia, PA 19102-2186  
(215) 972-1890  
(215) 972-1935 (fax)  
[ragran@saul.com](mailto:ragran@saul.com)

Introduction

Any lawyer familiar with typical merger and acquisition experience should be readily able to serve as capable counsel for buyer or seller in a sale under Section 363 of the Bankruptcy Code, so long as the lawyer has a good understanding of the most significant considerations that represent the differences in documenting and negotiating such sales, versus standard asset purchase agreements. For the debtor, an initial issue will be determining whether all, or only a portion, of its assets should be sought to be disposed of through a Section 363 sale, as opposed to an approved plan of reorganization, and then to prepare a form of asset purchase agreement that will serve as the standard against which potential bidders are to provide price, description of assets to be acquired and other relevant terms, conditions and comments. For a potential buyer, the client will need to understand from counsel the limitations on potential due diligence in the bankruptcy context, in light of the speed of the transaction, and the advantages and disadvantages of being the first bidder in the sale process and what terms and conditions to expect in any ultimately concluded asset purchase agreement.

The Horse to be Stalked or the Wolf in the Woods

For a debtor, particularly if the business is sought to be sold as a going concern, a Section 363 sale can serve as a swift method for disposing of individual business units, particularly described assets or even the entire business, a method much faster in fact than would be possible in any confirmed plan of reorganization. So long as the debtor can demonstrate “sound business judgment” behind the reasons for the sale, the bankruptcy court typically will permit a debtor to solicit bids for the assets so identified and sell them off using motions under Section 363. The business judgment justification usually stems from the likely larger sale price that would be obtained from individually negotiated deals rather than from a liquidation process. As part of obtaining bankruptcy court approval for such Section 363 sales, the debtor will offer for approval bidding

procedures, including a proposed form of asset purchase agreement, bidder qualification methods, timing of bids, auction procedures, and the like. In practical terms, these motions mean that debtor's counsel will need to prepare an asset purchase agreement for potential bidder review and response, after which the debtor's assessment of potential bids and bidders will include a comparison of proposed contingencies, representations and warranties, indemnification obligations and any holdbacks, for example, any of which might make a nominally higher purchase price bid actually less likely to generate more value to a debtor than other bids, with fewer such demands or carve-outs.

A debtor's motion for approval of a Section 363 process would make clear that any sale to a buyer identified as the highest bidder (the "stalking horse" bidder) would nevertheless be subject to higher and better bids at a bankruptcy auction. It should also be noted that such motions usually also provide a number of protections for a prospective stalking horse bidder. For example: prohibiting the debtor from continuing to seek buyers for the assets outside of the auction (*i.e.*, a "no shop" clause); establishing a requirement that competing bids be submitted by a defined minimum number of days before the auction date and that the debtor provide such competing bids to the stalking horse bidder enough in advance of the auction to enable the stalking horse to match or exceed such bids; and requiring that any terms and conditions of any such competing bids be the same or similar in all material respects to those contained in the asset purchase agreement with the stalking horse bidder.

A particularly interested potential bidder must make an initial decision regarding whether it prefers to be the stalking horse, seizing the initiative with its proposed price and conditions, but with the attendant risk of being outbid at the auction, versus lying in wait, permitting a stalking horse to lead the way, and then leaping out, wolf-like, at the auction, to swallow the assets itself. In assessing these pros and cons, potential bidders should also realize that because the bankruptcy court will need to approve the ultimate asset purchase agreement, which approval will need to consider potential objections that might be raised to the proposed deal by the seller's creditors, a bidder needs to be sensitive to the likely reactions by creditors to particular terms and conditions that might be perceived as onerous or potentially diminishing value and which in turn could cause a bid to be overborne and rejected. Moreover, a bidder needs to recognize that because the bankrupt seller will be likely to distribute sales proceeds immediately after the sale, the seller will be fairly unwilling to provide a buyer with any sort of extensive indemnification protections.

### The Section 363 Sale Asset Purchase Agreement – Salient Differences from the Standard

#### Purchase Price

Because the entire purpose of the bankruptcy sale process is to maximize return to creditors, most Section 363 sales require that purchase consideration be entirely in cash, to avoid any potential issues that might arise with respect to valuation of alternate consideration such as a bidder's shares of stock or the creditworthiness of its notes. In some circumstances, where a bidder is also a secured creditor, consideration may include

offering to apply the full face value of its claim as a creditor (including any unsecured debt). This technique, however, may cause other creditors to raise objections, as generating insufficient cash for the debtor to pay off these other claims.

In addition, most frequently, the seller demands a substantial deposit upon the execution of the asset purchase agreement, as evidence of the potential buyer's commitment to the transaction, and its ability to close. This deposit is credited against the purchase price at closing and in most circumstances is forfeited if the closing does not occur. From the buyer's perspective, since such a deposit will be required anyway, the stalking horse may wish to propose a more significant down payment than it might consider otherwise necessary, as a requirement for any competing bids, as a method of discouraging the arrival of any such overbidding wolves.

#### Purchase Price Adjustments/Earn-Outs/Escrows

Just as in standard asset purchase agreements, a bidder can propose typical working capital or net asset value adjustments with respect to the proposed purchase price, to occur on or after closing. It should be noted, however, that proposing such adjustments may increase the bidder's risk of being outbid, since a flat, non-adjustable purchase price will be more appealing to both the seller and to the bankruptcy court and will prevent any potential overbidders from proposing any such adjustable purchase prices. More importantly, creditors may well object to any such terms that could be characterized as delaying payment of any material portion of the purchase price, especially if dependent on a post-sale operation of the business such as an earn-out. A similar issue arises with respect to allocation of the purchase price among assets for depreciation and amortization purposes if different secured creditors have liens on different assets. Specifically, the allocation of the purchase price is required to represent the fair value of the particular purchased asset because, since each creditor has the right to the proceeds from the sale of an asset in which it has a security interest, if such an allocation disproportionately provides an advantage to one creditor over others, the disadvantaged creditors will likely complain to the bankruptcy court and therefore potentially significantly delay or even prevent the sale.

If, notwithstanding these concerns, the buyer demands a purchase price adjustment, the buyer should seek to establish a typical asset purchase escrow, in case such an adjustment would subsequently require the seller to return proceeds to the buyer. Such an escrow is particularly necessary in Section 363 deals because the seller otherwise will be distributing all sale proceeds promptly after the closing, to pay off its creditors, and will likely then still qualify as insolvent, without the ability in fact to return any portion of such proceeds. If there are a large number of bidders, however, the buyer is unlikely to be able to have an offer that contains an escrow viewed as the highest and best bid at auction. If an adjustment is included, in any event the seller should ensure that the asset purchase agreement provides that any payments to buyer pursuant to such adjustment provisions constitute "administrative expenses" under the Bankruptcy Code, giving the buyer a priority over other unsecured claims with respect to such adjustment obligation.

### Specifically Identified Assets and Liabilities

Although the description of transferred assets and liabilities in a Section 363 asset purchase agreement generally is similar to that in a standard asset purchase agreement, in Section 363 sales the bidder should also deal with the assignment, assumption and rejection of “executory contracts” (including leases) under Section 365 of the Bankruptcy Code. Executory contracts generally are defined as those in which additional future performance by another party would be required or expected. Since the seller in bankruptcy has the right to assume or reject such executory contracts, the buyer will want to decide which executory contracts and leases the buyer wants to assume and to require the seller to cure any defaults (or provide reasonable assurance that that such defaults – which may have occurred and continued after the bankruptcy filing – with respect to the executory contracts and leases being assumed by the buyer. In that regard, the buyer should address allocation of responsibility for such costs; although in general these are considered the seller’s responsibility, a buyer will be viewed as proposing a more attractive offer if it includes an assumption of such costs by the buyer. The offer also should be required to include adequate assurances of the buyer’s future performance of the executory contracts the buyer proposes to assume.

Strikingly for an attorney experience in M&A outside of Section 363, Section 365(f)(1) of the Bankruptcy Code permits the seller to transfer executory contracts regardless of any anti-assignment clauses they include, which dispenses entirely with the need to obtain any third party consents, on the theory that the bankruptcy court is ordering the assignment (with the exception of certain software and other intellectual property license agreements, which are subject to somewhat different rules under Section 365(n) of the Bankruptcy Code).

### Representations and Warranties

In contrast to standard asset purchase agreements, Section 363 buyers normally must live with extremely limited representations and warranties, which may even be as few as those relating to the organization and authority of the seller and mere title to the assets being sold. Between pre-bid due diligence and the bargaining power of the bidder, however, buyers often are able to obtain at least some sort of representations regarding environmental, employee benefits or product liability matters, especially if any such subjects are to survive bankruptcy as potential liabilities. Other subject matter representations often include the seller’s compliance with applicable regulations (including holding all required permits), particularly if the seller is in a regulated industry; the condition, utility and sufficiency of assets to be transferred; description of any ongoing litigation; and tax matters. Because of the need of overbidders to match or to exceed stalking horse bids, only the stalking horse bidder has a true opportunity to negotiate representations and warranties. Although theoretically an overbidder could improve its bid by reducing any such representations and warranties required by the stalking horse bidder, this strategy may not be advisable since any such overbidder will have had almost no opportunity to perform due diligence and therefore may want to rely

on the stalking horse's due diligence, which influenced the crafting of the representations and warranties in the stalking horse's asset purchase agreement.

The seller, for its part, usually insists on disclaiming standard UCC representations and warranties such as fitness for a particular purpose or any warranty of merchantability, or its compliance with applicable laws or regulations. In fact, very frequently, the seller insists on an absolute disclaimer, stating that the sale is being made on an "as is, where is" basis. Interestingly, most buyers will accept such a disclaimer, in recognition that the seller will still likely be insolvent after the sale and that indemnification, in practical terms, will not really be available. Buyers also are often comforted by the fact that Section 363 sales generally result in the transfer of assets free and clear of liens, claims and encumbrances (subject to certain exceptions).

### Covenants

Similarly, although Section 363 purchase agreements generally contain standard asset purchase agreement covenant subjects, the covenants themselves are much more limited than in such standard agreements. This is largely due to the buyer's bid being subject to higher and better bids, as burdensome covenants are viewed as constituting a potential reduction of the purchase price. For example, covenants regarding the operation of the business between signing and closing are usually less restrictive than is typical. Moreover, in the absence of such protections in the court approved bidding procedures, Section 363 asset purchase agreements rarely contain no-shop provisions that prohibit the seller from soliciting and providing information to other potential buyers, because that would potentially interfere with getting the highest and best price. However, to attract a prospective buyer if interest is limited, the bankruptcy court may permit a "go shop" or "window shop" provision.

Most importantly, covenants are included to require buyer and seller to comply with Section 363 and other requirements of the Bankruptcy Code, such as the bidding procedures, providing notice to the parties in interest such as creditors, and complying with the sale orders. Typically, a Section 363 asset purchase agreement also includes "break-up fees" – a fixed amount payable to the stalking horse if the sale is made to another bidder (although usually lower than such fees in standard agreements, generally ranging between 1% and 3% of the purchase price). Such provisions usually also set forth other events that trigger the payment of the break-up fee, including "tail" provisions, under which if an alternative deal is concluded within a certain period after any termination of the agreement with the stalking horse, the break-up fee is paid. The agreement also provides that the break-up fee is to be treated as an administrative expense, with priority over other unsecured claims. In addition to the break-up fee, the buyer is usually entitled, after such a termination, to an amount up to a specified maximum, to reimburse the stalking horse for some or all of its out-of-pocket due diligence and transaction expenses. "Topping fees", an amount payable to the stalking horse as a percentage of the amount by which the winning bid exceeds the stalking horse's initial bid, have been proposed and accepted in the past, but under current

practice this type of fee has become much more rarely accepted by the seller or approved by the bankruptcy court.

### Closing

Just as with standard asset purchase agreements, Section 363 purchase agreements provide for closing shortly after the satisfaction or waiver of all closing conditions (which includes the entry of the sale order of the bankruptcy court). Generally, buyers should provide in the agreement that closing will not occur until the later of (i) if no objection is filed, the expiration of the ten-day appeal period after entry of the sale order (contained in Fed. R. Bankr. P. 6004(h)), unless the bankruptcy court waives it in the sale order or (ii) if an objection is filed during the appeal period, the entry of a final appellate decision affirming the bankruptcy court's denial of the objection.

Note that Section 363 sales do not require the approval of the debtor's stockholders, since it is the bankruptcy court's approval alone that is required. Any other closing conditions would be set forth in the bidding procedures and sales orders also approved by the bankruptcy court. For reference and samples, see the other materials submitted in connection with this panel.

### Termination

Aside from the kind of termination rights typical in standard asset purchase agreements, Section 363 purchase agreements include other triggers that flow out of bankruptcy proceedings, such as conversion of the proceeding from a Chapter 11 reorganization to a Chapter 7 liquidation, the termination or adverse amendment of a debtor's debtor-in-possession (DIP) financing; the seller having failed to obtain the requisite orders approving the sale and/or the bidding procedures by a certain date, or the seller concluding or the bankruptcy court approving, an alternate transaction.

### Survival and Indemnification

Unlike standard asset purchase agreements, under Section 363 sales, representations and warranties generally do not survive closing, except in limited circumstances (often for matters such as environmental or product liability) and, as a general concept, indemnification is usually not provided to the buyer. If, however, some subject matters do warrant indemnification, the Section 363 sales agreement may provide for such survival (although, frankly, usually for only a few months) and some indemnification rights and mechanics. If such an indemnification is provided, the buyer needs to include an escrow or holdback of some of the purchase price, since most of the proceeds of the sale will be delivered to creditors and the seller will likely be insolvent after the closing.

### Conclusion

Section 363 sales offer a number of structural benefits not otherwise available, including the ability to obtain assets relatively easily and promptly, free and clear of all liens. Because of the increasing frequency of bankruptcy filings in these difficult times, and Section 363 use generally, strategic and financial buyers are increasingly comfortable with buying specific assets or even entire businesses in this manner. A shrewd client should keep an eye out for potentially excellent opportunities in the bankruptcy realm.



**EXECUTION COPY**

**ASSET PURCHASE AGREEMENT**

**By and Between**

**FOAMEX INTERNATIONAL INC., FOAMEX L.P. AND FMXI, LLC**

**And**

**THE OTHER ENTITIES IDENTIFIED HEREIN,**

**as Selling Subsidiaries of Foamex International Inc.**

**And**

**MP FOAM DIP LLC,**

**as Purchaser**

**Dated as of March 25, 2009**

NEWYORK\37267.15

## TABLE OF CONTENTS

	Page
ARTICLE I      CERTAIN DEFINITIONS .....	1
Section 1.1      Certain Definitions.....	1
Section 1.2      Headings; Table of Contents.....	17
Section 1.3      Singular, plural, gender.....	18
Section 1.4      Schedules .....	18
Section 1.5      Information .....	18
Section 1.6      Interpretation.....	18
ARTICLE II      PURCHASED SALE OF ASSETS; ASSUMPTION OF LIABILITIES .....	19
Section 2.1      Purchase and Sale of Assets.....	19
Section 2.2      Excluded Assets.....	20
Section 2.3      Assumed Liabilities .....	21
Section 2.4      Excluded Liabilities .....	21
Section 2.5      Contract Designation Rights .....	22
Section 2.6      Transferred Benefit Plans .....	24
ARTICLE III      PURCHASE PRICE .....	25
Section 3.1      Deposit.....	25
Section 3.2      Closing Escrow Agreement .....	25
Section 3.3      Purchase Price.....	25
Section 3.4      Purchase Price Adjustment .....	26
Section 3.5      Allocation of Purchase Price.....	27
Section 3.6      Section 22 Canadian Tax Election.....	27
Section 3.7      GST and QST Elections.....	27
Section 3.8      Subsection 20(24) Canadian Tax Election.....	27
Section 3.9      HL Fees, Seller Professional Fees and Wind-Down Amount.....	28
ARTICLE IV      CLOSING .....	29
Section 4.1      The Closing.....	29
Section 4.2      Deliveries at the Closing.....	29
ARTICLE V      REPRESENTATIONS AND WARRANTIES OF THE SELLERS .....	31
Section 5.1      Organization, Standing and Corporate Power .....	31
Section 5.2      Subsidiaries and Joint Ventures.....	31
Section 5.3      Authority; Noncontravention.....	31
Section 5.4      SEC Documents; Financial Statements .....	32

**TABLE OF CONTENTS**  
(continued)

		<b>Page</b>
Section 5.5	Absence of Certain Changes or Events.....	33
Section 5.6	Real Properties.....	33
Section 5.7	Tangible Personal Property.....	35
Section 5.8	Intellectual Property.....	36
Section 5.9	Litigation.....	36
Section 5.10	Material Contracts; Debt Instruments.....	37
Section 5.11	Employees; Labor Matters.....	38
Section 5.12	Benefits Plans and ERISA Compliance.....	39
Section 5.13	Licenses .....	42
Section 5.14	Restrictions on Business Activities.....	42
Section 5.15	[Reserved].....	43
Section 5.16	Insurance.....	43
Section 5.17	Environmental Matters .....	43
Section 5.18	No Brokers.....	44
Section 5.19	Taxes.....	44
Section 5.20	Regulated Entities.....	46
Section 5.21	No Other Representations.....	46
<b>ARTICLE VI</b>	<b>REPRESENTATIONS AND WARRANTIES OF PURCHASER.....</b>	<b>46</b>
Section 6.1	Corporate Existence and Qualification.....	46
Section 6.2	Corporate Power, Authorization, Enforceable Obligations .....	46
Section 6.3	Consents and Approvals .....	46
Section 6.4	Financial Ability; Purchaser DIP Claim .....	46
Section 6.5	Investment Intention .....	47
Section 6.6	No Brokers.....	47
Section 6.7	No Plan Assets.....	47
Section 6.8	Investigation by Purchaser.....	47
Section 6.9	Warranties Exclusive.....	47
Section 6.10	Taxes.....	47
<b>ARTICLE VII</b>	<b>COVENANTS .....</b>	<b>48</b>
Section 7.1	Conduct of Business Pending Closing.....	48
Section 7.2	Access to Information.....	50
Section 7.3	Consents.....	50

**TABLE OF CONTENTS**  
(continued)

	<b>Page</b>
Section 7.4 [Reserved].....	50
Section 7.5 Further Assurances .....	50
Section 7.6 Bankruptcy Covenants.....	50
Section 7.7 Employment.....	52
Section 7.8 [Reserved].....	55
Section 7.9 [Reserved].....	55
Section 7.10 Mexican APA Assets.....	55
Section 7.11 HSR Act Filings; Reasonable Efforts; Notification.....	56
Section 7.12 Termination of Tax Sharing Agreements .....	57
Section 7.13 Use of Name .....	57
Section 7.14 Letters of Credit.....	58
<b>ARTICLE VIII TAX MATTERS.....</b>	<b>58</b>
Section 8.1 Transaction Taxes .....	58
Section 8.2 Tax Characterization.....	58
Section 8.3 Purchased Joint Ventures and Purchased Subsidiaries Taxes and Tax Returns .....	58
Section 8.4 Straddle Period Returns .....	58
Section 8.5 Cooperation on Tax Returns and Tax Proceedings.....	58
<b>ARTICLE IX CONDITIONS .....</b>	<b>59</b>
Section 9.1 Conditions to Each Party's Obligations .....	59
Section 9.2 Conditions to the Obligations of Purchaser .....	59
Section 9.3 Conditions to the Obligations of Sellers .....	60
<b>ARTICLE X TERMINATION PROCEDURES.....</b>	<b>61</b>
Section 10.1 Termination.....	61
Section 10.2 Fees and Expenses .....	62
<b>ARTICLE XI NO SURVIVAL OF REPRESENTATIONS AND WARRANTIES AND CERTAIN COVENANTS .....</b>	<b>63</b>
Section 11.1 No Survival of Representations and Warranties and Certain Covenants .....	63
<b>ARTICLE XII MISCELLANEOUS .....</b>	<b>64</b>
Section 12.1 Governing Law .....	64
Section 12.2 Jurisdiction; Forum; Service of Process; Waiver of Jury .....	64
Section 12.3 Successors and Assigns .....	64

**TABLE OF CONTENTS**  
(continued)

	<b>Page</b>
Section 12.4	Entire Agreement; Amendment ..... 64
Section 12.5	Notices ..... 65
Section 12.6	Delays or Omissions ..... 66
Section 12.7	Counterparts..... 66
Section 12.8	Severability ..... 66
Section 12.9	Titles and Subtitles..... 66
Section 12.10	No Public Announcement..... 66
Section 12.11	Interpretation..... 67
Section 12.12	Action by Sellers..... 67
Section 12.13	Third Party Beneficiaries ..... 67

**EXHIBIT AND SCHEDULE INDEX**

Exhibit A	FORM OF APPROVAL ORDER
Exhibit B	FORM OF BIDDING PROCEDURES
Exhibit C	FORM OF SALE ORDER
Exhibit D	FORM OF DEPOSIT ESCROW AGREEMENT
Exhibit E	FORM OF CLOSING ESCROW AGREEMENT
Exhibit F	FORM OF DIP CLAIM ASSIGNMENT AGREEMENT

## ASSET PURCHASE AGREEMENT

THIS ASSET PURCHASE AGREEMENT (this "**Agreement**"), dated as of March 25, 2009, is made by and among MP Foam DIP LLC, a Delaware limited liability company ("**Purchaser**"), and Foamex International Inc., a Delaware corporation ("**Foamex Inc.**"), Foamex L.P., a Delaware limited partnership ("**Foamex**"), FMXI, LLC, a Delaware limited liability company ("**FMXI**"), together with Foamex Inc. and Foamex, the "**Seller Parents**", Foamex Latin America, Inc., a Delaware corporation ("**Foamex Latin America**"), Foamex Asia, Inc., a Delaware corporation ("**Foamex Asia**"), Foamex Carpet Cushion LLC, a Delaware limited liability company ("**Foamex Carpet**"), Foamex Mexico, Inc., a Delaware corporation ("**Foamex Mexico**") and Foamex Canada Inc., a Canadian corporation ("**Foamex Canada**") (each a "**Selling Subsidiary**", and collectively the "**Selling Subsidiaries**", and together with the Seller Parents, "**Sellers**").

WHEREAS, on February 18, 2009 (the "**Petition Date**"), Sellers commenced voluntary cases under chapter 11 of title 11, United States Code, 11 U.S.C. 101 *et seq.* (the "**Bankruptcy Code**"), in the United States Bankruptcy Court for the District of Delaware (the "**Bankruptcy Court**"), which cases are being jointly administered under Chapter 11 Case No. 09-10560 (the "**Bankruptcy Case**"), and such Bankruptcy Case has been recognized as a "foreign proceeding" by the Canadian Court in the Canadian Proceedings;

WHEREAS, Sellers continue to operate their businesses and manage their properties as debtors and debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code;

WHEREAS, Purchaser desires to purchase and assume from Sellers, and Sellers desire to sell and transfer to Purchaser, pursuant to sections 363 and 365 of the Bankruptcy Code, all of the Purchased Assets and Assumed Liabilities on the terms and subject to the conditions set forth in this Agreement (the "**Sale**").

NOW, THEREFORE, in consideration of the mutual covenants, agreements, representations and warranties contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

### ARTICLE I CERTAIN DEFINITIONS

Section 1.1 **Certain Definitions.** For purposes of this Agreement, the following terms shall have the respective meanings set forth below:

"**Accounting Firm**" has the meaning set forth in Section 3.3(d)(ii).

"**Accounts Receivables**" means as of the Closing Date, all accounts receivables, trade receivables, notes receivables, and other miscellaneous receivables, whether current or overdue, of any Seller or Purchased Subsidiary.

"**Action**" means any complaint, claim, charge, prosecution, indictment, action, suit, arbitration, audit, hearing, litigation, inquiry, investigation or proceeding (whether civil, criminal, administrative, investigative or informal) commenced, brought or asserted by any Person or group of Persons or Governmental Authority or conducted or heard by or before any Governmental Authority or any arbitration tribunal.

NEWYORK37267.15

"**Affiliate**" of any Person means any other Person who either directly or indirectly through one or more intermediaries is in control of, is controlled by, or is under common control with, such Person. For purposes of this definition, "**control**" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of securities, partnership interests or by contract, assignment, credit arrangement, as trustee or executor, or otherwise, and the terms "**controls**," "**controlling**" and "**controlled by**" shall have correlative meanings. With respect to Purchaser, the term "**Affiliate**" shall also include its respective managers or members or similar Persons, and any other entity controlled by the same managers or members or similar Persons as Purchaser (as the case may be), provided that such term shall not include any portfolio companies or managed accounts.

"**Agreement**" has the meaning set forth in the Preamble.

"**Alternative Transaction**" means (a) the sale (whether by stock sale, merger, consolidation or otherwise) of all or a substantial portion of the Equity Securities of Sellers, (b) the sale of all or a substantial portion of the Purchased Assets pursuant to the Bidding Procedures to any Person other than Purchaser or its Affiliates or (c) a transaction or series of transactions independent of and not in compliance with the Bidding Procedures involving the sale or transfer of all or a substantial portion of the Purchased Assets to a Person other than Purchaser or its Affiliates, excluding the sale of Inventory in the ordinary course of business consistent with past practice.

"**APBO**" has the meaning set forth in Section 5.12(j).

"**Approval Motion**" has the meaning set forth in Section 7.6(b).

"**Approval Order**" shall mean an order approving, among other things, (a) the Bidding Procedures, (b) the right of Purchaser to credit bid the Purchaser DIP Claim (in part or in whole) towards the Purchase Price (to the extent permissible under section 363(k) of the Bankruptcy Code) and (c) the Bidding Incentives, substantially in the form attached hereto as Exhibit A.

"**Approval Order Recognition Order**" shall mean an order of the Canadian Court recognizing the Approval Order.

"**Assumed Liabilities**" has the meaning set forth in Section 2.3.

"**Auction**" has the meaning set forth in the Bidding Procedures.

"**Avoidance Actions**" means any and all actual or potential actions to avoid a transfer of property or an obligation incurred by the Seller pursuant to any applicable section of the Bankruptcy Code, including sections 544, 545, 547, 548, 549, 550, 551, 553(b), and 724(a) of the Bankruptcy Code.

"**Bankruptcy Case**" has the meaning set forth in the Recitals.

"**Bankruptcy Code**" has the meaning set forth in the Recitals.

"**Bankruptcy Court**" has the meaning set forth in the Recitals.

"**Benefit Plan Liabilities**" shall have the meaning set forth in Section 2.3(g) hereof.

"**Benefit Plans**" means, collectively, any bonus, pension, profit sharing, deferred compensation, incentive compensation, stock ownership, stock purchase, stock option, phantom stock, stock appreciation



right, retirement, vacation, severance, pay in lieu of notice, change-of-control, disability, death benefit, hospitalization, medical, worker's compensation, supplementary unemployment benefits, or other plan, arrangement, program or practice (whether or not written) or any employment agreement providing compensation or benefits to any current or former employee, officer, director or independent contractor of Sellers, Purchased Subsidiaries or any beneficiary thereof or entered into, maintained or contributed to, as the case may be, by Sellers, any Purchased Subsidiaries or with respect to which any of Sellers, any Purchased Subsidiaries have or could have any obligation or liability other than government sponsored workers compensation, pension, health insurance, parental insurance, prescription drugs, and employment insurance plans, including, (i) any "employee welfare benefit plan" (as defined in Section 3(2) of ERISA), whether or not terminated and (ii) "employee pension benefit plan" (as defined in Section 3(1) of ERISA), whether or not terminated.

"**BIA**" has the meaning set forth in Section 10.1(f).

"**Bidding Incentives**" means, collectively, the Break-Up Fee and the Reimbursable Expenses .

"**Bidding Procedures**" means those bidding procedures set forth on Exhibit B hereof.

"**Books and Records**" means all books, records, data, and files (in any form or medium, including computerized or electronic) of the Business or of Sellers or the Purchased Subsidiaries, including (i) all books and records of account and other financial records; (ii) all catalogues, brochures, advertising materials, forms of purchase orders, sales orders and invoices and similar sales or marketing materials; (iii) all price lists, customer lists, supplier lists, mailing lists and credit records; (iv) all manuals pertaining to software, products, operations, research, development or maintenance; (v) all records or lists pertaining to supply, production or distribution; (vi) all engineering reports and studies, industrial hygiene surveys, medical monitoring records, permitting documents, environmental reports and studies, surveys, engineering, construction and design schematics, plans and drawings, site plans, maps, blueprints, title reports, title abstracts, title commitments and title policies (including copies of documents relating to exceptions contained therein), zoning/use restriction rulings or certifications, appraisals, bills, invoices or receipts relating to any Taxes and vesting deeds relating to the Real Estate; (vii) all operating records and operating, safety and maintenance manuals; and (viii) all personnel files of all employees other than Excluded Employees in each case, to the extent relating to the Business.

"**Break-Up Fee**" means \$2,000,000.

"**Business**" means the business of the Sellers and the Purchased Subsidiaries of manufacturing and distributing flexible polyurethane and advanced polymer foam products.

"**Business Day**" shall have the meaning provided in the Bankruptcy Code.

"**Canadian Court**" means the Quebec Superior Court (Commercial Division) or, such other court of competent jurisdiction in Canada administering the Canadian Proceedings.

"**CCAA**" means the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as heretofore or hereafter amended.

"**Canadian Proceedings**" means the proceedings commenced by the Sellers in the Canadian Court on March 3, 2009 to recognize the Bankruptcy Case as a "foreign proceeding" pursuant to Section 18.6 of the CCAA.

"**CERCLA**" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §§ 9601 et seq.)

"**Closing**" has the meaning set forth in Section 4.1.

"**Closing Date**" has the meaning set forth in Section 4.1.

"**Closing Escrow Agreement**" means that certain closing escrow agreement, dated as of the Closing Date, by and among the Escrow Agent, Sellers and Purchaser, substantially in the form attached hereto as Exhibit E.

"**Closing Statement**" has the meaning set forth in Section 3.3(d).

"**Collective Bargaining Agreements**" means all the collective bargaining agreements between any Seller or any Purchased Subsidiary and any labor union or other representative of current employees of any Seller or any Purchased Subsidiary (including material local agreements, amendments, supplements, letters and memoranda of understanding of any kind), each as listed in Section 5.10(a) of the Seller Disclosure Schedule, save and except for the Mexican Collective Bargaining Agreements.

"**Confidentiality Agreement**" means the confidentiality agreement dated March 27, 2008, between MatlinPatterson Global Advisers LLC and Foamex, as may be amended, modified or supplemented by the parties thereto.

"**Consent**" means any consent, approval, franchise, order, License, Permit, waiver or authorization, or registration, declaration or filing with or exemption, notice, application, or certification, including all Regulatory Approvals.

"**Contract**" means any contract, purchase order, lease or sublease, License or sublicense, agreement to settle litigation or claims, or other agreement or instrument, including, but not limited to, the Leases and any agreement or any contract related to the use, ownership or operation of the Owned Real Estate.

"**Controlled Group Liability**" means any and all liabilities under (i) Title IV of ERISA, (ii) Section 302 of ERISA, and (iii) Sections 412 and 4971 of the IRC.

"**Copyright Licenses**" means any written agreement naming a Seller or a Purchased Subsidiary as licensor or licensee, granting any right under any Copyright.

"**Copyrights**" means all of the following now owned or hereafter adopted or acquired by any Seller or Purchased Subsidiary: (a) all copyrights (whether registered or unregistered), all registrations thereof; and all applications in connection therewith, including all registrations, and applications in the United States Copyright Office, the Canadian Intellectual Property Office or in any similar office or agency of any other country or any political subdivision thereof, and (b) all extensions or renewals thereof. "Copyrights" expressly excludes copyrights in commercially available computer software licensed under a shrink wrap, click wrap or other similar commercial license.

"**Cure Costs**" means all cash amounts that, pursuant to section 365 of the Bankruptcy Code, will be required to be paid as of the Closing Date to cure any monetary defaults on the part of Sellers under the Purchased Contracts, in each case to the extent such Contract was entered into prior to the commencement of the Bankruptcy Cases and as a prerequisite to the assumption of such Purchased

Contracts under section 365 of the Bankruptcy Code; *provided, however*, in the case of any Contract, such Contract is executory and, in the case of any Lease, such Lease is unexpired.

**"Current Assets"** means the consolidated current Purchased Assets, as determined in accordance with GAAP on the basis of the same accounting principles, policies, methods and procedures, consistently applied, as those used in the Unaudited Financial Statements, but in any event consisting of and limited to the accounts identified as "Current Assets" (and sub-accounts of such accounts which have projected balances as of May 2009) in the illustrative calculation of Working Capital set forth in Section 1.1(a) of the Seller Disclosure Schedule, including (i) Accounts Receivable (net of reserves for doubtful accounts), (ii) Inventories (net of obsolete, excess or discontinued inventory), and (iii) other current Purchased Assets, but excluding (x) any current Tax assets and (y) any assets that would be Excluded Assets if the measurement date were the Closing Date.

**"Current Liabilities"** means (a) the consolidated current Assumed Liabilities, as determined in accordance with GAAP on the basis of the same accounting principles, policies, methods and procedures, consistently applied, as those used in the Unaudited Financial Statements, but in any event consisting of and limited to the accounts identified as "Current Liabilities" (and sub-accounts of such accounts which have projected balances as of May 2009) in the illustrative calculation of Working Capital set forth in Section 1.1(a) of the Seller Disclosure Schedule, including (i) trade accounts payable and (ii) any other current Assumed Liabilities, but in any event including Cure Costs and any settlement payments to be made in connection with the Closing, but excluding (x) any current Tax Liabilities and (y) any liabilities that would be Excluded Liabilities if the measurement date were the Closing Date plus (b) the estimated or actual Tax Amount, determined as of the relevant date.

**"Deposit Amount"** has the meaning set forth in Section 3.1.

**"Deposit Escrow Agreement"** means that certain deposit escrow agreement, dated as of the date hereof, by and among the Escrow Agent, Sellers and Purchaser, in the form attached hereto as Exhibit D.

**"DIP Claim Assignment Agreement"** means that certain DIP Claim Assignment Agreement, dated as of the Closing Date, by and among the Sellers and the DIP Lender attached hereto as Exhibit F.

**"DIP Financing"** means the senior secured superpriority debtor in possession term loan and letter of credit facility in an aggregate principal amount up to \$95,000,000, as amended, modified or otherwise in effect from time to time, provided to Sellers by the DIP Lender, as approved by the DIP Order.

**"DIP Lender"** means MP Foam DIP LLC, a Delaware limited liability company, in its capacity as lender under the DIP Loan Agreement.

**"DIP Loan Agreement"** means the Debtor-in-Possession Credit Agreement, dated as of February 24, 2009, among Foamex, as borrower, Foamex Inc., FMXI, Foamex Latin America, Foamex Asia, Foamex Carpet, Foamex Mexico and Foamex Canada, as guarantors, the lenders thereunder and Bank of America, N.A. as agent, as amended, modified supplemented or restated from time to time.

**"DIP Order"** means the Final Order Authorizing Post Petition Financing, entered by the Bankruptcy Court on March 18, 2009, and recognized by the Canadian Court in the Canadian Proceedings.

**"Employees"** has the meaning set forth in Section 5.11(a).

**"Environmental Laws"** means all federal, state, provincial, local and foreign administrative, civil and criminal laws, Permits, statutes, ordinances, codes, rules, standards, decrees, injunctions, directives and regulations, and any legally binding judicial or administrative interpretation thereof including any applicable judicial or administrative order, consent decree, order or judgment and all common and civil law theories (at law or in equity), arising from or relating to pollution, protection, remediation or preservation of human health and safety, the environment, or natural resources, including the regulation of discharges, Releases or threatened Releases of noxious odors or any Hazardous Substances into ambient air, water or land, or otherwise relating to the manufacture, processing, generation, distribution, use, importation, treatment, storage, disposal, cleanup, transport or handling of Hazardous Substances. Environmental Laws include CERCLA; the Hazardous Materials Transportation Authorization Act of 1994 (49 U.S.C. §§ 5101 *et seq.*); the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. §§ 136 *et seq.*); the Solid Waste Disposal Act (42 U.S.C. §§ 6901 *et seq.*); the Toxic Substance Control Act (15 U.S.C. §§ 2601 *et seq.*); the Clean Air Act (42 U.S.C. §§ 7401 *et seq.*); the Federal Water Pollution Control Act (33 U.S.C. §§ 1251 *et seq.*); the Occupational Safety and Health Act (29 U.S.C. §§ 651 *et seq.*); and the Safe Drinking Water Act (42 U.S.C. §§ 300(f) *et seq.*), and any and all regulations promulgated thereunder, and all analogous state, provincial, local and foreign counterparts or equivalents and any transfer of ownership environmental notification or approval statutes.

**"Environmental Liability"** means any direct, indirect, pending or threatened indebtedness, liability, claim, loss, damage, fine, penalty, cost, expense, deficiency or responsibility, whether known or unknown, arising under or relating to any Environmental Law, Environmental Permit, or Release, whether based on negligence, strict liability or otherwise, including costs and liabilities for investigation, removal, remediation, restoration, abatement, monitoring, personal injury, property damage, natural resource damages, court costs, and reasonable attorneys' fees.

**"Environmental Permit"** means all Consents issued or granted by any public or private entity or Person pursuant to or in relation to Environmental Law or Releases of Hazardous Substances.

**"Equity Securities"** means (i) with respect to any corporation, all shares, interests, participations or other equivalents of capital stock of such corporation (however designated), and any warrants, options or other rights to purchase or acquire any such capital stock and any securities convertible into or exchangeable or exercisable for any such capital stock, (ii) with respect to any partnership, all partnership interests, participations or other equivalents of partnership interests of such partnership (however designated), and any warrants, options or other rights to purchase or acquire any such partnership interests and any securities convertible into or exchangeable or exercisable for any such partnership interests and (iii) with respect to any limited liability company, all membership interests, participations or other equivalents of membership interests of such limited liability company (however designated), and any warrants, options or other rights to purchase or acquire any such membership interests and any securities convertible into or exchangeable or exercisable for any such membership interests.

**"ERISA"** means the Employee Retirement Income Security Act of 1974, as amended, and any successor statute thereto, and any regulations promulgated thereunder.

**"ERISA Affiliate"** shall mean any corporation, trade, business or entity under common control with any of Sellers or any Purchased Subsidiary within the meaning of Section 414(b), (c), (m), or (o) of the IRC or Section 4001 of ERISA.

**"Escrow Agent"** means Wilmington Trust Company.

**"Escrow Amount"** means \$5,000,000.

"**Estimated Cash Purchase Price**" has the meaning set forth in Section 3.3(a).

"**Estimated Working Capital**" has the meaning given in Section 3.3(c).

"**Exchange Act**" means the Securities Exchange Act of 1934, as amended, and the regulations promulgated thereunder.

"**Excluded Assets**" has the meaning set forth in Section 2.2.

"**Excluded Liabilities**" has the meaning set forth in Section 2.4.

"**Excluded Employees**" has the meaning set forth in Section 2.4(d).

"**Final Cash Purchase Price**" has the meaning set forth in Section 3.3(b).

"**Final Order**" means any order, ruling or judgment of the Bankruptcy Court, the Canadian Court, or any other court of competent jurisdiction, as to which the time to file an appeal, a motion for rehearing or a petition for writ of *certiorari* has expired and no such appeal, motion or petition is pending.

"**Final Working Capital**" has the meaning set forth in Section 3.3(d).

"**Financial Statements**" means the consolidated balance sheets, statements of operations and statements of cash flows of Foamex Inc. and subsidiaries included in the SEC Documents.

"**Foamex**" has the meaning set forth in the Preamble.

"**Foamex Asia**" has the meaning set forth in the Preamble.

"**Foamex Canada**" has the meaning set forth in the Preamble.

"**Foamex Carpet**" has the meaning set forth in the Preamble.

"**Foamex Inc.**" has the meaning set forth in the Preamble.

"**Foamex Latin America**" has the meaning set forth in the Preamble.

"**Foamex Mexico**" has the meaning set forth in the Preamble.

"**FMXI**" has the meaning set forth in the Preamble.

"**Fundamental Documents**" means the documents of a Person (other than a natural person) by which such Person establishes its legal existence or which govern its internal corporate affairs. For example, the Fundamental Documents of a corporation would be its charter and bylaws and the Fundamental Documents of a limited liability company would be its certificate of formation and operating agreement.

"**GAAP**" means generally accepted accounting principles in the United States.

"**General Intangibles**" means all intangible assets now owned or hereafter acquired by any Seller or any Purchased Subsidiary, including all right, title and interest that such Seller may now or hereafter have in or under any Contract, all payment intangibles, rights in customer lists, Intellectual Property, interest in business associations, Licenses, permits, proprietary or confidential information, technical

information, procedures, designs, knowledge, know-how, software, data bases, data, skill, expertise, experience, processes, rights in models, rights in drawings, goodwill, all rights and claims in or under insurance policies (including insurance for fire, damage, loss and casualty, whether covering personal property, real property, tangible rights or intangible rights, all liability, life and business interruption insurance, and all unearned premiums), uncertificated securities, checking and other bank accounts, rights to receive Tax refunds and other payments, rights to receive dividends, distributions, cash, Instruments and other property in respect of or in exchange for pledged Equity Securities and investment property, and rights of indemnification.

**"Governmental Authority"** shall mean any (a) nation, state, province, tribal, county, city, town, village, district, or other jurisdiction of any nature; (b) federal, state, local, provincial, municipal, foreign, or other government; (c) governmental or quasi-governmental authority of any nature (including any government agency, ministry, branch, department, official, or entity and any court or other tribunal); (d) multi-national organization or body; or (e) body exercising, or entitled to exercise, any administrative, executive, judicial, legislative, police, regulatory, or taxing authority or power of any nature.

**"GST"** has the meaning set forth in Section 3.7.

**"Hazardous Substance"** means any substance, material or waste that is regulated by, or forms the basis of liability under, any Environmental Laws, including, but not limited to, any material or substance that is (a) defined as a "hazardous waste," "hazardous material," "hazardous substance," "extremely hazardous waste," "restricted hazardous waste," "pollutant," "contaminant," "hazardous constituent," "special waste," "toxic substance" or other similar term or phrase under any Environmental Laws, or (b) petroleum or any fraction or by-product thereof, asbestos, asbestos-containing materials, polychlorinated biphenyls (PCBs), any radioactive substance, polyvinyl chloride, radon, lead-based paint or toxic mold.

**"HL Fee Amount"** has the meaning set forth in Section 3.9(a).

**"HL Fee Escrow"** has the meaning set forth in Section 3.9(a).

**"HL Escrow Agreement"** has the meaning set forth in Section 3.9(a).

**"HL Fees"** means the fees and expenses of Houlihan Lokey Howard & Zukin, Inc. pursuant to the engagement letter between Houlihan Lokey Howard & Zukin, Inc. and Foamex International, Inc., dated January 1, 2009, including the Monthly Fee and the M&A Transaction Fee (each as defined in such agreement), but solely to the extent that such fees and expenses become allowed administrative expense claims of Sellers' estates pursuant to Section 503(b) of the Bankruptcy Code.

**"HSR Act"** means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and the rules and regulations promulgated thereunder.

**"Income Tax"** means any Tax based upon, measured by, or calculated with respect to (i) net income, profits, sales, use or similar measures (including margin tax, flat Taxes, value added Taxes, customs, profit sharing Taxes, CUFIN, capital gains taxes and minimum taxes) or (ii) multiple bases (including corporate franchise, business and occupation, business license or similar taxes) if one or more of the bases on which such Tax is based upon, measured by or calculated with respect to that which is described in clause (i), in each case together with any interest, penalties, or additional to such Tax.

**"Indebtedness"** shall mean, with respect to any Person, without duplication:

- (a) obligations of such Person for borrowed money, or otherwise evidenced by bonds, debentures, notes or similar instruments;
- (b) all obligations of such Person under conditional sale or other title retention agreements relating to property purchased by such Person, other than any such obligation made in the ordinary course of business;
- (c) all obligations of such Person issued or assumed as the deferred purchase price of property or services (excluding obligations of such Person to creditors for raw materials, inventory, services and supplies incurred in the ordinary course of such Person's business);
- (d) all obligations of such Person under leases which have been or should be treated, in accordance with GAAP, as capitalized lease obligations of such Person;
- (e) all obligations of others secured by any Lien on property or assets owned or acquired by such Person, whether or not the obligations secured thereby have been assumed, other than any such obligation made in the ordinary course of business;
- (f) all obligations of such Person under interest rate or currency swap transactions (valued at the termination value thereof);
- (g) all letters of credit issued for the account of such Person (excluding letters of credit issued for the benefit of suppliers to support accounts payable to suppliers incurred in the ordinary course of business); and
- (h) all guarantees and arrangements having the economic effect of a guarantee of such Person of any Indebtedness of any other Person.

**"Indemnification Claims"** means claims for indemnification of any present or former officer, director, employee, partner or member of any Seller or Purchased Subsidiary whether arising under bylaws, certificates of formation or other formation documents, or Contract arising prior to the Closing Date.

**"Industrial Revenue Bond"** means the industrial revenue bonds issued pursuant to the Santa Teresa Indenture with respect to Sellers' Santa Teresa, Dona Ana County, New Mexico site, which bonds are secured by certain equipment and a portion of the real estate located at 2500 Airport Road, Santa Teresa, New Mexico.

**"Initial Purchase Price"** means \$105,000,000 consisting of a combination of \$78,400,000 in cash and Purchaser DIP Claim and the value of the Assumed Liabilities. The parties estimate that the value of the Assumed Liabilities as of the date hereof is \$26,600,000.

**"Instruments"** means all "instruments," as such term is defined in the UCC, now owned or hereafter acquired by any Seller or Purchased Subsidiary, wherever located, and, in any event, including all certificated securities, all certificates of deposit, and all promissory notes and other evidences of indebtedness, other than instruments that constitute, or are a part of a group of writings that constitute, chattel paper.

**"Intellectual Property"** means any and all Patents, Copyrights, Trademarks, Trade Secrets, and internet domain names, and other intellectual property, owned by any Seller or any Purchased Subsidiary

and used or held for use in connection with, all goodwill associated with the Business, and all rights to sue at law or in equity for any infringement or other impairment thereof, including the right to receive all proceeds and damages therefrom.

**"Intellectual Property Agreements"** means all Copyright Licenses, Patent Licenses, Trademark Licenses and all other agreements, permits, consents, orders, and franchises relating to the license, development or use of any Intellectual Property (expressly excluding shrink wrap, click wrap and other similar commercial technology licenses).

**"Inventory"** means all "inventory," as such term is defined in the UCC, now owned or hereafter acquired by any Seller or any Purchased Subsidiary, wherever located, and, without limiting the foregoing, all (i) inventory, (ii) merchandise, (iii) goods and other personal property, (iv) raw materials, work or construction in process, (v) finished goods, returned goods, or materials or supplies of any kind, nature or description and (vi) products, equipment, and appliances, whether owned or on order, including all embedded software.

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

**"IRS"** means the Internal Revenue Service.

**"Knowledge of Sellers"** means the actual knowledge of the officers of Sellers identified in Section 1.1(b) of the Seller Disclosure Schedule.

**"Laws"** means any federal, state, provincial, local, foreign, international or supranational law (including common law), statute, treaty, ordinance, rule, regulation, Order, code, or other similar authority enacted, adopted, promulgated, or applied by any Governmental Authority.

**"Leases"** has the meaning set forth in Section 5.6(d).

**"Leased Real Estate"** has the meaning set forth in Section 5.6(d).

**"Letters of Credit"** means the letters of credit that are outstanding under the DIP Loan Agreement as of any relevant time.

**"Letters of Credit Amount"** means the amount required to cash collateralize the Letters of Credit as of the Closing Date pursuant to the DIP Loan Agreement and/or any agreements or documents related thereto, if required pursuant to Section 7.14.

**"Liabilities"** means any and all debts, losses, liabilities, claims, damages, fines, costs, royalties, proceedings, deficiencies or obligations of any nature, whether known or unknown, absolute, accrued, contingent or otherwise and whether due or to become due and any out-of-pocket costs and expenses (including reasonable attorneys', accountants' or other fees and expenses).

**"License"** means any licenses, franchises, Consents, approvals and any Permits, including Permits of or registrations with any Governmental Authority; but expressly excluding any license or sublicense of Intellectual Property.

**"Liens"** means any mortgage, pledge, hypothecation, security interest, encumbrance, easement, license, encroachment, servitude, consent, option, lien, put or call right, right of first refusal, voting right, charge, lease, sublease, right to possession or other restrictions or encumbrances of any nature whatsoever.



**"Material Adverse Effect"** means (i) any event, occurrence, fact, condition, change or effect (any such item, an "Effect") that is materially adverse to the Business, the Purchased Assets, the Assumed Liabilities or the results of operations or condition (financial or otherwise) of the Business, taken as a whole, (ii) any impairment of the ability of any Seller to perform its obligations under this Agreement or (iii) any Effect that prevents or materially delays the consummation of any of the transactions contemplated by this Agreement, but excluding (A) Effects resulting from changes in the United States, Mexican, Canadian or general economic conditions, except to the extent such Effects disproportionately affect the Business taken as a whole, (B) Effects arising out of the execution or delivery of this Agreement or the transactions contemplated by this Agreement or the public announcement thereof, (C) Effects that result from any action required to be taken pursuant to this Agreement or any action taken pursuant to the written request or with the prior written consent of Purchaser, and (D) Effects arising out of the pendency of any Bankruptcy Cases and any action approved by, or motion made before, the Bankruptcy Court.

**"Material Contract"** and **"Material Contracts"** has the meaning set forth in Section 5.10(a).

**"Mexican APA"** has the meaning set forth in Section 7.10(a).

**"Mexican Collective Bargaining Agreements"** means all the collective bargaining agreements between any Seller or any Purchased Subsidiary and any Mexican labor union or other Mexican representative of current employees of any Seller or any Purchased Subsidiary (including material local agreements, amendments, supplements, letters and memoranda of understanding of any kind) that covers employees working in Mexico, each as listed in Section 5.10(a) of the Seller Disclosure Schedule.

**"Mexican GAAP"** means the applicable generally accepted accounting principles or Norms of Financial Information in force in Mexico upon execution of the Mexican Transfer Documents.

**"Mexican MAE"** means (i) any event, occurrence, fact, condition, change or effect (any such item, an "Effect") that is materially adverse to the Business of the Purchased Subsidiaries or the results of operations or condition (financial or otherwise) of the Business of the Purchased Subsidiaries, taken as a whole, (ii) any impairment of the ability of any Seller to perform its obligations under this Agreement or (iii) any Effect that prevents or materially delays the consummation of any of the transactions contemplated by this Agreement, but excluding (A) Effects resulting from changes in the United States, Mexican, Canadian or general economic conditions, except to the extent such Effects disproportionately affect the Business of the Purchased Subsidiaries taken as a whole, (B) Effects arising out of the execution or delivery of this Agreement or the transactions contemplated by this Agreement or the public announcement thereof, (C) Effects that result from any action required to be taken pursuant to this Agreement or any action taken pursuant to the written request or with the prior written consent of Purchaser, and (D) Effects arising out of the pendency of any Bankruptcy Cases and any action approved by, or motion made before, the Bankruptcy Court.

**"Mexican Taxes"** means the applicable provisions of the Income Tax Law (*Ley del Impuesto Sobre la Renta*), the Value Added Tax Law (*Ley del Impuesto al Valor Agregado*) and any other applicable tax law in force in Mexico upon execution of the Mexican Transfer Documents, including, without limitation, income Taxes, flat Taxes, profit sharing Taxes, and Taxes assessed as a result of net operating loss, asset Tax or CUFIN recapture.

**"Mexican Assets"** has the meaning set forth in Section 7.10(a).

**"Mexican Services Agreement"** has the meaning set forth in Section 7.10(a).

**"Mexican Transfer Documents"** has the meaning set forth in Section 7.10(a).

**"Mexico"** means the United Mexican States.

**"Multiemployer Plan"** shall have the meaning as such term is defined in Section 3(37) or Section 4001(a)(3) of ERISA or, for Benefit Plans for Canadian employees, former employees or beneficiaries, the meanings set forth in applicable Laws.

**"Non-Solicitation Period"** has the meaning set forth in Section 7.6(c)(i).

**"Notice of Disagreement"** has the meaning set forth in Section 3.3(d)(i).

**"Offered Employees"** has the meaning set forth in Section 7.7(a).

**"Order"** means any judgment, order, administrative order, writ, stipulation, injunction (whether permanent or temporary), award, decree or similar legal restraint of, or binding settlement having the same effect with, any governmental Action.

**"OSHA"** means the Occupational Safety and Health Act of 1970, as amended.

**"Owned Real Estate"** have the meanings set forth in Section 5.6(c).

**"Patent Licenses"** means all agreements, whether written or oral, providing for the grant by or to a Seller or a Purchased Subsidiary of any right to manufacture, use or sell any invention covered in whole or in part by a Patent.

**"Patents"** means all of the following now owned or hereafter acquired by any Seller or any Purchased Subsidiary: (a) all letters patent, inventions, patents and patent rights of the United States, Canada or of any other country, all registrations thereof, and all applications for letters patent, inventions, patents and patent rights of the United States, Canada or of any other country, including registrations and applications in the United States Patent and Trademark Office, the Canadian Intellectual Property Office or in any similar office or agency of the United States, any State, or any other country, and (b) all reissues, continuations, continuations-in-part or extensions thereof.

**"PBGC"** means the Pension Benefit Guaranty Corporation.

**"Permits"** means all approvals, authorizations, certificates, consents, franchises, variances, licenses, and permits issued by or in favor of any Seller, any Purchased Subsidiary or any Purchased Joint Venture by any federal, state, provincial, local, municipal or other governmental, quasi-governmental, or private authorities, districts or jurisdictions (including all applications, renewal applications, and/or documents filed, and/or fees paid, in connection therewith).

**"Permitted Liens"** means (i) any Liens specifically set forth in Section 5.6(a) of the Seller Disclosure Schedule, (ii) statutory Liens for current and future Taxes, assessments or other governmental charges, including water and sewage charges, not yet due and payable, or being contested in good faith, (iii) mechanic's, materialman's, warehouseman's, carrier's and similar liens for labor, materials or supplies arising by operation of Law in the ordinary course of business or which could not, individually or in the aggregate, have a Material Adverse Effect on the Business, (iv) purchase money security interests arising in the ordinary course of business, (v) rights of landlords or grantees in respect of any Leased Real Estate pursuant to the terms and conditions of the Leases in effect as of the date hereof, as may be modified by the Sale Order, (vi) present and future zoning, building codes and other land use Laws regulating the use

or occupancy of any Real Estate or the activities conducted thereon which are imposed by any Governmental Authority having jurisdiction over such Real Estate which are not violated by (A) the current use or occupancy of such Real Estate, (B) the proposed use, occupancy or development thereof by the Business as currently contemplated or (C) the operation of the Business, or any violation of which could not have a Material Adverse Effect on the Business, (vii) easements, covenants, conditions, restrictions and other similar matters affecting title to such Real Estate and other title encumbrances which encumber the Real Estate as of the date hereof and which do not, individually or in the aggregate, materially impair the use, occupancy, maintenance, repair or development of such Real Estate or the operation of the Business, (viii) any Lien incurred under or pursuant to the DIP Financing, (ix) any Lien that, pursuant to Section 363(f) of the Bankruptcy Code, will be released pursuant to the Sale Order (and/or the Sale Order Recognition Order, as applicable), (x) any lien constituting or arising in connection with an Intellectual Property license or sublicense, (xi) with respect to the Owned Real Estate only, any title matters which would be reflected on an accurate, current survey of the Real Estate and which do not, individually or in the aggregate, materially impair the use, occupancy, maintenance, repair or development of such Real Estate or the operation of the Business, (xii) consents by Seller or any former owner of the Real Estate for the erection of any structure or structures on, under or above any street or streets on which the Real Estate may abut, (xiii) non-material variations between tax lot lines and lines of record title, (xiv) with respect to the Owned Real Estate only, encumbrances to title to the Real Estate which are reflected in the official public real property records of the county in which the applicable Real Estate is located but only to the extent such encumbrances are valid and subsisting and affect the Real Estate as of the date hereof and which do not, individually or in the aggregate, materially impair the use, occupancy, maintenance, repair or development of such Real Estate or the operation of the Business, but not monetary Liens (unless otherwise expressly permitted pursuant to the other clauses of this definition of Permitted Liens) and (xv) with respect to the Leased Real Estate, the terms and conditions of the Leases with respect to encumbrances to title or limitation on the tenants right to use of such Leased Real Estate.

"**Person**" shall be construed broadly and means an individual, a partnership, a corporation, a limited liability company, an association, a joint stock company, a trust, a joint venture, an unincorporated organization or other business entity or a Governmental Authority.

"**Petition Date**" has the meaning set forth in the Recitals.

"**Pre-Closing Straddle Period Taxes**" means the amount of Taxes for the entire Straddle Period multiplied by a fraction, the numerator of which is the number of days in the Straddle Period ending on and including the Closing Date and the denominator is the number of days in the entire Straddle Period.

"**Prime Rate**" means the rate of interest published in the Wall Street Journal from time to time as the prime rate in the United States.

"**Purchase Price**" means the Initial Purchase Price, as adjusted prior to and after the Closing in accordance with Section 3.3.

"**Purchased Assets**" has the meaning set forth in Section 2.1.

"**Purchased Contracts**" means the Contracts designated as such in accordance with Section 2.5.

"**Purchased Joint Venture**" and "**Purchased Joint Ventures**" each have the meaning set forth in Section 2.1(m).

"**Purchased Subsidiary**" and "**Purchased Subsidiaries**" each have the meanings set forth in Section 2.1(n).

"**Purchaser**" has the meaning set forth in the Preamble.

"**Purchaser Advisors**" has the meaning set forth in Section 7.2.

"**Purchaser DIP Claim**" means (i) the claims of Purchaser arising under or in connection with the DIP Financing, including the principal amount thereof, and all accrued, but unpaid interest or fees thereunder (for the purpose of clarity excluding the Letters of Credit) less (ii) the amount of cash and cash equivalents of Sellers and the Purchased Subsidiaries, in each case as determined as of the Closing Date.

"**QST**" has the meaning set forth in Section 3.7.

"**Real Estate**" means the Owned Real Estate and the Leased Real Estate.

"**Registered Intellectual Property**" has the meaning set forth in Section 5.8(c).

"**Regulatory Approvals**" means all Consents and other authorizations reasonably required to be obtained from, or any filings required to be made with, any Governmental Authority that are necessary to consummate the transactions contemplated by this Agreement and the other Transaction Documents.

"**Reimbursable Expenses**" means the reasonable, documented out-of-pocket fees and expenses incurred by Purchaser and its Affiliates prior to termination of this Agreement in connection with this Agreement, the other Transaction Documents, the Sale Order, and the transactions contemplated hereby and thereby, including the reasonable fees and expenses of legal counsel, financial advisors, consultants and any other advisors that Purchaser engages in its reasonable discretion. Reimbursable Expenses shall not exceed \$2,500,000 and shall be payable in cash pursuant to Section 10.2, to the extent applicable.

"**Rejection Damages Claims**" means all claims arising from or related to the rejection of a Contract under section 365 of the Bankruptcy Code, including any administrative expense claims arising from the rejection of Contracts previously assumed.

"**Release**" means any discharge, emission, spilling, leaking, pumping, pouring, injecting, dumping, burying, leaching, migrating, abandoning or disposing into or through the environment of any Hazardous Substance including the abandonment or discarding of barrels, containers and other closed receptacles containing any Hazardous Substance.

"**Responsible Officer**" means, with respect to any Person, the chief executive officer, president, chief operating officer, chief financial officer, controller and chief accounting officer, vice president of finance or treasurer of such Person.

"**Restructuring Transaction**" means (a) a recapitalization transaction involving, in whole or in part, Sellers and its existing security holders or creditors, or (b) a transaction or series of transactions, including by way of a plan of reorganization or plan of arrangement or compromise, in connection with a liquidation or reorganization or other continuation of Sellers' Business relating to all or a substantial portion of the Purchased Assets.

"**Sale**" has the meaning set forth in the Recitals.

"**Sale Hearing**" means the hearing scheduled by the Bankruptcy Court to approve the Sale.

"**Sale Order**" means the order of the Bankruptcy Court approving the Sale substantially in the form attached hereto as Exhibit C.

"**Sale Order Recognition Order**" shall mean the order of the Canadian Court recognizing the Sale Order.

"**Santa Teresa Indenture**" means that certain Indenture of Trust dated as of November 1, 1985, by and between the County of Dona Ana, New Mexico, and Bankers Trust Company.

"**Santa Teresa Lease**" means that certain Lease Agreement dated as of November 1, 1985, by and between the County of Dona Ana, New Mexico and Foamex Products, Inc.

"**SEC**" means the United States Securities and Exchange Commission and any successor Governmental Authority.

"**SEC Documents**" has the meaning set forth in Section 5.4(a).

"**Securities Act**" means the Securities Act of 1933, as amended.

"**Selected Courts**" has the meaning set forth in Section 12.2(a).

"**Seller Disclosure Schedule**" has the meaning set forth in Article V.

"**Seller Parents**" has the meaning set forth in the Preamble.

"**Seller Professionals**" means Akin Gump Strauss Hauer & Feld LLP, Cozen O'Connor LLP and any other professionals that are retained by Sellers during the Bankruptcy Case.

"**Seller Professional Fee Amount**" has the meaning set forth in Section 3.9(b).

"**Seller Professional Fee Escrow**" has the meaning set forth in Section 3.9(b).

"**Seller Professional Fee Escrow Agreement**" has the meaning set forth in Section 3.9(b).

"**Seller Professional Fees**" means the fees and expenses of Seller with respect to the fees and expenses of the Sellers Professionals, but solely to the extent that such fees and expenses become allowed administrative expense claims of Sellers' estates pursuant to Section 503(b) of the Bankruptcy Code.

"**Sellers**" has the meaning set forth in the Preamble.

"**Seller Representatives**" has the meaning set forth in Section 7.6(c)(i).

"**Selling Subsidiaries**" has the meaning set forth in the Preamble.

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

"**Subsidiary**" or "**Subsidiaries**" means for any Person, any other Person or Persons of which a majority of the outstanding voting securities or other voting equity interests are owned, directly or indirectly, by such first Person.

"**Target Working Capital**" means \$86,600,000.

"**Tax**" or "**Taxes**" means (i) any federal, state, provincial, county, local or foreign taxes, charges, fees, levies or other assessments, including all net income, gross income, sales and use, goods and services, ad valorem, transfer, gains, profits, excise, franchise, real and personal property, gross receipt, value added, capital stock, production, business and occupation, disability, employment, payroll, license, estimated, stamp, custom duties, severance, unemployment, social security, Medicare, alternative minimum or withholding taxes or charges imposed by any Governmental Authority, and includes any interest and penalties (civil or criminal) on or additions to any such taxes and (ii) liability for items in (i) of any other person by Contract, operation of Law (including Treasury Regulation 1.1502-6) or otherwise.

"**Tax Amount**" means the sum of (i) Transaction Taxes (including any GST or QST owing), (ii) Tax Liabilities of the Sellers, Purchased Subsidiaries and the Purchased Joint Ventures for periods on or before the Closing Date determined in accordance with Article VIII of this Agreement and (iii) any Tax Liabilities payable by Purchaser, Sellers or the Purchased Subsidiaries in connection with Purchaser's (or its Affiliate's) acquisition of the Mexican Assets or the Equity Securities of the Purchased Subsidiaries, including, without limitation, any Mexican Taxes assessed after the acquisition as a result of deconsolidation, including loss, asset tax and CUFIN recapture, in each case, only to the extent not paid by Sellers, the Purchased Subsidiaries or the Purchased Joint Ventures prior to Closing.

"**Tax Proceeding**" has the meaning set forth in Section 8.5.

"**Tax Returns**" means any return, report, election, declaration, statement, information return, schedule, or other document (including any related or supporting information) filed or required to be filed with any Governmental Authority in connection with the determination, assessment, collection or administration of any Taxes or the administration of any laws, regulations or administrative requirements relating to any Taxes or any amendment thereof.

"**Taxing Authority**" means, with respect to any Tax, a Governmental Authority that imposes such Tax, and the agency (if any) charged with the collection of such Tax for such entity, including, without limitation, any Governmental Authority that imposes, or is charged with collecting, Social Security or similar charges or premiums.

"**Termination Date**" means the Termination Date as defined in the DIP Loan Agreement.

"**Title IV Plan**" means each Benefit Plan subject to Title IV of ERISA, Section 302 of ERISA or Sections 412 or 4971 of the IRC.

"**Trademark Licenses**" means any agreement, written or oral, providing for the grant by or to a Seller or a Purchased Subsidiary of any right to use any Trademark.

"**Trademarks**" means all of the following now owned or hereafter acquired by any Seller or any Purchased Subsidiary: (a) all trademarks, trade names, corporate names, business names, trade styles, service marks, logos, slogans, brand names, and other source or business identifiers (whether registered or unregistered), all registrations thereof, and all applications in connection therewith, including registrations and applications in the United States Patent and Trademark Office or in any similar office or agency of the United States, any state or territory thereof, or any other country or any political subdivision thereof; (b) all reissues, extensions or renewals thereof; and (c) all goodwill of the Business associated with or symbolized by any of the foregoing.

"**Trade Secrets**" means all confidential and proprietary information now owned or hereafter acquired by any Seller or any Purchased Subsidiary, used in the Business for commercial advantage and not generally known or reasonably ascertainable, including, without limitation, know-how, trade secrets,

manufacturing and production processes and techniques, research and development information, databases and data, including, without limitation, technical data, financial, marketing and business data, pricing and cost information, business and marketing plans and customer and supplier lists and information.

**"Transaction Documents"** means this Agreement, the DIP Claim Assignment Agreement, the Deposit Escrow Agreement, the Closing Escrow Agreement and any other agreements, documents and instruments to be executed and delivered pursuant to this Agreement.

**"Transaction Taxes"** has the meaning set forth in Section 8.1.

**"Transferred Benefit Plans"** has the meaning set forth in Section 2.6.

**"Transferred Employees"** has the meaning set forth in Section 7.7(a).

**"Treasury Regulations"** means one or more Treasury regulations promulgated under the IRC by the Treasury Department of the United States.

**"Tupelo Indenture"** means that certain Trust Indenture dated as of July 1, 1973 by and between Foamex L.P., successor in interest to '21' International Holdings, Inc., and Board of Supervisors of Lee County, Mississippi, relating to the Leased Property located in Tupelo, MS, including any amendments, supplements or modifications thereto.

**"UCC"** means the Uniform Commercial Code as the same may, from time to time, be enacted and in effect in the State of New York.

**"Unaudited Financial Statements"** has the meaning set forth in Section 5.4(d).

**"WARN Act"** means the Worker Adjustment and Retraining Notification Act or any similar state, local, provincial or foreign law.

**"Wind-Down Amount"** means the aggregate amount anticipated to be necessary to wind down Sellers' bankruptcy estates after the Closing, as set forth in the Wind-Down Budget.

**"Wind-Down Budget"** means a budget for the post-Closing wind-down of the Sellers' bankruptcy estates to be prepared by Sellers and delivered to Purchaser no later than five (5) days prior to the Closing Date.

**"Wind-Down Escrow"** has the meaning set forth in Section 3.9(c).

**"Wind-Down Escrow Agreement"** has the meaning set forth in Section 3.9(c).

**"Working Capital"** means Current Assets minus Current Liabilities, in accordance with GAAP on the basis of the same accounting principles, policies, methods and procedures, consistently applied, as those used in the preparation of the Unaudited Financial Statements (*provided, however*, that Taxes and the Tax Amount shall not be computed in accordance with GAAP), an illustrative calculation of which is set forth in Section 1.1(a) of the Seller Disclosure Schedule.

Section 1.2 **Headings; Table of Contents.** Headings and table of contents should be ignored in constructing this Agreement.

Section 1.3 **Singular, plural, gender.** References to one gender include all genders and references to the singular include the plural and vice versa.

Section 1.4 **Schedules.** References to this Agreement shall include any Exhibits, Schedules and Recitals to it and references to Sections, Exhibits and Schedules are to Sections of, Exhibits to and Schedules to, this Agreement.

Section 1.5 **Information.** References to books, records or other information mean books, records or other information in any form including paper, electronically stored data, magnetic media, film and microfilm.

Section 1.6 **Interpretation.**

(a) In this Agreement, unless the context otherwise requires, any references to "including" or "in particular" shall be illustrative only and without limitation.

(b) For purposes of any assets, liabilities or entities located in the Province of Quebec and for all other purposes pursuant to which the interpretation or construction of this Agreement may be subject to the laws of the Province of Quebec or a court or tribunal exercising jurisdiction in the Province of Quebec, any common law words or terms shall be deemed to have their correlative meaning under the Civil Code of Quebec, including, without limitation, (a) "personal property" shall include "movable property"; (b) "real property" or "real estate" shall include "immovable property"; (c) "tangible property" shall include "corporeal property"; (d) "intangible property" shall include "incorporeal property"; (e) "security interest", "mortgage" and "lien" shall include a "hypothec", "right of retention", "prior claim", and a resolatory clause; (f) all references to filing, perfection, priority, remedies, registering or recording under the UCC shall include publication under the Civil Code of Quebec; (g) all references to "perfection" of or "perfected" liens or security interest shall include a reference to an "opposable" or "set up" lien or security interest as against third parties; (h) any "right of offset", "right of setoff" or similar expression shall include a "right of compensation"; (i) "common law" shall include "civil law"; (j) "tort" shall include "delict"; (k) "bailor" shall include "depositor" and "bailee" shall include "depository"; (l) "goods" shall include "corporeal movable property" other than chattel paper, documents of title, instrument, money and securities; (m) an "agent" shall include a "mandatary"; (n) "construction liens" shall include "legal hypothecs"; (o) "joint and several" shall include "solidary"; (p) "jointly and severally" shall include "solidarily"; (q) "gross negligence or wilful misconduct" shall be deemed to be "intentional or gross fault"; (r) "beneficial ownership" shall include "ownership on behalf of another as mandatary"; (s) "easement" shall include "servitude"; (t) "priority" shall include "prior claim"; (u) "survey" shall include "certificate of location and plan"; (v) "state" shall include "province"; (w) "fee simple title" shall include "absolute ownership"; (x) "accounts" shall include "claims".

(c) For purposes of any Equity Securities of the Purchased Subsidiaries or any assets, liabilities or entities located in Mexico and for all other purposes pursuant to which the interpretation or construction of this Agreement may be subject to the laws of Mexico (including Mexican Taxes) or a court or tribunal exercising jurisdiction in Mexico, any common law words or terms shall be deemed to have their correlative meaning under the applicable Federal, local or municipal laws as set forth in the Mexican Transfer Documents as applicable.



**ARTICLE II  
PURCHASED SALE OF ASSETS;  
ASSUMPTION OF LIABILITIES**

Section 2.1 **Purchase and Sale of Assets.** On the terms and subject to the conditions set forth in this Agreement, at the Closing, Purchaser shall (or shall cause its designated Affiliate or Affiliates to) purchase, acquire and accept from Sellers, and Sellers shall sell, transfer, assign, convey and deliver to Purchaser (or its designated Affiliate or Affiliates) all of Sellers' right, title and interest in, to and under the Purchased Assets, free and clear of all Liens, claims (as defined in section 101(5) of the Bankruptcy Code) and interests other than the Permitted Liens and Assumed Liabilities. "**Purchased Assets**" means all of the Sellers' assets (other than the Excluded Assets), including, without limitation, the assets set forth as follows:

- (a) cash, cash equivalents, all prepayments (including all prepayments made to third party vendors), deferred assets, refunds, credits or overpayments, other than as set forth in Section 2.2(j);
- (b) all Accounts Receivables;
- (c) all Inventory;
- (d) all Leases (subject to any Leases being deemed Excluded Assets in accordance with Section 2.5);
- (e) all Owned Real Estate;
- (f) all personal property of the Sellers;
- (g) all Intellectual Property;
- (h) all rights of Sellers under the Purchased Contracts and Intellectual Property Agreements;
- (i) all General Intangibles associated with the Business;
- (j) all guarantees, representations, warranties and indemnities associated with the Business, including in respect of any Assumed Liabilities;
- (k) all insurance policies of Sellers and any claims thereunder to the extent such policies relate to the Business or to any Assumed Liabilities, other than any directors and officers (or similar) insurance policies and any claims thereunder;
- (l) any properties, rights and assets under any Transferred Benefit Plans;
- (m) Equity Securities in any joint venture of the Sellers listed in Section 2.1(m) of the Seller Disclosure Schedule (each a "**Purchased Joint Venture**" and collectively, the "**Purchased Joint Ventures**");
- (n) subject to the mutual agreement of the Sellers and Purchasers in accordance with Section 7.10, Equity Securities of any direct or indirect Subsidiary of Foamex Inc. listed in Section 2.1(n) of the Seller Disclosure Schedule (each a "**Purchased Subsidiary**" and collectively, the "**Purchased Subsidiaries**");

- (o) all goodwill associated with the Purchased Assets;
- (p) the properties, rights or assets listed in Section 2.1(p) of the Seller Disclosure Schedule;
- (q) any rights under the Collective Bargaining Agreements to the extent such Collective Bargaining Agreements are assumed by Purchaser in accordance with Section 7.7 of this Agreement;
- (r) all claims, causes of action, choses in action, rights of recovery, rights of set off, and rights of recoupment (including any such item relating to the payment of taxes) relating to the Purchased Assets set forth in Sections 2.1(a)-(q), other than any Avoidance Actions; and
- (s) rights with respect to proofs of claim filed in the bankruptcy cases of others.

Section 2.2 **Excluded Assets.** Notwithstanding anything in this Agreement to the contrary, Purchaser shall not assume and shall not be deemed to have assumed, any Excluded Assets relating to the Business of Sellers or any Affiliates of Sellers and Sellers and their Affiliates shall retain all right, title and interest to, in and under the Excluded Assets. "Excluded Assets" means the Sellers' properties and assets set forth as follows:

- (a) each Seller's Fundamental Documents and stock and minute books;
- (b) Equity Securities in any Seller Parents or Selling Subsidiaries;
- (c) Equity Securities in any joint venture of Sellers not listed in Section 2.1(m) of the Seller Disclosure Schedule;
- (d) except as otherwise provided in Section 7.7, any properties, rights and assets under any Benefit Plan that is not a Transferred Benefit Plan;
- (e) amounts owing to Sellers from Excluded Employees;
- (f) any Contracts of Sellers that are not Purchased Contracts;
- (g) any directors and officers (or similar) insurance policies and any claims thereunder;
- (h) rights of Sellers under this Agreement (including the Purchase Price) or the DIP Loan Agreement;
- (i) all assets set forth in Section 2.2(i) of the Seller Disclosure Schedule;
- (j) all deferred assets, refunds, credits or overpayments or other receivables for Taxes that may be due for pre-Closing periods including the pre-Closing portion of the Straddle Period, other than with respect to (x) the Purchased Subsidiaries or Mexican Assets or (y) the Purchased Joint Ventures;
- (k) absent the mutual agreement of the Sellers and Purchasers in accordance with Section 7.10 to include the Equity Securities of the Purchased Subsidiaries in the Purchased Assets, the Equity Securities of the Purchased Subsidiaries; and

- (l) any Avoidance Actions.

Section 2.3 **Assumed Liabilities.** On the terms and subject to the conditions set forth in this Agreement, at the Closing, Purchaser shall (or shall cause its designated Affiliate or Affiliates to) assume and be responsible for, effective as of the Closing, and thereafter pay, honor, perform and discharge as and when due, all of the Assumed Liabilities. "**Assumed Liabilities**" means the liabilities and obligations of the Sellers set forth as follows:

(a) all post-Petition Date current Liabilities of Sellers, as determined in accordance with GAAP on the basis of the same accounting principles, policies, methods and procedures, consistently applied, as those used in the Unaudited Financial Statements, including (i) all post Petition Date trade accounts payable and (ii) any post Petition Date other current liabilities, but excluding any Liabilities that would be or are Excluded Liabilities;

(b) all Liabilities of Sellers relating to or arising under Purchased Contracts, including all Cure Costs;

(c) all Liabilities of Sellers (other than in respect of Taxes) relating to, or arising in respect of, the Purchased Assets accruing, arising out of or relating to events, occurrences, acts or omissions occurring or existing after the Closing Date or the operation of the Business or the Purchased Assets after the Closing Date;

(d) all Liabilities for Taxes arising solely from and attributable to the ownership of any portion of the Purchased Assets after the Closing Date;

(e) the Tax Amount;

(f) all Liabilities of Sellers relating to (i) Transferred Employees (A) accruing prior to the Closing Date, relating to accrued vacation, sick days and personal days and (B) accruing from and after the Closing Date, in the case of this clause (B), to the extent arising out of or relating to their employment by Purchaser or any of its Affiliates and (ii) any Liabilities for which Purchaser is responsible pursuant to Section 7.7(f) of this Agreement;

(g) all Liabilities relating to Transferred Benefit Plans ("**Benefit Plan Liabilities**");

(h) the Environmental Liabilities of Sellers as set forth in Section 2.3(h) of the Seller Disclosure Schedule;

(i) to the extent lawfully transferable, all obligations, commitments and Liabilities under any Permits assigned to Purchaser hereunder;

(j) all Liabilities of Sellers relating to the Industrial Revenue Bond;

(k) all Liabilities of Sellers arising from or relating to claims eligible for coverage under the Sellers' workers' compensation insurance; and

(l) the respective other Liabilities set forth in Section 2.3(l) of the Seller Disclosure Schedule.

Section 2.4 **Excluded Liabilities.** Notwithstanding anything in this Agreement to the contrary, Purchaser shall not assume, and shall be deemed not to have assumed, any Liabilities relating to

the Business of Sellers or any Affiliate of Sellers and Sellers and their Affiliates shall be solely and exclusively liable with respect to all such Liabilities, other than the Assumed Liabilities (collectively, the "**Excluded Liabilities**"), including without limitation, those Liabilities set forth as follows:

- (a) any Liability of any Seller relating primarily to any Excluded Asset;
- (b) all Liabilities under Indebtedness for borrowed money of Sellers (including any Indebtedness or accounts payable owing from any Seller to any Affiliate of such Seller);
- (c) all Tax Liabilities of Sellers, the Purchased Joint Ventures and the Purchased Subsidiaries arising prior to or on the Closing Date, and any Tax Liabilities of Sellers, Purchased Joint Ventures or Purchased Subsidiaries arising from the transactions contemplated by this Agreement, other than the Tax Amount;
- (d) all Liabilities of Sellers relating primarily to employees of Sellers that are not Transferred Employees ("**Excluded Employees**");
- (e) except as set forth in Sections 2.3(f), 2.3(g) and 2.3(l), all Liabilities of Sellers arising out of, relating to or with respect to (1) the employment or performance of services, or termination of employment or services by any Seller of any employee, or independent contractor on or before the close of business on the Closing Date, (2) employment or labor Actions accruing either directly or indirectly against Seller that relate to the period on or before the close of business on the Closing Date, irrespective of whether such claims are made prior to or after the Closing and (3) all Liabilities (including, without limitation, all Liabilities to the PBGC, IRS or Department of Labor) with respect to any Benefit Plan that is not a Transferred Benefit Plan.
- (f) all Rejection Damages Claims;
- (g) any and all customer claims against Sellers, whether known or unknown, including product warranties and any Actions related to product liability claims relating to, resulting from, caused by or arising out of ownership, operation or control of the Business, to the extent accruing, arising out of or relating to events, occurrences, acts or omissions occurring or existing prior to the Closing Date;
- (h) except as set forth in Section 2.3(h), all Environmental Liabilities relating to, resulting from, caused by or arising out of ownership, operation or control of the Business, to the extent accruing, arising out of or relating to events, occurrences, acts or omissions occurring or existing prior to the Closing Date;
- (i) all Actions against each Seller, any of their respective assets, the Business and any of their past or present operations or activities;
- (j) all Indemnification Claims; and
- (k) those other Liabilities set forth in Section 2.4(k) of the Seller Disclosure Schedule.

Section 2.5 **Contract Designation Rights.**

- (a) On or prior to the date hereof, Sellers shall have delivered to Purchaser a list of (i) all Material Contracts to which any Seller is a party, (ii) the amount of the Cure Costs associated with each Material Contract identified in Section 5.10(a) of the Seller Disclosure Schedule and (iii) any

Material Contracts entered into by Sellers during the pendency of the Bankruptcy Case. To the Knowledge of Sellers, such list shall also contain a list of all other Contracts to which Sellers are a party, other than such Contracts that are immaterial to the Business. Sellers shall cooperate with and provide such additional information to Purchaser in order to identify and provide to Purchaser as promptly as practicable all Material Contracts related to the Business (and the related Cure Costs), as well as Cure Costs of non-Material Contracts, and subject to assumption or rejection hereunder.

(b) Any motions filed by Sellers with, and any proposed orders submitted by Sellers to, the Bankruptcy Court seeking authorization after the date hereof to assume or reject any Contracts, or any notices of disclaimer, rescission, or repudiation given by any Seller in the Canadian Proceeding shall be satisfactory in form and substance to Purchaser in its reasonable discretion. As set forth in the Approval Order, no later than twenty (20) days prior to the Sale Hearing, the Sellers shall cause notice to be provided to all counterparties to the Contracts, substantially in the form annexed to the Approval Motion as Exhibit D regarding the (i) assumption and assignment to Purchaser all of the Contracts, except for any such Contracts which Purchaser previously has advised Sellers in writing that it does not wish to assume (and Sellers shall thereupon be under no obligation to seek assumption and assignment to Purchaser of any such Contracts), and (ii) fixing of the Cure Costs associated with each Contract as of the Sale Hearing (or as of such later date reasonably acceptable to Purchaser and Sellers). Sellers shall consult with, and give due consideration to the views and concerns of, Purchaser prior to compromising or commencing any Action with respect to any material payment required to be made under the Bankruptcy Code to effectuate the assumption of any such Contract, including using commercially reasonable efforts to provide five (5) days notice of any such compromise or Action to Purchasers.

(c) For the purpose of determining whether a Contract of Sellers shall be included as a Purchased Contract or an Excluded Asset, from and after the filing of the Approval Motion all such Contracts shall be treated as follows:

(i) no later than three (3) days prior to the day of the Auction, Purchaser shall notify Sellers in writing of those Contracts which Purchaser desires to be designated to be assumed by Sellers and assigned to Purchaser on the Closing Date, with Purchaser responsible for all Cure Costs associated therewith; *provided, however*, each such Contract identified in Section 5.10(a) of the Seller Disclosure Schedule as a Material Contract shall be designated to be assumed by Sellers and assigned to Purchaser, with Purchaser responsible for all Cure Costs associated therewith, unless otherwise specifically noted in such Section of the Seller Disclosure Schedule (in which case each such Contract shall be deemed rejected and shall not be purchased by Purchaser as a Purchased Contract);

(ii) each of such Contracts entered into during the pendency of the Bankruptcy Case shall be designated to be assigned to Purchaser, unless Purchaser notifies Sellers in writing that it will not purchase such Contract, in which case such Contract shall not be assigned to Purchaser and shall be included as an Excluded Asset; *provided, however*, if such Contract was required to be identified in Section 5.10(a) of the Seller Disclosure Schedule as a Material Contract and was not identified or was entered into on or after the date hereof in breach of this Agreement then such Contract shall not be assigned to or purchased by Purchaser; and

(iii) after the Auction but in any event no later than two (2) Business Days prior to the Closing Date, Purchaser shall notify Sellers in writing of any Contracts which Purchaser does not desire to be assumed by Sellers and assigned to Purchaser, in which case any such Contracts shall not be assigned to Purchaser and shall be included as Excluded Assets and may be rejected by Sellers.

Any Contract designated to be assumed and assigned hereunder shall be accompanied by such information or documentation related to "adequate assurance of future performance" as shall be reasonably required in connection with the assumption and assignment of such Contract, and upon Bankruptcy Court approval for the assumption and assignment thereof to Purchaser, shall constitute a Purchased Asset hereunder. Any Contract that is not assumed as provided above shall be an Excluded Asset, and shall not constitute a Purchased Asset hereunder. Notwithstanding anything to the contrary set forth in this Agreement, to the extent that, prior to Closing, any Purchased Contract is not subject to an order of the Bankruptcy Court with respect to the assumption and assignment of such Purchased Contract, any Liabilities of Sellers related to such Purchased Contract shall be the responsibility of Sellers until such Purchased Contract is either assumed by Sellers and assigned to Purchaser or rejected by Sellers.

(d) At Closing, to the extent not previously paid, Purchaser shall pay or cause to be paid (and shall reimburse or cause to be reimbursed to Sellers on an after-Tax basis any amounts paid after the date hereof in respect of) any and all Cure Costs in respect of all prepetition Contracts that are Purchased Contracts.

(e) Nothing in this Agreement shall be construed as an attempt by Sellers to assign any Contract to the extent that such Contract is not assignable under the Bankruptcy Code or the CCAA or otherwise without the consent of the other party or parties thereto, and the consent of such other party has not been given or received, as applicable. With respect to any Contract for which the consent of a party thereto to the assignment thereof shall not have been obtained at Closing and any claim, right or benefit arising thereunder or resulting therefrom, to the extent Purchaser waives the condition set forth in Section 9.2(f) (to the extent applicable), Sellers and Purchaser shall use their reasonable good faith efforts to obtain as expeditiously as possible the written consent of the other party or parties to such Contract necessary for the assignment thereof to Purchaser. Unless and until any such consent, waiver, confirmation, novation or approval is obtained, Sellers and Purchaser shall cooperate to establish an arrangement reasonably satisfactory to Purchaser under which Purchaser would obtain the claims, rights and benefits and assume the corresponding Liabilities and obligations thereunder (including by means of any subcontracting, sublicensing or subleasing arrangement) or under which Sellers would enforce for the benefit of Purchaser, with Purchaser assuming and agreeing to pay Sellers' obligations (other than any related Cure Costs), any and all claims, rights and benefits of Sellers against a third party thereto. In such event, (i) Sellers will hold in trust for and promptly pay to Purchaser, when received, all moneys received by them under any such Contract or any claim, right or benefit arising thereunder and (ii) Purchaser will promptly pay, perform or discharge, when due, any and all obligations and Liabilities arising thereunder (other than any related Cure Costs), other than those being contested in good faith. Purchaser acknowledges that no adjustment to the Purchase Price shall be made for any such Contracts that are not assigned and that Purchaser shall have no claim against Sellers in respect of such unassigned Contracts. Nothing in this paragraph shall be deemed a waiver of Purchaser's right to receive an effective assignment of all of the Purchased Assets at Closing nor shall any Contracts covered by this paragraph be deemed to constitute Excluded Assets solely by virtue of this paragraph. Sellers' obligations under this paragraph shall terminate on the date that is ninety (90) days after the Closing Date.

Section 2.6 **Transferred Benefit Plans.** On or prior to the date hereof, Sellers have delivered to Purchaser Section 2.6 of the Seller Disclosure Schedule, which includes a list of all Benefit Plans currently anticipated to be assumed by and assigned to Purchaser on the Closing Date. Purchaser shall have the right to add or remove any Benefit Plans from Section 2.6 of the Seller Disclosure Schedule, until three (3) days prior to the date of the Auction. Those Benefit Plans set forth in Section 2.6 of the Seller Disclosure Schedule on such date shall be assumed by and assigned to Purchaser on the Closing Date (the "**Transferred Benefit Plans**").

### ARTICLE III PURCHASE PRICE

Section 3.1 **Deposit.** Simultaneous with the execution of this Agreement, Sellers and Purchaser shall execute the Deposit Escrow Agreement, pursuant to which Purchaser shall deposit with the Escrow Agent \$10,000,000 in cash (the "**Deposit Amount**"), by wire transfer of immediately available funds, to be applied as provided in the following two sentences. The Deposit Amount shall be retained by Sellers in the following circumstances: (i) at the Closing, at which time such Deposit Amount shall be credited against the Purchase Price; or (ii) if this Agreement is terminated under the circumstances set forth in Section 10.2(c). Except as described in the previous sentence, the Deposit Amount shall be returned to Purchaser after termination of this Agreement.

Section 3.2 **Closing Escrow Agreement.** On the Closing Date, Foamex Inc., Purchaser and the Escrow Agent shall execute the Closing Escrow Agreement and Purchaser shall deposit (or cause to be deposited) the Escrow Amount with the Escrow Agent.

#### Section 3.3 **Purchase Price.**

(a) On the terms and subject to the conditions hereof, at the Closing, Purchaser shall (i) pay or cause to be paid the Estimated Cash Purchase Price, by wire transfer of immediately available funds to an account designated by Sellers at least three (3) Business Days prior to the Closing Date; and (ii) assume the Assumed Liabilities as provided in Section 2.3, which are estimated as of the date hereof to be \$26,600,000. The "**Estimated Cash Purchase Price**" shall be a cash amount equal to \$78,400,000 less the Escrow Amount, the Deposit Amount, the HL Fee Amount, the Seller Professional Fee Amount, the Wind-Down Amount and the remaining portion of the Purchaser DIP Claim, (x) plus the Letters of Credit Amount, (y) minus the amount, if any, by which Estimated Working Capital is less than Target Working Capital or (z) plus the amount, if any, by which Estimated Working Capital exceeds Target Working Capital, provided that no such adjustment shall be made pursuant to the foregoing clauses (y) and (z) unless the positive or negative difference between Estimated Working Capital and Target Working Capital exceeds \$2,000,000. The procedure for determining Estimated Working Capital is set forth in Section 3.3(c).

(b) The "**Final Cash Purchase Price**" shall be a cash amount equal to \$78,400,000 less the Escrow Amount, the Deposit Amount, the HL Fee Amount, the Seller Professional Fee Amount, the Wind-Down Amount and the remaining portion of the Purchaser DIP Claim, (x) plus the Letters of Credit Amount, (y) minus the amount, if any, by which Final Working Capital is less than Target Working Capital or (z) plus the amount, if any, by which Final Working Capital exceeds Target Working Capital, provided that no such adjustment shall be made pursuant to the foregoing clauses (y) and (z) unless the positive or negative difference between Final Working Capital and the Target Working Capital exceeds \$2,000,000. The procedure for determining Final Working Capital is set forth in Section 3.3(d).

(c) Not less than five (5) Business Days prior to the Closing Date, Sellers shall prepare and deliver to Purchaser: (i) its estimate of Working Capital as of the close of business on the Closing Date (the "**Estimated Working Capital**") and (ii) its calculation of the Estimated Cash Purchase Price, each of which shall be certified as prepared in accordance with this Agreement by Foamex Inc.'s chief financial officer. Within two (2) Business Days after such delivery, if Purchaser has any objections to Sellers' calculation of the Estimated Cash Purchase Price, Purchaser shall provide a written statement of its objections to Sellers; *provided* that such objections shall be limited to mathematical errors or the failure to include a material component of Current Assets or Current Liabilities in the calculation of Working Capital. The parties shall use their respective good faith efforts to resolve any dispute regarding the calculation of the Estimated Cash Purchase Price as promptly as practicable. Sellers shall prepare and

deliver to Purchaser, no later than one (1) Business Day prior to the Closing Date, Sellers' final calculation of Estimated Working Capital and the Estimated Cash Purchase Price, which shall be conclusive for purposes of Section 3.3(a).

(d) Not more than forty-five (45) days following the Closing Date, Purchaser shall prepare and deliver to the Sellers: (i) a statement (the "**Closing Statement**") of its calculation of the Working Capital (the "**Final Working Capital**") and (ii) its calculation of the Final Cash Purchase Price, each of which shall be certified as prepared in accordance with this Agreement by Purchaser's chief financial officer.

(i) The Closing Statement shall become final and binding upon the parties unless Sellers give written notice of their disagreement with any component of the Closing Statement (the "**Notice of Disagreement**") to Purchaser within fifteen (15) Business Days following Sellers' receipt thereof. The Notice of Disagreement shall specify in reasonable detail the nature of any such disagreement. If a Notice of Disagreement complying with the preceding sentence is received by Purchaser in a timely manner, then the Closing Statement (as revised in accordance with clause (x) or (y) below) shall become final, binding and non-appealable (after complying with Section 3.3(d)(ii)) upon the earlier of (x) the date on which the parties resolve in writing any disputes with respect to the matters specified in the Notice of Disagreement or (y) the date on which any such disputes are finally resolved in writing by the Accounting Firm.

(ii) During the thirty (30) day period following the delivery of a Notice of Disagreement in compliance with paragraph (i) above, the parties shall seek in good faith to resolve any disputes with respect to the matters specified in the Notice of Disagreement. If, at the end of such thirty (30) day period, the parties have not resolved such disputes, the parties shall submit to the national office of a mutually acceptable "big four" accounting firm (the "**Accounting Firm**") for review and resolution of any and all matters that remain in dispute. The parties shall use their respective good faith efforts to cause the Accounting Firm to render a decision resolving the matters in dispute within thirty (30) days following the submission of such matters to the Accounting Firm. The Accounting Firm's determination shall be set forth in a written statement delivered to the parties and shall be final, binding and non-appealable, absent manifest or mathematical errors. All fees and expenses of the Accounting Firm shall be borne equally by Sellers and Purchaser.

**Section 3.4 Purchase Price Adjustment.** As soon as practicable after the Final Cash Purchase Price has been determined pursuant to Section 3.3 (but in any event, within five (5) Business Days after such determination):

(a) If the Target Working Capital exceeds the Final Working Capital by more than \$2,000,000, then Foamex Inc. and Purchaser shall jointly instruct the Escrow Agent to disburse (1) to Purchaser from the Escrow Amount, by wire transfer of immediately available funds to an account designated by Purchaser, the amount by which the Estimated Working Capital exceeds the Final Working Capital, together with interest earned thereon and (2) to Foamex Inc., the remaining portion of the Escrow Amount (if any), together with interest earned thereon, after the payment to Purchaser in accordance with the foregoing clause (1), by wire transfer of immediately available funds to an account designated by Sellers; or

(b) If the Final Working Capital equals or exceeds the Estimated Working Capital, then Foamex Inc. and Purchaser shall jointly instruct the Escrow Agent to disburse (1) to Foamex Inc. all of the Escrow Amount, by wire transfer of immediately available funds to an account designated by Sellers, together with interest earned thereon and (2) if the Final Working Capital exceeds the Target



Working Capital by more than \$2,000,000, Purchaser shall pay to Foamex Inc., by wire transfer of immediately available funds to an account designated by Foamex Inc., an amount equal to the amount by which the Final Working Capital exceeds the Estimated Working Capital, together with interest thereon between the Closing Date and the date of such payment at the Prime Rate.

Purchaser and Sellers agree and acknowledge that, notwithstanding anything to the contrary set forth in this Agreement, the Escrow Amount shall be the sole source of recovery for any purchase price adjustments in favor of Purchaser pursuant to this Section 3.4 and any adjustments to the Purchase Price in favor of Purchaser as a result of the application of this Section 3.4 shall not exceed the Escrow Amounts.

**Section 3.5 Allocation of Purchase Price.** As soon as practicable after the Final Cash Purchase Price has been determined pursuant to Section 3.3 (but in any event, within ten (10) Business Days after such determination), Purchaser shall provide Sellers with an allocation of the Purchase Price as determined for Tax purposes among the Purchased Assets on a Seller-by-Seller basis. Such allocation schedule shall be prepared in accordance with Section 1060 of the IRC for U.S. federal income Tax purposes (or in accordance with other Tax Laws, as applicable) and shall be binding on Purchaser and Sellers. The parties shall cooperate with each other and provide such information as any of them shall reasonably request in connection with this Section 3.5. The parties will each report the federal, state and local and other Tax consequences of the purchase and sale contemplated hereby (including the filing of IRS Form 8594) in a manner consistent with such allocation schedules.

**Section 3.6 Section 22 Canadian Tax Election.** Purchaser and Foamex Canada shall elect jointly in the prescribed form under section 22 of the Income Tax Act (Canada), section 184 of the Taxation Act (Quebec), and the corresponding provisions of any other applicable Tax statute as to the sale of the Accounts Receivable of Foamex Canada and designate in such election an amount equal to the portion of the Purchase Price allocated to such Accounts Receivable pursuant to Section 3.5. This election, or these elections, shall be made within the prescribed time for such elections.

**Section 3.7 GST and QST Elections.** At the Closing, Foamex Canada and Purchaser shall jointly execute an election under section 167 of the Excise Tax Act (Canada) and an election under section 75 of an Act Respecting the Québec Sales Tax following the prescribed form and including the prescribed information, such that no goods and services tax ("GST") or Québec sales tax ("QST") shall be payable in connection with the purchase and sale of the Purchased Assets of Foamex Canada pursuant to the provisions of this Agreement. Purchaser shall file the joint elections with the returns required to be filed by Purchaser under the Excise Tax Act (Canada) and an Act Respecting the Québec Sales Tax for the Purchaser's reporting periods in which the sale was made, in compliance with the requirements of the Excise Tax Act (Canada) and an Act Respecting the Québec Sales Tax.

**Section 3.8 Subsection 20(24) Canadian Tax Election.** Purchaser and Foamex Canada shall, if applicable, jointly execute and file an election under subsection 20(24) of the Income Tax Act (Canada) in the manner required by subsection 20(25) of the Income Tax Act (Canada), Sections 157.10 and 157.11 of the Taxation Act (Québec) and under the equivalent or corresponding provisions of any other applicable provincial or territorial statute, in the prescribed forms and within the time period permitted under the Income Tax Act (Canada), the Taxation Act (Québec) and under any other applicable provincial or territorial statute, as to such amount paid by Foamex Canada to Purchaser for assuming future obligations. In this regard, Purchaser and Sellers acknowledge that a portion of the Purchased Assets transferred by Foamex Canada pursuant to this Agreement and having a value equal to the amount elected under subsection 20(24) of the Income Tax Act (Canada), Sections 157.10 and 157.11 of the Taxation Act (Québec) and the equivalent provisions of any applicable provincial or territorial statute, is being transferred by Foamex Canada as a payment for the assumption of such future obligations by

Purchaser. Notwithstanding such elections, in the event it is determined by the Canada Revenue Agency or Revenu Québec, as the case may be, that there is a liability of Purchaser to pay, or of Foamex Canada to collect and remit, the GST or QST on all or part of the Purchased Assets, such GST or QST shall be paid in accordance with Section 8.1 and Purchaser shall pay all interest and penalties relating thereto.

Section 3.9 **HL Fees, Seller Professional Fees and Wind-Down Amount.**

(a) **HL Fees.** On the Closing Date, Purchaser shall pay an amount equal to the invoiced but unpaid amount of the HL Fees (the "**HL Fee Amount**") as of such date into an escrow account (the "**HL Fee Escrow**") pursuant to an escrow agreement by and among Purchaser, HL and the Escrow Agent, in form and substance reasonably satisfactory to the parties thereto (the "**HL Escrow Agreement**"). The HL Escrow Agreement shall provide that within one (1) Business Day of receipt by the Escrow Agent of an order of the Bankruptcy Court allowing any or all of the HL Fee Amount, the Escrow Agent shall distribute to HL such allowed HL Fee Amount. Within one (1) Business Day of payment in full of the HL Fee Amount, the Escrow Agent shall disburse any remaining amounts held in the HL Fee Escrow to Sellers. Within one (1) Business Day of receipt by the Escrow Agent of a final and non-appealable order of the Bankruptcy Court (or such other court) disallowing any or all of the HL Fee Amount, the Escrow Agent shall disburse such disallowed HL Fee Amount to Sellers.

(b) **Seller Professional Fees.** On the Closing Date, Purchaser shall pay an amount equal to the invoiced but unpaid amount of the Seller Professional Fees (the "**Seller Professional Fee Amount**") as of such date into an escrow account (the "**Seller Professional Fee Escrow**") pursuant to an escrow agreement by and among Purchaser, the Seller Professionals and the Escrow Agent, in form and substance reasonably satisfactory to the parties thereto (the "**Seller Professional Fee Escrow Agreement**"). The Seller Professional Escrow Agreement shall provide that within one (1) Business Day of receipt by the Escrow Agent of an order of the Bankruptcy Court allowing any or all of the Seller Professional Fee Amount, the Escrow Agent shall distribute to the applicable Seller Professional such allowed Seller Professional Fee Amount. Within one (1) Business Day of payment in full of the Seller Professional Fee Amount, the Escrow Agent shall disburse any remaining amounts held in the Seller Professional Fee Escrow to Sellers. Within one (1) Business Day of receipt by the Escrow Agent of a final and non-appealable order of the Bankruptcy Court (or such other court) disallowing any or all of the Seller Professional Fee Amount, the Escrow Agent shall disburse such disallowed Seller Professional Fee Amount to Sellers.

(c) **Wind-Down Amount.** On the Closing Date, Purchaser shall pay an amount equal to the Wind-Down Amount into an escrow account (the "**Wind-Down Escrow**") pursuant to an escrow agreement by and among Purchaser, Sellers and the Escrow Agent in form and substance reasonably satisfactory to the parties thereto (the "**Wind-Down Escrow Agreement**"). The Wind-Down Escrow Agreement shall provide that within one (1) Business Day of receipt by the Escrow Agent of a written instruction from Sellers authorizing the disbursement of any or all of the Wind-Down Amount, the Escrow Agent shall disburse such amount as directed by Sellers. The wind-down of Sellers' bankruptcy estates shall be administered by an appointee of the Sellers approved by the Bankruptcy Court, who shall disburse the Wind-Down Amount in accordance with the Wind-Down Budget, subject to the provisions of any applicable order of the Bankruptcy Court.

(d) **No Objection.** Purchaser agrees that it shall not, and Purchaser shall cause its Affiliates not to, directly or indirectly, object to the allowance or payment of any HL Fees or Seller Professional Fees.

#### ARTICLE IV CLOSING

Section 4.1 **The Closing.** The closing of the Sale (the "**Closing**") shall take place at the offices of Bracewell & Giuliani LLP, 1177 Avenue of the Americas, New York, NY 10036, at 10:00 a.m. local time, on the second (2nd) Business Day after the date upon which all conditions set forth in Article IX hereof have been satisfied or waived (other than those conditions which by their nature are to be satisfied at the Closing, but subject to the satisfaction or waiver of those conditions), or at such other place, date and time as the parties may agree. The date on which the Closing occurs is referred to in this Agreement as the "Closing Date."

Section 4.2 **Deliveries at the Closing.**

(a) Sellers shall deliver or shall cause to be delivered to Purchaser the following at the Closing:

(i) bills of sale, assignment agreements and other customary transfer documents necessary to transfer to Purchaser (or its Affiliate) all right, title and interest of Sellers to or in the Purchased Assets;

(ii) evidence reasonably satisfactory to Purchaser that all notices of the assumption and assignment of the Purchased Contracts and of the assumption of the Assumed Liabilities, and all required Consents to, and approvals of, such assumptions and assignments have been given and received in accordance with applicable Law;

(iii) a certificate signed by a Responsible Officer of each Seller (in form and substance reasonably satisfactory to Purchaser) certifying that the closing conditions set forth in Section 9.2(a) and (b) have been satisfied;

(iv) certificates signed by a Responsible Officer of each Seller to which is attached: (i) true and correct copies of the Fundamental Documents of such Seller; (ii) true and correct copies of the resolutions of the board of directors for such Seller respecting the transactions contemplated by this Agreement and the Transaction Documents; (iii) a certificate reflecting the incumbency and true signatures of the officers of such Seller who execute this Agreement and other Transaction Documents on behalf of such Seller; and (iv) a certificate from the Secretary of State or other applicable Governmental Authority of the State of formation or incorporation, as applicable, dated within ten (10) days of the Closing Date, with respect to the existence and good standing of such Seller. The certificates required pursuant to this Section 4.2(a)(iv) shall certify that the documents referred to in (i) and (ii) above are attached thereto are true and correct copies, have been duly and validly adopted and have not been amended or altered except as reflected therein;

(v) a certified copy of the Sale Order;

(vi) a certified copy of the issued and entered Approval Order Recognition Order;

(vii) a certified copy of the issued and entered Sale Order Recognition Order;

(viii) either (a) a certificate of non-foreign status as described in IRC Section 1445 and the Treasury Regulations thereunder or (b) a certificate that the asset conveyed

is not a U.S. real property interest under IRC Section 897, in form and substance reasonably satisfactory to Purchaser, from each Seller and any other Person treated as a seller of all or any portion of any asset under this Agreement for U.S. federal income tax purposes;

(ix) the Closing Escrow Agreement, duly executed by an authorized officer of each Seller;

(x) certificates or other evidence of Sellers' ownership interest, if any, in each of the Purchased Joint Ventures and Purchased Subsidiaries;

(xi) subject to the provisions of Section 7.10, the Mexican APA;

(xii) the elections referred to in Sections 3.6, 3.7 and 3.8;

(xiii) assignment agreements, duly executed by an authorized officer of each applicable Seller, required to assign any Intellectual Property included in the Purchased Assets;

(xiv) the Wind-Down Budget; and

(xv) such other instruments as are reasonably requested by Purchaser and otherwise necessary to consummate the Sale.

(b) Purchaser shall deliver or cause to be delivered to Sellers, or their designee(s), at the Closing:

(i) the Estimated Cash Purchase Price;

(ii) a certificate signed by a Responsible Officer of Purchaser certifying that the closing conditions set forth in Section 9.3(a) and (b) have been satisfied;

(iii) a certificate signed by a Responsible Officer of Purchaser to which is attached: (i) true and correct copies of the Fundamental Documents of Purchaser; (ii) true and correct copies of the resolutions of the board of directors of Purchaser respecting the transactions contemplated by this Agreement and the Transaction Documents; (iii) a certificate reflecting the incumbency and true signatures of the officers of Purchaser who execute this Agreement and other Transaction Documents on behalf of such Seller; and (iv) a certificate from the Secretary of State or other applicable Governmental Authority of the State of formation or incorporation, as applicable, dated within ten (10) days of the Closing Date, with respect to the existence and good standing of Purchaser. The certificate required pursuant to this Section 4.2(b)(iii) shall certify that the documents referred to in (i) and (ii) above are attached thereto are true and correct copies, have been duly and validly adopted and have not been amended or altered except as reflected therein];

(iv) the Closing Escrow Agreement, duly executed by an authorized officer of Purchaser;

(v) the elections referred to in Sections 3.6, 3.7 and 3.8; and

(vi) such other instruments as are reasonably requested by Sellers and otherwise necessary to consummate the Sale.

(c) In addition to the deliveries set forth in Section 4.2(b), the Purchaser shall deliver the Escrow Amount to the Escrow Agent at the Closing.

**ARTICLE V  
REPRESENTATIONS AND WARRANTIES OF THE SELLERS**

Subject to Bankruptcy Court approval of this Agreement and except as set forth in the SEC Documents filed after January 1, 2008 and prior to the date of this Agreement (other than the risk factors and forward looking information disclosed therein) and except as set forth in the disclosure schedule delivered by Sellers (the "**Seller Disclosure Schedule**") to Purchaser simultaneously with the execution and delivery hereof, Sellers jointly and severally represent and warrant to Purchaser that:

Section 5.1 **Organization, Standing and Corporate Power.** Each Seller and Purchased Subsidiary is an entity duly organized, validly existing and in good standing under the laws of the jurisdiction in which it is incorporated or formed and has the requisite corporate power and authority to carry on its business as now being conducted. Each Seller is duly qualified or licensed to do business and is in good standing in each jurisdiction in which the nature of its business or the ownership or leasing of its properties makes such qualification or licensing necessary, other than in such jurisdictions where the failure to be so qualified or licensed (individually or in the aggregate) could not reasonably be expected to have a Material Adverse Effect. Each Seller has delivered to Purchaser complete and correct copies of its respective Fundamental Documents, in each case as amended to the date of this Agreement.

Section 5.2 **Subsidiaries and Joint Ventures.**

(a) Section 5.2 of the Seller Disclosure Schedule lists for each Selling Subsidiary, Purchased Subsidiary and Purchased Joint Venture, its form of organization, its respective jurisdiction of incorporation or formation, if applicable, whether it holds any right, title or interest in any Purchased Assets, and the holders of the outstanding Equity Securities of such Subsidiaries. All such Subsidiaries and joint ventures are Selling Subsidiaries and "debtors" in the Bankruptcy Cases, Purchased Subsidiaries or Purchased Joint Ventures.

(b) All of the Equity Securities of each Selling Subsidiary and each Purchased Subsidiary, and the portion of Equity Securities of each Purchased Joint Venture owned by Sellers, are owned directly by Foamex Inc. or a wholly-owned Selling Subsidiary. All Equity Securities of each such Purchased Subsidiary, and all Equity Securities of the Purchased Joint Ventures included in the Purchased Assets, have been validly issued and are fully paid and nonassessable and, all such shares or ownership interests indicated as being owned by any Seller Parent or any of their respective Selling Subsidiaries are owned by such Seller Parent, by a Selling Subsidiary or by any Seller Parent and another Subsidiary, free and clear of all Liens and free of any other limitation or restriction (including any restriction on the right to vote, sell or otherwise dispose of such capital stock or Equity Securities) other than Permitted Liens.

Section 5.3 **Authority; Noncontravention.**

(a) Subject to the Bankruptcy Court's entry of the Approval Order and the Sale Order and the Canadian Court's entry of the Approval Order Recognition Order and the Sale Order Recognition Order, (i) each Seller has the requisite corporate power and authority to enter into this Agreement and to consummate the transactions contemplated by this Agreement and (ii) the execution and delivery of this Agreement by Sellers and the consummation by Sellers of the transactions contemplated by this Agreement have been duly authorized by all necessary corporate action on the part of each Seller. This Agreement has been duly executed and delivered by each Seller and, assuming this Agreement constitutes a valid and binding agreement of Purchaser and subject to entry of the Sale Order and the entry of the

Sale Order Recognition Order, constitutes a valid and binding obligation of each Seller, enforceable against each Seller in accordance with its terms, subject to (x) applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and other similar Laws relating to or affecting creditors' rights generally and (y) general principles of equity, regardless of whether enforcement is sought in a proceeding at law or in equity.

(b) Subject to the Bankruptcy Court's entry of the Approval Order and the Sale Order and the Canadian Court's entry of the Approval Order Recognition Order and the Sale Order Recognition Order, the execution and delivery by Sellers of this Agreement or any other Transaction Documents to which a Seller is a party does not, and the consummation by Sellers of the transactions contemplated by this Agreement or any other Transaction Documents to which a Seller is a party, and compliance by Sellers with the provisions of this Agreement or any other Transaction Documents to which a Seller is a party, shall not, conflict with, or result in any violation of, or default (with or without notice or lapse of time, or both) under, or give rise to a right of termination, cancellation, modification or acceleration of any obligation or to a loss of a benefit under, or result in the creation of any Lien upon any of the properties or assets of any Seller or any Purchased Subsidiary under (i) the Fundamental Documents of any Seller or Purchased Subsidiary or (ii) subject to the governmental filings and other matters referred to in Section 5.3(c), any judgment, order, decree, statute, Law, ordinance, rule or regulation applicable to any Seller or its respective properties or assets other than any such conflicts, violations, defaults, rights, losses or Liens that (individually or in the aggregate) would not reasonably be expected to have a Material Adverse Effect.

(c) No Consent of any Governmental Authority, or any third party, is required by or with respect to any Seller or any Purchased Subsidiary in connection with the execution and delivery of this Agreement by such Seller, or the consummation by such Seller of the transactions contemplated by this Agreement, except for (i) the Consents set forth in Section 5.3(c) of the Seller Disclosure Schedule, (ii) the entry of the Sale Order by the Bankruptcy Court and the entry of the Sale Order Approval Order by the Canadian Court, (iii) compliance with any applicable requirements of the Exchange Act or Securities Act, and (iv) such other Consents as to which the failure to obtain or make (individually or in the aggregate) could not reasonably be expected to have a Material Adverse Effect.

(d) Neither the aggregate value of the Purchased Assets, nor the aggregate value of the gross revenues from sales in or from Canada generated from the Purchased Assets, exceeds the threshold value set forth in Section 110(2) of the Competition Act (Canada) and accordingly the transactions completed by this Agreement are not subject to review under the Competition Act (Canada). The transactions contemplated by this Agreement are not subject to review under Part IV of the Investment Canada Act on the grounds that the thresholds set forth in Section 14.1 of the Investment Canada Act are not met.

#### Section 5.4 **SEC Documents; Financial Statements.**

(a) Except as set forth in Section 5.4(a) of the Seller Disclosure Schedule, Foamex Inc. has filed all reports, schedules, forms, statements and other documents (including exhibits and all other information incorporated by reference therein) required to be filed by Foamex Inc. with the SEC between January 1, 2008 and the date of this Agreement pursuant to the Exchange Act (the "**SEC Documents**"), each of which, as finally amended prior to the date hereof, has complied as to form in all material respects with the applicable requirements of the Securities Act and Exchange Act as of the date filed with the SEC. For the purposes of this Agreement, including Section 9.2(a) and the certificate to be delivered in accordance with Section 4.2(a)(iii), "SEC Documents" shall not include any reports, schedules, forms, statements or other documents (including exhibits and all other information

incorporated by reference therein) required to be filed by Foamex Inc. with the SEC on or after the date of this Agreement.

(b) None of the SEC Documents contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading.

(c) Except as set forth in Section 5.4(c) of the Seller Disclosure Schedule, the Financial Statements included in the SEC Documents complied, as of the date of filing, in all material respects with applicable accounting requirements and the published rules and regulations of the SEC applicable thereto, were prepared in accordance with GAAP (except, in the case of unaudited statements, as permitted by the rules and regulations of the SEC) applied on a consistent basis throughout the periods involved (except as may be indicated in such statements or in the notes thereto) and fairly present (subject, in the case of unaudited statements, to normal year-end audit adjustments and the absence of footnotes) in all material respects the consolidated financial position of Foamex Inc. and its consolidated Subsidiaries as of the dates thereof and the consolidated results of their operations and cash flows for the periods then ended.

(d) Set forth in Section 5.4(d) of the Seller Disclosure Schedule are copies of the unaudited consolidated financial statements of Foamex Inc. and its consolidated Subsidiaries as at and for the period ended December 28, 2008 (the "**Unaudited Financial Statements**"), including a balance sheet and statements of operations and cash flows. The Unaudited Financial Statements (x) have been derived from the accounting books and records of Sellers, (y) were prepared in accordance with GAAP consistently applied with the audited Financial Statements (except as may be indicated in such statements or in the notes thereto) and (z) fairly present in all material respects the consolidated financial position of Foamex Inc. and its consolidated Subsidiaries as of the dates thereof and the consolidated results of their operations and cash flows for the periods then ended. There are no off-balance-sheet transactions, arrangements, obligations or relationships attributable to the Business that have had or would reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect.

Section 5.5 **Absence of Certain Changes or Events.** Except (i) as set forth in Section 5.5 of the Seller Disclosure Schedule, (ii) as required under this Agreement or (iii) as reasonably necessary as a result of or in connection with the Bankruptcy Case, since September 28, 2008, (a) there has not been or occurred any Material Adverse Effect and (c) no Seller has taken any action that, if taken following the execution of this Agreement, would have violated Section 7.1 hereof.

Section 5.6 **Real Properties.**

(a) The Sellers and each Purchased Subsidiary have (i) good, valid, indefeasible and marketable title to the Owned Real Estate, (ii) good and valid leasehold interest in and to all Leased Real Estate and (iii) good and valid title to all other Purchased Assets constituting plants, buildings, structures, improvements, equipment and fixtures (other than tangible personal property covered by Section 5.7 below) or otherwise have the right to use such other Purchased Assets pursuant to a valid and enforceable lease, license or similar contractual arrangement, in each case free and clear of any Liens, other than Permitted Liens or as set forth in Section 5.6(a) of the Seller Disclosure Schedule.

(b) Except as set forth in Section 5.6(b) of the Seller Disclosure Schedule, the Real Estate constitutes all of the real property assets required for the conduct of the Business in substantially the same manner as such Business is being operated as of the date hereof. The plants, buildings, structures, improvements, material equipment and fixtures (other than tangible personal property covered by Section 5.7 below) included in the Purchased Assets are in good repair, working order and operating

condition, subject only to ordinary wear and tear, and are adequate and suitable for the purposes for which they are presently being used or held for use. To the Knowledge of Sellers, there are no facts or conditions affecting any Real Estate that could reasonably be expected, individually or in the aggregate, to interfere with the current use, occupancy or operation of such Real Estate. Except as set forth in Section 5.6(b) of the Seller Disclosure Schedule, only Sellers, the Purchased Subsidiaries and the Purchased Joint Ventures conduct the Business and the Business is not conducted through any other divisions or any direct or indirect Subsidiary or Affiliate of any Seller or Purchased Subsidiary.

(c) Section 5.6(c) of the Seller Disclosure Schedule sets forth a complete and correct list of all real property owned by Sellers and each Purchased Subsidiary (together with all improvements and fixtures located thereon or attached or appurtenant thereto and all easements, licenses, rights and appurtenances relating thereto, the "**Owned Real Estate**") and lists the address and owner of each parcel of Owned Real Estate. With respect to the Owned Real Estate, (i) no Seller has leased, licensed or otherwise granted to any Person the right to use or occupy such Owned Real Estate or any portion thereof, (ii) there are no outstanding options or rights of first offer or first refusal to purchase or lease or otherwise use or occupy the Owned Real Estate or any portion thereof or interest therein and (iii) except as set forth in Section 5.6(c) of the Seller Disclosure Schedule no Seller or Purchased Subsidiary is a party to any agreement or option to sell, mortgage, pledge, hypothecate, lease, sublease, license, convey, alienate, transfer or otherwise dispose of any Owned Real Estate or any portion thereof.

(d) Section 5.6(d) of the Seller Disclosure Schedule sets forth a complete and correct list of all of the real property leased, licensed or otherwise granted to Sellers or the Purchased Subsidiaries and each lease with respect thereto (the "**Leases**", and all interests leased pursuant to the Leases, the "**Leased Real Estate**"), including the addresses thereof and all written amendments or modifications to the Leases. Sellers have delivered to Purchaser true, correct and complete copies of all Leases, including all written amendments or modifications thereto, and the Leases are unmodified and in full force and effect. No Seller or Purchased Subsidiary is a sublessor or grantor under any sublease or other instrument granting to another Person any right to the possession, lease, occupancy or enjoyment of the Leased Real Estate, except as set forth on Section 5.6(d) of the Seller Disclosure Schedule. With respect to each Lease, except as set forth in Section 5.6(d) of the Seller Disclosure Schedule:

(i) the Leases are in full force and effect and are valid, binding and enforceable in accordance with their respective terms;

(ii) no amount payable under any Lease is past due;

(iii) each Seller and each Purchased Subsidiary is in compliance in all material respects with all commitments and obligations on its part to be performed or observed under each Lease and is not aware of the failure by any other party to any Lease to comply in all material respects with all of its commitments and obligations thereunder;

(iv) no Seller, nor any Purchased Subsidiary, has received any written notice (1) of a default (which has not been cured), offset or counterclaim under any Lease, or, any other written communication calling upon it to comply with any provision of any Lease or asserting noncompliance, or asserting such Seller or Purchased Subsidiary has waived or altered its rights thereunder, and no event or condition has happened or presently exists which constitutes a default or, after notice or lapse of time or both, would constitute a default under any Lease on the part of any Seller or Purchased Subsidiary or, to the Knowledge of Sellers, any other party, or (2) of any Action against any party under any Lease which if adversely determined would result in such Lease being terminated or cut off;



(v) no Seller, nor any Purchased Subsidiary, has assigned, subleased, sublicensed, mortgaged, pledged or otherwise encumbered or transferred its interest, if any, under any Lease; and

(vi) each Seller and each Purchased Subsidiary has exercised within the time prescribed in each Lease any option provided therein to extend or renew the term thereof.

(e) Except as disclosed in Section 5.6(e) of the Seller Disclosure Schedule, (i) there are no pending or, to the Knowledge of Sellers, threatened condemnation proceedings by or before any Governmental Authority with respect to any Real Estate and (ii) no Seller has received any written notice from any city, village, county or state or other Governmental Authority of any zoning, ordinance, building, fire, health or safety code or other legal violation in respect of any Lease. Each parcel of real property comprising the Real Estate has legal access to and from such property to a legally-dedicated, paved public right-of-way.

(f) To the Knowledge of the Sellers, the use and operation of the Real Estate in the conduct of the Business does not violate in any material respect any Law, Consent, Lien or agreement of any Governmental Authority. No improvements constituting a part of the Real Estate encroach on any real property not owned, leased or licensed by Sellers to the extent that removal of such encroachment could reasonably be expected to materially impair the manner and extent of the current use, occupancy and operation of such improvements. There are no Liens, other than Permitted Liens, affecting the Real Estate that materially impair the ability of any Seller or any Purchased Subsidiary to use such property in the operation of the Business as currently conducted.

(g) To the Knowledge of the Sellers, there are no pending or contemplated special assessments or reassessments of any parcel included in the Real Estate that would reasonably be expected to result in a material increase in the real property Taxes or other similar charges payable by any Sellers or any Purchased Subsidiaries with respect to any parcel of Owned Real Estate or in the rent, additional rent or other sums and changes payable by any Sellers or Purchased Subsidiaries under the Leases.

(h) Each parcel included in the Owned Real Estate is assessed for real property Tax purposes as a wholly-independent Tax lot, separate and apart from any adjoining land or improvements not constituting a part of that parcel.

(i) Sellers and the Purchased Subsidiaries are in possession of the Real Estate, respectively, and enjoy peaceful and undisturbed possession of such real property.

(j) A true and complete copy of the Santa Teresa Indenture has been delivered to the Purchaser. The Santa Teresa Indenture is unmodified and is in full force and effect. The principal amount of the outstanding bonds under the Santa Teresa Indenture is \$6,000,000. Seller has not received written notice of any default under the Santa Teresa Indenture and Seller has not received any written notice of any claim under Section 6.02 of the Santa Teresa Lease.

(k) The bonds under the Tupelo Indenture have been fully paid and there is no further debt outstanding under the Tupelo Indenture.

Section 5.7 **Tangible Personal Property**. Except as set forth in Section 5.7 of the Seller Disclosure Schedule and other than the Excluded Assets, Sellers and the Purchased Subsidiaries have good and valid title to, or have good and valid leasehold interests in, all tangible personal property that is included in the Business, free and clear of all Liens other than Permitted Liens, except in each case as (individually or in the aggregate) would not reasonably be expected to have a Material Adverse Effect.

Such owned and leased tangible personal property is in good working order, reasonable wear and tear excepted, except as (individually or in the aggregate) would not reasonably be expected to have a Material Adverse Effect.

Section 5.8 **Intellectual Property.**

(a) The operation of the Business and the business of each Purchased Subsidiary as currently conducted and the use of the Intellectual Property in connection therewith, to the Knowledge of Sellers, do not conflict with, infringe, misappropriate, dilute, misuse or otherwise violate the intellectual property rights of any third-party. No claim, action, suit, investigation, litigation or proceeding has been asserted or is pending or, to the Knowledge of Sellers, threatened against any Seller or any Purchased Subsidiary with respect to the foregoing.

(b) Sellers and/or the Purchased Subsidiaries own all right, title and interest in and to the Intellectual Property and are entitled to use all Intellectual Property material to the Business subject only to the terms of the Intellectual Property Agreements, and, to Sellers' Knowledge, are entitled to use all Intellectual Property material to the Business, subject only to the terms of the Intellectual Property Agreements, if applicable.

(c) The Intellectual Property set forth in Section 5.8(c) of the Sellers Disclosure Schedule identifies all registrations and applications for the Intellectual Property owned by each Seller and each Purchased Subsidiary and used or held for use by Sellers in the Business as presently conducted (the "**Registered Intellectual Property**"), and the Intellectual Property Agreements.

(d) The Registered Intellectual Property is subsisting and has not been adjudicated to be invalid or unenforceable in whole or part, and to the Knowledge of Sellers, is valid and enforceable. To the Knowledge of Seller, no Seller is aware of any uses of any item of Registered Intellectual Property that could be expected to lead to such item becoming invalid or unenforceable.

(e) To Sellers' Knowledge, no Person is engaging in any activity that infringes, misappropriates, dilutes, misuses or otherwise violates the Intellectual Property that is material to the Business or any Seller's or any Purchased Subsidiary's rights therein. Except as set forth on Section 5.8(e) of the Sellers Disclosure Schedule hereto, no Seller or Purchased Subsidiary has granted any license in settlement of an infringement, release, covenant not to sue, or non-assertion assurance to any Person with respect to any Registered Intellectual Property.

(f) With respect to each Intellectual Property Agreement, such Intellectual Property Agreement is in full force and effect.

(g) No Seller's or Purchased Subsidiary's Registered Intellectual Property is subject to any settlement agreement, consent agreement, decree, order, injunction, judgment or ruling materially restricting the use of any Registered Intellectual Property or that would materially impair the validity or enforceability of such Registered Intellectual Property.

(h) The Internet domain names set forth on Schedule 5.8(c) are registered and controlled by Seller or Purchased Subsidiary.

Section 5.9 **Litigation.** Except for such matters listed in Section 5.9 of the Seller Disclosure Schedule that will be discharged or that are reasonably expected to be discharged pursuant to the Sale Order and except for such environmental, health or safety matters addressed in Section 5.17, there is no Action or proceeding pending or, to the Knowledge of Sellers, threatened against Sellers or the Purchased

Subsidiaries that (individually or in the aggregate) would reasonably be expected to have a Material Adverse Effect, nor is there any judgment, decree, injunction, rule or order of any Governmental Authority outstanding against any of Sellers or any Purchased Subsidiary that (individually or in the aggregate) would reasonably be expected to have a Material Adverse Effect.

Section 5.10 **Material Contracts; Debt Instruments.**

(a) Section 5.10(a) of the Seller Disclosure Statement identifies all the following types of Contracts (each a "Material Contract", and collectively, the "Material Contracts") in effect as of the date hereof, which are related to the Purchased Assets or the Business generally and to which any Seller or Purchased Subsidiary is a party:

- (i) Contracts relating to Indebtedness (in either case, whether incurred, assumed, guaranteed or secured by any asset);
- (ii) joint venture, partnership, limited liability company or other similar Contracts;
- (iii) material lease for personal property;
- (iv) any Contract relating to any outstanding commitment for capital expenditures in excess of \$100,000 individually or \$300,000 in the aggregate;
- (v) Contracts (or series of related Contracts) relating to the acquisition, disposition or lease of any Person, business or material real property or other assets (whether by merger, sale of stock, sale of assets or otherwise);
- (vi) Contracts that (A) limit the freedom of any Seller, Purchased Subsidiary or the Business to compete in any line of business or with any Person or in any geographic area or (B) contains exclusivity obligations or restrictions binding on any Sellers or the Business;
- (vii) any sales, distribution, agency and marketing Contract (or series of related Contracts) involving in excess of \$500,000 in any annual period;
- (viii) any Contract (or series of related Contracts) relating to the purchase by any Sellers of any products or services under which the undelivered balance of such products or services is in excess of \$250,000;
- (ix) Contracts relating to any interest rate, currency or commodity derivatives or hedging transaction;
- (x) Contracts containing any "change of control" or similar provisions;
- (xi) Contracts (including any "take-or-pay" or keepwell agreement) under which (A) any Person has directly or indirectly guaranteed any liabilities or obligations of any Sellers or (B) any Sellers has directly or indirectly guaranteed liabilities or obligations of any other Person;
- (xii) Contracts with any current or former employee of any Seller or Purchased Subsidiary with aggregate payments of at least \$100,000 remaining under such Contract or providing for any severance Liabilities;

(xiii) Collective Bargaining Agreements and the Mexican Collective Bargaining Agreements; or

(xiv) Contracts with any of the Persons listed in Section 5.10(a)(xiv) of the Seller Disclosure Schedule.

(b) Each Material Contract included in the Purchased Assets is a legal, valid, binding and enforceable agreement of the applicable Sellers and is in full force and effect, and none of Sellers, Purchased Subsidiaries or, to the Knowledge of the Sellers, any other party thereto is in default or breach under the terms of, or has provided any written notice to terminate or modify, any such Material Contract. To the Knowledge of the Sellers, no Seller is a party to a Material Contract which is an oral Contract.

(c) Except as set forth in Section 5.10(c) of the Seller Disclosure Schedule, following the entry of the Sale Order, no Consent of any third party is required under any Material Contract included in the Purchased Assets as a result of or in connection with, and the enforceability of any such Material Contract will not be affected by, the execution, delivery and performance of this Agreement or any of the other Transaction Documents or the consummation of the transactions contemplated hereby and thereby. Complete and correct copies of (i) each Material Contract (including all waivers thereunder) and (ii) all form Contracts related to the Business have been made available to Purchaser.

#### Section 5.11 **Employees; Labor Matters.**

(a) Except as set forth in Section 5.10(a) of the Seller Disclosure Schedule, no Seller or Purchased Subsidiary is a party to or bound by any Collective Bargaining Agreement and there are no labor unions representing any employees employed by any Sellers or Purchased Subsidiaries ("**Employees**"). Within the past three (3) years there has not occurred or, to the Knowledge of Sellers, been threatened, any material strike, slowdown, picketing, work stoppage, concerted refusal to work or other similar material labor protest by any Employees. There are no material labor disputes currently subject to any grievance, arbitration, or Action, or, to the Knowledge of Sellers, threatened, by any Employees or any union representing the Employees. Within the past three (3) years neither Sellers, nor the Purchased Subsidiaries, have engaged in unfair labor practices within the meaning of the National Labor Relations Act or equivalent provision under any applicable Canadian Law that could, individually or in the aggregate, directly or indirectly, result in a material Liability to the Sellers or the Purchased Assets taken as a whole. Within the past three (3) years, neither Sellers nor the Purchased Subsidiaries have received written notice of the intent of any Governmental Authority responsible for the enforcement of labor and employment laws to conduct an investigation with respect to or relating to the Business which could, individually or in the aggregate, directly or indirectly, result in a material Liability to the Sellers or the Purchased Assets taken as a whole and, to the Knowledge of Sellers, no such investigation is in progress.

(b) Each Seller and each Purchased Subsidiary is in material compliance with all material foreign and United States Laws governing their employment practices, terms and conditions of Employees' employment, wages and hours, equal opportunity, civil rights, labor relations, occupational health and safety, and obligation to withhold Employee payroll taxes, including the Immigration and Reform Control Act, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Federal Age Discrimination in Employment Act and any federal, state, provincial or local law governing labor and employment. In the past three (3) years, Sellers have not received a written complaint, demand letter, or written charge issued by a U.S. federal, state, provincial or local agency or other Governmental Authority that alleges a material violation by any Seller of any applicable material Law governing their employment practices, terms and conditions of

Employees' employment, wages and hours, equal opportunity, civil rights, labor relations, occupational health and safety, or obligation to withhold Employee payroll taxes. Neither Sellers, nor the Purchased Subsidiaries, (i) have engaged in any plant closing, work force reduction, or other reduction in force that has resulted or could reasonably be expected to result in material Liability under the Workers Adjustment and Retraining Notification Act or any other applicable United States Law or local, provincial, state Law with respect to the Employees, (ii) have been issued any written notice that any such action is to be brought in the future with respect to the Employees. The Sellers and the Purchased Subsidiaries are in material compliance with all applicable requirements of the Immigration Reform and Control Act and the Consolidated Omnibus Budget Reconciliation Act of 1985 with respect to the Employees.

(c) Sellers have delivered to Purchaser a true, correct and complete list setting forth the name (except with respect to the Canadian employees), title, description of position, place of employment, current annual salary, most recent and/or expected bonus, and the to the extent applicable, deferred or contingent compensation, severance and other like benefits paid or payable (in cash or otherwise) for the years 2008 and 2009, for each current salaried employee, officer, directors, consultant or agent of each Seller and each Purchased Subsidiary. The parties agree that (i) the employee information disclosed to Purchaser pursuant to the present paragraph is necessary for Purchaser's determination to enter into this Agreement and proceed with the transactions contemplated hereby and for the parties to proceed with the Closing, and (ii) such information will only be used for such purposes for which it was initially collected from or in respect of such employee.

(d) The Purchased Subsidiaries have made all material payments of profit sharing that were legally required to be paid to the employees thereof with respect to all periods prior to the date hereof.

#### Section 5.12 **Benefits Plans and ERISA Compliance.**

(a) Section 5.12(a) of the Sellers Disclosure Schedule contains a list of all Benefit Plans of Sellers and all material Benefit Plans of the Purchased Subsidiaries. With respect to each Transferred Benefit Plan and each material Benefit Plan that is not a Transferred Benefit Plan, Sellers and the Purchased Subsidiaries have delivered or made available to Purchaser a true, correct and complete copy of: (A) all plan documents, benefit schedules, trust agreements, and insurance Contracts and other funding vehicles; (B) the three most recent annual reports (including Form 5500 Series) or filings and accompanying schedules, if any; (C) the current summary plan description, if any; (D) the three most recent annual financial reports, if any; (E) the most recent determination, opinion or advisory letter from the IRS or any other Governmental Authority, if any; (F) the three latest actuarial valuation reports (including but not limited to reports prepared for funding, deductions and financial accounting purposes), if any; and (G) the termination actuarial valuation reports and any supplementary actuarial reports prepared in respect of the termination of any pension plans maintained (or previously maintained) in Canada.

(b) (i) Section 5.12(b) of the Seller Disclosure Schedule identifies each Transferred Benefit Plan that is intended to be a "qualified plan" within the meaning of Section 401(a) of the IRC ("**Qualified Plans**") or that is registered with any Governmental Authority. The IRS or any other Governmental Authority has issued a favorable determination letter with respect to each Qualified Plan or registered plan (or the sponsor of such Qualified Plan or registered plan is entitled to rely on a favorable opinion or advisory letter) that has not been revoked, and (A) there are no existing circumstances or events that have occurred that would reasonably be expected to adversely affect in any material respect the qualified status of any Qualified Plan or related trust or the registered status of any Transferred Benefit Plan of the Sellers required to be registered and (B) with respect to any Qualified Plan or related trust or the registered status of any Transferred Benefit Plan of any Purchased Subsidiary, there are no

existing circumstances or events that have occurred that would reasonably be expected to adversely affect the qualified status of any such Qualified Plan or related trust or registered status of any such Transferred Benefit Plan, except circumstances or events, which individually or in the aggregate would not reasonably be expected to result in a Mexican MAE.

(ii) Sellers' 401(k) plan/tax-qualified "cash or deferred arrangement" has received a favorable determination letter (or the sponsor of such plan is entitled to rely on a favorable opinion or advisory letter) from the IRS that has not been revoked, and there are no existing circumstances or events that have occurred that could reasonably be expected to adversely affect the qualified status of such plan or related trust in any material respect and, except as set forth in Section 5.12(b)(ii) of the Seller Disclosure Schedule, such plan has been administered and is in compliance in all material respects with its terms and all applicable Laws. Notwithstanding anything in this Agreement to the contrary, the exclusive remedy of Purchaser for breach of this Section 5.12(b)(ii) shall be to not accept eligible rollover distributions (or purported eligible rollover distributions) from Sellers 401(k) plan/tax-qualified "cash or deferred arrangement" and as such, Purchasers shall not be deemed to be in breach of Section 7.7(e) hereof for failing to accept such eligible rollover distributions.

(c) Each Transferred Benefit Plan has been administered and is in compliance in all material respects in accordance with its terms and all applicable Laws, except where, with respect to any Transferred Benefit Plan of a Purchased Subsidiary, such administration and/or noncompliance has not resulted in and could not reasonably be expected to result in a Mexican MAE. Except as set forth in Section 5.12(c) of the Seller Disclosure Schedule, no prohibited transaction has occurred (i) with respect to any Seller Benefit Plan that could reasonably be expected to result in a material liability to the Purchaser or (ii) with respect to any Benefit Plan of a Purchased Subsidiary, a Mexican MAE. All contributions required to be made to any Transferred Benefit Plan by applicable Laws or regulations for any period through the date hereof have been timely made or paid in full or, to the extent not required to be made or paid on or before the date hereof, have been fully reflected in the SEC Documents and the Financial Statements, except where such failure to make or reflect such contributions with respect to any Transferred Benefit Plan of a Purchased Subsidiary has not resulted in and could not reasonably be expected to result in a Mexican MAE.

(d) Except as set forth in Section 5.12(d) of the Seller Disclosure Schedule, there does not now exist, and there are no existing circumstances that could reasonably be expected to result in, any Controlled Group Liability that would be a liability of Purchaser or any of its Affiliates following the Closing, other than with respect to Transferred Benefit Plans.

(e) (i) Except as set forth in Section 5.12(e)(i) of the Seller Disclosure Schedule, no Seller or Purchased Subsidiary has any liability under any Transferred Benefit Plan for life, health, medical or other welfare benefits to former employees or beneficiaries or dependents thereof, except (A) for health continuation coverage as required by Section 4980B of the IRC or Part 6 of Title I of ERISA or other similar Laws, or (B) where such liability with respect to any Transferred Benefit Plan of a Purchased Subsidiary has not resulted and would not reasonably be expected to result in a Mexican MAE; (ii) except as set forth in Section 5.12(e)(ii) of the Seller Disclosure Schedule, no Purchased Subsidiary has any liability under any Benefit Plan for life, health, medical or other welfare benefits to former employees or beneficiaries or dependents thereof, except for health continuation coverage as required by Section 4980B of the IRC or Part 6 of Title I of ERISA or other similar Laws, except where such liability has not resulted and would not reasonably be expected to result in a Mexican MAE; and (iii) except as set forth in Section 5.12(e)(iii) of the Sellers' Disclosure Schedule, there has been no communication to employees of Sellers or the Purchased Subsidiaries or any of their Subsidiaries that would reasonably be expected or interpreted to promise or guarantee such employees retiree health or life insurance benefits or

other retiree death benefits on a permanent basis for which Purchaser or any of its Affiliates would reasonably be expected to have any Liability following the Closing, except where such communication to employees of any Purchased Subsidiary (or its Subsidiaries) has not resulted and would not reasonably be expected to result in a Mexican MAE.

(f) Except as set forth in Section 5.12(f) of the Seller Disclosure Schedule, neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated hereby shall (either alone or in conjunction with any other event) result in, cause the accelerated vesting or delivery of, or increase the amount or value of, any payment or benefit to any employee of any Seller or any Purchased Subsidiary, except, in the case of any employee of any Purchased Subsidiary, which would not reasonably be expected to result in a Mexican MAE. Only to the extent that Section 280G(a) of the IRC is applicable to any Purchased Subsidiary, without limiting the generality of the foregoing, no material amount paid or payable by any such Purchased Subsidiary in connection with the transactions contemplated hereby (either solely as a result thereof or as a result of such transactions in conjunction with any other event) shall be nondeductible by any Purchased Subsidiary under Section 280G(a) of the IRC.

(g) There are no pending, or to the Knowledge of Sellers, threatened claims (other than claims for benefits in the ordinary course), lawsuits, investigations, examinations, arbitrations or other proceedings which have been asserted or instituted against the Benefit Plans, any fiduciaries thereof with respect to their duties to the Benefit Plans, any other persons with respect to the Benefit Plans or the assets of any of the trusts under any of the Benefit Plans which would reasonably be expected to result in any material Liability to Purchaser or, with respect to any Benefit Plans of the Purchased Subsidiaries, a Mexican MAE after the Closing.

(h) Except as set forth in Section 5.12(h) of the Seller Disclosure Schedule, with respect to any Title IV Plan: (i) Sellers and the Purchased Subsidiaries, any of their respective Subsidiaries and the ERISA Affiliates satisfied the minimum funding standard, and have made all contributions required, under Section 302 of ERISA and Section 402 of the IRC; (ii) Sellers, the Purchased Subsidiaries, any of their respective Subsidiaries and the ERISA Affiliates have paid all amounts due to the PBGC pursuant to Section 4007 of ERISA; (iii) Sellers, the Purchased Subsidiaries, the Purchased Joint Ventures, any of their respective Subsidiaries and the ERISA Affiliates have not filed a notice of intent to terminate any Title IV Plan or adopted any amendment to treat a Title IV Plan as terminated, and the PBGC has not instituted proceedings to treat any Title IV Plan as terminated; (iv) no event has occurred or circumstance exists that may constitute grounds under Section 4042 of ERISA for the termination of, or the appointment of a trustee to administer, any Title IV Plan; (v) no accumulated funding deficiency, whether or not waived, exists with respect to any Title IV Plan, and no event has occurred or circumstance exists that may result in an accumulated funding deficiency as of the last day of the current Benefit Plan year of any such Title IV Plan, and, on and after the effectiveness of the Pension Protection Act of 2006, there has been no failure by any Benefit Plan to satisfy the minimum funding standards (within the meaning of Section 412 of the IRC or Section 302 of ERISA) applicable to such plan, whether or not waived; and (vi) no reportable event (as defined in Section 403 of ERISA and in regulations issued thereunder) has occurred for which the notice requirement has not been waived.

(i) Except as set forth in Section 5.12(i) of the Seller Disclosure Schedule, no Benefit Plan is a Multiemployer Plan, nor have Sellers, the Purchased Subsidiaries, nor any of their respective ERISA Affiliates, been obligated to contribute or have any liability with respect to any Multiemployer Plan.

(j) As of December 31, 2008, the total unfunded liability with respect to the post-retirement welfare obligations that are Assumed Liabilities set forth on Section 2.3(l) of the Sellers' Disclosure Schedule was \$27,000 on an accumulated post retirement benefit obligations basis.

(k) [Reserved].

(l) Except as set forth in Section 5.12(l) of the Seller Disclosure Schedule, none of the Sellers or Purchased Subsidiaries, nor any of their ERISA Affiliates have incurred any material liability for any tax, excise tax, penalty or fee with respect to any Benefit Plan under Sections 412, 4971, 4977, 4978, 4979, 4980 or 4980B of the IRC or Sections 302 or 502 of ERISA which could result in any material Liability to Purchaser or any Purchased Subsidiary after the Closing, and no Lien on the Purchased Assets has arisen as a result of any material liability under such Sections.

(m) The parties acknowledge and agree that the representations and warranties of Sellers with respect to Transferred Benefit Plans contained in this Agreement or any certificate delivered by Sellers pursuant to this Agreement, including without limitation, the certificate required by Section 4.2(a)(iii) hereof, shall be limited to (i) as to such representations and warranties made as of the date of this Agreement, the Transferred Benefit Plans identified in Section 2.6 of the Seller Disclosure Schedule in the form delivered by Sellers on or prior to the date of this Agreement and (ii) as to such representations and warranties made as of the Closing Date, the Transferred Benefit Plans identified in Section 2.6 of the Sellers Disclosure Schedule as of the Closing Date. The parties further agree and acknowledge that Sellers may update Section 5.12 of the Seller Disclosure Schedule to reflect any additional disclosures that may be required thereunder as a result of Purchaser's designation of any Benefit Plans as Transferred Benefit Plans after the date of this Agreement in accordance with Section 2.6 and that no such updates shall be considered a breach of the representations and warranties contained in this Section 5.12 made as of the date of this Agreement.

(n) Section 5.12(n) of the Seller Disclosure Schedule lists all material non-U.S. government-sponsored employee benefit plans to which the Sellers and any Purchased Subsidiary are obligated to contribute (each a "**Government Sponsored Plan**"). The Sellers and the Purchased Subsidiaries have satisfied all contribution requirements with respect to such Government Sponsored Plans, if any.

Section 5.13 Licenses. Section 5.13 of the Seller Disclosure Schedule contains a true and correct list of all material Licenses that are held by Sellers and the Purchased Subsidiaries as of the date hereof and that are necessary for Sellers and the Purchased Subsidiaries to operate the Business in all material respects. All such Licenses are in full force and effect, as of the date hereof, and Sellers and the Purchased Subsidiaries are not, as of the date hereof, in default (or with the giving of notice or lapse of time or both, would be in default) under any such Licenses, except as would not reasonably be expected to have a Material Adverse Effect. There are no proceedings pending or, to the Knowledge of Sellers, threatened in writing that seek the revocation, cancellation, suspension or adverse modification of any such Licenses. All required filings with respect to such Licenses have been timely made and all required applications for renewal thereof have been timely filed except where the failure to make any such filing or application would not reasonably be expected to have a Material Adverse Effect.

Section 5.14 Restrictions on Business Activities. There is no Contract (non-compete or otherwise), commitment, judgment, injunction, order or decree binding upon any Seller or any Purchased Subsidiary or to which any Seller or any Purchased Subsidiary is a party, that by its terms prohibits or impairs any business practice of any Seller or any Purchased Subsidiary, any acquisition of property by any Seller or any Purchased Subsidiary or the conduct of the Business in any geographic region. Without limiting the foregoing, except as set forth in Section 5.14 of the Seller Disclosure Schedule, no Seller or



Purchased Subsidiary has entered into any Contract under which it is restricted from selling, licensing or otherwise distributing any of its products to or providing services to, customers or potential customers or any class of customers, in any geographic area, during any period of time or in any segment of the market.

Section 5.15 **[Reserved]**.

Section 5.16 **Insurance**. Section 5.16 of the Seller Disclosure Schedule sets forth all insurance policies with respect to the Purchased Assets other than any director and officer or similar insurance policies and any insurance policies of any Purchased Joint Ventures. All such policies are in full force and effect and Sellers and the Purchased Subsidiaries have complied with the terms thereof in all material respects.

Section 5.17 **Environmental Matters**. Except as set forth in Section 5.17 of the Seller Disclosure Schedule and except for any matter relating to an Excluded Asset or that is an Excluded Liability:

(a) Except as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect, there are no Actions pending against any Seller or Purchased Subsidiary relating to or arising out of an Environmental Law nor are any such Actions, to the Knowledge of Sellers, threatened against any Seller or Purchased Subsidiary, nor has any Seller or Purchased Subsidiary received any written notice, alleging or warning of a violation or noncompliance with any Environmental Law at or in relation to any Real Estate or any real property previously owned or operated by any Seller, Purchased Subsidiary or their corporate predecessors.

(b) Sellers and the Purchased Subsidiaries, respectively, (i) are and have been in compliance in all material respects with applicable Environmental Laws, and (ii) have obtained all Environmental Permits arising under Environmental Law that are necessary for the conduct of the Business in compliance in all materials respects with applicable Environmental Law.

(c) Seller has not Released Hazardous Substances in amounts, concentrations or conditions, and, to the Knowledge of Sellers, no Release or threatened Release of Hazardous Substances has occurred or is occurring, at, in or under or migrating from the Real Estate or any real property previously owned or operated by any Seller or Purchased Subsidiary or their respective corporate predecessors, in each case requiring notice, investigation or response action by any Seller or Purchased Subsidiary pursuant to applicable Environmental Law, except as would not, individually or in the aggregate, reasonably be expected to result in a material Environmental Liability forming the basis of an Action pursuant to any applicable Environmental Law.

(d) There are no Environmental Liabilities of any Seller or Purchased Subsidiary that would, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. None of Sellers or the Purchased Subsidiaries has owned, leased or operated a site, or, to the Knowledge of Sellers, disposed of, sent or arranged for the transportation of Hazardous Substances at or to a site, that (i) pursuant to CERCLA or any analogous state law, has been placed or is proposed to be placed by the United States Environmental Protection Agency or analogous state authority on the National Priorities List or analogous state list or (ii) has been or is involved in any government-sponsored voluntary cleanup program.

(e) None of Sellers or the Purchased Subsidiaries has by law or contract agreed to, assumed or retained any responsibility or liability relating to environmental, health or safety matters, including responsibility to indemnify for, defend against or retain any material Environmental Liability

under any lease, purchase agreement, sale agreement, joint venture agreement or other binding corporate or real estate document or agreement.

(f) Except to the extent not in Sellers' or the Purchased Subsidiaries' possession or control, Sellers and the Purchased Subsidiaries have identified and made available to Purchaser, true and correct copies of all significant environmental and health and safety audits or assessments, analyses of soil, groundwater, indoor and outdoor air, sediment, surface water and asbestos containing materials relating in whole or in part to Sellers and to the Purchased Subsidiaries, the Real Estate or the Business, and any material written communications received by any Seller or Purchased Subsidiary since January 1, 2007 from any Governmental Authorities relating in whole or in part to potential or alleged non-compliance with Environmental Laws or the existence of contamination by Hazardous Substances at any Real Estate or any real property previously owned or operated by any Sellers or the Purchased Subsidiaries or their corporate predecessors or the compliance of the owners, operators or lessees thereof with respect to any Environmental Law.

(g) To the Knowledge of Sellers, neither Sellers nor the Purchased Subsidiaries have received any written complaint, claim, citation, notice, summons or subpoena that alleges that any Seller, Purchased Subsidiary or the Business is liable for the presence or Release of Hazardous Substances resulting from the use of any product manufactured or sold by any Seller, Purchased Subsidiary or the Business prior to the Closing Date.

Section 5.18 **No Brokers.** Except as set forth in Section 5.18 of the Seller Disclosure Schedule no Person has acted, directly or indirectly, as a broker or financial advisor for Sellers or the Purchased Subsidiaries in connection with the transactions contemplated by this Agreement and no Person is entitled to any fee or commission or like payment in respect thereof.

Section 5.19 **Taxes.** Except as set forth in Section 5.19 of the Seller Disclosure Schedule:

(i) Each Seller and each Purchased Subsidiary has timely filed all Tax Returns with the appropriate Taxing Authority in accordance with all applicable Laws. All such Tax Returns are correct and complete in all material respects. All material Taxes owed or remittable by each Seller and each Purchased Subsidiary have been paid.

(ii) No Lien (other than Tax Liens contested in good faith) has been filed on or with respect to any Seller, any Purchased Asset or any asset of a Purchased Subsidiary as a result of failure to pay Taxes. To the Knowledge of Sellers, no investigation, audit, proceeding or other examination by any Taxing Authority is in progress, pending or threatened with respect to any Tax Return filed by, or Taxes relating to, any Seller, any Purchased Asset or any asset of a Purchased Subsidiary. No agreement, consent, clearance, or other Tax ruling or agreement has been executed or entered into relating to Taxes arising in connection with the ownership or operation of any Purchased Asset or any asset of any Purchased Subsidiary, including any IRS private letter rulings or comparable rulings of any Taxing Authority and closing agreements pursuant to Section 7121 of the IRC or any similar Law.

(iii) Each Seller and each Purchased Subsidiary has withheld and timely remitted all material Taxes required to have been withheld and remitted in connection with amounts paid or owing to any employee, independent contractor, creditor, stockholder, or other third party.

(iv) No Seller or Purchased Subsidiary has been notified in writing by any Taxing Authority that it intends to assess any additional Taxes against it for any period and there

are no pending adjustments by any Taxing Authority in connection with any Tax Return filed by any Seller or any Purchased Subsidiary. No dispute, Tax audit, or claim concerning any Tax Liability of any Seller or any Purchased Subsidiary has been proposed, threatened or claimed in writing by any Taxing Authority.

(v) No Seller or Purchased Subsidiary has waived any statute of limitations in respect of Taxes or agreed to any extension of time with respect to a Tax assessment or deficiency.

(vi) No Seller or Purchased Subsidiary has filed a consent pursuant to Section 341(f) of the IRC concerning collapsible corporations. No Seller or Purchased Subsidiary is a party to any Tax allocation, sharing, or similar arrangement or agreement (whether or not in writing). No Seller or Purchased Subsidiary has any liability for the Taxes of any other Person (other than liability arising as a result of any Sellers' status as a member of Foamex Inc.'s affiliated group filing a consolidated federal income Tax Return under Treasury Regulation Section 1.1502-6 (or any similar provision of state, local, or foreign Law)), as a transferee or successor, by Contract, or otherwise.

(vii) No Seller or Purchased Subsidiary is required to include in income any adjustment pursuant to Section 481(a) of the IRC (or similar provisions of other Law or regulations) in its current or in any future taxable period by reason of a change in accounting method; nor, to the Knowledge of Sellers, has the IRS (or other Taxing Authority) proposed or is considering proposing, any such change in accounting method. No Seller or Purchased Subsidiary is a party to any agreement, Contract, or arrangement that (individually or in the aggregate) could reasonably be expected to give rise to the payment of any amount (whether in cash or property, including stock or other equity interests) that would not be deductible pursuant to the terms of Sections 162(a)(1) or 162(n) of the IRC.

(viii) No Seller or Purchased Subsidiary has engaged in any reportable transaction as defined in the Treasury Regulations section 1.6011-4.

(ix) None of the Sellers or Purchased Subsidiaries has constituted a "distributing corporation" or a "controlled corporation" (within the meaning of Section 355(a)(1)(A) of the IRC) in connection with a distribution of stock intended to qualify for tax-free treatment under Section 355 of the IRC.

(x) Each of the Purchased Subsidiaries is, and has always been since the date of its formation, treated as a corporation for U.S. federal income Tax purposes.

(xi) Foamex Canada is not a non-resident of Canada for purposes of the Income Tax Act (Canada).

(xii) Except for the Purchased Assets sold by Foamex Canada hereunder, none of the Purchased Assets constitute "taxable Canadian property" for purposes of the Income Tax Act (Canada).

(xiii) Foamex Canada is registered under Part IX of the Excise Tax Act (Canada) and Chapter VIII of An Act Respecting Quebec Sales Tax with the following registration numbers: GST (104445846RT0001), QST (1003703033TQ0001).

Section 5.20 **Regulated Entities.** No Seller or Purchased Subsidiary is an "investment company" or a company "controlled" by an "investment company" within the meaning of the Investment Company Act of 1940. No Seller or Purchased Subsidiary is a "holding company" or a "subsidiary company" of a "holding company" or an "affiliate" of a "holding company" or a "public utility" within the meaning of the Public Utility Holding Company Act of 1935, or a regulated entity under the Federal Power Act, the Interstate Commerce Act, any state public utilities code or law, or any other federal or state statute or regulation limiting its ability to incur indebtedness.

Section 5.21 **No Other Representations.** Except as and to the extent set forth in this Agreement, Sellers do not make any representation or warranty whatsoever to Purchaser, and Sellers hereby disclaim all liability and responsibility for any representation, warranty, statement or information not included in this Agreement that was made, communicated or furnished (orally or in writing) to the Purchaser or any of its Affiliates or representatives.

## ARTICLE VI REPRESENTATIONS AND WARRANTIES OF PURCHASER

Purchaser represents and warrants to Sellers as of the date hereof that:

Section 6.1 **Corporate Existence and Qualification.** Purchaser (a) is a limited liability company duly formed, validly existing and in good standing under the laws of its jurisdiction of formation and has all requisite power and authority to carry on its business as it is now being conducted and (b) is duly qualified to conduct business and is in good standing in each other jurisdiction where its ownership or lease of property or the conduct of its business requires such qualification, except where the failure to be so qualified would not reasonably be expected to prevent, hinder or impair the ability of Purchaser to perform its obligations under this Agreement.

Section 6.2 **Corporate Power, Authorization, Enforceable Obligations.** The execution, delivery and performance by Purchaser of the Transaction Documents to which it is a party: (a) are within Purchaser's corporate power; (b) have been duly authorized by all necessary corporate action; (c) do not contravene any provision of its Fundamental Documents; and (d) do not violate any Law of any court or Governmental Authority. Each of the Transaction Documents shall be duly executed and delivered by Purchaser to the extent a party thereto and each such Transaction Document shall constitute a legal, valid and binding obligation of Purchaser enforceable against it in accordance with its terms, subject to (x) applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and other similar Laws relating to or affecting creditors' rights generally and (y) general principles of equity, regardless of whether enforcement is sought in a proceeding at law or in equity.

Section 6.3 **Consents and Approvals.** Except for any such requirements, the failure of which to be obtained or made would not reasonably be expected to prevent, impede or materially delay or otherwise affect in any material respect the Sale, and assuming the truth and correctness of the representations and warranties of Sellers set forth in Section 5.3(d) hereof, no Consent of any Governmental Authority or any third party is required to be made or obtained by Purchaser in connection with the execution, delivery, and performance by Purchaser of this Agreement or any of the other Transaction Documents to which Purchaser is a party, other than the filing of a premerger notification and report form by Purchaser under the HSR Act.

Section 6.4 **Financial Ability; Purchaser DIP Claim.**

(a) The Purchaser has, and on the Closing Date will have, sufficient cash on hand to allow Purchaser to perform all of its obligations under this Agreement, including payment of (i) the

Purchase Price and (ii) all fees and expenses to be paid by Purchaser related to the transactions contemplated by this Agreement.

(b) The DIP Lender owns, free and clear of all Liens, the Purchaser DIP Claim and shall assign the Purchaser DIP Claim to Sellers at the Closing pursuant to the DIP Claim Assignment Agreement.

Section 6.5 **Investment Intention.** Purchaser is acquiring the Equity Securities of Purchased Subsidiaries and Purchased Joint Ventures for its own account, for investment purposes only and not with a view to the distribution (as such term is used in Section 2(a)(11) of the Securities Act). Purchaser understands that the Equity Securities of Purchased Subsidiaries and Purchased Joint Ventures may not have been registered under the Securities Act and may not be sold unless subsequently registered under the Securities Act or an exemption from such registration is available.

Section 6.6 **No Brokers.** Except for Broadpoint Capital Inc. the fees, commissions, expenses or other payments for which Purchaser is solely responsible, no Person has acted, directly or indirectly, as a broker or financial advisor for Purchaser in connection with the transactions contemplated by this Agreement and no Person is entitled to any fee or commission or like payment in respect thereof.

Section 6.7 **No Plan Assets.** Purchaser is not a "benefit plan investor" and none of the assets of Purchaser include "plan assets" (as such terms are defined under Department of Labor Regulation Section 2510.3-101, as modified by Section 3(42) of ERISA).

Section 6.8 **Investigation by Purchaser.** Purchaser has conducted its own independent review and analysis of the Purchased Assets and the Assumed Liabilities and the Business and acknowledges that Seller has provided Purchaser and its Affiliates and representatives with access to the personnel, properties, premises and records of the Business for this purpose. In entering into this Agreement, Purchaser has relied solely upon its own investigation and analysis, and Purchaser (i) acknowledges that neither Sellers nor any Affiliates of Sellers or their respective Related Persons makes or has made any representation or warranty, either express or implied, as to the accuracy or completeness of any of the information provided or made available to Purchaser or its Affiliates or Related Persons, except for the representations and warranties contained in Article V hereof (which are subject to the limitations and restrictions contained in this Agreement); and (ii) agrees, to the fullest extent permitted by Law, that none of Sellers, Sellers' Affiliates or any of their respective Related Persons shall have any liability or responsibility whatsoever to Purchaser or its Affiliates or Related Persons on any basis (including, without limitation, in contract or tort, under federal or state securities Laws or otherwise) based upon any information provided or made available, or statements made, to Purchaser or its Affiliates or Related Persons (or any omissions therefrom).

Section 6.9 **Warranties Exclusive.** Purchaser acknowledges that the representations and warranties contained in Article V are the only representations or warranties given by Sellers and that all other express or implied representations and warranties are disclaimed. Without limiting the foregoing Purchaser acknowledges that neither Sellers nor their Affiliates or Related Persons have made any representation or warranty concerning (i) any use to which the Purchased Assets may be put, or (ii) any future revenues, costs, expenditures, cash flow, results of operations, collectability of accounts receivable, financial condition or prospects that may result from the ownership, use or sale of the Purchase Assets or the Assumption of the Assumed Liabilities.

Section 6.10 **Taxes.** Purchaser shall be registered under Part IX of the Excise Tax Act (Canada) and under Chapter VIII of An Act Respecting the Quebec Sales Tax and at or prior to the Closing shall deliver to Sellers the applicable GST and QST registration numbers.

**ARTICLE VII  
COVENANTS**

Section 7.1 **Conduct of Business Pending Closing.**

(a) Except as otherwise expressly contemplated by this Agreement, the other Transaction Documents or Section 7.1(a) of the Seller Disclosure Schedule or with the prior written consent of Purchaser, during the period from and after the date hereof until the earlier of termination of this Agreement or the Closing Date, Sellers shall use commercially reasonable efforts to, and shall cause the Purchased Subsidiaries to use commercially reasonable efforts to, conduct the Business in all material respects in the ordinary course of business, including meeting all postpetition obligations relating to the Business as they become due. Except as otherwise expressly contemplated by this Agreement or the other Transaction Documents or Section 7.1(a) of the Seller Disclosure Schedule, except as may be required in connection with or as a result of the Bankruptcy Case, or with the prior written consent of Purchaser, during the period from and after the date hereof until the earlier of termination of this Agreement or the Closing Date, Sellers shall, and shall cause the Purchased Subsidiaries to, (i) use reasonable efforts to preserve and maintain their relationships with their customers, suppliers, unions, partners in the Purchased Joint Ventures, lessors, licensors, licensees, contractors, distributors, agents, officers, and employees and other Persons with which they have significant business relationships material to the Business except in relation to the Contracts of the Business that are determined not to become Purchased Contracts in accordance with this Agreement; *provided* that nothing herein shall prevent Sellers from commencing or defending any Action against or by any such Person in connection with the claims of such Person in the Bankruptcy Case or in the Canadian Proceeding; (ii) use reasonable efforts to preserve and maintain the Purchased Assets, ordinary wear and tear excepted; (iii) use reasonable efforts to preserve the ongoing operations of the Business; (iv) maintain the Books and Records in all material respects in the ordinary course of business; (v) comply in all material respects with all applicable Laws (including Environmental Laws); (vi) not enter into any business, arrangement or otherwise take any action that would reasonably be expected to have a material adverse impact on the ability of Sellers, the Purchased Subsidiaries or Purchaser to obtain any approvals of any Governmental Authority for this Agreement and the transactions contemplated hereby; and (vii) not dispose of any Real Estate and, except in the ordinary course of business, not modify, amend or terminate any of the Leases.

(b) Without limiting the generality of the foregoing, except as otherwise expressly contemplated by this Agreement, the other Transaction Documents, Section 7.1(b) of the Seller Disclosure Schedule or with the prior written consent of Purchaser, during the period from and after the date hereof until the earlier of termination of this Agreement or the Closing Date, each of Sellers shall not, and shall cause each Purchased Subsidiary not to, do any of the following:

(i) with respect to the Equity Securities of Foamex Inc., declare, set aside or pay any dividends (payable in cash, stock, property or otherwise) on, or make any other distributions in respect of its capital stock;

(ii) issue, deliver, sell, pledge or otherwise encumber or subject to any Lien the Equity Securities of any Selling Subsidiary or Purchased Subsidiary;

(iii) amend their Fundamental Documents;

(iv) acquire or agree to acquire by merging or consolidating with, or by purchasing a substantial equity interest in or a substantial portion of the assets of, or by any other manner, any business of another Person;

(v) other than with respect to Permitted Liens, sell, assign, license, transfer, convey, lease or otherwise dispose of any Purchased Assets, other than sales of inventory in the ordinary course of business;

(vi) other than with respect to the DIP Financing, incur any Indebtedness for borrowed money;

(vii) pay, loan or advance any amount to, or sell, transfer or lease any properties or assets (real, personal or mixed, tangible or intangible) to, or purchase any properties or assets from, or enter into any Material Contract with any of Sellers' or Purchased Subsidiaries' executive officers or directors (or immediate family members thereof), other than payment of compensation and benefits in the ordinary course of business;

(viii) other than in accordance with Section 2.5 hereof, assume or reject or amend, restate, supplement, modify, waive or terminate any Material Contract, material Permit or unexpired Lease or enter into any settlement of any claim that (i) is outside the ordinary course of business, (ii) delays the Closing, (iii) relates to a Material Contract or (iv) subjects any Seller or any Purchased Subsidiary to any material non-compete or other similar material restriction on the conduct of its Business that would be binding following the Closing;

(ix) adopt or change any method of accounting (except as required by changes in GAAP or Mexican GAAP), make, change or revoke any Tax election, change any annual Tax accounting period, file any amended Tax Return, enter into any closing agreement, settle any Tax claim or assessment, surrender any right to claim a Tax refund, consent to the extension or waiver of the limitations period applicable to any Tax claim or assessment, or take or omit to take any other action if such action or omission would have a material effect on any Seller, Purchased Subsidiary, Purchased Joint Venture or in the Sellers' reasonable belief, Purchaser, except as required by Law;

(x) with respect to Transferred Employees, except as may be required by applicable Laws or any Contract or Benefit Plan, (i) grant any material increase or acceleration in compensation or benefits, except in the ordinary course of business; (ii) grant any material increase in severance or termination pay (including the acceleration in the exercisability of any options or in the vesting of shares of common stock (or other property)); (iii) enter into any material employment, deferred compensation, severance or termination agreement with or for the benefit of any such Transferred Employee; (iv) pay or provide to any Transferred Employee any benefit not provided for under a Benefit Plan as in effect on the date hereof to which such Transferred Employee is a beneficiary of as of the date hereof, other than the payment of base compensation, pay in lieu of notice or severance (but only to the extent that such severance is (x) paid after reasonable notice to Purchaser and (y) not otherwise prohibited by this Agreement) in each case, in the ordinary course of business; (v) establish, adopt, enter into, terminate or amend any collective bargaining agreement or other labor union contract or Transferred Benefit Plan (except as required by Law or except as may be expressly required or allowed by the terms of this Agreement); or (vi) take any action to accelerate or dilute any material rights or benefits, including vesting and payment, under any collective bargaining agreement or Transferred Benefit Plan;

(xi) acquire any additional Equity Securities of Foamex Shanghai Laminated Material Co., Ltd. including pursuant to that certain Share Transfer Agreement between Shanghai Luwan Industry Investment Co., Ltd. and Foamex previously provided to Purchaser; or

(xii) agree to take any of the foregoing actions.

Section 7.2 **Access to Information.** Until the Closing Date, Sellers shall, and shall cause each Purchased Subsidiary to, (i) afford to the officers, employees, attorneys, financial advisors, financing sources, Affiliates and other representatives of Purchaser (collectively, the "Purchaser Advisors"), reasonable access during normal business hours and upon reasonable advance notice to the Purchased Assets and Sellers' and Purchased Subsidiaries' properties, respectively, (including access to existing environmental reports), Books and Records and Contracts; (ii) make available to the Purchaser Advisors copies of all such Contracts, Books and Records and other existing documents and data as the Purchaser Advisors may reasonably request, including any financial data filed with the Bankruptcy Court or otherwise provided to any lender under any Indebtedness of the Sellers and the Purchased Subsidiaries; and (iii) make available to the Purchaser Advisors during normal business hours and upon reasonable advance notice the appropriate management personnel of Sellers (and shall use commercially reasonable efforts to cause their attorneys, accountants and other professionals to be made available) for discussion of the Business and each Purchased Subsidiary's business, properties, the Purchased Assets, the Assumed Liabilities and personnel as Purchaser may reasonably request, in each case so long as such access does not unreasonably interfere with the operations of the Sellers and the Purchased Subsidiaries; provided, however, that nothing in this Section 7.2 or otherwise shall require Sellers or the Purchased Subsidiaries to furnish to the Purchaser Advisors any confidential materials prepared by Sellers' or the Purchased Subsidiaries' financial advisors or legal advisors or any materials to the extent that the disclosure thereof would result in the loss of attorney-client privilege or would result in a violation of Law or breach of an agreement or other obligation.

Section 7.3 **Consents.** Sellers shall use commercially reasonable efforts to, and shall cause each Purchased Subsidiary to use commercially reasonable efforts to, cooperate with Purchaser to solicit and obtain all Consents, waivers, approvals, authorizations or orders required for the consummation of transactions contemplated by this Agreement and the other Transaction Documents, including with respect to any Contracts designated to be Purchased Contracts in accordance with Section 2.5 hereof.

Section 7.4 **[Reserved].**

Section 7.5 **Further Assurances.** At any time and from time to time after the date hereof, Sellers and Purchaser agree to use their respective reasonable efforts to cooperate with each other and (a) at the reasonable request of the other party, execute and deliver any instruments or documents and (b) take, or cause to be taken, all such further action as the other party may reasonably request in order to evidence or effectuate the consummation of the transactions contemplated hereby and to otherwise carry out the intent of the parties hereunder.

Section 7.6 **Bankruptcy Covenants.**

(a) **Approval of Break-Up Fee and Reimbursable Expenses.** Sellers acknowledge and agree that Purchaser has expended considerable time and expense in connection with this Agreement and the negotiation thereof and the identification and quantification of assets of Sellers and the Purchased Subsidiaries. In consideration therefor, Sellers shall file with and seek the approval of the Bankruptcy Court of the Approval Motion, including the Break-Up Fee and Reimbursable Expenses, and the entry by the Bankruptcy Court of the Approval Order approving the payment of the Break-Up Fee and the Reimbursable Expenses in accordance with Section 10.2 hereof and deeming the Break-Up Fee and the Reimbursable Expenses as administrative priority expenses under sections 503(b) and 507(a)(1) of the Bankruptcy Code and obtaining the Approval Recognition Order.



(b) Bidding Procedures. Not later than the date that is one (1) Business Day following the date hereof, Sellers shall file a motion seeking entry of the Approval Order with the Bankruptcy Court (the "**Approval Motion**"). Sellers shall use commercially reasonable efforts to obtain entry by the Bankruptcy Court of the Approval Order (with such changes thereto as Purchaser shall approve or request in its reasonable discretion) within twenty (20) days after the date hereof. Sellers shall comply with all of the terms and conditions contained in the Bidding Procedures, including the occurrence of the events by the dates and times listed therein which are expressly incorporated by reference herein as if set forth at length.

(c) Non-Solicitation.

(i) From the time of execution and delivery by each Seller and Purchaser of this Agreement until the Bankruptcy Court's entry of the Approval Order (the "**Non-Solicitation Period**"), Sellers shall not, and shall cause each of the Purchased Subsidiaries not to, nor shall they authorize or permit any of their respective controlled Affiliates to, nor shall they authorize or permit any officer, director, manager or employee of, or any investment banker, attorney or other advisor, agent or representative of, Sellers or any of their respective controlled Affiliates (each of the foregoing, collectively the "**Seller Representatives**") to directly or indirectly solicit or otherwise encourage any Person with respect to any inquiries or the submission of an Alternative Transaction or Restructuring Transaction or engage in any negotiations concerning the terms of an Alternative Transaction or Restructuring Transaction or provide any information or data to, or have any discussions with any Person relating to an Alternative Transaction or Restructuring Transaction, or otherwise facilitate any effort or attempt to make or implement an Alternative Transaction or Restructuring Transaction or enter into any agreement or understanding with any other Person with the intent to effect an Alternative Transaction or Restructuring Transaction; *provided* that Sellers and the Seller Representatives shall be authorized and permitted to (x) provide and continue to provide information or data to those Persons that, as of the date hereof, have already expressed, or during the Non-Solicitation Period express, interest to Sellers or the Seller Representatives that such Person is interested in potentially proposing an Alternative Transaction or Restructuring Transaction and (y) execute confidentiality agreements with such interested Persons; *provided further* that during the Non-Solicitation Period, Sellers and the Seller Representatives shall not be authorized or permitted to engage in any negotiations concerning the terms of an Alternative Transaction or Restructuring Transaction with any such Person. Sellers shall not, and shall not authorize any Purchased Subsidiary to, execute any definitive documents (other than confidentiality agreements) relating to any Alternative Transaction or Restructuring Transaction during the Non-Solicitation Period.

(ii) Following the Non-Solicitation Period, Sellers and Seller Representatives shall not be subject to any restrictions with respect to the solicitation or encouragement of any entity concerning an Alternative Transaction or Restructuring Transaction in accordance with the Bidding Procedures; *provided, however*, that within forty-eight (48) hours after Sellers' receipt of any written offer for an Alternative Transaction or any Restructuring Transaction, Sellers must deliver to Purchaser by email transmission, facsimile transmission or same day courier service true and complete copies of all documents related to any such offer.

(d) Bankruptcy Court Approval.

(i) Sellers shall use commercially reasonable efforts to serve a copy to the applicable Taxing Authority of the Approval Motion (along with a copy of the proposed Sale Order and Approval Order) in each jurisdiction where the Purchased Assets are subject to Tax at least twenty-five (25) days prior to the Sale Hearing.

(ii) Sellers shall use commercially reasonable efforts to obtain entry by the Bankruptcy Court of the Sale Order no later than sixty (60) days after the date hereof.

(iii) Sellers shall use commercially reasonable efforts to obtain entry by the Canadian Court of the Sale Order Approval Order no later than seven (7) days after the date of entry of the Sale Order.

(iv) If the Approval Order or Sale Order or any other orders of the Bankruptcy Court relating to this Agreement shall be appealed by any party (or a petition for certiorari or motion for reconsideration, amendment, clarification, modification, vacation, stay, rehearing or reargument shall be filed with respect to any such order), Sellers shall diligently defend against such appeal, petition or motion and shall use their commercially reasonable efforts to obtain an expedited resolution of any such appeal, petition or motion; *provided* that Sellers consult with Purchaser at Purchaser's reasonable request regarding the status of any such proceedings or Actions.

(v) Sellers shall use commercially reasonable efforts to consult with Purchaser and its representatives upon Purchaser's reasonable request concerning the Approval Order, the Sale Order, the Approval Order Recognition Order and the Sale Order Recognition Order, any other orders of the Bankruptcy Court or the Canadian Court, and the bankruptcy proceedings in connection therewith and provide Purchaser with copies of requested applications, pleadings, notices, proposed orders and other documents relating to such proceedings as soon as reasonably practicable prior to any submission thereof to the Bankruptcy Court and the Canadian Court, as applicable. Sellers further covenant and agree that, after the Closing, the terms of any reorganization plan it submits to the Bankruptcy Court or Canadian Court for confirmation or sanction shall not conflict with, supersede, abrogate, nullify or restrict the terms of this Agreement, or in any way prevent or interfere with the consummation or performance of the transactions contemplated by this Agreement, including, without limitation, any transaction contemplated by or approved pursuant to the Approval Order, the Sale Order, the Approval Order Recognition Order or the Sale Order Recognition Order.

#### Section 7.7 Employment.

(a) Purchaser will offer employment to, or where required to under applicable Law, continue the employment of, all employees of the Sellers listed in Section 7.7(a) of the Seller Disclosure Schedule ("**Offered Employees**") and who are available to work immediately prior to and subsequent to the Closing Date (or who are on temporary leave), on terms substantially similar to those in effect for such Offered Employees immediately prior to the Closing Date; *provided* that Purchaser shall be under no obligation to assume, create or make payments to any defined benefit pension plans other than the Transferred Benefit Plans (except as may be required by applicable Laws, this Agreement or any Collective Bargaining Agreement). Purchaser intends that Section 7.7(a) of the Seller Disclosure Schedule shall contain substantially all of the employees of Sellers; *provided* that, such Section of the Seller Disclosure Schedule shall also contain all of the employees of Sellers employed in the Province of Quebec. Any such offer of employment (or confirmation of employment where required by applicable Law) shall be made in writing by Purchaser on or before the Closing Date and Sellers shall assist with the distribution of offers to Offered Employees in any manner that Purchaser shall reasonably request. All Offered Employees who accept such offer from, or continue their employment with, Purchaser are referred to herein as the "**Transferred Employees**" or in the case of Transferred Employees who are on temporary leave of absence, including pregnancy leave, parental leave, family medical leave, military leave, workers' compensation, temporary disability or sick leave, as soon as they are removed from such pregnancy leave, parental leave, family medical leave, military leave, workers' compensation, temporary

disability or sick leave or return from leave, *provided* that such removal or return occurs within two years after the Closing Date or such longer period as may be required by applicable Laws. Sellers shall terminate any Transferred Employee effective as of the Closing, except for such Transferred Employees whose employment is continued by effect of applicable Law. After the Closing Date, subject to applicable Laws, the Transferred Benefit Plans or applicable Purchased Contracts, Purchaser shall have the right to dismiss any or all Transferred Employees at any time, with or without cause, and to change the terms and conditions of their employment (including compensation and employee benefits provided to them) provided that Purchaser assumes all liabilities and obligations that could be owed to the Transferred Employees in connection with any such termination of employment or change in terms and conditions of employment including under the WARN Act or any Collective Bargaining Agreement assumed by Purchaser. Notwithstanding any of the foregoing, those Offered Employees who are covered by a Collective Bargaining Agreement which is assumed by Purchaser as described under this Section 7.7 will be governed by the terms of such assumed Collective Bargaining Agreement, subject to any modifications of benefits as referenced in this Section 7.7; *provided* that, and notwithstanding any of the foregoing, if any Transferred Employees were covered immediately prior to the Closing Date by a Collective Bargaining Agreement which is not assumed by Purchaser as described under this Section 7.7, Purchaser shall retain the right, at its sole discretion, to set the initial terms of employment of such Transferred Employees subject to and in accordance with applicable Laws.

(b) To the extent permitted by applicable Law and to the extent that Sellers have any personnel to do so, from time to time following the Closing, Sellers shall make available to Purchaser such non-confidential data in personnel records of Transferred Employees as is reasonably necessary for Purchaser to transition such Transferred Employees into Purchaser's records.

(c) Purchaser shall assume all accrued, but unused, vacation of Transferred Employees as an Assumed Liability. To the extent that service is relevant for purposes of eligibility and vesting (and, in order to calculate the amount of any vacation, sick days, severance, layoff and similar benefits) under any benefit plan of Purchaser or its Affiliates or where required to by applicable Law, Purchaser shall credit (or cause to be credited) Transferred Employees for service earned prior to the Closing with Sellers or any of their respective predecessors in addition to service earned with Purchaser on and after the Closing.

(d) To the extent the Transferred Employees and their dependents enroll in any welfare benefit plan sponsored by Purchaser or its Affiliates, Purchaser shall use reasonable best efforts to waive, or cause such waiver of, any preexisting condition limitation applicable to such Transferred Employees to the extent that the Transferred Employee's or dependent's condition would not have operated as a preexisting condition under the applicable welfare benefit plan maintained by Sellers. In addition, Purchaser shall use reasonable best efforts to, or cause any applicable subsidiary or Affiliate to (i) waive all waiting periods otherwise applicable to the Transferred Employees and their dependents, other than waiting periods that are in effect with respect to such individuals as of the Closing to the extent not satisfied under the corresponding benefit plans of Sellers and (ii) provide each Transferred Employee and his or her dependents with corresponding credit for any co-payments and deductibles paid by them under the corresponding Benefit Plans during the portion of the respective plan year prior to the Closing.

(e) To the extent Sellers' 401(k) plan/tax-qualified "cash or deferred arrangement" is not a Transferred Benefit Plan, following the Closing and pursuant to Section 401(a)(31)(D) of the IRC, Purchaser shall permit its tax-qualified defined contribution plan to accept rollover contributions of "eligible rollover distributions" (within the meaning of Section 401(a)(31) of the IRC) in cash in an amount up to the full account balance distributed to a Transferred Employee from Sellers' tax-qualified defined contribution plan. For purpose of this Section 7.7(e), the term "eligible rollover distribution" shall include (i) the amount of any unpaid balance of any loan made to a Transferred Employee under

Sellers' tax-qualified defined contribution plan and (ii) the promissory note evidencing such loan. Notwithstanding anything in this Agreement to the contrary, in the event of a breach of Section 5.12(b)(ii), Purchaser shall not be required to accept eligible rollover distributions (or purported eligible rollover distributions) from any of the Sellers' 401(k) plans/tax-qualified "cash or deferred arrangements," and as such, Purchaser shall not be deemed to be in breach of Section 7.7(e) hereof for failing to accept such rollover distributions.

(f) Purchaser shall be responsible for satisfying obligations under Section 601 *et seq.* of ERISA and Section 4980B of the IRC, to provide continuation coverage to or with respect to any Transferred Employee (and eligible dependents) with respect to any "qualifying event" which occurs after the Closing, and for any Employee with respect to the Purchased Assets (or such spouse or dependent of any Transferred Employee) who is an "M&A qualified beneficiary," as determined pursuant to Treasury Regulation 54.4980B-9, Q&A 4 *et seq.* or such other applicable Laws. With respect to each such "M&A qualified beneficiary" Sellers shall: (1) provide written notice to Purchaser within ten (10) days prior to date of termination of each of Sellers' group health plans of which any such "M&A qualified beneficiary" is eligible to receive continuation coverage under Section 601 *et seq.* of ERISA and Section 4980B of the IRC, and (2) provide such other information related to the "M&A qualified beneficiaries" within five (5) days of a request from Purchaser to enable Purchaser to properly satisfy any notification requirements with respect to these individuals.

(g) All provisions contained in this Agreement with respect to employee benefit plans or compensation of Transferred Employees are included for the sole benefit of the respective parties hereto. Nothing contained herein (a) shall confer upon any former, current or future employee of Sellers, Purchased Subsidiaries or Purchaser or any legal representative or beneficiary thereof any rights or remedies, including, without limitation, any right to employment or continued employment, of any nature, for any specified period, (b) shall cause the employment status of any former, present or future employee of Purchaser to be other than terminable at will or (c) shall confer any third party beneficiary rights upon any Transferred Employee or any dependent or beneficiary thereof or any heirs or assigns thereof.

(h) **[Reserved]**

(i) Any Liability or obligation that Sellers may incur with respect to severance benefits, OSHA exposure or termination of employees of Sellers occurring on or prior to the Closing Date will be an Excluded Liability, except as provided by applicable Laws or this Agreement.

(j) Except as contemplated by Section 7.7(f) hereof and except with respect to Transferred Benefit Plans and any Assumed Liabilities, Purchaser will not be liable for any post-retirement welfare benefits required to be provided with respect to service performed for Sellers or their Affiliates or any of their Affiliates prior to the Closing Date with respect to: (i) all Transferred Employees, (ii) all employees of Sellers or their Affiliates who do not become Transferred Employees and (iii) all former employees of the Sellers or their Affiliates and, in each case, all of their eligible dependents.

(k) Subject to agreement by each of the unions that are parties to the Collective Bargaining Agreements, and subject to the provisions of Section 7.7(l), Purchaser or its Affiliate may assume and continue in full force and effect the Collective Bargaining Agreements effective as of the Closing Date; *provided, however*, that no Benefit Plans, other than Transferred Benefit Plans, shall be assumed. Purchaser or its Affiliate may substitute insurance carriers or providers to administer and/or deliver the benefits to Transferred Employees who are covered by the Collective Bargaining Agreements, *provided* that those benefits are substantially comparable in the aggregate to those benefits that would have been required under the Collective Bargaining Agreements. Purchaser or its Affiliate continuing the

Collective Bargaining Agreements will have sole responsibility for all obligations and liabilities arising under the assumed Collective Bargaining Agreements, save and except for the Benefit Plans that Purchaser is not assuming.

(l) Prior to the Closing Date, Sellers will use commercially reasonable efforts to obtain from each union that is a party to a Collective Bargaining Agreement the union's written acknowledgement, understanding and agreement, in form and substance reasonably acceptable to Purchaser, that if Sellers sell their assets as contemplated by this Agreement and Purchaser assumes such Collective Bargaining Agreement, such Collective Bargaining Agreement may be amended such that Purchaser or its Affiliate, at its respective election, may substitute its own benefits for the existing benefits provided under such Collective Bargaining Agreement, including providing a defined contribution plan rather than a defined benefit pension plan, if applicable; *provided* that those benefits are substantially comparable in the aggregate to those which exist under such Collective Bargaining Agreement as of the date hereof, except that Purchaser or its Affiliate may provide a defined contribution plan rather than a defined benefit pension plan, if applicable. With respect to any Collective Bargaining Agreement, if no such written acknowledgment or understanding is obtained, unless otherwise notified by Purchaser, such Collective Bargaining Agreement shall not be a Purchased Contract and Purchaser will retain its lawful right to set the initial terms of employment of those Transferred Employees who were covered by such Collective Bargaining Agreement immediately prior to the Closing Date.

(m) No provision of this Section 7.7 will create any third party beneficiary or other rights in any employee or former employee (including any beneficiary, dependent or alternate payee thereof) of Sellers or any of its Affiliates in respect of continued employment (or resumed employment) with either Purchaser or any of its Affiliates and no provision of this Section 7.7 will create any such rights to any such Persons in respect of any benefits that may be provided, directly or indirectly, under any Benefit Plan, or any plan or arrangement which may be established by Purchaser or any of its Affiliates.

(n) At any time and from time to time after the date hereof, Purchaser shall take, or cause to be taken, any and all actions necessary to effectuate the foregoing as set forth in this Section 7.7, including, without limitation, taking all action necessary to assume and adopt each Transferred Benefit Plan effective as of the Closing. Sellers will reasonably cooperate with Purchaser and take, or cause to be taken, all reasonable actions as the Purchaser may reasonably request in order to effectuate the foregoing.

(o) To the extent that the Mexican Assets are purchased pursuant to the Mexican APA, the Mexican APA shall designate which employees of the Purchased Subsidiaries shall be hired by the purchaser of the Mexican Assets and which Liabilities of the Purchased Subsidiaries, including employee benefit plans, shall be assumed by the purchaser of the Mexican Assets. The Mexican APA shall also designate which Mexican Collective Bargaining Agreements, if any, shall be assumed by Purchaser in connection with the Mexican APA, and the extent of any such assumption.

Section 7.8 [Reserved].

Section 7.9 [Reserved].

Section 7.10 Mexican APA Assets.

(a) Purchaser and Sellers shall, and Sellers shall cause the Purchased Subsidiaries to negotiate in good faith and enter into one or more separate asset purchase agreements (the "**Mexican APA**") with respect to the Sellers' assets, including those of the Purchased Subsidiaries, located in Mexico (the "**Mexican Assets**") and any reasonably required Real Estate transfer documents, pursuant to which,

among other things, the Purchased Subsidiaries shall assign, to the extent permitted under Mexican law, all Consents required by the Mexican Governmental Authorities to operate the business of the Purchased Subsidiaries and assign all Contracts to which the Purchased Subsidiaries are a party (together with the Mexican APA, the "**Mexican Transfer Documents**") on terms and conditions reasonably satisfactory to Purchaser and Sellers. If the necessary Consents with respect to the transfer and operation of the Mexican Assets to Purchaser pursuant to the Mexican Transfer Documents cannot, in the opinion of Purchaser, be obtained or assigned, as the case may be, on or prior to the Closing Date, or the Contracts cannot, in the opinion of Purchaser, be assigned as of the Closing Date, so long as all other conditions in Article IX are satisfied or anticipated to be satisfied at the Closing, (i) Purchaser and Sellers shall negotiate in good faith a service agreement (the "**Mexican Service Agreement**"), effective as of the Closing Date, pursuant to which, until the Consents necessary to operate the Mexican Assets and to effectuate the transfer of the Mexican Assets to Purchaser are obtained, and the Contracts are assigned, the Purchased Subsidiaries shall provide, or cause to be provided, services to Purchaser such that Purchaser shall receive the same benefits, and be no materially worse off with respect to the Mexican Assets, as if the Mexican Assets had been transferred to Purchaser at the Closing pursuant to the Mexican Transfer Documents; and (ii) the Purchased Subsidiaries shall grant to the individuals appointed by Purchaser, the necessary powers of attorney and assistance in order to transfer and/or assign the Consents and Contracts.

(b) Notwithstanding the foregoing, if Sellers and Purchaser agree, including without limitation, on the specific steps that must be taken to implement such transfer, instead of entering into the Mexican Transfer Documents, at the Closing Sellers shall transfer to Purchaser the Equity Securities of the Purchased Subsidiaries pursuant to this Agreement.

(c) The amount of the Purchase Price allocated for Mexican Tax purposes to the Mexican Assets or the Equity Securities of the Purchased Subsidiaries, as the case may be, will be determined in accordance with Mexican GAAP and Mexican valuation procedures.

Section 7.11 **HSR Act Filings; Reasonable Efforts; Notification.**

(a) Purchaser and each Seller shall (i) promptly make or cause to be made the filings required of such party or any of its respective Subsidiaries under the HSR Act with respect to the transactions contemplated by this Agreement, (ii) comply at the earliest practicable date with any request under the HSR Act for additional information, documents, or other material received by such party or any of its respective Subsidiaries from the Federal Trade Commission or the Department of Justice or any other Governmental Authority in respect of such filings or such transactions and (iii) cooperate with the other party in connection with any such filing, and in connection with resolving any investigation or other inquiry of any such agency or other Governmental Authority under the HSR Act, the Sherman Act, as amended, the Clayton Act, as amended, the Federal Trade Commission Act, as amended, and any other federal or state statutes, rules, regulations, orders or decrees that are designed to prohibit, restrict or regulate actions having the purpose or effect of monopolization or restraint of trade with respect to any such filing or any such transaction. Purchaser and each Seller shall promptly inform each other of any communication with, and any proposed understanding, undertaking, or agreement with, any Governmental Authority regarding any such filings or any such transaction. Neither Purchaser nor any Seller shall participate in any meeting with any Governmental Authority in respect of any such filings, investigation, or other inquiry without giving each other notice of the meeting and, to the extent permitted by such Governmental Authority, the opportunity to attend and participate.

(b) Purchaser and each Seller shall use all reasonable efforts to take such action as may be required to cause the expiration of the notice periods under the HSR Act or any state statutes, rules, regulations, orders or decrees that are designed to prohibit, restrict or regulate actions having the

purpose or effect of monopolization or restraint of trade with respect to the transactions contemplated hereby as promptly as possible after the execution of this Agreement.

(c) Subject to the fiduciary duties of the boards of directors (or similar governing bodies) of the Sellers, Purchaser and each Seller agree to use all reasonable efforts to take, or cause to be taken, all actions, and to do, or cause to be done, and to assist and cooperate with the each other in doing, all things necessary, proper or advisable to consummate and make effective, in the most expeditious manner practicable the Sale and the other transactions contemplated by this Agreement, including (i) the obtaining of all other necessary actions or nonactions, waivers, consents and approvals from Governmental Authorities and the making of all other necessary registrations and filings (including other filings with Governmental Authorities, if any), (ii) the obtaining of all necessary consents, approvals or waivers from third parties and (iii) the execution and delivery of any additional instruments necessary to consummate the transactions contemplated by, and to fully carry out the purposes of, this Agreement.

(d) Notwithstanding anything to the contrary in Section 7.11(a), (b) or (c) (i) neither Purchaser nor any of its Subsidiaries shall be required to divest, or cause or permit the Sellers or their respective Subsidiaries or Affiliates to divest, any of their respective businesses, product lines or assets, or to take or agree to take any other action or agree to any limitation that could reasonably be expected to have a Material Adverse Effect on the value, condition (financial or otherwise), prospects, business or results of operations or prospects of Purchaser and its Subsidiaries taken as a whole or of the Sellers and their respective Subsidiaries taken as a whole, or all such entities taken together, (ii) Purchaser shall not be required to waive any of the conditions to the Sale set forth in Sections 9.1 or 9.2 and (iii) if the Federal Trade Commission or the Department of Justice or any other Governmental Authority issues a "second request" for information under the HSR Act, Sellers may terminate this Agreement in accordance with Section 10.1(c).

(e) If required pursuant to applicable provisions of the Federal Antitrust Law of Mexico (*Ley Federal de Competencia Económica*) and its Regulations, a notice of this Agreement and of the Mexican APA shall be filed with the Mexican Federal Antitrust Commission (*Comisión Federal de Competencia Económica*) prior to the Closing.

**Section 7.12 Termination of Tax Sharing Agreements.** Any Tax sharing agreement, contract or similar arrangement, including any Seller, Purchased Joint Venture or Purchased Subsidiary, on one hand, and any other Seller, Purchased Joint Venture, Purchased Subsidiary or other Person, on the other hand, shall be terminated as of the Closing Date and shall have no further effect with respect to any taxable year.

**Section 7.13 Use of Name.** Each Seller agrees, and agrees to cause each of its Affiliates, as of, and after, the Closing, to (i) amend their respective certificates of incorporation or other appropriate documents which are required to change their respective corporate name to a new name that is, in Purchaser's judgment, sufficiently dissimilar to their respective present name so as to avoid confusion and make their respect similar name available to Purchaser and (ii) not use the name "Foamex" or any name confusingly similar thereto for any purpose, *provided, however,* that Purchaser hereby grants Sellers, effective as of the Closing, a royalty-free, non-exclusive, non-assignable authorization to use the term "Foamex" in connection with the Bankruptcy Case, the Canadian Proceedings or in any other legal case or proceeding in which any Seller is a party and for the purpose of winding up the Sellers and their estates until such time as the Sellers are wound up and dissolved. The term of such authorization shall be a period one (1) year from the Closing Date, *provided* that with the consent of Purchaser (not to be unreasonably withheld or delayed) such term shall be extended for one (1) additional year.

Section 7.14 **Letters of Credit.** At the Closing, Purchaser shall either replace the Letters of Credit with new letters of credit or provide to the issuer of such Letters of Credit such credit support as may be required pursuant to the terms of the DIP Credit Agreement and/or related agreements and documents or as may otherwise be agreed by Purchaser and such issuer ("**Credit Support**"). If all Letters of Credit are so replaced, the Letters of Credit Amount shall be zero. At the Closing, Sellers shall apply the Letters of Credit Amount that is paid by Purchaser to Sellers as part of the Estimated Cash Purchase Price as directed by Purchaser to provide credit support for any Letters of Credit that are not so replaced and for which Credit Support is required.

## **ARTICLE VIII TAX MATTERS**

Section 8.1 **Transaction Taxes.** Any sales, use, value added, goods and services, gross receipts, stamp, duty, stamp duty, transfer, documentary, registration, business and occupation and other similar Taxes imposed by any Governmental Authority with respect to the transactions contemplated by this Agreement ("Transaction Taxes") that are not eliminated through the application of section 1146(a) of the Bankruptcy Code shall be paid by Purchaser and Purchaser shall file any Tax Return that must be filed in connection with any Transaction Taxes, where applicable. Purchaser shall be responsible for (i) administering the payment of such Transaction Taxes; and (ii) defending or pursuing any proceedings related thereto.

Section 8.2 **Tax Characterization.** In accordance with IRS Revenue Ruling 99-6, I.R.B. 1999-6, the Purchaser and Sellers agree to report the purchase and sale of all of the outstanding equity of any Purchased Joint Venture as a sale by the selling members or partners of each Purchased Joint Ventures' Equity Securities and an acquisition by the Purchaser of the assets of each Purchased Joint Venture, subject to solely the Liabilities assumed in Section 2.3 of this Agreement, in exchange for a portion of the Final Purchase Price. The allocation of the Final Purchase Price in respect to the assets of each Purchased Joint Venture will be in accordance with Section 3.5 of this Agreement.

Section 8.3 **Purchased Joint Ventures and Purchased Subsidiaries Taxes and Tax Returns.** Sellers shall prepare or cause to be prepared and timely file all Tax Returns of any Purchased Subsidiary that are due (taking into account timely extensions) on or before the Closing Date. Purchaser shall prepare or cause to be prepared all Tax Returns for the Purchased Subsidiaries for all periods ending on or prior to the Closing Date which are filed after the Closing Date. The taxable year of any Purchased Subsidiary that includes the Closing Date shall be treated as closing on (and including) the Closing Date for Income Tax purposes or, if not permitted for Income Tax purposes, for purposes of this Agreement. The Taxes attributable to the pre-Closing period shall include (i) all Income Taxes that would be payable by Purchased Joint Ventures or Purchased Subsidiaries for pre-Closing periods determined as if the entities' taxable period or year ended on (and included) the Closing Date; and (ii) the portion of the Taxes other than Income Taxes of any Purchased Subsidiary and Purchased Joint Venture for a pre-Closing period including any Pre-Closing Straddle Period Taxes.

Section 8.4 **Straddle Period Returns.** Any Straddle Period Tax Return with respect to any Purchased Asset shall be prepared and filed by Purchaser. The Taxes attributable to the pre-Closing period shall include the Pre-Closing Straddle Period Taxes on such Tax Returns.

Section 8.5 **Cooperation on Tax Returns and Tax Proceedings.** Purchaser and Sellers shall cooperate fully as and to the extent reasonably requested by the other party, in connection with the filing of Tax Returns and any audit, litigation or other proceeding with respect to Taxes (each a "Tax Proceeding") imposed on or with respect to the Purchased Assets, any Purchased Joint Venture or any Purchased Subsidiary. Such cooperation shall include the retention and (upon the other party's request)



the provision of records and information which are reasonably relevant to any such Tax Return or Tax Proceeding and making employees available on a mutually convenient basis to provide additional information and explanation of any material provided hereunder. Sellers' obligations under this Section 8.5 shall terminate on the date that is ninety (90) days after the Closing Date.

## ARTICLE IX CONDITIONS

Section 9.1 **Conditions to Each Party's Obligations.** The respective obligations of Purchaser and Sellers to consummate the Sale shall be subject to the satisfaction at or prior to the Closing of each of the following conditions unless waived, to the extent permitted by applicable Law, by both Sellers and Purchaser in writing:

(a) **No Injunctions or Restraints.** No temporary restraining order, preliminary or permanent injunction or other order issued by any Governmental Authority preventing consummation of the Sale shall be in effect. No Law shall be in effect which prohibits the transactions contemplated by the Sale.

(b) **Continuing Effectiveness.** This Agreement shall continue to remain in full force and effect.

(c) **Closing Escrow Agreement.** The Closing Escrow Agreement shall be fully and duly executed by Purchaser, each Seller and the Escrow Agent.

(d) **Final Order.** The Bankruptcy Court shall have entered the Approval Order and the Sale Order, and each shall be a Final Order and reasonably satisfactory to Purchaser and Sellers.

(e) **Recognition Orders.** The Canadian Court shall have entered the Approval Order Recognition Order and the Sale Order Recognition Order, the Approval Order Recognition Order shall be a Final Order and each of the Approval Order Recognition Order and the Sale Order Recognition Order shall be reasonably satisfactory to Purchaser and Sellers.

(f) **Consents.** Sellers and Purchaser shall have received all Consents set forth in Section 9.1(f) of the Seller Disclosure Schedule.

Section 9.2 **Conditions to the Obligations of Purchaser.** The obligation of Purchaser to consummate the Sale shall be subject to the satisfaction, at or prior to the Closing, of each of the following conditions unless waived in writing, in whole or in part, by Purchaser:

(a) **Representations and Warranties of Sellers.** The representations and warranties of Sellers set forth in this Agreement qualified as to materiality shall be true and correct, and those not so qualified shall be true and correct in all material respects, as of the date of this Agreement and as of the Closing as though made at and as of the Closing, except to the extent such representations and warranties expressly relate to an earlier date (in which case such representations and warranties qualified as to materiality shall be true and correct, and those not so qualified shall be true and correct in all material respects, on and as of such earlier date); *provided* that in the case of each of the representations and warranties set forth in Section 5.8(c), the second sentence of Section 5.8(e), Section 5.8(h) and the first sentence of Section 5.16, without giving effect to any "materiality", "Material Adverse Effect" or similar qualifiers set forth in such representations and warranties, except where the failure to be so true and correct, individually or in the aggregate, has not had a Material Adverse Effect.

(b) Performance of Obligations. Each of Sellers shall have performed in all material respects all material obligations required to be performed by it under this Agreement at or prior to the Closing.

(c) Mexican Transfer Documents; Mexican Services Agreement. Sellers shall have caused the Purchased Subsidiaries to execute and deliver to Purchaser the Mexican Transfer Documents and/or the Mexican Services Agreement, as applicable in accordance with Section 7.10(a); or if agreed to by Sellers and Purchaser in accordance with Section 7.10(b), no such documents shall be required and instead, the Equity Securities of the Purchased Subsidiaries shall have been delivered to Purchaser at the Closing.

(d) Employees. Each employee set forth in Section 9.2(d) of the Seller Disclosure Schedule shall have agreed in writing to be employed by Purchaser, effective as of the Closing, on terms and conditions substantially similar to the terms and conditions of such employee's employment by Sellers immediately prior to the date of this Agreement and no such employee shall have notified Sellers or Purchaser of such employee's intention to leave the employment of Purchaser after the Closing.

(e) Deliverables. Purchaser shall have been furnished with the documents set forth in Section 4.2(a).

(f) Consents. Purchaser shall have received all Consents set forth in Section 9.2(f) of the Seller Disclosure Schedule.

(g) Accounts Receivable. Eligible Accounts (as defined in the DIP Loan Agreement) shall equal at least \$50 million as of the Closing Date.

(h) Contracts. The Contracts set forth in Section 9.2(h) of the Seller Disclosure Schedule shall have been executed.

Section 9.3 Conditions to the Obligations of Sellers. The obligation of Sellers to consummate the Sale shall be subject to the satisfaction at or prior to the Closing of each of the following conditions unless waived in writing, in whole or in part, by Sellers:

(a) Representations and Warranties of Purchaser. The representations and warranties of Purchaser set forth in this Agreement qualified as to materiality shall be true and correct, and those not so qualified shall be true and correct in all material respects, as of the date of this Agreement and as of the Closing as though made at and as of the Closing, except to the extent such representations and warranties expressly relate to an earlier date (in which case such representations and warranties qualified as to materiality shall be true and correct, and those not so qualified shall be true and correct in all material respects, on and as of such earlier date).

(b) Performance of Obligations. Purchaser shall have performed in all material respects all material obligations required to be performed by it under this Agreement at or prior to the Closing.

(c) Deliverables. The Sellers shall have been furnished with the documents set forth in Section 4.2(b).

**ARTICLE X**  
**TERMINATION PROCEDURES**

Section 10.1 **Termination.** This Agreement may be terminated and the Sale contemplated in this Agreement may be abandoned at any time prior to the Closing Date, notwithstanding the fact that any requisite authorization and approval of the Sale shall have been received, as follows:

- (a) by the mutual written consent of Purchaser and Sellers;
- (b) by Purchaser or Sellers, if the Closing has not occurred by the Termination Date; *provided*, that the right to terminate this Agreement under this Section 10.1(b) shall not be available to any party whose breach of this Agreement shall have been the cause of, or shall have resulted in, the failure of the Closing to occur by such date;
- (c) by Purchaser or Sellers, if there shall be any Law that makes consummation of the Sale illegal or otherwise prohibited or if any Governmental Authority shall have issued an order, decree, ruling or taken any other action restraining, enjoining or otherwise prohibiting the consummation of the Sale and such order, decree, ruling or other action shall have become final and non-appealable; *provided*, that the right to terminate this Agreement under this Section 10.1(c) shall not be available to any party whose breach of this Agreement shall have been the cause of, or shall have resulted in the Law, order, decree, ruling or other action that restrains, enjoins or prohibits the consummation of the Sale;
- (d) by Purchaser or Sellers upon the earlier to occur of (i) Sellers enter into a Alternative Transaction or Restructuring Transaction and (ii) the Bankruptcy Court approves Sellers' entry into or pursuit of an Alternative Transaction or Restructuring Transaction; *provided* that Sellers shall have the right to terminate this Agreement pursuant to this Section 10.1(d) only if they have complied in all material respects with the requirements of Section 7.6(c) hereof; *provided further* that, notwithstanding anything to the contrary set forth in this Agreement, including without limitation Section 10.1(b), if Purchaser is the Alternate Bidder (as defined in the Bidding Procedures) Purchaser cannot terminate this Agreement, pursuant to this Section 10.1(d) or 10.1(b) or otherwise, until the Alternate Bid Expiration Date (as defined in the Bidding Procedures).
- (e) by (i) Purchaser, if any Seller has materially breached any of its material obligations under this Agreement, and such breach cannot be or has not been cured within fifteen (15) Business Days after the giving of written notice thereof to Sellers; or (ii) Sellers, if Purchaser has materially breached any of its material obligations under this Agreement, and such breach cannot be or has not been cured within fifteen (15) Business Days after the giving of written notice thereof to Purchaser; *provided*, that the right to terminate this Agreement pursuant to this Section 10.1(e) shall not be available to any party who at such time is in material breach of any of its material obligations hereunder;
- (f) by Purchaser, if the Bankruptcy Cases are converted to cases under chapter 7 of the Bankruptcy Code, a trustee or examiner with expanded powers is appointed pursuant to the Bankruptcy Code or the Bankruptcy Court enters an order pursuant to section 362 of the Bankruptcy Code lifting the automatic stay with respect to any material portion of the Purchased Assets or Canadian Proceedings are converted into liquidation proceedings under the *Bankruptcy and Insolvency Act* (Canada) ("**BIA**"), a trustee in bankruptcy is appointed over Foamex Canada pursuant to the BIA or a receiver, interim receiver or receiver and manager or any similar official is appointed in respect of Foamex Canada or any of its business or assets;

(g) by Purchaser, if the Approval Order has not been entered by the Bankruptcy Court within thirty (30) days after the date hereof or the Approval Order Recognition Order has not been entered by the Canadian Court within thirty seven (37) days after the date hereof;

(h) by Purchaser, if the Sale Order has not been entered by the Bankruptcy Court within sixty-five (65) days of the date hereof or the Sale Order Recognition Order has not been entered by the Canadian Court within seventy (70) days after the date hereof;

(i) by Purchaser, if the Approval Order (including the Bidding Procedures and Bidding Incentives) or the Sale Order is modified in any respect without the consent of Purchaser; *provided, however*, Purchaser shall exercise its reasonable discretion; *provided* that no such modification shall be adverse to Purchaser; or

(j) by Purchaser, if the Approval Order Recognition Order or the Sale Order Recognition Order are not made in the Canadian Proceedings or such orders are made in modified form without the consent of Purchaser; *provided, however*, Purchaser shall exercise its reasonable discretion; *provided* that no such modification shall be adverse to Purchaser.

In the event of termination of this Agreement as permitted by Section 10.1, this Agreement shall become void and of no further force and effect, except for the provisions of Section 3.1 (relating to the Deposit), Section 10.2 (relating to Fees and Expenses) and Article XII, which shall remain in full force and effect, and nothing in this Agreement shall be deemed to release or relieve any party from any Liability for any fraud or willful breach by such party of the terms and provisions of this Agreement. Notwithstanding anything to the contrary set forth in this Agreement, except in the event of fraud or willful breach by the Sellers, (i) the Sellers' aggregate Liability for money damages in the event that the Closing has not occurred or does not occur for any reason whatsoever, without regard to whether Purchaser elects to terminate this Agreement pursuant to this Section 10.1, shall be limited to the Break-Up Fee and the Reimbursable Expenses if and to the extent payable in accordance with Section 10.2 and (ii) the Break-Up Fee and/or the Reimbursable Expenses, if and to the extent payable in accordance with Section 10.2, shall be the sole and exclusive remedy of Purchaser, whether at Law or in equity, in the event that Closing has not occurred or does not occur for any reason whatsoever, without regard to whether Purchaser elects to terminate this Agreement pursuant to this Section 10.1.

#### Section 10.2 Fees and Expenses.

(a) In the event that this Agreement is terminated pursuant to (i) Section 10.1(b), other than in the circumstance set forth in Section 10.2(c) in which the Deposit Amount is payable to Sellers, or (ii) Section 10.1(c), (e)(i), (f), (g), (h), (i) or (j), Sellers shall pay to Purchaser the Reimbursable Expenses within five (5) Business Days after the delivery by Purchaser to Sellers of notice of demand for payment setting forth a reasonable description of the Reimbursable Expenses; *provided* that any amounts previously paid by Sellers to Purchaser pursuant to this Section 10.2(a) shall be credited against the amounts under this Section 10.2(a).

(b) The Bidding Incentives shall be payable to Purchaser as follows:

(i) if either Purchaser or Sellers terminate this Agreement pursuant to Section 10.1(d); or

(ii) if Purchaser terminates this Agreement pursuant to Section 10.1(b), (c), (e)(i), (f), (g), (h), (i) or (j); *provided* that (1) at the time of any such termination, any Alternative Transaction or Restructuring Transaction, as applicable, has been proposed in writing or

announced, (2) the value offered to Sellers in such Alternative Transaction or Restructuring Transaction is at least as great as the value under this Agreement after providing for the payment of the Bidding Incentives hereunder and (3) such Alternative Transaction or Restructuring Transaction is consummated on or prior to three (3) months following the date of termination of this Agreement.

Upon the occurrence of the events set forth in the foregoing clauses (i) or (ii), as applicable, the Bidding Incentives shall be payable to Purchaser (less any amounts previously paid by Sellers to Purchaser pursuant to Section 10.2(a)), provided that such Bidding Incentives shall be paid to Purchaser upon the consummation of such Alternative Transaction or Restructuring Transaction, as applicable.

Any obligation to pay the Break-Up Fee and/or Reimbursable Expenses hereunder shall be absolute and unconditional; such payment shall constitute an administrative expense of Sellers' estates under sections 503(b)(1)(A) and 507(a)(2) of the Bankruptcy Code and shall be payable as specified herein, and not subject to any defense, claim, counterclaim, offset, recoupment, or reduction of any kind whatsoever. Sellers and Purchaser agree that the Bidding Incentives were a material inducement to Purchaser to enter into this Agreement and to consummate the transactions contemplated hereby and shall be payable as specified herein and not subject to any defense, claim, counterclaim, offset, recoupment, or reduction of any kind whatsoever.

(c) In the event (i) Sellers terminate this Agreement pursuant to Section 10.1(e)(ii) or (ii) Purchaser or Sellers terminate this Agreement pursuant to Section 10.1(b) and, as of the date of such termination pursuant to Section 10.1(b) all of the conditions set forth in Section 9.1 and 9.2 have been satisfied and continue to be satisfied (other than those conditions that by their nature are to be satisfied at the Closing), then the Deposit Amount shall be payable to Sellers. Sellers agree (i) that Purchaser's aggregate Liability for money damages in such circumstances shall be limited to the Deposit Amount and (ii) the Deposit Amount constitutes the sole and exclusive remedy of Sellers, whether at Law or in equity, in the event that this Agreement is terminated under such circumstances, except in the event of Purchaser's fraud or willful breach. Sellers and Purchaser agree that the Deposit Amount was a material inducement to Sellers to enter into this Agreement and to consummate the transactions contemplated hereby and shall be payable as specified herein and not subject to any defense, claim, counterclaim, offset, recoupment, or reduction of any kind whatsoever.

(d) Except as set forth above in this Section 10.2, all fees and expenses incurred in connection with this Agreement and the other Transaction Documents shall be paid by the party incurring such expenses, whether or not the Sale is consummated.

(e) This Section 10.2, and the rights and obligations created hereunder, shall survive termination of this Agreement.

#### ARTICLE XI

#### NO SURVIVAL OF REPRESENTATIONS AND WARRANTIES AND CERTAIN COVENANTS

Section 11.1 No Survival of Representations and Warranties and Certain Covenants. None of the representations and warranties of Sellers or Purchaser contained in Articles V and VI hereof, respectively, including the Seller Disclosure Schedule or any certificate or instrument delivered in connection herewith at or prior to the Closing, and none of the covenants contained in Article VII to be performed on or prior to the Closing shall survive the Closing other than Section 7.7. The Confidentiality Agreement and the parties' respective covenants and agreements set forth herein that by their specific terms contemplate performance after Closing shall survive the Closing indefinitely unless otherwise set forth herein.

**ARTICLE XII  
MISCELLANEOUS**

Section 12.1 **Governing Law.** This Agreement shall be governed by, and construed in accordance with, the Bankruptcy Code and, to the extent not inconsistent with the Bankruptcy Code, the laws of the State of New York without giving effect to conflicts of law principles thereof.

Section 12.2 **Jurisdiction; Forum; Service of Process; Waiver of Jury.** With respect to any Action arising out of or relating to this Agreement, each of Sellers and Purchaser hereby irrevocably:

(a) consents to the exclusive jurisdiction of the Bankruptcy Court, as the sole judicial forum for the adjudication of any matters arising under or in connection with the Agreement. After Sellers are no longer subject to the jurisdiction of the Bankruptcy Court, each of Sellers and Purchaser irrevocably submits to the exclusive jurisdiction of the courts of the State of New York and of the United States of America, in each case located in Manhattan, ("**Selected Courts**") for any Action arising out of or relating to this Agreement or the other Transaction Documents and the transactions contemplated hereby and thereby (and agrees not to commence any Action relating hereto or thereto except in such courts) and waives any objection to venue being laid in the Selected Courts whether based on the grounds of forum non conveniens or otherwise;

(b) consents to service of process in any Action by the mailing of copies thereof by registered or certified mail, postage prepaid, or by recognized international express carrier or delivery service, to Sellers or Purchaser at their respective addresses referred to in Section 12.5 hereof; provided, however, that nothing herein shall affect the right of any party hereto to serve process in any other manner permitted by law, and

(c) **WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY ACTION, PROCEEDING OR LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR THE OTHER TRANSACTION DOCUMENTS.**

Section 12.3 **Successors and Assigns.** Except as otherwise provided herein, the provisions hereof shall inure to the benefit of, and be binding upon, the successors by operation of law and permitted assigns of the parties hereto. No assignment of this Agreement may be made by any party at any time, whether or not by operation of law, without the other party's prior written consent; provided, however, that Purchaser may, without the consent of the other parties hereto, assign any of its rights, interests and obligations under this Agreement to one or more Affiliate(s) of Purchaser, which assignment, in either case, will not relieve Purchaser of any obligations hereunder. Except as specifically provided for herein, only the parties to this Agreement or their permitted assigns shall have rights under this Agreement.

Section 12.4 **Entire Agreement; Amendment.** This Agreement, the Confidentiality Agreement and the other Transaction Documents constitute the full and entire understanding and agreement between the parties with regard to the subjects hereof and supersede all prior agreements relating to the subject matter hereof. Except as expressly provided herein, neither this Agreement nor any term hereof may be amended, modified, supplemented, waived, discharged or terminated other than by a written instrument signed by Sellers and Purchaser expressly stating that such instrument is intended to amend, modify, supplement, waive, discharge or terminate this Agreement or such term hereof. No waiver of any of the provisions of this Agreement shall be deemed to or shall constitute a waiver of any other provision hereof (whether or not similar).

Section 12.5 **Notices.** All notices, requests, consents and other communications hereunder to any party shall be deemed to be sufficient if contained in a written instrument delivered in person or sent by telecopy (with receipt confirmed), nationally recognized overnight courier or first class registered or certified mail, return receipt requested, postage prepaid, addressed to such party at the address set forth below or such other address as may hereafter be designated in writing by such party to the other party:

(a) if to Sellers or Seller, to:

Foamex International Inc.  
Rose Tree Corporate Center II  
1400 N. Providence Road, Suite 2000  
Media, Pennsylvania 19063  
Attention: Andrew Prusky

Facsimile No.: (610) 744-2118  
Telephone No.: (610) 744-2300

with a copy to:

Akin Gump Strauss Hauer & Feld LLP  
One Bryant Park  
New York, NY 10036  
Attention: Ira Dizengoff  
Stephen Kuhn

Facsimile No.: (212) 872-1000  
Telephone No.: (212) 872-1002

(b) if to Purchaser, to:

MP Foam DIP LLC  
c/o MatlinPatterson Global Advisers LLC  
520 Madison Avenue, 35<sup>th</sup> Floor  
New York, NY 10022  
Attention: Lawrence M. Teitelbaum

Facsimile No.: (212) 651-4010  
Telephone No.: (212) 651-9500

with a copy to:

Bracewell & Giuliani LLP  
1177 Avenue of the Americas  
New York, New York 10036  
Attention: Robb L. Tretter  
Jennifer Feldsher

Facsimile No.: (212) 508-6101  
Telephone No.: (212) 508-6100

All such notices, requests, consents and other communications shall be deemed to have been given or made if and when delivered personally or by overnight courier to the parties at the above addresses or sent by electronic transmission, with confirmation received, to the telecopy numbers specified above (or at such other address or telecopy number for a party as shall be specified by like notice).

Section 12.6 **Delays or Omissions**. Except as expressly provided herein, no delay or omission to exercise any right, power or remedy accruing to Sellers or Purchaser upon any breach or default of any party under this Agreement, shall impair any such right, power or remedy of Sellers or Purchaser nor shall it be construed to be a waiver of any such breach or default, or an acquiescence therein, or of or in any similar breach or default thereafter occurring; nor shall any waiver of any single breach or default be deemed a waiver of any other breach or default theretofore or thereafter occurring. Any waiver, permit, consent or approval of any kind or character on the part of Sellers or Purchaser of any breach or default under this Agreement, or any waiver on the part of any such party of any provisions or conditions of this Agreement, must be in writing and shall be effective only to the extent specifically set forth in such writing. All remedies, either under this Agreement or by law, in equity, or otherwise afforded to Sellers or Purchaser shall be cumulative and not alternative.

Section 12.7 **Counterparts**. This Agreement may be executed in one or more counterparts, all of which shall be considered one and the same agreement and shall become effective when one or more counterparts have been signed by each of the parties and delivered to the other parties.

Section 12.8 **Severability**. In the event that any provision of this Agreement becomes or is declared by a court of competent jurisdiction to be illegal, unenforceable or void, this Agreement shall continue in full force and effect without said provisions; *provided* that no such severability shall be effective if it materially changes the economic benefit of this Agreement to any party. Any provision held invalid or unenforceable only in part or degree will remain in full force to the extent not held invalid or unenforceable.

Section 12.9 **Titles and Subtitles**. The titles and subtitles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

Section 12.10 **No Public Announcement**. Absent the prior written consent of the other party, such consent not to be unreasonably withheld, delayed or conditioned, neither Sellers nor Purchaser shall make any press release, public announcement or securities filing with any Governmental Authority concerning the transactions contemplated by the Transaction Documents, except as and to the extent that any such party shall be obligated to make any such disclosure by this Agreement or by applicable Law, and then only after giving the other party hereto adequate time to review such disclosure and consider in good faith the comments of the other party hereto and consultation as to such comments with such party as to the content of such disclosure. Notwithstanding anything to the contrary herein or in the Confidentiality Agreement, the parties hereto and each of their respective employees, representatives or other agents, are permitted to disclose to any and all Persons, without limitations of any kind, the tax treatment and tax structure of the transactions and all materials of any kind (including opinions or other tax analyses) that are or have been provided to such parties related to such tax treatment and tax structure; provided, however, that the foregoing permission to disclose the tax treatment and tax structure does not permit the disclosure of any information that is not relevant to understanding the tax treatment or tax structure of the transactions (including the identity of any party and the amounts paid in connection with the transactions); provided, further, however, that the tax treatment and tax structure shall be kept confidential to the extent necessary to comply with federal or state securities laws.



Section 12.11 **Interpretation.**

(a) When a reference is made in this Agreement to an Article, Section or Exhibit, such reference shall be to an Article or Section of, or an Exhibit to, this Agreement unless otherwise indicated. Whenever the words "include", "includes" or "including" are used in this Agreement, they shall be deemed to be followed by the words "without limitation". The words "hereof", "herein" and "hereunder" and words of similar import when used in this Agreement shall refer to this Agreement as a whole and not to any particular provision of this Agreement. All terms defined in this Agreement shall have the defined meanings when used in any certificate or other document made or delivered pursuant hereto unless otherwise defined therein. The definitions contained in this Agreement are applicable to the singular as well as the plural forms of such terms and to the masculine as well as to the feminine and neutral genders of such term. Any agreement, instrument or statute defined or referred to herein or in any agreement or instrument that is referred to herein means such instrument or statute as from time to time amended, modified or supplemented, including (in the case of agreements or any waiver or consent and (in the case of statutes) by succession of comparable successor statutes and references to all attachments thereto and instruments incorporated therein unless expressly stated to refer to such as at a particular date, in which case such reference shall be to such agreement, instrument or statute as at that particular date. References to a Person are also to its permitted successors and assigns.

(b) The parties have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties and no presumption of burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any provisions of this Agreement.

(c) In the event of any inconsistency between the provisions of this Agreement and the terms of the Approval Order or the Sale Order, this Agreement shall control.

Section 12.12 **Action by Sellers.** Foamex Inc. shall be entitled to act on behalf of each Seller for any action required or permitted to be taken by any Seller under this Agreement.

Section 12.13 **Third Party Beneficiaries.** The terms and provisions of this Agreement are intended solely for the benefit of each party hereto and their respective successors or permitted assigns, and it is not the intention of the parties to confer third-party beneficiary rights upon any other Person.

[SIGNATURE PAGES TO FOLLOW]

IN WITNESS WHEREOF, each of the undersigned has caused this Agreement to be executed as of the date first above written.

SELLERS:

Foamex International, Inc.

By: [Signature]  
Name JOHN G. JOHNSON, JR.  
Title: PRESIDENT AND CHIEF EXECUTIVE OFFICER

Foamex L.P.

By: [Signature]  
Name JOHN G. JOHNSON, JR.  
Title: PRESIDENT AND CHIEF EXECUTIVE OFFICER

FMXI, LLC

By: [Signature]  
Name JOHN G. JOHNSON, JR.  
Title: PRESIDENT AND CHIEF EXECUTIVE OFFICER

Foamex Latin America, Inc.

By: [Signature]  
Name JOHN G. JOHNSON, JR.  
Title: PRESIDENT AND CHIEF EXECUTIVE OFFICER

Foamex Asia, Inc.

By: [Signature]  
Name JOHN G. JOHNSON, JR.  
Title: PRESIDENT AND CHIEF EXECUTIVE OFFICER

Foamex Carpet Cushion LLC

By: [Signature]  
Name JOHN G. JOHNSON, JR.  
Title: PRESIDENT AND CHIEF EXECUTIVE OFFICER

Foamex Mexico, Inc.

By: [Signature]  
Name JOHN G. JOHNSON, JR.  
Title: PRESIDENT AND CHIEF EXECUTIVE OFFICER

Foamex Canada Inc.

By: [Signature]  
Name JOHN G. JOHNSON, JR.  
Title: PRESIDENT AND CHIEF EXECUTIVE OFFICER

Signature Page to Foamex

IN WITNESS WHEREOF, each of the undersigned has caused this Agreement to be executed as of the date first above written.

**PURCHASER:**

**MP Foam DP LLC**

By: 

Name: **Lawrence M. Teckbaum**  
Title:

Signature Page to Foamex APA

**EXHIBIT A**  
**FORM OF APPROVAL ORDER**

NEWYORK\37267.15

**EXHIBIT B**  
**FORM OF BIDDING PROCEDURES**

NEWYORK\37267.15

**EXHIBIT C**  
**FORM OF SALE ORDER**

NEWYORK\37267.15

**EXHIBIT D**  
**FORM OF DEPOSIT ESCROW AGREEMENT**

NEWYORK\37267.15

## DEPOSIT ESCROW AGREEMENT

**THIS AGREEMENT** (the "**Agreement**") is made this \_\_\_ day of March, 2009, by and among MP Foam DIP LLC, a Delaware limited liability company ("**Buyer**"), Foamex International Inc., a Delaware corporation ("**Seller**"), and WILMINGTON TRUST COMPANY ("**Escrow Agent**").

### RECITALS

**WHEREAS**, on February 18, 2009, Seller, together with certain of its subsidiaries, commenced voluntary cases under chapter 11 of title 11, United States Code, 11 U.S.C. 101 *et seq.*, in the United States Bankruptcy Court for the District of Delaware (the "**Bankruptcy Court**"), which cases are being jointly administered under Chapter 11 Case No. 09-10560 (the "**Bankruptcy Case**");

**WHEREAS**, Seller and such subsidiaries continue to operate their businesses and manage their properties as debtors and debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code;

**WHEREAS**, on the date hereof, Buyer, Seller and certain of Seller's subsidiaries have entered into that certain Asset Purchase Agreement, pursuant to which, among other things, Seller and such subsidiaries have agreed to sell and transfer to Buyer, pursuant to sections 363 and 365 of the Bankruptcy Code, all of the Purchased Assets and Assumed Liabilities on the terms and subject to the conditions set forth in such agreement (the "**Purchase Agreement**");

**WHEREAS**, pursuant to the Purchase Agreement, Buyer has agreed to place \$10,000,000 as a deposit in escrow to be held and disbursed in accordance with the Purchase Agreement and this Agreement; and

**WHEREAS**, this Agreement constitutes the Deposit Escrow Agreement referred to in the Purchase Agreement;

**NOW, THEREFORE**, in consideration of the premises, and further consideration of the covenants set forth hereafter, it is hereby agreed mutually as follows:

**I. Designation as Escrow Agent.**

Buyer and Seller hereby appoint Escrow Agent to act as escrow agent and Escrow Agent hereby accepts such appointment, all on the terms and subject to the conditions set forth in this Agreement.

**II. Deposit of Escrow Funds.**

(a) Upon execution of this Escrow Agreement, Buyer shall deposit the sum of ten million dollars (\$10,000,000) (such amount, together with all investments thereof and all interest accumulated thereon and proceeds therefrom, the "**Escrow Funds**") by wire transfer of immediately available funds into an account (the "**Escrow Account**") established with Escrow Agent.

(b) Escrow Agent hereby agrees to accept the Escrow Funds and hold the Escrow Funds in the Escrow Account in escrow upon the terms and conditions set forth in this Agreement and disburse the Escrow Funds from the Escrow Account pursuant to the terms and conditions hereof.



(c) Escrow Agent shall invest the Escrow Account pursuant to written directions of Seller and Buyer, and in the absence of such directions, in the Federated Treasury Obligations Fund. Seller and Buyer acknowledge that shares in this mutual fund are not obligations of Wilmington Trust Company or Wilmington Trust Corporation, are not deposits and are not insured by the FDIC. Escrow Agent or its affiliate may be compensated by the mutual fund for services rendered in its capacity as investment advisor, or other service provider, such as provider of shareholder servicing and distribution services, and such compensation is both described in detail in the prospectus for the fund, and is in addition to the compensation, if any, paid to Wilmington Trust Company in its capacity as Escrow Agent hereunder.

### **III. Disbursement of Escrow Account.**

(a) Escrow Agent will hold the Escrow Funds in its possession in the Escrow Account until authorized hereunder to deliver such Escrow Funds as follows:

1. On the closing date of the transactions contemplated by the Purchase Agreement, Buyer shall direct the Escrow Agent in writing to deliver the Escrow Funds to Seller at the Closing by wire transfer of immediately available federal funds to an account designated in writing by Seller, and Seller agrees to credit any of the Escrow Funds so received by them against the purchase price due under the Purchase Agreement. Buyer shall give the Escrow Agent sufficient prior written notice of the Closing to enable the Escrow Agent to comply herewith.
2. If Buyer delivers a written notice to the Escrow Agent and Seller (a "**Buyer Certificate of Instruction**") stating either that the Purchase Agreement has been terminated pursuant to (i) Section 10.1(b) of the Purchase Agreement, other than in the circumstance set forth in Section 10.2(c) of the Purchase Agreement in which the Escrow Amount is payable to Seller, or (ii) Sections 10.1(c), (d), (e)(i), (f), (g), (h), (i) or (j) of the Purchase Agreement and (x) in the case of a termination pursuant to Section 10.1(b) of the Purchase Agreement, Buyer represents that no breach of the Purchase Agreement by Buyer shall have been the cause of, or shall have resulted in, the failure of the Closing to occur by the Termination Date, (y) in the case of a termination pursuant to Section 10.1(c) of the Purchase Agreement, Buyer represents that no breach of the Purchase Agreement by the Buyer shall have been the cause of, or shall have resulted in, the Law, order, decree, ruling or other action that restrains, enjoins or prohibits the consummation of the Sale, and (z) in the case of a termination of the Purchase Agreement pursuant to Section 10.1(e)(i) of the Purchase Agreement, Buyer represents that as of the date of such termination Buyer was not in material breach of any of its material obligations under the Purchase Agreement, then if within ten (10) business days after the Seller's receipt (as determined in accordance with Section V) of the Buyer Certificate of Instruction the Escrow Agent does not receive from Seller a written notice objecting to the release of the Escrow Funds to Buyer (a "**Seller Objection Notice**"), the Escrow Agent shall deliver to Buyer all of the Escrow Funds then held by the Escrow Agent pursuant to this Agreement. In the event that a Seller Objection Notice is received by the Escrow Agent within such ten (10) business day period, the provisions of Section III(a)(5) shall apply. The Seller shall send Buyer a copy of any Seller Objection Notice delivered to the Escrow Agent.

3. If Seller delivers a written notice to the Escrow Agent and Buyer (a "**Seller Certificate of Instruction**") stating that the Purchase Agreement has been terminated (i) by Seller pursuant to Section 10.1(e)(ii) of the Purchase Agreement or (ii) by Purchaser or Seller pursuant to Section 10.1(b) of the Purchase Agreement and, as of the date of such termination pursuant to Section 10.1(b) all of the conditions set forth in Section 9.1 and 9.2 of the Purchase Agreement have been satisfied and continue to be satisfied (other than those conditions that by their nature are to be satisfied at the Closing), then if within ten (10) business days after the Buyer's receipt (as determined in accordance with Section V) of the Seller Certificate of Instruction the Escrow Agent does not receive written notice from Buyer objecting to the release of the Escrow Funds to Seller (a "**Buyer Objection Notice**"), the Escrow Agent shall deliver to Seller all of the Escrow Funds then held by the Escrow Agent pursuant to this Agreement. In the event that a Buyer Objection Notice is received by the Escrow Agent within such ten (10) business day period, the provisions of Section III(a)(5) shall apply. The Buyer shall send Seller a copy of any Buyer Objection Notice delivered to the Escrow Agent.
4. Upon receipt of joint written instructions from Seller and Buyer to the Escrow Agent (a "**Joint Certificate of Instruction**"), the Escrow Agent shall deliver the Escrow Funds in accordance with such instructions by wire transfer of immediately available funds to such account or accounts as are designated in such instructions.
5. In the event of a dispute between Seller and Buyer as to their respective rights to the Escrow Funds, the Escrow Agent shall continue to hold the Escrow Funds until otherwise directed by either (i) Joint Certificate of Instruction or (ii) a final and non-appealable court order binding on the Escrow Agent which has not been stayed or vacated before disbursement of all of the Escrow Funds; provided, however, that notwithstanding the foregoing, the Escrow Agent shall have the right in the event of such a dispute to deposit the Escrow Funds with the Clerk of the Bankruptcy Court or any federal or state court then having jurisdiction over an interpleader action with respect to the Escrow Funds. The Escrow Agent shall give written notice of any such deposit to Seller and Buyer. Upon such deposit or other disbursement in accordance with the provisions of this Section III(a)(5), the Escrow Agent shall be relieved and discharged of all further obligations with respect to the Escrow Funds and all further obligations and liability to the parties hereto with respect to its obligations under this Agreement.

(b) Notwithstanding anything contained herein to the contrary, in the event transfer instructions for any Escrow Funds are given, whether in writing, by telecopier or otherwise, Escrow Agent is authorized (but not required) to seek confirmation of such instructions by telephone call-back, and the Escrow Agent may rely upon the confirmations of anyone purporting to be the person or persons designated in the instructions. The persons and telephone numbers for call-backs may be changed only in a writing actually received and acknowledged by the Escrow Agent. The parties to this Escrow Agreement acknowledge that such security procedure is commercially reasonable. Absent specific written direction as to method of disbursement, Escrow Agent may disburse the Escrow Funds pursuant to this Section III, either by wire transfer or certified or bank check, at the sole discretion of the Escrow Agent. It is understood that the Escrow Agent may disburse any Escrow Funds in the Escrow Account without any separate instructions, if such disbursements are in accordance with the terms of this Escrow Agreement.

**IV. Authority of Escrow Agent and Limitation of Liability.**

(a) In acting hereunder, Escrow Agent shall have only such duties as are specified herein and no implied duties shall be read into this Agreement, and Escrow Agent shall not be liable for any act done, or omitted to be done, by it in the absence of its gross negligence or willful misconduct. Escrow Agent shall not be charged with knowledge or notice of any fact, order, agreement or circumstance not specifically set forth herein including without limitation the terms of the Purchase Agreement.

(b) Escrow Agent may act in reliance upon any writing or instrument or signature which it, in good faith, believes to be genuine, and may assume the validity and accuracy of any statement or assertion contained in such a writing or instrument and may assume that any person purporting to give any writing, notice, advice or instruction in connection with the provisions hereof has been duly authorized to do so.

(c) Escrow Agent shall be entitled to consult with legal counsel in the event that a question or dispute arises with regard to the construction of any of the provisions hereof, and, in the absence of its gross negligence or willful misconduct, shall incur no liability and shall be fully protected in acting in accordance with the advice or opinion of such counsel.

(d) Escrow Agent shall not be required to use more than a de minimis amount of (in the Escrow Agent's reasonable determination) its own funds in the performance of any of its obligations or duties or the exercise of any of its rights or powers, and shall not be required to take any action which, in Escrow Agent's sole and absolute judgment, could involve more than a de minimis (in the Escrow Agent's reasonable determination) expense or liability unless furnished with security and indemnity which it deems, in its sole and absolute discretion, to be satisfactory. Nothing in this Section IV(d) is meant to limit the terms in Section IV(e) below.

(e) Buyer and Seller shall pay to Escrow Agent compensation for its services hereunder to be determined from time to time by the application of the current rates than charged by Escrow Agent for accounts of similar size and character, with a minimum rate of \$3,500 per annum together with such other applicable transaction fees as set forth on the Fee Schedule annexed hereto as Exhibit A. In the event Escrow Agent renders any extraordinary services in connection with the Escrow Account at the request of the parties, Escrow Agent shall be entitled to additional compensation therefor, so long as such compensation is agreed to by the Buyer and Seller in advance. Buyer and Seller also agree to pay the reasonable legal fees of Escrow Agent in connection with this Agreement, which shall be due and payable contemporaneous with the initial deposit of the Escrow Funds, and from time to time thereafter as incurred and upon written invoice. Escrow Agent's legal fees, disbursements and expenses shall be payable whether or not the transactions contemplated hereby occur. Escrow Agent shall have a first lien against the Escrow Account to secure the obligations of Buyer and Seller hereunder. The terms of this paragraph shall survive termination of this Agreement.

(f) Buyer and Seller hereby agree, jointly and severally, to indemnify Escrow Agent, its directors, officers, employees and agents (collectively, the "**Indemnified Parties**"), and hold the Indemnified Parties harmless from any and against all liabilities, losses, actions, suits or proceedings at law or in equity, and any other expenses, fees or charges of any character or nature, including, without limitation, reasonable attorney's fees and expenses, which an Indemnified Party may incur or with which it may be threatened by reason of acting as or on behalf of Escrow Agent under this Agreement or arising out of the existence of the Escrow Account, except to the extent the same shall be caused by Escrow Agent's gross negligence or willful misconduct. The Escrow Agent may retain counsel of its choice to participate in the defense of any indemnified claims, at the expense of the Buyer and Seller and Buyer and

Seller shall not settle or otherwise resolve any indemnified claim without an unconditional release in favor of the Escrow Agent in form, scope and substance satisfactory to the Escrow Agent. Escrow Agent shall have a first lien against the Escrow Account to secure the obligations of Buyer and Seller hereunder. The terms of this paragraph shall survive termination of this Agreement.

(g) In the event Escrow Agent receives conflicting instructions hereunder, Escrow Agent shall be fully protected in refraining from acting until such conflict is resolved to the satisfaction of Escrow Agent.

(h) Escrow Agent may resign as Escrow Agent, and, upon its resignation, shall thereupon be discharged from any and all further duties and obligations under this Agreement by giving notice in writing of such resignation to Buyer and Seller, which notice shall specify a date upon which such resignation shall take effect. Upon the resignation of Escrow Agent, Buyer and Seller shall, within thirty (30) business days after receiving the foregoing notice from Escrow Agent, designate a substitute escrow agent (the "**Substitute Escrow Agent**"), which Substitute Escrow Agent shall, upon its designation and notice of such designation to Escrow Agent, succeed to all of the rights, duties and obligations of Escrow Agent hereunder. In the event Buyer and Seller shall not have delivered to Escrow Agent a written designation of Substitute Escrow Agent within the aforementioned thirty (30) business day period, together with the consent to such designation by the Substitute Escrow Agent, the Escrow Agent may apply to a court of competent jurisdiction to appoint a Substitute Escrow Agent, and the costs of obtaining such appointment shall be reimbursable from Buyer and Seller and from the Escrow Funds. Upon the delivery of the funds in the Escrow Account to a Substitute Escrow Agent, Escrow Agent shall be relieved of all liability hereunder.

#### **V. Notices.**

Except as otherwise provided herein, any notice or other communication required or permitted hereunder shall be in writing and shall be deemed to have been duly given (a) on the day of delivery if delivered in person, or if delivered by facsimile upon confirmation of receipt, (b) on the first (1st) business day following the date of dispatch if delivered by a nationally recognized express courier service guaranteeing next business day delivery, or (c) on the fifth (5th) business day following the date of mailing if delivered by registered or certified mail, return receipt requested, postage prepaid. All notices hereunder shall be delivered as set forth on the signature pages hereof or pursuant to such other instructions as may be designated by notice given in accordance with this Section V by the party to receive such notice.

#### **VI. Amendment.**

This Escrow Agreement may not be amended, modified, supplemented or otherwise altered except by an instrument in writing signed by each of the parties hereto.

#### **VII. Termination.**

This Agreement will terminate upon the disbursement of all Escrow Funds in the Escrow Account, as provided above, by the Escrow Agent.

#### **VIII. Tax Reporting.**

The parties hereto, other than the Escrow Agent, agree that, for tax reporting purposes, all interest and other income earned from the investment of amounts in the Escrow Account ("**Taxable Income**") in

any tax year shall be allocated to the Buyer ("**Taxpayer**"). Upon execution of this Escrow Agreement, Taxpayer shall provide Escrow Agent with its certified tax identification number ("**TIN**") on an executed Internal Revenue Service Form ("**IRS**") W-9 or other applicable IRS Form. Taxpayer agrees to report all Taxable Income allocable to it on its federal and other applicable tax returns. Taxpayer acknowledges and agrees that, in the event its TIN is not certified to the Escrow Agent, and/or it does not make all certifications set forth in IRS Form W-9 or other applicable IRS Form, applicable tax laws may require withholding of a portion of any income earned with respect to amounts in the Escrow Account that are allocable to it.

**IX. Anti-Terrorism/Anti-Money Laundering Laws.**

IMPORTANT INFORMATION ABOUT PROCEDURES FOR OPENING A NEW ACCOUNT  
 - To help the United States government fight the funding of terrorism or money laundering activities, Federal law requires all financial institutions to obtain, verify, and record information that identifies each person who opens a new account. What this means for the parties to this Agreement: the Escrow Agent will ask for your name, address, date of birth, and other information that will allow the Escrow Agent to identify you (e.g., your social security number or tax identification number.) The Escrow Agent may also ask to see your driver's license or other identifying documents (e.g., passport, evidence of formation of corporation, limited liability company, limited partnership, etc., certificate of good standing.)

Each party to this Agreement hereby agrees to provide the Escrow Agent, prior to the establishment of the Escrow Account, with the information identified above pertaining to it by completing the form attached as Exhibit B and returning it to the Escrow Agent. Exhibit B includes one form for individuals and another form for entities.

**X. Governing Law.**

This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware in all respects without giving effect to the conflicts of laws principles thereof.

**XI. Submission to Jurisdiction; No Jury Trial.** With respect to any Action arising out of or relating to this Agreement, each of the parties hereby irrevocably:

(a) consents to the exclusive jurisdiction of the Bankruptcy Court, as the sole judicial forum for the adjudication of any matters arising under or in connection with the Agreement. After Seller is no longer subject to the jurisdiction of the Bankruptcy Court, each of the parties irrevocably submits to the exclusive jurisdiction of the courts of the State of New York and of the United States of America, in each case located in Manhattan, ("**Selected Courts**") for any Action arising out of or relating to this Agreement and the transactions contemplated hereby and thereby (and agrees not to commence any Action relating hereto or thereto except in such courts) and waives any objection to venue being laid in the Selected Courts whether based on the grounds of forum non conveniens or otherwise;

(b) consents to service of process in any Action by the mailing of copies thereof by registered or certified mail, postage prepaid, or by recognized international express carrier or delivery service, to Seller, Buyer or Escrow Agent at their respective addresses set forth on the signature page; provided, however, that nothing herein shall affect the right of any party hereto to serve process in any other manner permitted by law, and

(c) WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY ACTION, PROCEEDING OR LITIGATION

DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR THE OTHER TRANSACTION DOCUMENTS.

**XII. Entire Agreement.**

This Agreement constitutes the full and entire understanding and agreement between the parties with regard to the subjects hereof and supersede all prior agreements relating to the subject matter hereof.

**XIII. Delays or Omissions.**

Except as expressly provided herein, no delay or omission to exercise any right, power or remedy accruing to each of the parties upon any breach or default of any party under this Agreement, shall impair any such right, power or remedy of each of the parties nor shall it be construed to be a waiver of any such breach or default, or an acquiescence therein, or of or in any similar breach or default thereafter occurring; nor shall any waiver of any single breach or default be deemed a waiver of any other breach or default theretofore or thereafter occurring. Any waiver, permit, consent or approval of any kind or character on the part of each of the parties of any breach or default under this Agreement, or any waiver on the part of any such party of any provisions or conditions of this Agreement, must be in writing and shall be effective only to the extent specifically set forth in such writing. All remedies, either under this Agreement or by law, in equity, or otherwise afforded to each of the parties shall be cumulative and not alternative.

**XIV. Severability.**

In the event that any provision of this Agreement becomes or is declared by a court of competent jurisdiction to be illegal, unenforceable or void, this Agreement shall continue in full force and effect without said provisions; provided that no such severability shall be effective if it materially changes the economic benefit of this Agreement to any party. Any provision held invalid or unenforceable only in part or degree will remain in full force to the extent not held invalid or unenforceable.

**XV. Successors and Assigns.**

Except as otherwise provided herein, the provisions hereof shall inure to the benefit of, and be binding upon, the successors by operation of law and permitted assigns of the parties hereto. No assignment of this Agreement may be made by any party at any time, whether or not by operation of law, without the other party's prior written consent; provided, however, that Buyer may, without the consent of the other parties hereto, assign any of its rights and interests under this Agreement to one or more Affiliate(s) of Buyer, which assignment, in either case, will not relieve Buyer of any obligations hereunder. Except as specifically provided for herein, only the parties to this Agreement or their permitted assigns shall have rights under this Agreement.

**XVI. Third Party Beneficiaries.**

The terms and provisions of this Agreement are intended solely for the benefit of each party hereto and their respective successors or permitted assigns, and it is not the intention of the parties to confer third-party beneficiary rights upon any other person.

**XVII. Counterparts.**

This Agreement may be executed in any number of counterparts, each of which when so executed shall be deemed to be an original, and such counterparts together shall constitute and be one and the same instrument.

[This space is intentionally left blank.]

IN WITNESS WHEREOF, the parties hereto have caused their names to be hereto subscribed by their respective Presidents or Vice Presidents as of the day and year first above written.

MP Foam DIP LLC,  
as Buyer

WILMINGTON TRUST COMPANY,  
Escrow Agent

By: \_\_\_\_\_  
Name:  
Title:

By: \_\_\_\_\_  
Name:  
Title:

Address:  
c/o MatlinPatterson Global Advisers LLC  
520 Madison Avenue, 35<sup>th</sup> Floor  
New York, NY 10022  
Fax No.: (212) 651-4010  
Tel.No.: (212) 651-9500  
Attention: Lawrence M. Teitelbaum

Address:  
1100 North Market Street  
Wilmington, Delaware 19890  
Fax No.: (302) \_\_\_\_-\_\_\_\_\_  
Tel. No.: (302) 636-\_\_\_\_\_  
Attention: \_\_\_\_\_

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

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

Bracewell & Giuliani LLP  
1177 Avenue of the Americas  
New York, New York 10036  
Attention: Robb L. Tretter  
Jennifer Feldsher

Moritt Hock Hamroff & Horowitz LLP  
400 Garden City Plaza  
Garden City, NY 11530  
Phone: 516-873-2000  
Fax: 516-873-2010  
Attention: Leslie Ann Berkoff, Esq.

Facsimile No.: (212) 508-6101  
Telephone No.: (212) 508-6100

Foamex International Inc.,  
as Seller

By: \_\_\_\_\_  
Name:  
Title:

Address:  
Foamex International Inc.  
Rose Tree Corporate Center II  
1400 N. Providence Road, Suite 2000  
Media, Pennsylvania 19063  
Fax No.: (610) 744-2118  
Tel.No.: (610) 744-2300  
Attention: Andrew Prusky

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

Akin Gump Strauss Hauer & Feld LLP

*Signature Page to the Deposit Escrow Agreement*



One Bryant Park  
New York, NY 10036  
Attention: Ira Dizengoff  
                  Stephen Kuhn  
Facsimile No.: (212) 872-1000  
Telephone No.: (212) 872-1002

**EXHIBIT A  
FEE SCHEDULE**

**WILMINGTON TRUST COMPANY**

**SCHEDULE OF FEES**

**To act as  
Escrow Agent/Paying Agent**

<b>Initial Acceptance Fee (one time, payable in advance at closing)</b>	<b>\$ 500.00</b>
Covers acceptance of appointment as Escrow Agent	
<b><u>Administration Fee (payable in advance at closing)</u></b>	<b>\$3,500.00</b>
Including complete study of drafts of Escrow Agreement and all supporting documents in connection therewith, conferences until final Agreement is agreed upon, execution of final Agreement and administrative duties in connection with the security provisions of the Agreement.	
<b><u>Transaction Fees (only if applicable)*:</u></b>	
<b>a. Purchase, sale, withdrawal, maturities, calls, and puts of domestic securities</b>	<b>\$15.00</b>
<b>b. Physical delivery of domestic securities</b>	<b>\$50.00</b>
<b>c. Purchase of Eurodollar certificate of deposit</b>	<b>\$65.00</b>
<b>d. Principal amortizing securities (per pool/per month)</b>	<b>\$10.00</b>
<b>e. Tax Reporting</b>	<b>At Cost</b>
<b>f. Wire Transfer Charges</b>	<b>Outgoing \$25.00</b>
	<b>Incoming \$10.00</b>

\* These fees do not apply if funds invested within WTC Family of Funds.

**NOTE:**

Charges for any services not specifically covered in this schedule will be billed commensurate with the services rendered. This schedule reflects charges that are now in effect for our normal and regular services and are subject to modification where unusual conditions or requirements prevail **and does not include counsel fees** or expenses and disbursements, which will be billed at cost. **The fees of our counsel shall be is due and payable whether or not the transaction closes.**

Exhibit A-1

**EXHIBIT B  
Due Diligence Questionnaire for Entity Customers**

Dear Customer:

**IMPORTANT INFORMATION ABOUT PROCEDURES FOR OPENING A NEW ACCOUNT**

To help the government fight the funding of terrorism or money laundering activities, Federal law requires all financial institutions to obtain, verify, and record information that identifies each person who opens a new account. What this means for you: When you open an account, we will ask for your name, address, date of birth, and other information that will allow us to identify you. We may also ask to see your driver's license or other identifying documents.

Please complete the items identified and sign below. In certain circumstances, we may be required to request additional information. Thank you for your cooperation in this matter.

**Company Name:** \_\_\_\_\_

**SSN/TIN\*:** \_\_\_\_\_

**Street Address\*\*:** \_\_\_\_\_

**City:** \_\_\_\_\_ **State:** \_\_\_\_\_ **Zip Code:** \_\_\_\_\_

**Phone (Optional):** \_\_\_\_\_ **Fax (Optional):** \_\_\_\_\_ **eMail (Optional):** \_\_\_\_\_

*\*If SSN/TIN has been applied for please attach copy of filed application*

*\*\* Business street address, address for the principal place of business, local office or other physical location,*

*P.O. Box address is not acceptable*

**Required documents from non-individuals:**

Please provide the following *executed* document:  
Completed IRS Form W-9/W-8 (form attached)

Please provide **at least one (1)** of the following certified documents:  
Certificate or Articles of Incorporation  
Government-issued business license  
Partnership Agreement  
LLC Agreement  
Trust Agreement  
Certificate of Good Standing (issued within the last six months)

\_\_\_\_\_  
**Signature**

\_\_\_\_\_  
**Date**

EXHIBIT B (Cont'd)
Due Diligence Questionnaire for Individual Customers

Dear Customer:

IMPORTANT INFORMATION ABOUT PROCEDURES FOR OPENING A NEW ACCOUNT

To help the government fight the funding of terrorism or money laundering activities, Federal law requires all financial institutions to obtain, verify, and record information that identifies each person who opens a new account. What this means for you: When you open an account, we will ask for your name, address, date of birth, and other information that will allow us to identify you. We may also ask to see your driver's license or other identifying documents.

Please complete the items identified and sign below. In certain circumstances, we may be required to request additional information. Thank you for your cooperation in this matter.

Your Name: \_\_\_\_\_

SSN/TIN\*: \_\_\_\_\_ Date of Birth (Individuals): \_\_\_\_\_

Street Address (individual's residential address\*\*): \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip Code: \_\_\_\_\_

Phone (Optional): \_\_\_\_\_ Fax (Optional): \_\_\_\_\_ eMail (Optional): \_\_\_\_\_

\* If SSN/TIN has been applied for please attach copy of filed application

\*\* P.O. Box address is not acceptable

Required documents from individuals:

Please provide the following executed document:
Completed IRS Form W-9/W-8 (form attached)

Copy of at least one (1) of the following documents:

1) Driver License (Photo ID):

State/Country of Issuance: \_\_\_\_\_
License Number: \_\_\_\_\_
Issuance Date: \_\_\_\_\_
Expiration Date: \_\_\_\_\_

2) Passport:

Country of Issuance: \_\_\_\_\_
Issuance Date: \_\_\_\_\_
Passport Number: \_\_\_\_\_
Expiration Date: \_\_\_\_\_

3) Government Issued ID Card (Photo ID):

State/Country of Issuance: \_\_\_\_\_
ID Number: \_\_\_\_\_
Issuance Date: \_\_\_\_\_
Expiration Date: \_\_\_\_\_

Signature
Revised: January 9, 2007/Due Diligence Form

Date

Form <b>W-9</b> (Rev. November 2005) Department of the Treasury Internal Revenue Service	<h2 style="margin:0;">Request for Taxpayer Identification Number and Certification</h2>	Give form to the requester. Do not send to the IRS.
---	---	---

Print or Type See Specific Instructions on page 2.	Name (as shown on your income tax return)	
	Business name, if different from above	
	<input type="checkbox"/> Individual/ Sole Proprietor <input type="checkbox"/> Corporation <input type="checkbox"/> Partnership <input type="checkbox"/> Other <input type="checkbox"/> Exempt from backup withholding	
	Check appropriate box: Address (number, street, and apt. or suite no.)	Requester's name and address (optional):
	City, state, and ZIP code.	
List account number(s) here (optional)		

**Part I Taxpayer Identification Number (TIN)**

Enter your TIN in the appropriate box. For individuals, this is your social security number (SSN) **However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 2.** For other entities, it is your employer identification number (EIN). If you do not have a number, see **How to get a TIN on page 2.**

Social Security number _____
Employer identification number _____

**Note:** If the account is in more than one name, see the chart on page 2 for guidelines on whose number to enter.

**Part II Certification**

Under penalties of perjury, I certify that:

- The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), **and**
- I am not subject to backup withholding because: **(a)** I am exempt from backup withholding, or **(b)** I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or **(c)** the IRS has notified me that I am no longer subject to backup withholding, **and**
- I am a U.S. person (including a U.S. resident alien).

**Certification instructions.** You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the Certification, but you must provide your correct TIN. (See the instructions on page 4.)

<b>Sign Here</b>	Signature of U.S. person ▶	Date ▶
------------------	----------------------------	--------

**Purpose of Form**  
 A person who is required to file an information return with the IRS, must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.

**U.S. person.** Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:

- Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),
- Certify that you are not subject to backup withholding, or
- Claim exemption from backup withholding if you are a U.S. exempt payee.

In 3 above, if applicable, you are also certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income.

**Note.** If a requester gives you a form other than Form W-9 to request your TIN, you must use the requester's form if it is substantially similar to this Form W-9.

For federal tax purposes, you are considered a person if you are:

- An individual who is a citizen or resident of the United States,
- A partnership, corporation, company, or association created or organized in the United States or under the laws of the United States, or
- Any estate (other than a foreign estate) or trust. See Regulations sections 301.7701-6(a) and 7(a) for additional information.

**Special rules for partnerships.** Partnerships that conduct a trade or business in the United States are generally required to pay a withholding tax on any foreign partners' share of income from such business. Further, in certain cases where a Form W-9 has not been received, a partnership is required to presume that a partner is a foreign person, and pay the withholding tax. Therefore, if you are a U.S. person that is a partner in a partnership conducting a trade or business in the United States, provide Form W-9 to the partnership to establish your U.S. status and avoid withholding on your share of partnership income.

The person who gives Form W-9 to the partnership for purposes of establishing its U.S. status and avoiding withholding on its allocable share of net income from the partnership conducting a trade or business in the United States is in the following cases:

- The U.S. owner of a disregarded entity and not the entity,

- The U.S. grantor or other owner of a grantor trust and not the trust, and
- The U.S. trust (other than a grantor trust) and not the beneficiaries of the trust.

**Foreign person.** If you are a foreign person, do not use Form W-9. Instead, use the appropriate Form W-8 (see Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Entities).

**Nonresident alien who becomes a resident alien.** Generally, only a nonresident alien individual may use the terms of a tax treaty to reduce or eliminate U.S. tax on certain types of income. However, most tax treaties contain a provision known as a "saving clause." Exceptions specified in the saving clause may permit an exemption from tax to continue for certain types of income even after the recipient has otherwise become a U.S. resident alien for tax purposes.

If you are a U.S. resident alien who is relying on an exception contained in the saving clause of a tax treaty to claim an exemption from U.S. tax on certain types of income, you must attach a statement to Form W-9 that specifies the following five items:

1. The treaty country. Generally, this must be the same treaty under which you claimed exemption from tax as a nonresident alien.
2. The treaty article addressing the income.
3. The article number (or location) in the tax treaty that contains the saving clause and its exceptions.
4. The type and amount of income that qualifies for the exemption from tax.
5. Sufficient facts to justify the exemption from tax under the terms of the treaty article.

**Example.** Article 20 of the U.S.-China income tax treaty allows an exemption from tax for scholarship income received by a Chinese student temporarily present in the United States. Under U.S. law, this student will become a resident alien for tax purposes if his or her stay in the United States exceeds 5 calendar years. However, paragraph 2 of the first Protocol to the U.S.-China treaty (dated April 30, 1984) allows the provisions of Article 20 to continue to apply even after the Chinese student becomes a resident alien of the United States. A Chinese student who qualifies for this exception (under paragraph 2 of the first protocol) and is relying on this exception to claim an exemption from tax on his or her scholarship or fellowship income would attach to Form W-9 a statement that includes the information described above to support that exemption.

If you are a nonresident alien or a foreign entity not subject to backup withholding, give the requester the appropriate completed Form W-8.

**What is backup withholding?** Persons making certain payments to you must under certain conditions withhold and pay to the IRS 28% of such payments (after December 31, 2002). This is called "backup withholding." Payments that may be subject to backup withholding include interest, dividends, broker and barter exchange transactions, rents, royalties, nonemployee pay, and certain payments from fishing boat operators. Real estate transactions are not subject to backup withholding.

You will not be subject to backup withholding on payments you receive if you give the requester your correct TIN, make the proper certifications, and report all your taxable interest and dividends on your tax return.

**Payments you receive will be subject to backup withholding if:**

1. You do not furnish your TIN to the requester,
2. You do not certify your TIN when required (see the Part II instructions on page 4 for details),

3. The IRS tells the requester that you furnished an incorrect TIN,

4. The IRS tells you that you are subject to backup withholding because you did not report all your interest and dividends on your tax return (for reportable interest and dividends only), or

5. You do not certify to the requester that you are not subject to backup withholding under 4 above (for reportable interest and dividend accounts opened after 1983 only).

Certain payees and payments are exempt from backup withholding. See the instructions below and the separate Instructions for the Requester of Form W-9.

Also see *Special rules regarding partnerships* on page 1.

## Penalties

**Failure to furnish TIN.** If you fail to furnish your correct TIN to a requester, you are subject to a penalty of \$50 for each such failure unless your failure is due to reasonable cause and not to willful neglect.

**Civil penalty for false information with respect to withholding.** If you make a false statement with no reasonable basis that results in no backup withholding, you are subject to a \$500 penalty.

**Criminal penalty for falsifying information.** Willfully falsifying certifications or affirmations may subject you to criminal penalties including fines and/or imprisonment. **Misuse of TINs.** If the requester discloses or uses TINs in violation of federal law, the requester may be subject to civil and criminal penalties.

## Specific Instructions

### Name

If you are an individual, you must generally enter the name shown on your income tax return. However, if you have changed your last name, for instance, due to marriage without informing the Social Security Administration of the name change, enter your first name, the last name shown on your social security card, and your new last name.

If the account is in joint names, list first, and then circle, the name of the person or entity whose number you entered in Part I of the form.

**Sole proprietor.** Enter your individual name as shown on your income tax return on the "Name" line. You may enter your business, trade, or "doing business as (DBA)" name on the "Business name" line.

**Limited liability company (LLC).** If you are a single-member LLC (including a foreign LLC with a domestic owner) that is disregarded as an entity separate from its owner under Treasury regulations section 301.7701-3, enter the owner's name on the "Name" line. Enter the LLC's name on the "Business name" line. Check the appropriate box for your filing status (sole proprietor, corporation, etc.), then check the box for "Other" and enter "LLC" in the space provided. **Other entities.** Enter your business name as shown on required federal tax documents on the "Name" line. This name should match the name shown on the charter or other legal document creating the entity. You may enter any business, trade, or DBA name on the "Business name" line. **Note.** You are requested to check the appropriate box for your status (individual/sole proprietor, corporation, etc.).

## Exempt From Backup Withholding

If you are exempt, enter your name as described above and check the appropriate box for your status, then check the "Exempt from backup withholding" box in the line following the business name, sign and date the form.

Generally, individuals (including sole proprietors) are not exempt from backup withholding. Corporations are exempt from backup withholding for certain payments, such as interest and dividends.

**Note.** If you are exempt from backup withholding, you should still complete this form to avoid possible erroneous backup withholding.

**Exempt payees.** Backup withholding is not required on any payments made to the following payees:

1. An organization exempt from tax under section 501(a), any IRA, or a custodial account under section 403(b)(7) if the account satisfies the requirements of section 401(f)(2),
  2. The United States or any of its agencies or instrumentalities,
  3. A state, the District of Columbia, a possession of the United States, or any of their political subdivisions or instrumentalities,
  4. A foreign government or any of its political subdivisions, agencies, or instrumentalities, or
  5. An international organization or any of its agencies or instrumentalities.
- Other payees that may be exempt from backup withholding include:
6. A corporation,
  7. A foreign central bank of issue,
  8. A dealer in securities or commodities required to register in the United States, the District of Columbia, or a possession of the United States,
  9. A futures commission merchant registered with the Commodity Futures Trading Commission,
  10. A real estate investment trust,
  11. An entity registered at all times during the tax year under the Investment Company Act of 1940,
  12. A common trust fund operated by a bank under section 584(a),
  13. A financial institution,
  14. A middleman known in the investment community as a nominee or custodian, or
  15. A trust exempt from tax under section 664 or described in section 4947.

The chart below shows types of payments that may be exempt from backup withholding. The chart applies to the exempt recipients listed above, 1 through 15.

IF the payment is for ...	THEN the payment is exempt for...
Interest and dividend payments	All exempt recipients except for 9
Broker transactions	Exempt recipients 1 through 13. Also, a person registered under the Investment Advisers Act of 1940 who regularly acts as a broker
Barter exchange transactions and patronage dividends	Exempt recipients 1 through 5
Payments over \$600 required to be reported and direct sales over \$5,000 <sup>1</sup>	Generally, exempt recipients 1 through 7 <sup>2</sup>

<sup>1</sup> See Form 1099-MISC, Miscellaneous Income, and its instructions.

<sup>2</sup> However, the following payments made to a corporation (including gross proceeds paid to an attorney under section 6045(f), even if the attorney is a corporation) and reportable on Form 1099-MISC are not exempt from backup withholding: medical and health care payments, attorneys' fees; and payments for services paid by a federal executive agency.

## Part I. Taxpayer Identification Number (TIN)

**Enter your TIN in the appropriate box.** If you are a resident alien and you do not have and are not eligible to get an SSN, your TIN is your IRS individual taxpayer identification number (ITIN). Enter it in the social security number box. If you do not have an ITIN, see *How to get a TIN* below.

If you are a sole proprietor and you have an EIN, you may enter either your SSN or EIN. However, the IRS prefers that you use your SSN.

If you are a single-owner LLC that is disregarded as an entity separate from its owner (see *Limited liability company (LLC)* on page 2), enter your SSN (or EIN, if you have one). If the LLC is a corporation, partnership, etc., enter the entity's EIN.

**Note.** See the chart on page 4 for further clarification of name and TIN combinations.

**How to get a TIN.** If you do not have a TIN, apply for one immediately. To apply for an SSN, get Form SS-5, Application for a Social Security Card, from your local Social Security Administration office or get this form online at [www.socialsecurity.gov](http://www.socialsecurity.gov). You may also get this form by calling 1-800-772-1213. Use Form W-7, Application for IRS Individual Taxpayer Identification Number, to apply for an ITIN, or Form SS-4, Application for Employer Identification Number, to apply for an EIN. You can apply for an EIN online by accessing the IRS website at [www.irs.gov/businesses](http://www.irs.gov/businesses) and clicking on Employer ID Numbers under Related Topics. You can get Forms W-7 and SS-4 from the IRS by visiting [www.irs.gov](http://www.irs.gov) or by calling 1-800-TAX-FORM (1-800-829-3676).

If you are asked to complete Form W-9 but do not have a TIN, write "Applied For" in the space for the TIN, sign and date the form, and give it to the requester. For interest and dividend payments, and certain payments made with respect to readily tradable instruments, generally you will have 60 days to get a TIN and give it to the requester before you are subject to backup withholding on payments. The 60-day rule does not apply to other types of payments. You will be subject to backup withholding on all such payments until you provide your TIN to the requester.

**Note.** Writing "Applied For" means that you have already applied for a TIN or that you intend to apply for one soon. **Caution:** A *disregarded domestic entity that has a foreign owner must use the appropriate Form W-8.*

**Part II. Certification**

To establish to the withholding agent that you are a U.S. person, or resident alien, sign Form W-9. You may be requested to sign by the withholding agent even if items 1, 4, and 5 below indicate otherwise.

For a joint account, only the person whose TIN is shown in Part I should sign (when required). Exempt recipients, see *Exempt From Backup Withholding* on page 2.

**Signature requirements.** Complete the certification as indicated in 1 through 5 below.

**1. Interest, dividend, and barter exchange accounts opened before 1984 and broker accounts considered active during 1983.** You must give your correct TIN, but you do not have to sign the certification.

**2. Interest, dividend, broker, and barter exchange accounts opened after 1983 and broker accounts considered inactive during 1983.** You must sign the certification or backup withholding will apply. If you are subject to backup withholding and you are merely providing your correct TIN to the requester, you must cross out item 2 in the certification before signing the form.

**3. Real estate transactions.** You must sign the certification. You may cross out item 2 of the certification. **4. Other payments.** You must give your correct TIN, but you do not have to sign the certification unless you have been notified that you have previously given an incorrect TIN. "Other payments" include payments made in the course of the requester's trade or business for rents, royalties, goods (other than bills for merchandise), medical and health care services (including payments to corporations), payments to a nonemployee for services, payments to certain fishing boat crew members and fishermen, and gross proceeds paid to attorneys (including payments to corporations).

**5. Mortgage interest paid by you, acquisition or abandonment of secured property, cancellation of debt, qualified tuition program payments (under section 529), IRA, Coverdell ESA, Archer MSA or HSA contributions or distributions, and pension distributions.** You must give your correct TIN, but you do not have to sign the certification.

**What Name and Number To Give the Requester**

For this type of account:	Give name and SSN of:
1. Individual	The individual
2. Two or more individuals Joint account)	The actual owner of the account
3. Custodian account of a minor (Uniform Gift to Minors Act)	or, if combined funds, the first individual on the account <sup>1</sup>
4. a. The usual revocable savings trust (grantor is also trustee)	The minor <sup>2</sup> The grantor-trustee <sup>1</sup> The actual owner <sup>1</sup>
b. So-called trust account that is not a legal or valid trust under state law	The owner <sup>3</sup>
5. Sole proprietorship or single-owner LLC	
For this type of account:	Give name and EIN of:
6. Sole proprietorship or single-owner LLC	The owner <sup>3</sup> Legal entity <sup>4</sup>
7. A valid trust, estate, or pension trust	The corporation The organization
8. Corporate or LLC electing corporate status on Form 8832	The partnership The broker or nominee The public entity
9. Association, club, religious, charitable, educational, or other tax-exempt organization	
10. Partnership or multi-member LLC	
11. A broker or registered nominee	
12. Account with the Department of Agriculture in the name of a public entity (such as a state or local government, school district, or prison) that receives agricultural program	

<sup>1</sup> List first and circle the name of the person whose number you furnish. If only one person on a joint account has an SSN, that person's number must be furnished.

<sup>2</sup> Circle the minor's name and furnish the minor's SSN.

<sup>3</sup> You must show your individual name and you may also enter your business or "DBA" name on the second name line. You may use either your SSN or EIN (if you have one). If you are a sole proprietor, IRS encourages you to use your SSN.

<sup>4</sup> List first and circle the name of the legal trust, estate, or pension trust. (Do not furnish the TIN of the personal representative or trustee unless the legal entity itself is not designated in the account title.) Also see *Special rules regarding partnerships* on page 1.

**Note.** If no name is circled when more than one name is listed, the number will be considered to be that of the first name listed.

**Privacy Act Notice**

Section 6109 of the Internal Revenue Code requires you to provide your correct TIN to persons who must file information returns with the IRS to report interest, dividends, and certain other income paid to you, mortgage interest you paid, the acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA, or Archer MSA or HSA. The IRS uses the numbers for identification purposes and to help verify the accuracy of your tax return. The IRS may also provide this information to the Department of Justice for civil and criminal litigation, and to cities, states, the District of Columbia, and U.S. possessions to carry out their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism.

You must provide your TIN whether or not you are required to file a tax return. Payers must generally withhold 28% of taxable interest, dividend, and certain other payments to a payee who does not give a TIN to a payer. Certain penalties may also apply.



**EXHIBIT E**  
**FORM OF CLOSING ESCROW AGREEMENT**

NEWYORK\37267.15



## CLOSING ESCROW AGREEMENT

**THIS AGREEMENT** (the "**Agreement**") is made this \_\_\_ day of \_\_\_\_\_, 2009, by and among MP Foam DIP LLC, a Delaware limited liability company ("**Buyer**"), Foamex International Inc., a Delaware corporation ("**Seller**"), and WILMINGTON TRUST COMPANY ("**Escrow Agent**").

### RECITALS

**WHEREAS**, on February 18, 2009, Seller, together with certain of its subsidiaries, commenced voluntary cases under chapter 11 of title 11, United States Code, 11 U.S.C. 101 *et seq.*, in the United States Bankruptcy Court for the District of Delaware (the "**Bankruptcy Court**"), which cases are being jointly administered under Chapter 11 Case No. 09-10560 (the "**Bankruptcy Case**");

**WHEREAS**, Seller and such subsidiaries continue to operate their businesses and manage their properties as debtors and debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code;

**WHEREAS**, on the date hereof, Buyer, Seller and certain of Seller's subsidiaries have entered into that certain Asset Purchase Agreement, pursuant to which, among other things, Seller and such subsidiaries have agreed to sell and transfer to Buyer, pursuant to sections 363 and 365 of the Bankruptcy Code, all of the Purchased Assets and Assumed Liabilities on the terms and subject to the conditions set forth in such agreement (the "**Purchase Agreement**");

**WHEREAS**, pursuant to the Purchase Agreement, Buyer has agreed to place \$5,000,000 in escrow to be held and disbursed in accordance with the Purchase Agreement and this Agreement; and

**WHEREAS**, this Agreement constitutes the Closing Escrow Agreement referred to in the Purchase Agreement;

**NOW, THEREFORE**, in consideration of the premises, and further consideration of the covenants set forth hereafter, it is hereby agreed mutually as follows:

#### **I. Designation as Escrow Agent.**

Buyer and Seller hereby appoint Escrow Agent to act as escrow agent and Escrow Agent hereby accepts such appointment, all on the terms and subject to the conditions set forth in this Agreement.

#### **II. Deposit of Escrow Funds.**

(a) Upon execution of this Escrow Agreement, Buyer shall deposit the sum of five million dollars (\$5,000,000) (such amount, together with all investments thereof and all interest accumulated thereon and proceeds therefrom, the "**Escrow Funds**") by wire transfer of immediately available funds into an account (the "**Escrow Account**") established with Escrow Agent.

(b) Escrow Agent hereby agrees to accept the Escrow Funds and hold the Escrow Funds in the Escrow Account in escrow upon the terms and conditions set forth in this Agreement and disburse the Escrow Funds from the Escrow Account pursuant to the terms and conditions hereof.

(c) Escrow Agent shall invest the Escrow Account pursuant to written directions of Seller and Buyer, and in the absence of such directions, in the Federated Treasury Obligations Fund. Seller and Buyer acknowledge that shares in this mutual fund are not obligations of Wilmington Trust Company or Wilmington Trust Corporation, are not deposits and are not insured by the FDIC. Escrow Agent or its affiliate may be compensated by the mutual fund for services rendered in its capacity as investment advisor, or other service provider, such as provider of shareholder servicing and distribution services, and such compensation is both described in detail in the prospectus for the fund, and is in addition to the compensation, if any, paid to Wilmington Trust Company in its capacity as Escrow Agent hereunder.

### **III. Disbursement of Escrow Account.**

(a) Escrow Agent will hold the Escrow Funds in its possession in the Escrow Account until authorized hereunder to deliver such Escrow Funds as follows:

1. Upon determination of the Final Cash Purchase Price and Final Working Capital in accordance with Section 3.3(d) of the Purchase Agreement, Seller and Buyer shall deliver joint written instructions to the Escrow Agent (a "**Joint Certificate of Instruction**"), the Escrow Agent shall deliver the Escrow Funds in accordance with such instructions by wire transfer of immediately available funds to such account or accounts as are designated in such instructions.
2. In the event of a dispute between Seller and Buyer as to their respective rights to the Escrow Funds, the Escrow Agent shall continue to hold the Escrow Funds until otherwise directed by either (i) Joint Certificate of Instruction or (ii) a final and non-appealable court order binding on the Escrow Agent which has not been stayed or vacated before disbursement of all of the Escrow Funds; provided, however, that notwithstanding the foregoing, the Escrow Agent shall have the right in the event of such a dispute to deposit the Escrow Funds with the Clerk of the Bankruptcy Court or any federal or state court then having jurisdiction over an interpleader action with respect to the Escrow Funds. The Escrow Agent shall give written notice of any such deposit to Seller and Buyer. Upon such deposit or other disbursement in accordance with the provisions of this Section III(a)(2), the Escrow Agent shall be relieved and discharged of all further obligations with respect to the Escrow Funds and all further obligations and liability to the parties hereto with respect to its obligations under this Agreement.

(b) Notwithstanding anything contained herein to the contrary, in the event transfer instructions for any Escrow Funds are given, whether in writing, by telecopier or otherwise, Escrow Agent is authorized (but not required) to seek confirmation of such instructions by telephone call-back, and the Escrow Agent may rely upon the confirmations of anyone purporting to be the person or persons designated in the instructions. The persons and telephone numbers for call-backs may be changed only in a writing actually received and acknowledged by the Escrow Agent. The parties to this Escrow Agreement acknowledge that such security procedure is commercially reasonable. Absent specific written direction as to method of disbursement, Escrow Agent may disburse the Escrow Funds pursuant to this Section III, either by wire transfer or certified or bank check, at the sole discretion of the Escrow Agent. It is understood that the Escrow Agent may disburse any Escrow Funds in the Escrow Account without any separate instructions, if such disbursements are in accordance with the terms of this Escrow Agreement.

### **IV. Authority of Escrow Agent and Limitation of Liability.**

(a) In acting hereunder, Escrow Agent shall have only such duties as are specified herein and no implied duties shall be read into this Agreement, and Escrow Agent shall not be liable for any act done, or omitted to be done, by it in the absence of its gross negligence or willful misconduct. Escrow Agent shall not be charged with knowledge or notice of any fact, order, agreement or circumstance not specifically set forth herein including without limitation the terms of the Purchase Agreement.

(b) Escrow Agent may act in reliance upon any writing or instrument or signature which it, in good faith, believes to be genuine, and may assume the validity and accuracy of any statement or assertion contained in such a writing or instrument and may assume that any person purporting to give any writing, notice, advice or instruction in connection with the provisions hereof has been duly authorized to do so.

(c) Escrow Agent shall be entitled to consult with legal counsel in the event that a question or dispute arises with regard to the construction of any of the provisions hereof, and, in the absence of its gross negligence or willful misconduct, shall incur no liability and shall be fully protected in acting in accordance with the advice or opinion of such counsel.

(d) Escrow Agent shall not be required to use more than a de minimis amount of (in the Escrow Agent's reasonable determination) its own funds in the performance of any of its obligations or duties or the exercise of any of its rights or powers, and shall not be required to take any action which, in Escrow Agent's sole and absolute judgment, could involve more than a de minimis (in the Escrow Agent's reasonable determination) expense or liability unless furnished with security and indemnity which it deems, in its sole and absolute discretion, to be satisfactory. Nothing in this Section IV(d) is meant to limit the terms in Section IV(e) below.

(e) Buyer and Seller shall pay to Escrow Agent compensation for its services hereunder to be determined from time to time by the application of the current rates than charged by Escrow Agent for accounts of similar size and character, with a minimum rate of \$3,500 per annum together with such other applicable transaction fees as set forth on the Fee Schedule annexed hereto as Exhibit A. In the event Escrow Agent renders any extraordinary services in connection with the Escrow Account at the request of the parties, Escrow Agent shall be entitled to additional compensation therefor, so long as such compensation is agreed to by the Buyer and Seller in advance. Buyer and Seller also agree to pay the reasonable legal fees of Escrow Agent in connection with this Agreement, which shall be due and payable contemporaneous with the initial deposit of the Escrow Funds, and from time to time thereafter as incurred and upon written invoice. Escrow Agent's legal fees, disbursements and expenses shall be payable whether or not the transactions contemplated hereby occur. Escrow Agent shall have a first lien against the Escrow Account to secure the obligations of Buyer and Seller hereunder. The terms of this paragraph shall survive termination of this Agreement.

(f) Buyer and Seller hereby agree, jointly and severally, to indemnify Escrow Agent, its directors, officers, employees and agents (collectively, the "**Indemnified Parties**"), and hold the Indemnified Parties harmless from any and against all liabilities, losses, actions, suits or proceedings at law or in equity, and any other expenses, fees or charges of any character or nature, including, without limitation, reasonable attorney's fees and expenses, which an Indemnified Party may incur or with which it may be threatened by reason of acting as or on behalf of Escrow Agent under this Agreement or arising out of the existence of the Escrow Account, except to the extent the same shall be caused by Escrow Agent's gross negligence or willful misconduct. The Escrow Agent may retain counsel of its choice to participate in the defense of any indemnified claims, at the expense of the Buyer and Seller and Buyer and Seller shall not settle or otherwise resolve any indemnified claim without an unconditional release in

favor of the Escrow Agent in form, scope and substance satisfactory to the Escrow Agent. Escrow Agent shall have a first lien against the Escrow Account to secure the obligations of Buyer and Seller hereunder. The terms of this paragraph shall survive termination of this Agreement.

(g) In the event Escrow Agent receives conflicting instructions hereunder, Escrow Agent shall be fully protected in refraining from acting until such conflict is resolved to the satisfaction of Escrow Agent.

(h) Escrow Agent may resign as Escrow Agent, and, upon its resignation, shall thereupon be discharged from any and all further duties and obligations under this Agreement by giving notice in writing of such resignation to Buyer and Seller, which notice shall specify a date upon which such resignation shall take effect. Upon the resignation of Escrow Agent, Buyer and Seller shall, within thirty (30) business days after receiving the foregoing notice from Escrow Agent, designate a substitute escrow agent (the "**Substitute Escrow Agent**"), which Substitute Escrow Agent shall, upon its designation and notice of such designation to Escrow Agent, succeed to all of the rights, duties and obligations of Escrow Agent hereunder. In the event Buyer and Seller shall not have delivered to Escrow Agent a written designation of Substitute Escrow Agent within the aforementioned thirty (30) business day period, together with the consent to such designation by the Substitute Escrow Agent, the Escrow Agent may apply to a court of competent jurisdiction to appoint a Substitute Escrow Agent, and the costs of obtaining such appointment shall be reimbursable from Buyer and Seller and from the Escrow Funds. Upon the delivery of the funds in the Escrow Account to a Substitute Escrow Agent, Escrow Agent shall be relieved of all liability hereunder.

#### V. **Notices.**

Except as otherwise provided herein, any notice or other communication required or permitted hereunder shall be in writing and shall be deemed to have been duly given (a) on the day of delivery if delivered in person, or if delivered by facsimile upon confirmation of receipt, (b) on the first (1st) business day following the date of dispatch if delivered by a nationally recognized express courier service guaranteeing next business day delivery, or (c) on the fifth (5th) business day following the date of mailing if delivered by registered or certified mail, return receipt requested, postage prepaid. All notices hereunder shall be delivered as set forth on the signature pages hereof or pursuant to such other instructions as may be designated by notice given in accordance with this Section V by the party to receive such notice.

#### VI. **Amendment.**

This Escrow Agreement may not be amended, modified, supplemented or otherwise altered except by an instrument in writing signed by each of the parties hereto.

#### VII. **Termination.**

This Agreement will terminate upon the disbursement of all Escrow Funds in the Escrow Account, as provided above, by the Escrow Agent.

#### VIII. **Tax Reporting.**

The parties hereto, other than the Escrow Agent, agree that, for tax reporting purposes, all interest and other income earned from the investment of amounts in the Escrow Account ("**Taxable Income**") in any tax year shall be allocated to the Buyer ("**Taxpayer**"). Upon execution of this Escrow Agreement,

Taxpayer shall provide Escrow Agent with its certified tax identification number ("TIN") on an executed Internal Revenue Service Form ("IRS") W-9 or other applicable IRS Form. Taxpayer agrees to report all Taxable Income allocable to it on its federal and other applicable tax returns. Taxpayer acknowledges and agrees that, in the event its TIN is not certified to the Escrow Agent, and/or it does not make all certifications set forth in IRS Form W-9 or other applicable IRS Form, applicable tax laws may require withholding of a portion of any income earned with respect to amounts in the Escrow Account that are allocable to it.

**IX. Anti-Terrorism/Anti-Money Laundering Laws.**

IMPORTANT INFORMATION ABOUT PROCEDURES FOR OPENING A NEW ACCOUNT  
- To help the United States government fight the funding of terrorism or money laundering activities, Federal law requires all financial institutions to obtain, verify, and record information that identifies each person who opens a new account. What this means for the parties to this Agreement: the Escrow Agent will ask for your name, address, date of birth, and other information that will allow the Escrow Agent to identify you (e.g., your social security number or tax identification number.) The Escrow Agent may also ask to see your driver's license or other identifying documents (e.g., passport, evidence of formation of corporation, limited liability company, limited partnership, etc., certificate of good standing.)

Each party to this Agreement hereby agrees to provide the Escrow Agent, prior to the establishment of the Escrow Account, with the information identified above pertaining to it by completing the form attached as Exhibit B and returning it to the Escrow Agent. Exhibit B includes one form for individuals and another form for entities.

**X. Governing Law.**

This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware in all respects without giving effect to the conflicts of laws principles thereof.

**XI. Submission to Jurisdiction; No Jury Trial.** With respect to any Action arising out of or relating to this Agreement, each of the parties hereby irrevocably:

(a) consents to the exclusive jurisdiction of the Bankruptcy Court, as the sole judicial forum for the adjudication of any matters arising under or in connection with the Agreement. After Seller is no longer subject to the jurisdiction of the Bankruptcy Court, each of the parties irrevocably submits to the exclusive jurisdiction of the courts of the State of New York and of the United States of America, in each case located in Manhattan, ("**Selected Courts**") for any Action arising out of or relating to this Agreement and the transactions contemplated hereby and thereby (and agrees not to commence any Action relating hereto or thereto except in such courts) and waives any objection to venue being laid in the Selected Courts whether based on the grounds of forum non conveniens or otherwise;

(b) consents to service of process in any Action by the mailing of copies thereof by registered or certified mail, postage prepaid, or by recognized international express carrier or delivery service, to Seller, Buyer or Escrow Agent at their respective addresses set forth on the signature page; provided, however, that nothing herein shall affect the right of any party hereto to serve process in any other manner permitted by law, and

(c) WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY ACTION, PROCEEDING OR LITIGATION

DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR THE OTHER TRANSACTION DOCUMENTS.

**XII. Entire Agreement.**

This Agreement constitutes the full and entire understanding and agreement between the parties with regard to the subjects hereof and supersedes all prior agreements relating to the subject matter hereof.

**XIII. Delays or Omissions.**

Except as expressly provided herein, no delay or omission to exercise any right, power or remedy accruing to each of the parties upon any breach or default of any party under this Agreement, shall impair any such right, power or remedy of each of the parties nor shall it be construed to be a waiver of any such breach or default, or an acquiescence therein, or of or in any similar breach or default thereafter occurring; nor shall any waiver of any single breach or default be deemed a waiver of any other breach or default theretofore or thereafter occurring. Any waiver, permit, consent or approval of any kind or character on the part of each of the parties of any breach or default under this Agreement, or any waiver on the part of any such party of any provisions or conditions of this Agreement, must be in writing and shall be effective only to the extent specifically set forth in such writing. All remedies, either under this Agreement or by law, in equity, or otherwise afforded to each of the parties shall be cumulative and not alternative.

**XIV. Severability.**

In the event that any provision of this Agreement becomes or is declared by a court of competent jurisdiction to be illegal, unenforceable or void, this Agreement shall continue in full force and effect without said provisions; provided that no such severability shall be effective if it materially changes the economic benefit of this Agreement to any party. Any provision held invalid or unenforceable only in part or degree will remain in full force to the extent not held invalid or unenforceable.

**XV. Successors and Assigns.**

Except as otherwise provided herein, the provisions hereof shall inure to the benefit of, and be binding upon, the successors by operation of law and permitted assigns of the parties hereto. No assignment of this Agreement may be made by any party at any time, whether or not by operation of law, without the other party's prior written consent; provided, however, that Buyer may, without the consent of the other parties hereto, assign any of its rights and interests under this Agreement to one or more Affiliate(s) of Buyer, which assignment, in either case, will not relieve Buyer of any obligations hereunder. Except as specifically provided for herein, only the parties to this Agreement or their permitted assigns shall have rights under this Agreement.

**XVI. Third Party Beneficiaries.**

The terms and provisions of this Agreement are intended solely for the benefit of each party hereto and their respective successors or permitted assigns, and it is not the intention of the parties to confer third-party beneficiary rights upon any other person.

**XVII. Counterparts.**

This Agreement may be executed in any number of counterparts, each of which when so executed shall be deemed to be an original, and such counterparts together shall constitute and be one and the same instrument.

[This space is intentionally left blank.]



**IN WITNESS WHEREOF**, the parties hereto have caused their names to be hereto subscribed by their respective Presidents or Vice Presidents as of the day and year first above written.

MP Foam DIP LLC,  
as Buyer

WILMINGTON TRUST COMPANY,  
Escrow Agent

By: \_\_\_\_\_  
Name:  
Title:

By: \_\_\_\_\_  
Name:  
Title:

Address:  
c/o MatlinPatterson Global Advisers LLC  
520 Madison Avenue, 35<sup>th</sup> Floor  
New York, NY 10022  
Fax No.: (212) 651-4010  
Tel.No.: (212) 651-9500  
Attention: Lawrence M. Teitelbaum

Address:  
1100 North Market Street  
Wilmington, Delaware 19890  
Fax No.: (302) \_\_\_\_ - \_\_\_\_\_  
Tel. No.: (302) 636- \_\_\_\_\_  
Attention: \_\_\_\_\_

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

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

Bracewell & Giuliani LLP  
1177 Avenue of the Americas  
New York, New York 10036  
Attention: Robb L. Tretter  
Jennifer Feldsher

Moritt Hock Hamroff & Horowitz LLP  
400 Garden City Plaza  
Garden City, NY 11530  
Phone: 516-873-2000  
Fax: 516-873-2010  
Attention: Leslie Ann Berkoff, Esq.

Facsimile No.: (212) 508-6101  
Telephone No.: (212) 508-6100

Foamex International, Inc.,  
as Seller

By: \_\_\_\_\_  
Name:  
Title:

Address:  
Foamex International, Inc.  
Rose Tree Corporate Center II  
1400 N. Providence Road, Suite 2000  
Media, Pennsylvania 19063  
Fax No.: (610) 744-2118  
Tel.No.: (610) 744-2300  
Attention: Andrew Prusky

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

Akin Gump Strauss Hauer & Feld LLP

One Bryant Park  
New York, NY 10036  
Attention: Ira Dizengoff  
                  Stephen Kuhn  
Facsimile No.: (212) 872-1000  
Telephone No.: (212) 872-1002

**EXHIBIT A  
FEE SCHEDULE**

**WILMINGTON TRUST COMPANY**

**SCHEDULE OF FEES**

**To act as  
Escrow Agent/Paying Agent**

**Initial Acceptance Fee (one time, payable in advance at closing) \$ 500.00**

Covers acceptance of appointment as Escrow Agent

**Administration Fee (payable in advance at closing) \$3,500.00**

Including complete study of drafts of Escrow Agreement and all supporting documents in connection therewith, conferences until final Agreement is agreed upon, execution of final Agreement and administrative duties in connection with the security provisions of the Agreement.

**Transaction Fees (only if applicable)\*:**

<b>a. Purchase, sale, withdrawal, maturities, calls, and puts of domestic securities</b>	<b>\$15.00</b>	
<b>b. Physical delivery of domestic securities</b>	<b>\$50.00</b>	
<b>c. Purchase of Eurodollar certificate of deposit</b>	<b>\$65.00</b>	
<b>d. Principal amortizing securities (per pool/per month)</b>	<b>\$10.00</b>	
<b>e. Tax Reporting</b>		<b>At Cost</b>
<b>f. Wire Transfer Charges</b>		
	<b>Outgoing</b>	<b>\$25.00</b>
	<b>Incoming</b>	<b>\$10.00</b>

\* These fees do not apply if funds invested within WTC Family of Funds.

**NOTE:**

Charges for any services not specifically covered in this schedule will be billed commensurate with the services rendered. This schedule reflects charges that are now in effect for our normal and regular services and are subject to modification where unusual conditions or requirements prevail **and does not include counsel fees** or expenses and disbursements, which will be billed at cost. **The fees of our counsel shall be is due and payable whether or not the transaction closes.**

**EXHIBIT B**  
**Due Diligence Questionnaire for Entity Customers**

Dear Customer:

**IMPORTANT INFORMATION ABOUT PROCEDURES FOR OPENING A NEW ACCOUNT**

To help the government fight the funding of terrorism or money laundering activities, Federal law requires all financial institutions to obtain, verify, and record information that identifies each person who opens a new account. What this means for you: When you open an account, we will ask for your name, address, date of birth, and other information that will allow us to identify you. We may also ask to see your driver's license or other identifying documents.

Please complete the items identified and sign below. In certain circumstances, we may be required to request additional information. Thank you for your cooperation in this matter.

**Company Name:** \_\_\_\_\_

**SSN/TIN\*:** \_\_\_\_\_

**Street Address\*\*:** \_\_\_\_\_

**City:** \_\_\_\_\_ **State:** \_\_\_\_\_ **Zip Code:** \_\_\_\_\_

**Phone (Optional):** \_\_\_\_\_ **Fax (Optional):** \_\_\_\_\_ **eMail (Optional):** \_\_\_\_\_

*\*If SSN/TIN has been applied for please attach copy of filed application*

*\*\* Business street address, address for the principal place of business, local office or other physical location,*

*P.O. Box address is not acceptable*

**Required documents from non-individuals:**

Please provide the following *executed* document:

Completed IRS Form W-9/W-8 (form attached)

Please provide *at least one* (1) of the following certified documents:

Certificate or Articles of Incorporation

Government-issued business license

Partnership Agreement

LLC Agreement

Trust Agreement

Certificate of Good Standing (issued within the last six months)

\_\_\_\_\_  
**Signature**

\_\_\_\_\_  
**Date**

Exhibit B

687170.0001 EAST 8140937 v1

**EXHIBIT B (Cont'd)  
Due Diligence Questionnaire for Individual Customers**

Dear Customer:

**IMPORTANT INFORMATION ABOUT PROCEDURES FOR OPENING A NEW ACCOUNT**

To help the government fight the funding of terrorism or money laundering activities, Federal law requires all financial institutions to obtain, verify, and record information that identifies each person who opens a new account. What this means for you: When you open an account, we will ask for your name, address, date of birth, and other information that will allow us to identify you. We may also ask to see your driver's license or other identifying documents.

Please complete the items identified and sign below. In certain circumstances, we may be required to request additional information. Thank you for your cooperation in this matter.

**Your Name:** \_\_\_\_\_

**SSN/TIN\*:** \_\_\_\_\_ **Date of Birth (Individuals):** \_\_\_\_\_

**Street Address (individual's residential address\*\*):** \_\_\_\_\_

**City:** \_\_\_\_\_ **State:** \_\_\_\_\_ **Zip Code:** \_\_\_\_\_

**Phone (Optional):** \_\_\_\_\_ **Fax (Optional):** \_\_\_\_\_ **eMail (Optional):** \_\_\_\_\_

\* *If SSN/TIN has been applied for please attach copy of filed application*

\*\* *P.O. Box address is not acceptable*

**Required documents from individuals:**

Please provide the following *executed* document:  
Completed IRS Form W-9/W-8 (form attached)

Copy of *at least one* (1) of the following documents:

**1) Driver License (Photo ID):**

State/Country of Issuance: \_\_\_\_\_  
License Number: \_\_\_\_\_  
Issuance Date: \_\_\_\_\_  
Expiration Date: \_\_\_\_\_

**2) Passport:**

Country of Issuance: \_\_\_\_\_  
Issuance Date: \_\_\_\_\_  
Passport Number: \_\_\_\_\_  
Expiration Date: \_\_\_\_\_

**3) Government Issued ID Card (Photo ID):**

State/Country of Issuance: \_\_\_\_\_  
ID Number: \_\_\_\_\_  
Issuance Date: \_\_\_\_\_  
Expiration Date: \_\_\_\_\_

\_\_\_\_\_  
**Signature**  
Revised: January 9, 2007/Due Diligence Form

\_\_\_\_\_  
**Date**

Form <b>W-9</b> (Rev. November 2005) Department of the Treasury Internal Revenue Service	<h2 style="margin:0;">Request for Taxpayer Identification Number and Certification</h2>	Give form to the requester. Do not send to the IRS.
---	---	---

Print or Type See Specific Instructions on page 2.	Name (as shown on your Income tax return)		
	Business name, if different from above		
	<input type="checkbox"/> Individual/ Sole Proprietor <input type="checkbox"/> Corporation <input type="checkbox"/> Partnership <input type="checkbox"/> Other <input type="checkbox"/> Exempt from backup withholding		
	Check appropriate box: Address (number, street, and apt. or suite no.)	Requester's name and address (optional):	
	City, state, and ZIP code.		
List account number(s) here (optional)			

**Part I Taxpayer Identification Number (TIN)**

Enter your TIN in the appropriate box. For individuals, this is your social security number (SSN) **However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 2.** For other entities, it is your employer identification number (EIN). If you do not have a number, see **How to get a TIN on page 2.**

Social Security number 
Employer identification number 

**Note:** If the account is in more than one name, see the chart on page 2 for guidelines on whose number to enter.

**Part II Certification**

Under penalties of perjury, I certify that:

- The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), **and**
- I am not subject to backup withholding because: **(a)** I am exempt from backup withholding, or **(b)** I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or **(c)** the IRS has notified me that I am no longer subject to backup withholding, **and**
- I am a U.S. person (including a U.S. resident alien).

**Certification instructions.** You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the Certification, but you must provide your correct TIN. (See the instructions on page 4.)

<b>Sign Here</b>	Signature of U.S. person ▶	Date ▶
------------------	----------------------------	--------

**Purpose of Form**  
 A person who is required to file an information return with the IRS, must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.

**U.S. person.** Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:

- Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),
- Certify that you are not subject to backup withholding, or
- Claim exemption from backup withholding if you are a U.S. exempt payee.

In 3 above, if applicable, you are also certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income.

**Note.** If a requester gives you a form other than Form W-9 to request your TIN, you must use the requester's form if it is substantially similar to this Form W-9.

For federal tax purposes, you are considered a person if you are:

- An individual who is a citizen or resident of the United States,
- A partnership, corporation, company, or association created or organized in the United States or under the laws of the United States, or
- Any estate (other than a foreign estate) or trust. See Regulations sections 301.7701-6(a) and 7(a) for additional information.

**Special rules for partnerships.** Partnerships that conduct a trade or business in the United States are generally required to pay a withholding tax on any foreign partners' share of income from such business. Further, in certain cases where a Form W-9 has not been received, a partnership is required to presume that a partner is a foreign person, and pay the withholding tax. Therefore, if you are a U.S. person that is a partner in a partnership conducting a trade or business in the United States, provide Form W-9 to the partnership to establish your U.S. status and avoid withholding on your share of partnership income.

The person who gives Form W-9 to the partnership for purposes of establishing its U.S. status and avoiding withholding on its allocable share of net income from the partnership conducting a trade or business in the United States is in the following cases:

- The U.S. owner of a disregarded entity and not the entity,

- The U.S. grantor or other owner of a grantor trust and not the trust, and
- The U.S. trust (other than a grantor trust) and not the beneficiaries of the trust.

**Foreign person.** If you are a foreign person, do not use Form W-9. Instead, use the appropriate Form W-8 (see Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Entities).

**Nonresident alien who becomes a resident alien.** Generally, only a nonresident alien individual may use the terms of a tax treaty to reduce or eliminate U.S. tax on certain types of income. However, most tax treaties contain a provision known as a "saving clause." Exceptions specified in the saving clause may permit an exemption from tax to continue for certain types of income even after the recipient has otherwise become a U.S. resident alien for tax purposes.

If you are a U.S. resident alien who is relying on an exception contained in the saving clause of a tax treaty to claim an exemption from U.S. tax on certain types of income, you must attach a statement to Form W-9 that specifies the following five items:

1. The treaty country. Generally, this must be the same treaty under which you claimed exemption from tax as a nonresident alien.
2. The treaty article addressing the income.
3. The article number (or location) in the tax treaty that contains the saving clause and its exceptions.
4. The type and amount of income that qualifies for the exemption from tax.
5. Sufficient facts to justify the exemption from tax under the terms of the treaty article.

**Example.** Article 20 of the U.S.-China income tax treaty allows an exemption from tax for scholarship income received by a Chinese student temporarily present in the United States. Under U.S. law, this student will become a resident alien for tax purposes if his or her stay in the United States exceeds 5 calendar years. However, paragraph 2 of the first Protocol to the U.S.-China treaty (dated April 30, 1984) allows the provisions of Article 20 to continue to apply even after the Chinese student becomes a resident alien of the United States. A Chinese student who qualifies for this exception (under paragraph 2 of the first protocol) and is relying on this exception to claim an exemption from tax on his or her scholarship or fellowship income would attach to Form W-9 a statement that includes the information described above to support that exemption.

If you are a nonresident alien or a foreign entity not subject to backup withholding, give the requester the appropriate completed Form W-8.

**What is backup withholding?** Persons making certain payments to you must under certain conditions withhold and pay to the IRS 28% of such payments (after December 31, 2002). This is called "backup withholding." Payments that may be subject to backup withholding include interest, dividends, broker and barter exchange transactions, rents, royalties, nonemployee pay, and certain payments from fishing boat operators. Real estate transactions are not subject to backup withholding.

You will not be subject to backup withholding on payments you receive if you give the requester your correct TIN, make the proper certifications, and report all your taxable interest and dividends on your tax return.

**Payments you receive will be subject to backup withholding if:**

1. You do not furnish your TIN to the requester,
2. You do not certify your TIN when required (see the Part II instructions on page 4 for details),

3. The IRS tells the requester that you furnished an incorrect TIN,

4. The IRS tells you that you are subject to backup withholding because you did not report all your interest and dividends on your tax return (for reportable interest and dividends only), or

5. You do not certify to the requester that you are not subject to backup withholding under 4 above (for reportable interest and dividend accounts opened after 1983 only).

Certain payees and payments are exempt from backup withholding. See the instructions below and the separate Instructions for the Requester of Form W-9.

Also see *Special rules regarding partnerships* on page 1.

## Penalties

**Failure to furnish TIN.** If you fail to furnish your correct TIN to a requester, you are subject to a penalty of \$50 for each such failure unless your failure is due to reasonable cause and not to willful neglect.

**Civil penalty for false information with respect to withholding.** If you make a false statement with no reasonable basis that results in no backup withholding, you are subject to a \$500 penalty.

**Criminal penalty for falsifying information.** Willfully falsifying certifications or affirmations may subject you to criminal penalties including fines and/or imprisonment. **Misuse of TINs.** If the requester discloses or uses TINs in violation of federal law, the requester may be subject to civil and criminal penalties.

## Specific Instructions

### Name

If you are an individual, you must generally enter the name shown on your income tax return. However, if you have changed your last name, for instance, due to marriage without informing the Social Security Administration of the name change, enter your first name, the last name shown on your social security card, and your new last name.

If the account is in joint names, list first, and then circle, the name of the person or entity whose number you entered in Part I of the form.

**Sole proprietor.** Enter your individual name as shown on your income tax return on the "Name" line. You may enter your business, trade, or "doing business as (DBA)" name on the "Business name" line.

**Limited liability company (LLC).** If you are a single-member LLC (including a foreign LLC with a domestic owner) that is disregarded as an entity separate from its owner under Treasury regulations section 301.7701-3, enter the owner's name on the "Name" line. Enter the LLC's name on the "Business name" line. Check the appropriate box for your filing status (sole proprietor, corporation, etc.), then check the box for "Other" and enter "LLC" in the space provided. **Other entities.** Enter your business name as shown on required federal tax documents on the "Name" line. This name should match the name shown on the charter or other legal document creating the entity. You may enter any business, trade, or DBA name on the "Business name" line. **Note.** You are requested to check the appropriate box for your status (individual/sole proprietor, corporation, etc.).

## Exempt From Backup Withholding

If you are exempt, enter your name as described above and check the appropriate box for your status, then check the "Exempt from backup withholding" box in the line following the business name, sign and date the form.

Generally, individuals (including sole proprietors) are not exempt from backup withholding. Corporations are exempt from backup withholding for certain payments, such as interest and dividends.

**Note.** If you are exempt from backup withholding, you should still complete this form to avoid possible erroneous backup withholding.

**Exempt payees.** Backup withholding is not required on any payments made to the following payees:

1. An organization exempt from tax under section 501(a), any IRA, or a custodial account under section 403(b)(7) if the account satisfies the requirements of section 401(f)(2),
  2. The United States or any of its agencies or instrumentalities,
  3. A state, the District of Columbia, a possession of the United States, or any of their political subdivisions or instrumentalities,
  4. A foreign government or any of its political subdivisions, agencies, or instrumentalities, or
  5. An international organization or any of its agencies or instrumentalities.
- Other payees that may be exempt from backup withholding include:
6. A corporation,
  7. A foreign central bank of issue,
  8. A dealer in securities or commodities required to register in the United States, the District of Columbia, or a possession of the United States,
  9. A futures commission merchant registered with the Commodity Futures Trading Commission,
  10. A real estate investment trust,
  11. An entity registered at all times during the tax year under the Investment Company Act of 1940,
  12. A common trust fund operated by a bank under section 584(a),
  13. A financial institution,
  14. A middleman known in the investment community as a nominee or custodian, or
  15. A trust exempt from tax under section 664 or described in section 4947.

The chart below shows types of payments that may be exempt from backup withholding. The chart applies to the exempt recipients listed above, 1 through 15.

IF the payment is for ...	THEN the payment is exempt for...
Interest and dividend payments	All exempt recipients except for 9
Broker transactions	Exempt recipients 1 through 13. Also, a person registered under the Investment Advisers Act of 1940 who regularly acts as a broker
Barter exchange transactions and patronage dividends	Exempt recipients 1 through 5
Payments over \$600 required to be reported and direct sales over \$5,000 <sup>1</sup>	Generally, exempt recipients 1 through 7 <sup>2</sup>

<sup>1</sup> See Form 1099-MISC, Miscellaneous Income, and its instructions.

<sup>2</sup> However, the following payments made to a corporation (including gross proceeds paid to an attorney under section 6045(f), even if the attorney is a corporation) and reportable on Form 1099-MISC are not exempt from backup withholding: medical and health care payments, attorneys' fees; and payments for services paid by a federal executive agency.

## Part I. Taxpayer Identification Number (TIN)

**Enter your TIN in the appropriate box.** If you are a resident alien and you do not have and are not eligible to get an SSN, your TIN is your IRS individual taxpayer identification number (ITIN). Enter it in the social security number box. If you do not have an ITIN, see *How* to get a *TIN* below.

If you are a sole proprietor and you have an EIN, you may enter either your SSN or EIN. However, the IRS prefers that you use your SSN.

If you are a single-owner LLC that is disregarded as an entity separate from its owner (see *Limited liability company (LLC)* on page 2), enter your SSN (or EIN, if you have one). If the LLC is a corporation, partnership, etc., enter the entity's EIN.

**Note.** See the chart on page 4 for further clarification of name and TIN combinations.

**How to get a TIN.** If you do not have a TIN, apply for one immediately. To apply for an SSN, get Form SS-5, Application for a Social Security Card, from your local Social Security Administration office or get this form online at [www.socialsecurity.gov](http://www.socialsecurity.gov). You may also get this form by calling 1-800-772-1213. Use Form W-7, Application for IRS Individual Taxpayer Identification Number, to apply for an ITIN, or Form SS-4, Application for Employer Identification Number, to apply for an EIN. You can apply for an EIN online by accessing the IRS website at [www.irs.gov/businesses](http://www.irs.gov/businesses) and clicking on Employer ID Numbers under Related Topics. You can get Forms W-7 and SS-4 from the IRS by visiting [www.irs.gov](http://www.irs.gov) or by calling 1-800-TAX-FORM (1-800-829-3676).

If you are asked to complete Form W-9 but do not have a TIN, write "Applied For" in the space for the TIN, sign and date the form, and give it to the requester. For interest and dividend payments, and certain payments made with respect to readily tradable instruments, generally you will have 60 days to get a TIN and give it to the requester before you are subject to backup withholding on payments. The 60-day rule does not apply to other types of payments. You will be subject to backup withholding on all such payments until you provide your TIN to the requester.

**Note.** Writing "Applied For" means that you have already applied for a TIN or that you intend to apply for one soon. **Caution:** A *disregarded domestic entity that has a foreign owner must use the appropriate Form W-8.*



**Part II. Certification**

To establish to the withholding agent that you are a U.S. person, or resident alien, sign Form W-9. You may be requested to sign by the withholding agent even if items 1, 4, and 5 below indicate otherwise.

For a joint account, only the person whose TIN is shown in Part I should sign (when required). Exempt recipients, see *Exempt From Backup Withholding* on page 2.

**Signature requirements.** Complete the certification as indicated in 1 through 5 below.

**1. Interest, dividend, and barter exchange accounts opened before 1984 and broker accounts considered active during 1983.** You must give your correct TIN, but you do not have to sign the certification.

**2. Interest, dividend, broker, and barter exchange accounts opened after 1983 and broker accounts considered inactive during 1983.** You must sign the certification or backup withholding will apply. If you are subject to backup withholding and you are merely providing your correct TIN to the requester, you must cross out item 2 in the certification before signing the form.

**3. Real estate transactions.** You must sign the certification. You may cross out item 2 of the certification. **4. Other payments.** You must give your correct TIN, but you do not have to sign the certification unless you have been notified that you have previously given an incorrect TIN. "Other payments" include payments made in the course of the requester's trade or business for rents, royalties, goods (other than bills for merchandise), medical and health care services (including payments to corporations), payments to a nonemployee for services, payments to certain fishing boat crew members and fishermen, and gross proceeds paid to attorneys (including payments to corporations).

**5. Mortgage interest paid by you, acquisition or abandonment of secured property, cancellation of debt, qualified tuition program payments (under section 529), IRA, Coverdell ESA, Archer MSA or HSA contributions or distributions, and pension distributions.** You must give your correct TIN, but you do not have to sign the certification.

**What Name and Number To Give the Requester**

For this type of account:	Give name and SSN of:
1. Individual	The individual
2. Two or more individuals Joint account)	The actual owner of the account
3. Custodian account of a minor (Uniform Gift to Minors Act)	or, if combined funds, the first individual on the account <sup>1</sup>
4. a. The usual revocable savings trust (grantor is also trustee)	The minor <sup>2</sup> The grantor-trustee <sup>1</sup> The actual owner <sup>1</sup>
b. So-called trust account that is not a legal or valid trust under state law	The owner <sup>3</sup>
5. Sole proprietorship or single-owner LLC	
For this type of account:	Give name and EIN of:
6. Sole proprietorship or single-owner LLC	The owner <sup>3</sup> Legal entity <sup>4</sup>
7. A valid trust, estate, or pension trust	The corporation The organization
8. Corporate or LLC electing corporate status on Form 8832	The partnership The broker or nominee The public entity
9. Association, club, religious, charitable, educational, or other tax-exempt organization	
10. Partnership or multi-member LLC	
11. A broker or registered nominee	
12. Account with the Department of Agriculture in the name of a public entity (such as a state or local government, school district, or prison) that receives agricultural program	

<sup>1</sup> List first and circle the name of the person whose number you furnish. If only one person on a joint account has an SSN, that person's number must be furnished.

<sup>2</sup> Circle the minor's name and furnish the minor's SSN.

<sup>3</sup> You must show your individual name and you may also enter your business or "DBA" name on the second name line. You may use either your SSN or EIN (if you have one). If you are a sole proprietor, IRS encourages you to use your SSN.

<sup>4</sup> List first and circle the name of the legal trust, estate, or pension trust. (Do not furnish the TIN of the personal representative or trustee unless the legal entity itself is not designated in the account title.) Also see *Special rules regarding partnerships* on page 1.

**Note.** If no name is circled when more than one name is listed, the number will be considered to be that of the first name listed.

**Privacy Act Notice**

Section 6109 of the Internal Revenue Code requires you to provide your correct TIN to persons who must file information returns with the IRS to report interest, dividends, and certain other income paid to you, mortgage interest you paid, the acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA, or Archer MSA or HSA. The IRS uses the numbers for identification purposes and to help verify the accuracy of your tax return. The IRS may also provide this information to the Department of Justice for civil and criminal litigation, and to cities, states, the District of Columbia, and U.S. possessions to carry out their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism.

You must provide your TIN whether or not you are required to file a tax return. Payers must generally withhold 28% of taxable interest, dividend, and certain other payments to a payee who does not give a TIN to a payer. Certain penalties may also apply.

**EXHIBIT F**  
**FORM OF DIP CLAIM ASSIGNMENT AGREEMENT**

NEWYORK\37267.15

## DIP CLAIM ASSIGNMENT AGREEMENT

This DIP Claim Assignment Agreement (this "**Assignment Agreement**"), dated as of [●], 2009, is made by and among MP Foam DIP LLC, a Delaware limited liability company (the "**Assignor**"), and Foamex International Inc., a Delaware corporation ("**Foamex Inc.**"), Foamex L.P., a Delaware limited partnership ("**Foamex**"), FMXI, LLC, a Delaware limited liability company ("**FMXI**", together with Foamex Inc. and Foamex, the "**Seller Parents**"), Foamex Latin America, Inc., a Delaware corporation ("**Foamex Latin America**"), Foamex Asia, Inc., a Delaware corporation ("**Foamex Asia**"), Foamex Carpet Cushion LLC, a Delaware limited liability company ("**Foamex Carpet**"), Foamex Mexico, Inc., a Delaware corporation ("**Foamex Mexico**") and Foamex Canada Inc., a Canadian corporation ("**Foamex Canada**") (each a "**Selling Subsidiary**", and collectively the "**Selling Subsidiaries**", and together with the Seller Parents, "**Sellers**").

WHEREAS, on the date hereof, the Assignor and Sellers entered into that certain Asset Purchase Agreement dated March 25, 2009 (the "**APA**"). Capitalized terms used and not defined herein shall have the meanings ascribed to such terms in the APA;

WHEREAS, as of the date hereof, the amount of the Purchaser DIP Claim is \$[●] (the "**DIP Claim**");

WHEREAS, pursuant to the APA, among other things, (i) in exchange for the Purchase Price, the Assignor has agreed to purchase the Purchased Assets and to assume the Assumed Liabilities and (ii) Sellers have agreed to accept the DIP Claim as payment against a portion of the Purchase Price, as more fully described herein and in the APA.

NOW THEREFORE, in consideration of the mutual covenants, agreements, representations and warranties contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

### ARTICLE I

#### ASSIGNMENT

Section 1.1 **DIP Claim Assignment.** The Assignor hereby assigns to Sellers all right, title and interest in and to the DIP Claim (the "**Assignment**"). The DIP Claim shall reduce the amount of cash required by Assignor to fund the Purchase Price on a dollar for dollar basis in accordance with the terms of the APA. The Assignment includes all rights and benefits of the Assignor relating to the DIP Claim, including without limitation all of Assignor's rights and obligations under the DIP Loan Agreement, such as the Assignor's rights to receive any principal, interest, penalties and fees which may be paid with respect to the DIP Claim and all cash, securities, instruments and other property which may be paid or issued by Sellers' bankruptcy estates in satisfaction of the DIP Claim.

Section 1.2 **Unconditional Assignment.** The Assignment shall be deemed an absolute and unconditional assignment of the DIP Claim.

NEWYORK\38477.2

**ARTICLE II****REPRESENTATIONS AND WARRANTIES**

Section 2.1 **Representations and Warranties of the Assignor.** The Assignor represents and warrants that (a) it is the legal and beneficial owner of the DIP Claim and that it has title to the DIP Claim free and clear of any and all Liens; (b) it makes no representation or warranty and assumes no responsibility with respect to any statements, warranties or representations made in or in connection with the DIP Claim or any other instrument or document furnished pursuant thereto or the execution, legality, validity, enforceability, genuineness, sufficiency or value of the DIP Loan Agreement or any other related agreement or any other instrument or document furnished pursuant thereto; (c) it has not previously assigned, sold, pledged or otherwise disposed or transferred the DIP Claim, or any interest therein, to any third party, in whole or in part; and (d) there are no offsets or defenses that have been or may be asserted by or on behalf of Sellers or any other party to reduce the amount of the DIP Claim or to impair its value.

**ARTICLE III****POWER OF ATTORNEY**

Section 3.1 **Appointment of Sellers.** The Assignor hereby irrevocably appoints Sellers as its true and lawful attorney and authorizes Sellers to act in the Assignor's stead to demand, sue for, compromise and recover all amounts as now are, or may hereafter become, due and payable for or on account of the DIP Claim assigned herein. The Assignor grants unto Sellers full authority to do all things necessary to enforce the DIP Claim and its rights thereunder pursuant to this Assignment Agreement. The Assignor agrees that the powers granted by this paragraph are discretionary in nature and that Sellers may exercise or decline to exercise such powers at Sellers' sole option. **THE APPOINTMENT HEREBY MADE AND THE POWERS HEREBY GRANTED ARE COUPLED WITH AN INTEREST AND ARE NOT AND SHALL NOT BE REVOCABLE BY THE ASSIGNOR IN ANY MANNER OR FOR ANY REASON.**

**ARTICLE IV****MISCELLANEOUS**

Section 4.1 **Miscellaneous.** The provisions of Article XII of the APA shall apply to this Assignment Agreement as if expressly set forth herein in their entirety.

*[Signature page follows]*

NEWYORK\38477.2

IN WITNESS WHEREOF, the parties hereto have caused this Assignment Agreement to be executed by their respective officers thereunto duly authorized, as of the date first written above.

MP FOAM DIP LLC

By: \_\_\_\_\_  
Name:  
Title:

SELLERS:

**Foamex International, Inc.**

By: \_\_\_\_\_  
Name  
Title:

**Foamex L.P.**

By: \_\_\_\_\_  
Name  
Title:

**FMXI, LLC**

By: \_\_\_\_\_  
Name  
Title:

**Foamex Latin America, Inc.**

By: \_\_\_\_\_  
Name  
Title:

**Foamex Asia, Inc.**

By: \_\_\_\_\_  
Name  
Title:

**Foamex Carpet Cushion LLC**

By: \_\_\_\_\_  
Name  
Title:

NEWYORK\38477.2

**Foamex Mexico, Inc.**

By: \_\_\_\_\_  
Name  
Title:

**Foamex Canada, Inc.**

By: \_\_\_\_\_  
Name  
Title:

NEWYORK\38477.2

**EXECUTION VERSION**

**ASSET PURCHASE AGREEMENT**

**DATED as of March 17, 2009**

**by and between**

**WALGREEN EASTERN CO., INC.**

**and**

**DRUG FAIR GROUP, INC.**

**TABLE OF CONTENTS**

**ARTICLE I**

**DEFINITIONS .....5**

1.1. Definitions.....5

1.2. Additional Definitions .....9

1.3. Interpretation.....10

**ARTICLE II**

**PURCHASE AND SALE .....11**

2.1. Purchased Assets – Operate Location Pharmacies .....11

2.2. Assumed Contracts .....12

2.3. Excluded Assets.....12

2.4. Assumed Liabilities .....13

2.5. Excluded Liabilities .....13

**ARTICLE III**

**PURCHASE PRICE .....13**

3.1. Purchase Price .....13

3.2. Payments; Deposit; Escrow Account.....14

3.3. Inventory Amount.....15

3.4. Prepaid Rent.....15

3.5. Prescription Volume Reduction Amount.....15

3.6. Operating Covenant Reduction Amount.....16

3.7. Allocation of Purchase Price.....16

**ARTICLE IV**

**CLOSING .....16**

4.1. Closing Date.....16

4.2. Closing Date Payment; Buyer’s Closing Deliveries.....16

4.3. Seller’s Closing Date Deliveries.....17

**ARTICLE V**

**REPRESENTATIONS AND WARRANTIES OF SELLER.....18**

5.1. Organization and Authority .....18

5.2. No Conflicts.....18

5.3. Taxes .....18

5.4. Title and Sufficiency.....19

5.5. Financial Schedules .....19

5.6. Suppliers; Distributors and Third Party Payors .....19

5.7. Prescription Volume .....19

5.8. Leased Real Property .....19

5.9. Personal Property .....20

5.10. Inventory .....20

5.11. Employee Matters .....20

5.12. Employee Relations .....21



5.13.	Legal Proceedings.....	22
5.14.	Compliance With Law; Permits; Medicare and Medicaid.....	22
5.15.	Broker .....	23
5.16.	Warranties .....	23
5.17.	Affiliate Transactions.....	24
 <b>ARTICLE VI</b>		
	<b>REPRESENTATIONS AND WARRANTIES OF BUYER .....</b>	<b>24</b>
6.1.	Organization of Buyer.....	24
6.2.	Authorization .....	24
6.3.	Non-Contravention .....	24
6.4.	Sufficient Funds.....	25
 <b>ARTICLE VII</b>		
	<b>COVENANTS AND AGREEMENTS REGARDING BANKRUPTCY .....</b>	<b>25</b>
7.1.	Chapter 11 Filings.....	25
7.2.	Cooperation; Efforts.....	25
7.3.	Break-Up Fee .....	26
7.4.	Assignment of Rights.....	26
 <b>ARTICLE VIII.....</b>		
<b>26</b>		
 <b>ADDITIONAL AGREEMENTS .....</b>		
<b>26</b>		
8.1.	Employees.....	26
8.2.	Non-competition .....	28
8.3.	Records and Data .....	29
8.4.	Matters Related to Prescriptions .....	30
8.5.	Interim Operations .....	30
8.6.	Taxes .....	31
8.7.	Access .....	32
8.8.	Consent of Third Parties; Regulatory and Other Authorizations; HSR Act. ....	33
8.9.	Avoiding Abandonment.....	34
8.10.	License .....	34
8.11.	Remittance .....	35
8.12.	Further Assurances; Transition Services .....	35
8.13.	Access to Records.....	36
8.14.	Limitations on Solicitation, etc.....	36
8.15.	Estoppels.....	37
 <b>ARTICLE IX</b>		
	<b>INDEMNIFICATION .....</b>	<b>37</b>
9.1.	Indemnification by Seller.....	37
9.2.	Indemnification by Buyer .....	38
9.3.	Escrow Fund; Termination of Escrow Fund.....	39
9.4.	Notice and Determination of Claims .....	39
9.5.	Indemnification as Sole Remedy .....	40

<b>ARTICLE X .....</b>	<b>40</b>
<b>CONDITIONS TO CLOSING .....</b>	<b>40</b>
10.1. Seller's Condition to Closing.....	40
10.2. Buyer's Conditions to Closing.....	41
<b>ARTICLE XI</b>	
<b>TERMINATION.....</b>	<b>42</b>
11.1. Termination.....	42
11.2. Effect of Termination.....	43
<b>ARTICLE XII</b>	
<b>GENERAL PROVISIONS.....</b>	<b>44</b>
12.1. Survival of Obligations .....	44
12.2. No Public Announcement.....	44
12.3. Notices .....	44
12.4. Successors and Assigns; No Third Party Beneficiaries .....	45
12.5. Entire Agreement; Amendments.....	45
12.6. Waivers .....	45
12.7. Expenses .....	45
12.8. Partial Invalidity.....	46
12.9. Injunctive Relief; Remedies.....	46
12.10. Compliance with Law .....	46
12.11. Counterparts.....	46
12.12. Governing Law; Submission to Jurisdiction; Selection of Forum.....	46

## ASSET PURCHASE AGREEMENT

This ASSET PURCHASE AGREEMENT (this "Agreement") is made and entered into as of March 17, 2009, by and between Walgreen Eastern Co., Inc., a New York corporation ("Buyer"), and Drug Fair Group, Inc., a Delaware corporation, as debtor and debtor in possession ("Seller").

WHEREAS, Seller, among other things, owns and operates clinic, retail and apothecary pharmacies;

WHEREAS, Seller shall file, as soon as practicable after execution and delivery of this Agreement, with the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") voluntary petitions (the "Chapter 11 Cases") for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code");

WHEREAS, Seller has advised Buyer that Seller intends to dispose of certain of its assets and liabilities (including the Purchased Assets referred to in Section 2.1) through a sale or sales to be effected under the supervision of the Bankruptcy Court in the Chapter 11 Cases under the Bankruptcy Code; and

WHEREAS, Seller desires to sell to Buyer, and Buyer desires to purchase from Seller, upon the terms and subject to the conditions set forth in this Agreement, certain of the assets of Seller used in the operation of the 32 pharmacy locations identified as "Operate Location Pharmacies" on Exhibit A (the "Operate Location Pharmacies").

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

### ARTICLE I

#### DEFINITIONS

1.1. Definitions. In this Agreement, the following terms have the meanings specified or referred to in this Section 1.1.

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

"Antitrust Division" means the Antitrust Division of the United States Department of Justice.

"Assumed Contracts" means all real estate leases, modifications, amendments and supplements thereto, associated with the Operate Location Pharmacies, each as set forth on Schedule 1.1(a), and any equipment leases that Buyer determines to assume following identification of any such lease pursuant to Section 5.9.

**“Business”** means the business of owning and operating all of the Purchased Assets.

**“Buyer Group Members”** means Buyer and its Affiliates, directors, officers, employees, agents, attorneys and consultants and their respective successors and assigns.

**“Calculation Date”** means the date that is two business days prior to the Closing Date.

**“Closing”** means the closing of the transfer of the Purchased Assets from Seller to Buyer and **“Closing Date”** means the time and date upon which the Closing actually occurs.

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

**“Confidential Information”** means, with respect to any Person, information regarding such Person that is not previously disclosed to the public or to the trade and includes information regarding, facilities, strategies, methods, trade secrets and other intellectual property, software, systems, procedures, operational policies, manuals, confidential reports, product price lists, pricing and cost policies, customer lists, inventory information, financial information (including revenue, costs or profits of the disclosing party), business plans, prospects, or opportunities.

**“Cure Amounts”** means the cure, compensation and restatement costs and expenses of or relating to the assumption and assignment of the Assumed Contracts pursuant to, and as required by, Section 365 of the Bankruptcy Code or otherwise hereunder.

**“DIP Credit Agreement”** means the debtor-in-possession credit agreement to be executed by Seller and Bank of America, N.A., as agent on the date hereof.

**“Encumbrance”** means any lien, encumbrance, claim, charge, security interest, assignment, collateral assignment, mortgage, pledge, easement, conditional sale or other title retention agreement, defect in title, covenant or other restrictions of any kind.

**“Environmental, Health and Safety Requirements”** means all Requirements of Law concerning or relating to public health and safety, worker/occupational health and safety, and pollution or protection of the environment, including those relating to the presence, use, manufacturing, refining, production, generation, handling, transportation, treatment, recycling, transfer, storage, disposal, distribution, importing, labeling, testing, processing, discharge, release, threatened release, control, or other action or failure to act involving cleanup of any Hazardous Substances or wastes, chemical substances or mixtures, pesticides, pollutants, process waste water, contaminants, toxic chemicals, petroleum products or byproducts, asbestos, polychlorinated biphenyls, noise, or radiation, each as amended and as now in effect, including: the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended; the Occupational Safety and Health Act of 1970, as amended; the Federal Water Pollution Control Act, as amended; the Federal Resource Conservation and Recovery Act, as amended; the Federal Clean Water Act, as amended; the Toxic Substances Control Act, as amended; the Federal Clean Air Act, as amended, and the Superfund Amendments and Reauthorization Act.

“**ERISA**” means the Employee Retirement Income Security Act of 1974, as amended

“**Excluded Businesses**” means Seller’s businesses other than the business of owning and operating all of the Purchased Assets.

“**Excluded Inventory**” means (i) all items of inventory that fit within one or more of the following categories: (a) sample inventory; (b) inventory out of date within ninety (90) days from the Closing Date (or already expired), as shown by manufacturer’s labeled expiration date; (c) prescription items over three years old; (d) diagnostic equipment, test strips, labels, vials, bottles and similar items; (e) inventory that is spoiled, has been damaged or broken, is shopworn or faded (including faded labels), or has visible deterioration; (f) any compounding inventory; (g) any chemicals deemed by Buyer to constitute hazardous materials; (h) obsolete inventory not currently being supplied by distributors to retail stores; (i) all non-retail inventory that is not otherwise salable in the ordinary course of business (e.g., register tapes, labels, shopping bags, etc.); (j) inventory that does not have a legible NDC, lot number or expiration date and (k) any items subject to a mandatory or voluntary recall; (ii) all items of front-end inventory that fit within one or more of the following categories (in addition to items of front-end inventory that fit within one or more of the categories set forth in clause (i) above): (w) inventory not in its original packaging or in damaged packaging; (x) seasonal merchandise; (y) live plants and (z) furniture or similar items; (iii) any amount of Inventory that would result in the Purchase Price, together with the purchase price paid under that certain File Transfer Purchase Agreement, exceeding \$65,100,000; and (iv) any other items that the parties agree to exclude.

“**Expenses**” means any and all reasonable expenses incurred in connection with investigating, defending or asserting any claim, action, suit or proceeding incident to any matter indemnified against hereunder (including court filing fees, court costs, arbitration fees or costs, witness fees, and reasonable fees and disbursements of legal counsel, investigators, expert witnesses, accountants and other professionals).

“**File Transfer Purchase Agreement**” means the asset purchase agreement entered into as of March 17, 2009, by and between Seller and Buyer, relating to the purchase and sale of prescription files and prescription pharmaceutical inventory related to eleven pharmacy locations.

“**FTC**” means the United States Federal Trade Commission.

“**Governmental Body**” means any foreign, federal, state, local or other governmental authority or regulatory body.

“**HIPAA**” means the Health Insurance Portability and Accountability Act of 1996, P. L. 104-191, and its implementing rules and regulations.

“**Hazardous Substances**” has the meaning set forth in Section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, and will also expressly include petroleum, crude oil and any fraction thereof.

**“Escrow Agreement”** means the Escrow Agreement entered into as of the date hereof among Buyer, Seller and the Escrow Agent.

**“Instrument of Assignment and Assumption”** means Instrument of Assignment and Assumption, to be delivered by Buyer and Seller at Closing, in the form of Exhibit B.

**“knowledge”** means, in the case of Seller, the actual knowledge of Seller’s chief executive officer, chief financial officer, chief restructuring officer and two vice presidents of operations.

**“Loss”** means any and all losses, costs, obligations, liabilities, settlement payments, awards, judgments, fines, penalties, damages, expenses, deficiencies or other charges, including any amount payable with respect to Taxes (including any amounts relating to Taxes payable pursuant to a contract or otherwise).

**“Permitted Encumbrances”** means (a) encumbrances for taxes or assessments or other governmental charges which are not yet due and payable and (b) materialmen’s, merchants’, carriers’, worker’s, repairer’s, or other similar Encumbrances arising in the ordinary course of business which are not yet due or payable.

**“Person”** means any individual, corporation, partnership, joint venture, trust, Governmental Body or other organization or entity.

**“Premises”** means the premises upon which any of the Operate Location Pharmacies conducts its business.

**“Requirements of Law”** means any foreign, federal, state and local laws, statutes, regulations, rules, codes or ordinances enacted, adopted, issued or promulgated by any Governmental Body.

**“Security Deposits”** means all security deposits paid by Seller to any Person prior to the Closing related to the Business.

**“Shared Expenses”** means an amount equal to the aggregate of all expenses associated with the Escrow Agent, the Independent Valuator and the Data Converter.

**“Straddle Period”** means any taxable year or period beginning on or before and ending after the Closing Date.

**“Targeted Inventory Amount”** means \$18,100,000.

**“Tax”** means any federal, state, local, or foreign income, gross receipts, license, payroll, employment, excise, severance, stamp, occupation, premium, windfall profits, environmental, customs, ad valorem, duties, capital stock, franchise, profits, prescription tax or fee, withholding, social security, unemployment, disability, real property, personal property, sales, use, transfer, registration, value added, alternative or add-on minimum, estimated, unclaimed property, custom duties or other tax of any kind whatsoever, including any interest, penalty, or addition thereto, whether disputed or not.

**“Tax Return”** means any return, declaration, report, claim for refund, or information return or statement relating to Taxes required to be filed with any Governmental Body, including any schedule or attachment thereto, and including any amendment thereof.

**“Third-Party Payor Agreements”** means, with respect to the Business, the contracts and agreements between Seller and any Government Body, insurance company, managed care company or other third party payor.

**“Trademarks”** means all service marks, Internet domain names, logos, designs, slogans, trade dress, trade names, corporate names and general intangibles of like nature whether registered or reregistered, and registrations and pending applications to register the foregoing.

1.2. Additional Definitions. The following terms are defined in the Sections set forth across from such term in the following table:

363/365 Orders	7.2
Agreement	Preamble
Allocation Schedule	3.7
Alternate Transaction	7.3
Assumed Liabilities	2.4
Bankruptcy Code	Preamble
Bankruptcy Court	Preamble
Break-Up Fee	7.3
Business Employee	5.11(a)
Buyer	Preamble
Buyer Applications	8.9(a)
Chapter 11 Cases	Preamble
Chosen Courts	12.12
Claim Notice	9.4(a)
Closing Date Payment	3.2(c)(i)
Comparison Period	3.5
Contribution Data	5.5
Customer	8.2(b)
Data Converter	8.3(a)
Deposit	3.2(a)
Employee Data Schedule	5.11(a)
Employee Plans	5.11(b)
Escrow Account	3.2(a)
Escrow Agent	3.2(a)
Escrow Fund	3.2(a)
Excluded Assets	2.3
Excluded Contracts	2.3(b)
Excluded Liabilities	2.5
Expense Reimbursement	7.3
IOU Prescriptions	8.4
Indemnified Person	9.4(a)

Indemnitor	9.4(a)
Independent Valuator	3.3
Inventory	2.1(c)
Inventory Amount	3.3
Inventory Audit	3.3
Negative Inventory Adjustment Amount	3.1
Operate Location Pharmacies	Preamble
Operating Covenant Reduction Amount	3.6
Operations Data	5.5
Other Financial Data	5.5
Payment Program	5.14(c)
Permits	5.14(a)
Personal Property	2.1(a)
PHI	8.3(c)
Positive Inventory Adjustment Amount	3.1
Power of Attorney	8.9(c)
Prepaid Rent Amount	3.4
Prescription Volume Reduction Amount	3.5
Proposal	8.14
Purchase Price	3.1
Purchased Assets	2.1
Record Data	8.3(a)
Records	2.1(b)
Restricted Persons	8.14
Sale Order	7.2
Sale Procedures Order	7.2
Seller	Preamble
Selling Activities	8.14
Superior Proposal	8.14
Third Person Claim	9.4(a)
Transaction	8.14
Transferable Permits	8.9(a)
Transferred Employees	8.1(b)
Transfer Taxes	8.6
Transition Services	8.12(c)
Transition Services Period	8.12(c)
WARN Act	2.5(c)

1.3. Interpretation. Article titles and headings to sections herein are inserted for convenience of reference only and are not intended to be a part of or to affect the meaning or interpretation of this Agreement. The Schedules and Exhibits referred to herein shall be construed with and as an integral part of this Agreement to the same extent as if they were set forth verbatim herein. Any agreement referred to herein shall mean such agreement as amended, supplemented and modified from time to time to the extent permitted by the applicable



provisions thereof and by this Agreement. As used herein, the word “including” means “including without limitation.”

## ARTICLE II

### PURCHASE AND SALE

2.1. Purchased Assets – Operate Location Pharmacies. Upon the terms and subject to the conditions of this Agreement, on the Closing Date, Seller shall sell, transfer, assign, convey and deliver to Buyer, and Buyer shall purchase from Seller, free and clear of all Encumbrances (except Permitted Encumbrances), all right, title and interest of Seller in, to and under substantially all of the assets and properties of Seller (other than the Excluded Assets), primarily used in the ownership or operation of the Operate Location Pharmacies, as the same shall exist on the Closing Date, including the following (collectively, the “Purchased Assets”):

(a) Any and all owned personal property located at the Operate Location Pharmacies, including all furniture, fixtures, equipment, vehicles, leasehold improvements and signage (collectively, the “Personal Property”);

(b) Any and all prescriptions, prescription files and records, customer lists and patient profiles, including refill status reports and insurance coverages, any files or records maintained electronically, any files or records added between the date of this Agreement and the Closing Date, in each case related to the Operate Location Pharmacies (collectively, the “Records”);

(c) The inventory located at any Operate Location Pharmacies (the “Inventory”);

(d) All improvements, fixtures, and fittings thereon, and other appurtenants located at any Operate Location Pharmacies (such as appurtenant rights in and to public streets) including prepaid rent, rent credits and tenant improvement credits and allowances paid or made with respect to the Premises;

(e) To the extent transferable, all Permits and similar rights obtained from Governmental Bodies primarily used in or related to the ownership or operation of any Operate Location Pharmacies;

(f) Copies of all other books and records of Seller relating primarily to the assets, properties and operations of the Operate Location Pharmacies;

(g) Any guarantees, warranties, indemnities and similar rights relating to Purchased Assets;

(h) All rights in, to and under the Assumed Contracts; and

(i) Any other mutually agreeable assets related to the Operate Location Pharmacies.

2.2. Assumed Contracts. On the Closing Date, Seller shall (i) cure, at Seller's sole expense, any and all defaults existing under each Assumed Contract to the extent required for Seller to assume such Assumed Contract in the Chapter 11 Cases, (ii) pay, or to the extent permitted by the Sale Order segregate funds sufficient to pay, any and all cure amounts due with respect to each Assumed Contract, (iii) assume each Assumed Contract in the Chapter 11 Cases and (iv) subject to Buyer providing adequate assurance of performance to the counterparty thereto to the extent required by the Bankruptcy Court, assign such Assumed Contract to Buyer pursuant to an order of the Bankruptcy Court (which may be the Sale Order or one or more other orders that are no less favorable to Buyer than the provisions of the Sale Order). Effective upon and concurrently with such assignment, Buyer shall assume each Assumed Contract assigned to it pursuant to this Section 2.2. The parties acknowledge and agree that if the amounts necessary to cure any and all defaults existing under any Assumed Contract at any Operate Store Location are materially higher than contemplated by the parties, the parties will negotiate in good faith for up to 15 days after Buyer's receipt of written notice from Seller identifying the affected Operate Store Locations and describing the material relevant circumstances to reduce the Purchase Price by the amount attributable to such Operate Store Location and amend this Agreement to provide that the Purchased Assets otherwise attributable to such Operate Store Location not be included in the Purchased Assets. Notwithstanding anything to the contrary in this Agreement, if the parties are unable to agree upon such adjustments to the Purchase Price and amendments hereto, and the transaction is not consummated as a result thereof, the Escrow Agent shall distribute the Deposit to Buyer.

2.3. Excluded Assets. Notwithstanding the provisions of Section 2.1 the Purchased Assets shall not include the following (collectively, the "Excluded Assets"):

- (a) All cash and cash deposits and accounts receivable, including insurance receivables, of Seller or the Business and Security Deposits;
- (b) All agreements, contracts and understandings of Seller other than the Assumed Contracts (collectively, the "Excluded Contracts");
- (c) All employee benefit plans, programs or arrangements and all contracts of insurance of Seller;
- (d) All of Seller's software and any web sites, including the URL addresses and related domain names;
- (e) All corporate minute books and the corporate seal of Seller;
- (f) All assets primarily used in the ownership or operation of the Excluded Businesses;
- (g) All real estate leases other than those included in Assumed Contracts;
- (h) The Excluded Inventory;
- (i) All causes of action, rights, choses in action and claims of Seller against third parties;

- and
- (j) All refunds of any Tax for which Seller is liable pursuant to Section 8.6;
  - (k) All of Seller's Trademarks.

2.4. Assumed Liabilities. Buyer shall assume the obligations of Seller under the Assumed Contracts arising after the Closing Date, except to the extent such obligations, but for a breach or default by Seller, would have been paid, performed or otherwise discharged on or prior to the Closing Date or to the extent the same arise out of any such breach or default (collectively, the "Assumed Liabilities").

2.5. Excluded Liabilities. Notwithstanding anything contained in this Agreement to the contrary, Buyer shall not assume or be obligated to pay, perform or otherwise discharge any other liability of Seller whatsoever or any liabilities or obligations constituting an Encumbrance upon the Purchased Assets, regardless of whether any such liabilities or obligations are absolute or contingent, liquidated or unliquidated, or otherwise. Seller shall remain liable for all liabilities other than the Assumed Liabilities (collectively, the "Excluded Liabilities"), including any obligations arising prior to Closing, any liabilities and obligations arising prior to Closing under any Assumed Contract, any liabilities related to any Excluded Assets, any liabilities arising under the Excluded Contracts and all liabilities in respect of Taxes for which Seller is liable pursuant to Section 8.6. Without limiting the generality of the foregoing, in no event shall Buyer assume any of the following liabilities or obligations:

- (a) any liabilities arising from the ownership or operation of the Purchased Assets or the Business prior to Closing;
- (b) any liabilities with respect to any Persons at any time employed by Seller or its Affiliates in connection with the operation or ownership of the Business or the Purchased Assets, including, without limitation, all liabilities for severance pay, accrued vacation, personal time off and sick pay, whether known or unknown, fixed or contingent, which arise out of events occurring prior to employment of any of such Persons, if at all, by Buyer;
- (c) any liabilities arising under the Worker Adjustment and Retraining Notification Act (the "WARN Act") in connection with Seller's termination of any employees; or
- (d) any legal obligations of Seller under HIPAA or other applicable laws or regulations, including the HIPAA privacy standard requiring accounting of certain disclosures of PHI made by Seller prior to the Closing Date.

### ARTICLE III

#### PURCHASE PRICE

3.1. Purchase Price. In consideration for the sale of the Purchased Assets described in this Agreement, the aggregate purchase price (the "Purchase Price") shall be equal to

\$54,000,000, plus the sum of (a) the Prepaid Rent Amount and (b) the amount, if any, by which the Inventory Amount exceeds the Targeted Inventory Amount (a "Positive Inventory Adjustment Amount") and minus the sum of (c) the amount, if any, by which the Targeted Inventory Amount exceeds the Inventory Amount (a "Negative Inventory Adjustment Amount"), (d) the Prescription Volume Reduction Amount and (e) the Operating Covenant Reduction Amount.

3.2. Payments; Deposit; Escrow Account.

(a) Concurrently with the execution and delivery of this Agreement, Buyer, Seller and The Bank of New York Trust Company, N.A., as escrow agent (the "Escrow Agent") are executing the Escrow Agreement and Buyer is depositing \$5,400,000 (the "Deposit") into an escrow account (the "Escrow Account") pursuant to the terms of the Escrow Agreement. Pursuant to the terms of the Escrow Agreement, upon Closing, (i) \$1,000,000 of the Deposit will become the "Escrow Fund" and will continue to be held by the Escrow Agent and released in accordance with the provisions of Article IX and the Escrow Agreement and (ii) the balance of the Deposit will be released to Seller. Pursuant to the terms and conditions of the Escrow Agreement, all interest, dividends and proceeds received on the Escrow Account shall be retained by the Escrow Agent as part of the Escrow Fund. The Escrow Fund shall be governed by the terms set forth herein and in the Escrow Agreement. Following Closing, the Escrow Fund shall be available to indemnify the Buyer Group Members from any Loss or Expense as set forth in Article IX. All fees and expenses of the Escrow Agent shall be shared equally by Buyer and Seller as provided in Section 12.7.

(b) If (i) all of the conditions to the obligations of Buyer set forth in Section 10.2 have been or are able to promptly be satisfied, (ii) Buyer fails to proceed with the Closing in breach of this Agreement, and (iii) Seller terminates this Agreement pursuant to Section 11.1(f), then the Escrow Agent shall distribute the Deposit to Seller. The Deposit shall be Seller's full liquidated damages and sole and exclusive remedy for such breach by Buyer or any of its Affiliates at law or in equity, Buyer and Seller hereby agreeing that such sum constitutes a reasonable estimate of the damages which Seller would sustain on account of such breach by Buyer and that Seller's actual damages in such circumstances would be difficult, if not impossible to determine, and therefore Buyer and Seller hereby fix such amount as liquidated damages. Seller agrees not to institute, and to cause its Affiliates not to institute, any proceeding or bring any other claim arising under, or in connection with, such breach or the transactions contemplated hereby against Buyer or any of its Affiliates, except with respect to the Deposit.

(c) On the Closing Date:

(i) Buyer shall pay to Seller \$30,500,000 plus the (a) the Prepaid Rent Amount and minus the sum of (b) the Prescription Volume Reduction Amount and (c) the Operating Covenant Reduction Amount (such payment, the "Closing Date Payment").

(ii) On the Closing Date or the later date on which Buyer has received all of the Inventory Audits signed by representatives of Buyer, Seller and the Independent

Valuator, if the Inventory Amount exceeds the Targeted Inventory Amount, Buyer shall pay Seller an amount equal to (i) the Targeted Inventory Amount, plus (ii) the Positive Inventory Adjustment Amount, less (iii) one-half of the Shared Expenses; and if the Targeted Inventory Amount exceeds the Inventory Amount, Buyer shall pay Seller an amount equal to the (i) Targeted Inventory Amount, less (ii) the Negative Inventory Adjustment Amount, and less (iii) one-half of the Shared Expenses.

(d) All payments made by Buyer or Seller hereunder shall be by wire transfer of immediately funds to an account specified by Seller or Buyer, as applicable.

3.3. Inventory Amount. The parties shall commission Washington Inventory Service or another independent valuator (the "Independent Valuator") to conduct a full review and valuation of the Inventory, to be valued in tenths, at each of the Operate Location Pharmacies as promptly as practicable after the Closing Date (each, an "Inventory Audit"). The parties shall use commercially reasonable efforts to schedule the Inventory Audits as promptly as practicable after the Closing Date. Each of Seller and Buyer shall be permitted to have representatives present to observe each Inventory Audit. The costs and expenses of the Independent Valuator are to be shared equally by Buyer and Seller as provided in Section 12.7. The Independent Valuator will determine the aggregate value of the Inventory at each of the Operate Location Pharmacies as of the required date (such aggregate value, the "Inventory Amount") in accordance with the procedures set forth on Exhibit C; provided, that (i) the Inventory shall be valued on the basis of Seller's acquisition cost, as indicated in its most recent cost file, as follows: (i) prescription pharmaceutical Inventory shall be valued at 98% of such costs (less the cost of rebates, to the extent such rebates are not already accounted for in Seller's records of its acquisition cost) (Seller estimates that total rebate costs are approximately 2% of actual inventory costs.), (ii) all other Inventory shall be valued at 98% of such costs, provided that any such Inventory purchased in accordance with the terms and conditions set forth in Section 8.5(c) after the date of the filing of the Chapter 11 Cases shall be valued at 98% of such costs and (iii) no value shall be ascribed to Excluded Inventory or any packaging or dispensing materials that are not chargeable to patients or payers. Unless otherwise agreed by the parties, the Inventory Amount as determined by the Independent Valuator in conducting the Inventory Audit shall be binding upon Seller and Buyer.

3.4. Prepaid Rent. At least two business days prior to the Closing Date, Seller shall provide to Buyer a certificate duly executed by Seller's chief financial officer setting forth the amount of rent paid under any Assumed Contract relating to periods after the Closing (such amount that Buyer has confirmed or otherwise agreed to, the "Prepaid Rent Amount"). The certificate shall be in form and substance reasonably satisfactory to Buyer and shall contain such detail as Buyer reasonably requests. Buyer shall be afforded an opportunity to review and confirm all amounts set in the certificate prior to Closing.

3.5. Prescription Volume Reduction Amount. Two business days prior to the Closing Date, Buyer and Seller will review the prescription count information for each Operate Location Pharmacy for the period between March 18, 2009 and the Calculation Date (the "Comparison Period"). To the extent the aggregate prescription count information for the Comparison Period is less than aggregate prescription count information for the period beginning on March 18, 2008 and ending on the date that is one year prior to the Calculation Date, the Purchase Price shall be

reduced in accordance with the methodology set forth on Schedule 3.5 (such reduction being referred to as the “Prescription Volume Reduction Amount”). In reviewing the prescription count information and determining the Prescription Volume Reduction Amount, Buyer and Seller will follow the methodology set forth on Schedule 3.5.

3.6. Operating Covenant Reduction Amount. In the event of any breach of Section 8.5 specified on Schedule 3.6, the Purchase Price will be subject to reduction in accordance with the terms and conditions set forth in Schedule 3.6. Buyer and Seller acknowledge and agree that any reduction to the Purchase Price resulting from the provisions of this Section 3.6 are intended to encourage Seller to operate in accordance with Section 8.5, but shall not act as a limitation on Buyer's claims for indemnification for any breach of Section 8.5. Notwithstanding the foregoing, Buyer and Seller further acknowledge and agree that any Purchase Price reduction resulting from the provisions of this Section 3.6 (the “Operating Covenant Reduction Amount”) shall (i) reduce the amount of the Escrow Fund available to indemnify the Buyer Group Members from any Loss or Expense as set forth in Article IX and (ii) reduce the amount of any claim Buyer can make under Article IX for the same breach.

3.7. Allocation of Purchase Price. Within 30 days following the Closing, Buyer shall deliver to Seller a schedule (the “Allocation Schedule”) allocating the Purchase Price (including, for purposes of this Section 3.7, any other consideration paid to Seller including the Assumed Liabilities) among the Purchased Assets. The Allocation Schedule shall be reasonable and shall be prepared in accordance with Section 1060 of the Code and the Treasury Regulations thereunder. Seller agrees that promptly after receiving the Allocation Schedule it shall return an executed copy thereof to Buyer. Each of Buyer and Seller agrees to file Internal Revenue Service Form 8594, and all federal, state, local and foreign Tax Returns, in accordance with the Allocation Schedule, and to provide the other promptly with any other information required to complete Form 8594.

## ARTICLE IV

### CLOSING

4.1. Closing Date. The Closing shall be consummated as promptly as practicable following satisfaction of the conditions precedent contained herein, at a date and time mutually agreed upon by the parties.

4.2. Closing Date Payment; Buyer's Closing Deliveries. At Closing, Buyer shall deliver to Seller (or to Seller's designee) each of the following:

(a) An amount equal to the Closing Date Payment, by wire transfer of immediately available funds to an account specified by Seller;

(b) A certificate, dated as of the Closing Date, signed by an officer of Buyer to the effect set forth in clauses (a) and (b) of Section 10.1;

(c) The Instrument of Assignment and Assumption, duly executed by an authorized officer of Buyer; and

(d) Such other instruments or documents as may be necessary or appropriate to carry out the transactions contemplated hereby.

4.3. Seller's Closing Date Deliveries. At Closing, Seller shall deliver to Buyer each of the following:

(a) Possession of the Purchased Assets;

(b) All Record Data, in accordance with Section 8.3;

(c) proof reasonably satisfactory to Buyer that all Cure Amounts with respect to the Real Property Leases assumed by Buyer have been paid;

(d) A certificate, dated as of the Closing Date, signed by an officer of Seller to the effect set forth in clauses (a) and (b) of Section 10.2;

(e) A certificate of the secretary or an assistant secretary of Seller, dated as of the Closing Date, in form and substance reasonably satisfactory to Buyer, as to the certificate or articles of incorporation of Seller; (ii) the by-laws (or similar document) of Seller; (iii) the authority of Seller regarding the due execution and performance of this Agreement and the contemplated transactions; (iv) the good standing of Seller in the State of Delaware; and (v) the incumbency and signatures of the officers of Seller executing this Agreement and any document or agreement required to be delivered hereunder;

(f) The Instrument of Assignment and Assumption, duly executed by an authorized officer of Seller;

(g) The Powers of Attorney as contemplated by Section 8.9(c), duly executed by authorized officers of Seller;

(h) A schedule in form and substance reasonably acceptable to Buyer, identifying the name and address of each landlord under each real estate lease included in the Assumed Contracts, together with all pertinent notice and payee information, including 1099 information;

(i) True and complete files for all Assumed Contracts, including, to the extent in Seller's possession, originally signed copies of each Assumed Contract and all correspondence, amendments, modifications and waivers related thereto;

(j) A certification of non-foreign status, in form and substance reasonably satisfactory to Buyer, in accordance with Treas. Reg. § 1.1445-2(b), and Buyer shall not have actual knowledge that such certification is false and shall not have received a notice that such certification is false pursuant to Treas. Reg. § 1.1445-4;

(k) A certified copy of the Sale Order; and

(l) Such other instruments or documents as may be necessary or appropriate to carry out the transactions contemplated hereby.

## ARTICLE V

### REPRESENTATIONS AND WARRANTIES OF SELLER

As an inducement to Buyer to enter into this Agreement and to consummate the transactions contemplated hereby, Seller represents and warrants to Buyer and agrees as follows:

5.1. Organization and Authority. Seller is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and has the corporate power and other authority to execute, deliver and perform this Agreement, the Escrow Agreement and all other documents and agreements required to be delivered hereunder. This Agreement, the Escrow Agreement and the transactions contemplated hereby have been approved by the Board of Directors (or other governing body) of Seller. Each of this Agreement and the Escrow Agreement has been duly authorized, executed and delivered by Seller and is the legal, valid and binding obligation of Seller enforceable in accordance with its terms, and all other documents and agreements required to be delivered hereunder, have been duly authorized by Seller and upon execution and delivery thereof by Seller will be a legal, valid and binding obligation of Seller enforceable in accordance with their terms, in each case subject to bankruptcy, insolvency, reorganization, moratorium and similar laws of general application relating to or affecting creditors' rights and to general equity principles. No actions of any holders of capital stock of Seller that have not already been taken are necessary for the approval of this Agreement and the transactions contemplated hereby.

5.2. No Conflicts. Neither the execution and delivery of this Agreement, the Escrow Agreement or the consummation of any of the transactions contemplated hereby or thereby nor compliance or compliance with or fulfillment of the terms, conditions and provisions hereof or thereof, in each case by Seller will conflict with, result in a material breach of the terms, conditions or provisions of, or constitute a material default, a material event of default or an event creating rights of acceleration, termination or cancellation or a loss of rights under, or result in the creation or imposition of any Encumbrance upon any of the Purchased Assets, under (i) the certificate of incorporation or bylaws of Seller, (ii) any Assumed Contract or material contract, agreement or understanding to which Seller is a party, or (iii) conflict with any order from a Governmental Body or any Requirements of Law to which any of the Purchased Assets is subject or by which Seller is bound, or (b) require the approval, consent, authorization or act of, or the making by Seller of any declaration, filing or registration with, any Person, except as may be required under the HSR Act.

5.3. Taxes.

(a) Except as set forth on Schedule 5.3, (i) Seller has, in respect of the Business and the Purchased Assets, filed all Tax Returns which are required to be filed and has paid all Taxes which have become due pursuant to such Tax Returns or pursuant to any assessment which has become payable or for which Buyer may otherwise have any



transferee liability; (ii) all such Tax Returns are complete and accurate and disclose all Taxes required to be paid in respect of the Business and the Purchased Assets; (iii) all such Tax Returns have been examined by the relevant taxing authority or the period for assessment of the Taxes in respect of which such Tax Returns were required to be filed has expired; and (iv) all monies required to be withheld by Seller (including from employees of the Business for income Taxes and social security and other payroll Taxes) have been collected or withheld, and either paid to the respective taxing authorities, set aside in accounts for such purpose, or accrued, reserved against and entered upon the books of the Business.

(b) No transaction contemplated by this Agreement is subject to withholding under Section 1445 of the Code, and no sales Taxes, use Taxes, real estate transfer Taxes or other similar Taxes will be imposed on the transfer of the Purchased Assets or the assumption of the Assumed Liabilities pursuant to this Agreement.

5.4. Title and Sufficiency. At Closing, Seller will transfer to Buyer good and marketable title to all of the Purchased Assets subject to no Encumbrances (except Permitted Encumbrances).

5.5. Financial Schedules. Set forth on Schedule 5.5 are (a) selected unaudited prescription operations data (the "Operations Data") for each of the Operate Location Pharmacies, in each case, for the period commencing July 29, 2007 and ending on February 21, 2009; (b) unaudited contribution reports (the "Contribution Data") for each of the Operate Location Pharmacies, in each case, for the period commencing July 29, 2007 and ending on February 21, 2009; and (c) certain other selected financial information (the "Other Financial Data"). The Operations Data, the Contribution Data and the Other Financial Data have been compiled from source books, records, pharmacy system and financial reports of Seller. The Operations Data, the Contribution Data and the Other Financial Data fairly reflects in the aggregate, in all material respects, the prescription operating data, revenues and the selling, general and administrative expenses, in each case, for the locations specified on Schedule 5.5 and for the periods set forth therein. Seller's cost files for inventory at any date, and from time to time, reflect the actual costs of inventory paid by Seller.

5.6. Suppliers; Distributors and Third Party Payors. To Seller's knowledge, no distribution, payor, wholesaler, customer, supplier or other Person with a material business relationship with Seller has provided written notice of its intention to cease or substantially reduce the use or supply of products, goods or services of or to the Business or return any products of the Business, whether as a result of the Closing, the Chapter 11 Cases or otherwise.

5.7. Prescription Volume. The prescription count information set forth on Schedule 5.7 was derived from the ordinary business records of Seller and, to the best knowledge of Seller, accurately reflects such records in all material respects. The prescriptions filled at each Operate Location Pharmacy have arisen from bona fide, legal transactions and the information included in the Records is, to Seller's knowledge, accurate in all material respects.

5.8. Leased Real Property.

(a) The Assumed Contracts set forth on Schedule 1.1(a) comprise all leasehold interests and amendments and other modifications thereto in the Premises. Except as set forth on Schedule 5.8(a), Seller has not pledged, encumbered or hypothecated its right, title or interest in any real estate lease or Premises. Seller has provided Buyer with true and correct copies of each Assumed Contract and all amendments, addendums and attachments thereto. Seller enjoys peaceful and undisturbed possession of all the Premises. Each of the Assumed Contracts, when assumed by Buyer, will be in full force and effect in accordance with its terms.

(b) Except as set forth on Schedule 5.8(b), Seller is not in, or, to the knowledge of Seller, alleged to be in, material breach or default under any Assumed Contract, and there is no event that, but for the passage of time or the giving of notice or both would constitute or result in any such material breach or default. To the knowledge of Seller, no third party to any Assumed Contracts is in, or alleged to be in, material breach or default of any Assumed Contracts, and there is no event that, but for the passage of time or the giving of notice or both would constitute or result in any such material breach or default.

(c) None of the Premises are subject to any pending suit for condemnation or other taking by any Governmental Body, and, to the knowledge of Seller, no such condemnation or other taking is threatened or contemplated

5.9. Personal Property. All machinery, equipment, vehicles, furniture and other tangible personal property owned by Seller and used at the Operate Store Locations is and shall be as of the Closing Date in good working order and condition, free of defect or damage, ordinary wear and tear excepted. Between the date hereof and Closing, there will not be a material reduction in the property referenced above. Except for leases of computers, photocopiers, postage machines and other similar office equipment, there is no personal property leased to Seller located at any of the Operate Location Pharmacies. Within ten (10) days of the date hereof, Seller shall deliver to Buyer a list of all such equipment subject to a lease. To the extent Buyer desires to assume any such lease, Seller shall use commercially reasonable efforts to assign such lease (or the applicable portion thereof) to Buyer, as applicable.

5.10. Inventory. The Inventory is in good, merchantable and useable condition, and consists only of items of quality and quantity commercially usable and salable in the ordinary course of the Business, except for any items of obsolete material or material below standard quality.

5.11. Employee Matters.

(a) On the date hereof, Seller delivered to Buyer (i) a list of all employees of the Business on the date hereof whose discharge of duties is primarily performed in an Operate Store Location (each, a "Business Employee"), including their full legal name and position and (ii) a true and complete schedule of the salary, bonus and other compensation information for each Business Employee and, in the case of pharmacists, nurses or other licensed Persons, their relevant license numbers (the "Employee Data Schedule"). The Employee Data Schedule shall be updated as necessary to reflect new

hires or other personnel changes occurring between the date hereof and Closing. Seller is not bound by any oral or written employment agreement, consulting agreement, or deferred compensation agreement with any of the Business Employees. No Business Employee is a party to any collective bargaining agreement. As related to the Business Employees, Seller is not and has never been subject to any affirmative action obligations under any Requirements of Law with respect to any current or former Business Employees, including Executive Order 11246, or is or has been a government contractor for purposes of any Requirements of Law with respect to the terms and conditions of employment of any current or former Business Employees.

(b) Set forth on Schedule 5.11(b) is a correct and complete list identifying each material "employee benefit plan," as defined in Section 3(3) of ERISA, each material employment, retention, severance or similar contract, plan, arrangement or policy and each other material plan or arrangement (written or oral) providing for compensation, bonuses, profit-sharing, stock option or other stock-related rights or other forms of incentive or deferred compensation, vacation benefits, insurance (including any self-insured arrangements), health or medical benefits, employee assistance program, disability or sick leave benefits, workers' compensation, supplemental unemployment benefits, severance or retention benefits and post-employment or retirement benefits (including compensation, pension, health, medical or life insurance benefits) which is maintained, administered or contributed to by Seller or any of its Affiliates or by which any of them are bound, and which covers any Business Employee as of the date hereof (all of the foregoing collectively referred to as the "Employee Plans"). Copies of such Employee Plans (and, if applicable, related trust or funding agreements or insurance policies) and all amendments thereto that Buyer has requested copies of have been made available to Buyer together with, if applicable, the most recently filed annual report (Form 5500 including, if applicable, Schedule B thereto) in connection with any such plan or trust. Each Employee Plan that is intended to be qualified under Section 401(a) of the Code has received a favorable determination letter from the Internal Revenue Service that it is so qualified, and no fact or event has occurred since the date of such determination letter that would reasonably be expected to adversely affect such qualification. Each Employee Plan is now and has been operated in all material respects in accordance with its terms and the Requirements of Law, including ERISA and the Code. Seller has made all required contributions to the Employee Plans, except for any contribution which is not yet due and payable. None of the Purchased Assets is the subject of any lien arising under Section 302(f) of ERISA or Section 412(n) of the Code.

5.12. Employee Relations. Except as set forth on Schedule 5.12, Seller believes that its relations with the employees of Seller with respect to the Business are satisfactory. Seller is not a party to, and Seller with respect to the Business is not affected by or threatened with, any dispute or controversy with a union or with respect to unionization or collective bargaining involving the employees of Seller with respect to the Business. Seller, with respect to the Business, is not adversely affected by any dispute or controversy with a union or with respect to unionization or collective bargaining involving any supplier or customer of Seller with respect to the Business. Schedule 5.12 sets forth a description of any union organizing or election activities involving any non-union employees of Seller with respect to the Business which have occurred since January 1, 2005 or, to the knowledge of Seller, are threatened as of the date hereof.

5.13. Legal Proceedings.

(a) Except as described in Schedule 5.13, there are no material claims, actions, suits or proceedings pending or, to the best of Seller's knowledge, threatened by or against Seller relating to or affecting the Business or the Purchased Assets.

(b) Except as described in Schedule 5.13, there are no material judgments, decrees, orders, writs, injunctions, rulings, decisions or awards of any court or Governmental Body to which Seller is a party or is subject with respect to the Business or to which any of the Purchased Assets is subject. Seller has received no notice of complaints filed against Seller under HIPAA or applicable patient privacy and data protection laws and, to Seller's knowledge, no such violation exists.

5.14. Compliance With Law; Permits; Medicare and Medicaid.

(a) Except as described in Schedule 5.14, Seller has obtained all material licenses, franchises, permits, approvals and other authorizations from a Governmental Body that are necessary to entitle Seller to own or lease, and operate and use the Purchased Assets and to carry on the Business as currently conducted. Schedule 5.14 sets forth a list of all such material licenses, franchises, permits, approvals and other authorizations and a list of all NCPDP, Medicare, Medicaid or other billing or similar numbers used in the Business (collectively, the "Permits").

(b) Seller is not in violation, and has not been in violation in the preceding three years, in any material respects of any Requirements of Laws with respect to the Business or the Purchased Assets. Seller has timely filed all material reports, registrations and statements required to be filed by it with any Governmental Body, and has paid all related fees and assessments due and payable. Neither Seller nor, to the knowledge of Seller, anyone acting on behalf of Seller has, to the knowledge of Seller, received or filed for any Medicare or Medicaid overpayments. To Seller's knowledge, all Medicare, Medicaid and third-party reports and claims filed or required to be filed by or on behalf of Seller have been timely filed and are complete and accurate in all material respects. None of Seller, not to Seller's knowledge any director, officer or employee of Seller or any Affiliate of Seller has been excluded from participation in any government healthcare payment program, including Medicare or Medicaid, nor, to Seller's knowledge, are any of the foregoing Persons aware of any pending or threatened investigation or government action that may lead to such exclusion, fine or other remedy.

(c) Without limiting the generality of the foregoing,

(i) there is no pending or, to the knowledge of Seller, threatened, lawsuits, claims, suits, or other proceedings relating to Seller's participation in any payment program, including Medicare, TRICARE, Medicaid, worker's compensation, Blue Cross/Blue Shield programs, and all other health maintenance organizations, preferred provider organizations, health benefit plans, health insurance plans, and other third party reimbursement and payment programs (the "Payment Programs").

(ii) to the knowledge of Seller, (x) no Payment Program has requested or threatened any recoupment, refund, or set-off from Seller except in the ordinary course of the Business consistent with past practice; and (y) since January 1, 2004, no Payment Program has imposed a fine, penalty or other sanction on Seller and Seller has not been excluded or suspended from participation in any material Payment Program.

(iii) Since January 1, 2004, neither Seller, nor, to the knowledge of Seller, any employee, with respect to actions taken in connection with their employment by Seller, (A) has been assessed a civil money penalty under Section 1128A of the Social Security Act or any regulations promulgated thereunder, (B) has been excluded from participation in any federal health care program or state health care program (as such terms are defined by the Social Security Act), including Medicare or Medicaid, nor, to the knowledge of Seller, are any of the foregoing Persons aware of any pending or threatened investigation or government action that may lead to such an exclusion, (C) has been convicted of any criminal offense relating to the delivery of any item or service under a federal health care program relating to the unlawful manufacture, distribution, prescription, or dispensing of a prescription drug or a controlled substance, (D) has failed to comply with the requirements of Section 340B of the Public Health Service Act, (E) is now or has ever been listed on the office of the Inspector General's excluded persons list, or (F) has been a party to or subject to any action concerning any of the matters described above in clauses (A) through (E).

(d) The Business is in compliance in all material respects with all Environmental, Health and Safety Requirements in connection with the ownership, use, maintenance or operation of the Business. To Seller's knowledge, each Premises is in compliance in all material respects with all Environmental, Health and Safety Requirements. There are no pending or, to the knowledge of Seller, any threatened allegations by any Person that any of the Purchased Assets are not, or that the Business has not been conducted, in compliance with all Environmental, Health and Safety Requirements and Seller has not received any written notice (or, to the knowledge of Seller, any other notice), report, or information (including information that litigation, investigation or administrative action of any kind are pending or threatened) regarding any actual or potential liabilities or any corrective, investigatory, or remedial obligations, arising under Environmental, Health and Safety Requirements relating to the Business or the use of any of the Purchased Assets. To the knowledge of Seller, no Hazardous Substances have been or are currently located at, in, under, or about, either the Purchased Assets or the Premises in a manner that: (i) violates in any material respect any applicable Environmental, Health and Safety Requirements; or (ii) requires response, remedial, corrective action or cleanup of any kind under any applicable Environmental, Health and Safety Requirements.

5.15. Broker. Except as set forth on Schedule 5.15, neither Seller nor any Person acting on Seller's behalf has paid or become obligated to pay any fee or commission to any broker, finder or intermediary for or on account of the transactions contemplated by this Agreement.

5.16. Warranties. All pharmaceuticals and other products marketed, sold, distributed, delivered or licensed by Seller or its Affiliates with respect to the Business at any time since

January 1, 2004 have been in conformity, in all material respects, with all applicable contractual commitments and express or implied warranties.

5.17. Affiliate Transactions. Except as set forth on Schedule 5.17, no Affiliate of Seller and no employee, officer or director of Seller or any of its Affiliates (a) owns, directly or indirectly, in whole or in part, any Permits, real property, leasehold interests or other property, the use of which is necessary for the operation of the Business, (b) has any claim or cause of action or any other action, suit or proceeding against, or owes any amount to Seller related to the Business, or (c) is a party to any contract related to the Business pursuant to which Seller provides to, or receives services from, any such Person, except as to any such individual in his or her capacity as a Business Employee.

## ARTICLE VI

### REPRESENTATIONS AND WARRANTIES OF BUYER

As an inducement to Seller to enter into this Agreement and to consummate the transactions contemplated hereby, Buyer hereby represents and warrants to Seller and agrees as follows:

6.1. Organization of Buyer. Buyer is a corporation duly organized, validly existing and in good standing under the laws of the State of Illinois and has full corporate power and authority to carry on its business as now conducted.

6.2. Authorization. Buyer has full corporate power and authority to enter into this Agreement, the Escrow Agreement and all documents and agreements required to be delivered hereunder, to consummate the transactions contemplated hereby and thereby and to comply with the terms, conditions and provisions hereof and thereof. The execution, delivery and performance by Buyer of this Agreement, the Escrow Agreement and the actions contemplated hereby and thereby have been duly and validly authorized by the Board of Directors of Buyer and no other corporate proceedings on the part of Buyer are necessary with respect hereto or thereto. Each of this Agreement and the Escrow Agreement has been duly authorized, executed and delivered by Buyer and is the legal, valid and binding obligation of Buyer enforceable in accordance with its terms, and all other documents and agreements required to be delivered hereunder have been duly authorized by Buyer and upon execution and delivery by Buyer will be a legal, valid and binding obligation of Buyer enforceable in accordance with their terms, in each case subject to bankruptcy, insolvency, reorganization, moratorium and similar laws of general application relating to or affecting creditors' rights and to general equity principles.

6.3. Non-Contravention. Neither the execution and delivery of this Agreement, the Escrow Agreement or the consummation of any of the transactions contemplated hereby or thereby nor compliance with or fulfillment of the terms, conditions and provisions hereof or thereof, in each case by Buyer will:

- (a) conflict with, result in a breach of the terms, conditions or provisions of, or constitute a default, an event of default or an event creating rights of acceleration,

termination or cancellation or a loss of rights under, or result in the creation or imposition of any Encumbrance upon, any of the assets of Buyer, under (i) the certificate of incorporation or by-laws of Buyer, (ii) any material agreement, note, instrument, mortgage, lease, license, franchise, permit or other authorization, right, restriction or obligation to which Buyer is a party or any of their respective assets or business is subject or by which Buyer is bound, (iii) any order, writ, injection or decree to which Buyer is a party or any of their respective assets or business is subject or by which Buyer is bound or (iv) any Requirements of Laws affecting Buyer or its assets or business, except as may be required under the HSR Act; or

(b) require the approval, consent, authorization or act of, or the making by Buyer of any declaration, filing or registration with, any Person, and such other approvals, consents, authorizations or acts the failure of which to be obtained or made would not materially impair the ability of Buyer to perform its obligations hereunder or prevent the consummation of any of the transactions contemplated hereby.

6.4. Sufficient Funds. Buyer has, and on the Closing Date will have, sufficient funds available to enable Buyer to pay the Purchase Price pursuant to the terms of this Agreement. Buyer will not require any third-party financing to consummate the transactions contemplated by this Agreement.

## ARTICLE VII

### COVENANTS AND AGREEMENTS REGARDING BANKRUPTCY

7.1. Chapter 11 Filings. As promptly as practicable after the execution of this Agreement, Seller shall file the Chapter 11 Cases with the Bankruptcy Court and true and complete copies of the petitions will be delivered by Seller to Buyer.

7.2. Cooperation; Efforts. Each of Seller and Buyer shall use its reasonable best efforts to cooperate, assist and consult with each other to procure the entry of a sales procedures order (the "Sale Procedures Order") and a sale order (the "Sale Order" and together with the Sale Procedures Order, the "363/365 Orders") as promptly thereafter as practicable, in each case in the form attached hereto as Exhibit D. Without limiting the generality of the foregoing, Seller shall (i) comply with all requirements under the Bankruptcy Code and Federal Bankruptcy Rules in connection with obtaining the 363/365 Orders, (ii) agree to proceed with its Chapter 11 Cases pursuant to and in accordance with the terms and provisions contemplated by the 363/365 Orders, in each case after the order has been entered by the Bankruptcy Court and (iii) comply or cause the compliance with the notice requirements of the 363/365 Orders, in each case after the order has been entered by the Bankruptcy Court, and any other applicable order of the Bankruptcy Court as they relate to the Chapter 11 Cases, the Federal Bankruptcy Rules (including, without limitation, Rules 2002, 6004, 6006 and 9014 of the Federal Rules of Bankruptcy Procedure) and any applicable rules of the Bankruptcy Court with respect to the transactions contemplated by this Agreement. In the event that the 363/365 Orders or any other orders of the Bankruptcy Court relating to this Agreement shall be appealed by any party (or a petition for certiorari or motion for reconsideration, amendment, clarification, modification, vacation, stay, rehearing or reargument shall be filed with respect to any such order), Seller and

Buyer will cooperate in taking such steps diligently to defend against such appeal, petition or motion and Seller and Buyer shall use their reasonable best efforts to obtain an expedited resolution of any such appeal, petition or motion. Neither Purchaser nor Seller shall make any filing in the Bankruptcy Court with respect to the 363/365 Orders (or otherwise take any position in the Bankruptcy Court proceedings with respect thereto) without the express written consent of the other party, which may not be unreasonably withheld, conditioned or delayed, or otherwise that would be reasonably likely to result in the failure of the transactions contemplated hereby. Notwithstanding anything to the contrary herein, however, nothing shall be deemed to prohibit or otherwise restrain Buyer from making any filing in the Bankruptcy Court to challenge or object to the entry of an order by the Bankruptcy Court approving the entry by Seller into an Alternate Transaction.

7.3. Break-Up Fee. Seller hereby agrees, in the event that a Bankruptcy Court enters an order that becomes final approving a Transaction with a party other than Buyer (the "Alternate Buyer", and such Transaction an "Alternate Transaction"), Seller shall owe to Buyer (a) a break-up fee (the "Break-Up Fee") in the amount of \$1,620,000, which amount shall be earned upon entry of the Order approving such Alternate Transaction and shall be paid upon consummation of such Alternate Transaction and (b) an amount equal to all of the out-of-pocket expenses, up to a total of \$600,000, incurred by Buyer or its Affiliates in connection with the transactions contemplated by this Agreement, including all HSR Act filing fees (the "Expense Reimbursement"), which amount shall be paid immediately upon entry of the order approving such Alternate Transaction, in each case, without further order of the Bankruptcy Court. The Break-Up Fee and Expense Reimbursement are intended to compensate Buyer and its Affiliates for the time and expense dedicated to this transaction and the value added by Buyer and its Affiliates in (i) establishing a bid standard or minimum for other bidders, (ii) placing Seller's estate property in a sales configuration mode attracting other bidders to the auction and (iii) for serving, by its name and its expressed interest, as a catalyst for other potential or actual bidders. The Break-Up Fee and Expense Reimbursement shall constitute allowed super priority administrative claims against Seller's estate under Sections 503(b) and 507(a)(2) of the Bankruptcy Code and in connection with the entry of the order approving any Alternate Transaction, Buyer shall be granted a lien, that shall be subordinate to Seller's lender's claims under the DIP Credit Agreement, on the deposit made by the Alternate Buyer in order to secure the payment of the Break-Up Fee.

7.4. Assignment of Rights. If, in connection with the auction or sale referred to in the Sale Procedures Order, Seller or any of its Affiliates enter into confidentiality or similar agreements with any Person, Seller shall assign all rights under those agreements to the extent relating to the Business to Buyer at the Closing and to the extent such rights are assignable.

## ARTICLE VIII

### ADDITIONAL AGREEMENTS

#### 8.1. Employees.

(a) Unless otherwise agreed to by Buyer, between the date hereof and Closing, Seller shall use (i) its commercially reasonable efforts to continue to employ all



of the Business Employees, subject to normal workplace practices and discipline, and (ii) not transfer the Business Employees or offer the Business Employees an employment position outside of the Operate Location Pharmacies. In addition, between the date hereof and Closing, Seller shall inform Buyer if any such Business Employee has terminated or given notice of their termination of employment at the Operate Location Pharmacies.

(b) Between the date hereof and Closing, Buyer may interview some or all of Seller's employees to determine whether to offer employment to any of them. Buyer shall have no obligation to hire any Business Employee. Any employees who accept Buyer's offer of employment (each, a "Transferred Employee") shall be employed on substantially similar terms as currently available to similarly situated employees of Buyer. Any Transferred Employee will be deemed terminated by Seller and hired by Buyer, effective upon the hiring of such employee by Buyer. Any Business Employee who is not a Transferred Employee will be terminated or retained by Seller, in its discretion.

(c) Nothing herein contained shall be considered or construed as an agreement to employ any Business Employee for any period of time. Except as specifically provided for herein, Buyer assumes no obligation with respect to any of Seller's employees, whether hired by Buyer or not, for any benefit, perquisite or remuneration accrued or earned while under Seller's employ. Without limiting the generality of the foregoing, Buyer shall have no obligation or liability for such employees' accrued vacation time, bonuses, awards, commissions, salaries, reimbursements of any kind, health or disability benefit, insurance, severance pay, pension or profit sharing interests or any other benefits, compensation or remuneration of any nature whatsoever.

(d) The benefits of Transferred Employees under the Employee Plans (if and to the extent applicable) will be determined as of Closing in accordance with the terms of the applicable Employee Plans. Except as expressly set forth herein, no assets or liabilities of any Employee Plan shall be transferred to Buyer or any of its Affiliates or to any plan of Buyer or any of its Affiliates.

(e) Buyer will make available to Transferred Employees such benefits as Buyer currently makes available to its similarly situated employees. Buyer will cause all employee benefit plans and programs of Buyer and its Affiliates to recognize all service of Transferred Employees with Seller or any of its Affiliates (to the extent such service was recognized under the comparable Employee Plans as of Closing) for purposes of vesting and eligibility under Buyer's employee benefit plans (other than the frozen retiree health benefit plan) and for purposes of determining the length of annual vacation, number of sick days and amount of severance benefits.

(f) Promptly after the date of this Agreement, Buyer and Seller shall mutually agree upon the terms of a registered pharmacist incentive plan (the "Incentive Plan"). Thereafter, Buyer and Seller shall jointly communicate the terms of the Incentive Plan to mutually selected employees. At Closing, Buyer and Seller shall each contribute up to \$175,000 toward the Incentive Plan; provided that Buyer shall be permitted to fund

Seller's portion thereof, in which case the Purchase Price shall be reduced by the same amount. Buyer shall administer the Incentive Plan after Closing.

(g) No provision of this Section 8.1 shall create any third party beneficiary or other rights in any Business Employee (including any beneficiary or dependent thereof, and further including the Transferred Employees) of Seller or of any of its Affiliates in respect of employment with Buyer or any of its Affiliates and no provision of this Section 8.1 shall create any rights in any such Persons in respect of any benefits that may be provided, directly or indirectly, under any Employee Plan or any plan or arrangement which may be established by Buyer or any of its Affiliates. No provision of this Agreement shall constitute a limitation on rights to amend, modify or terminate after Closing any such plans or arrangements of Buyer or any of its Affiliates.

(h) With respect to all employees of Seller who are employed at any pharmacy location of Seller, Seller shall comply with, and be responsible for performing and discharging, all requirements under the WARN Act, and any similar applicable state or local law, and for the timely notification to its employees, or any other required individuals or entities, of any "employment loss" within the meaning of the WARN Act which occurs prior to, at or following the Closing Date as a result of or to the extent otherwise related to the transactions contemplated by this Agreement, the File Transfer Purchase Agreement or otherwise. Seller shall be responsible for, and shall indemnify Buyer and its Affiliates for, all costs and liabilities associated with any failure by Seller to comply with the requirements of the WARN Act or any similar applicable state or local laws.

#### 8.2. Non-competition.

(a) In furtherance of the sale of the Purchased Assets to Buyer hereunder by virtue of the transactions contemplated hereby and more effectively to protect the value and goodwill of the Purchased Assets so sold, for a period of three (3) years after the Closing Date, Seller agrees not to (and shall cause its controlled Affiliates not to), in any manner whatsoever, directly or indirectly operate, own, lease, engage or participate in as an owner, landlord, partner, employee, joint venturer, shareholder, director, assignor, seller, transferor, or as a sales or marketing agent or otherwise, in, for, or in connection with any retail drug store, clinic pharmacy, pharmacy business as conducted by Buyer after the date hereof within a radius of one (1) mile from any Operate Location Pharmacy.

(b) Seller also agrees that, for a period of three (3) years after the Closing Date it shall not (and shall cause its controlled Affiliates not to), directly or indirectly, call upon, solicit, write, direct or divert business from any Person who filled a prescription in the twelve (12) month period ending on the Closing Date at any Operate Location Pharmacy (a "Customer").

(c) For a period of two (2) years after the Closing Date, Seller shall not (and shall cause its controlled Affiliates not to) solicit, recruit or hire any employee of the

Business at the date of this Agreement who becomes a Transferred Employee and shall not encourage any such employee to leave the employment of Buyer.

(d) Seller covenants and agrees that it shall not (and shall cause its controlled Affiliates not to) divulge to any Person any Confidential Information of Buyer or the Business.

(e) The parties hereby recognize, acknowledge and agree that the territorial and time limitations contained in this Agreement are reasonable and properly required for the adequate protection of the business to be conducted by Buyer with the Purchased Assets. The parties further agree that the geographical and temporal restrictions referred to in this Section 8.2 are divisible and severable. The parties acknowledge that inclusion of this Section 8.2 in the Agreement is a material inducement to Buyer to enter into this Agreement and pay the Purchase Price.

(f) Notwithstanding the foregoing, nothing in this Section 8.2 shall prevent Seller from (i) owning and operating the Excluded Businesses in their current locations or (ii) purchasing or otherwise acquiring, up to a non-controlling interest, of any class of securities of any enterprise that may be competitive with Buyer and the Operate Location Pharmacies (but without other participation in the activities of such enterprise) as long as such securities are listed on any national or regional securities exchange or have been registered under Section 12(g) of the Securities Exchange Act of 1934, as amended; (iii) selling, disposing, liquidating or otherwise transferring any Excluded Assets in connection with a liquidation process; or (iv) continuing to provide service to Customers who are also customers at other pharmacy locations owned or operated by Seller other than the Operate Location Pharmacies. For the avoidance of doubt, "controlled Affiliates" of Seller, as used herein, shall not include any holder of debt or equity interests or securities of Seller or its Affiliates or any officer, director, member or partner of any such equity or debt holder.

8.3. Records and Data. (a) The parties agree that Seller will engage Infoworks (the "Data Converter") to convert Seller's prescription file and record data in electronic form that are included in the Purchased Assets (the "Record Data") to a format specified by Buyer. Seller agrees, on or prior to Closing, to provide, during regular business hours, such access, information and cooperation to the Data Converter as may be reasonably required to enable the Data Converter to deliver the Record Data to Buyer at least two business days prior to the Closing Date. In the event that the Record Data is not or cannot be delivered to Buyer as of the date of Closing, Buyer, at Buyer's sole discretion, may delay the Closing Date until the Record Data is delivered to Buyer.

(b) Seller will retain a complete copy of all Record Data in accordance with applicable Requirements of Law regarding retention of records.

(c) Seller has, with respect to each of the Operate Location Pharmacies, maintained (i) an accurate log of all disclosures, to the extent any have been made, as of January 1, 2004, of Protected Health Information ("PHI"), as that term is defined in HIPAA.

8.4. Matters Related to Prescriptions. Prior to the Closing, Seller shall use reasonable efforts to fill and deliver to customers of Operate Location Pharmacies any partial-fill prescriptions with a remaining quantity balance ("IOU Prescriptions"). For any IOU Prescriptions remaining on the Closing Date, Seller shall credit the prescription to the customer or to the third-party payor, as appropriate, on the Closing Date. Buyer assumes no liability for IOU Prescriptions. In addition, prior to the Closing, Seller shall reverse and return to stock any filled prescriptions that have not been picked up, providing all necessary notice to any third-party payors, and shall provide Buyer with a list of such prescriptions so that Buyer is prepared to fill such prescriptions on or after the Closing Date.

8.5. Interim Operations.

(a) Between the date hereof and the Closing Date, Seller shall, subject to the terms and conditions set forth in the DIP Credit Agreement, operate and carry on the Business in the ordinary course and substantially as presently operated; provided, however, the parties acknowledge and agree that Seller's ability to operate in the ordinary course is limited by the utilization of cash available to it under the DIP Credit Agreement and cash flow from operations, and such limitations may not permit Seller to operate in the ordinary course; provided further, however, that the parties acknowledge and agree that Buyer's right to reductions in the Purchase Price pursuant to Sections 3.5 and 3.6 are not limited by the preceding proviso. Consistent with the foregoing, Seller shall use reasonable efforts to keep and maintain the Purchased Assets in good operating condition and repair, ordinary wear and tear excepted. In furtherance of the foregoing, Seller shall maintain normal operating hours, staffing levels, inventory levels and merchandise mix, in each case in accordance with Schedule 3.6. Buyer shall have the right, at any time before Closing upon reasonable notice and at Buyer's expense, to audit Seller's prescription records to verify the then-current average daily prescription counts.

(b) Except as expressly contemplated by this Agreement or except with the express written approval of Buyer, Seller shall not: (i) take any action that is intended or may reasonably be expected to result in (x) any of the representations and warranties set forth in this Agreement being or becoming untrue in any material respect, (y) any of the conditions to the Closing set forth in this Agreement not being satisfied or (z) any violation of any provision of this Agreement, except, in each case, as may be required by applicable law; (ii) enter into any lease or material agreement, contract or commitment of any nature (or amendment, supplement or modification of any existing lease, agreement, contract or commitment), oral or written, nor make any material capital investment or expenditures, primarily related to the ownership or operation of the Operate Location Pharmacies; (iii) enter into any material contract with respect to, or make any material increase in (or commitment to increase) the compensation payable to any of its employees or agents primarily related to the Operate Location Pharmacies; or (iv) sell, lease, transfer or otherwise dispose of (including any transfers from Seller to any of its Affiliates), or impose or suffer to be imposed any Encumbrance on, any of the Purchased Assets, other than inventory and minor amounts of personal property sold or otherwise disposed of for fair value in the ordinary course of the Business consistent with past practice.

(c) Between the date hereof and the Closing Date, Seller shall, with respect to the Operate Location Pharmacies, purchase “front-end” Inventory in accordance with and subject to the provisions set forth on Schedule 3.6. The aggregate amount of Inventory purchased by Seller between the date hereof and the Closing Date shall be limited as set forth on Schedule 3.6. Notwithstanding the foregoing, Seller shall be permitted to transfer prescription pharmaceutical inventory from the eleven (11) pharmacies included in the File Transfer Purchase Agreement to the Operate Location Pharmacies.

(d) Without limiting the effect of the condition to Closing set forth in Section 10.2(b) or the termination right set forth in Section 11.1(d), Seller shall not be deemed to have breached (other than for purposes of Sections 10.2(b) and 11.1(d)) any covenant set forth in Section 8.5(a), (b) or (c) if it takes or fails to take any action in order to comply with the Bankruptcy Code or an order of the Bankruptcy Court. Any action or failure to take action which would have been a breach but for the prior sentence shall be deemed to be a breach of a covenant for purposes of Section 10.2(b) or 11.1(d).

(e) Concurrently with the execution of this Agreement, Seller shall enter into the DIP Credit Agreement in the form provided to Buyer on the date hereof.

(f) Between the date hereof and the Closing Date, Buyer may sell to Seller and Seller may purchase from Buyer certain front-end inventory on terms and conditions to be agreed up on by the parties. Notwithstanding the foregoing, unless otherwise specified in a written agreement between Buyer and Seller after the date hereof, neither party shall have any obligation or commitment to participate, or to continue to participate, in any inventory supply arrangement and either party may terminate such arrangement at any time.

#### 8.6. Taxes.

(a) Seller shall be liable for and covenants to pay, and pursuant to Article IX shall indemnify and hold harmless each Buyer Group Member from and against any and all Losses and Expenses incurred by any of them in connection with or arising from, (i) all Taxes (whether assessed or unassessed) applicable to the Business or the Purchased Assets, in each case attributable to taxable years or periods (or portions thereof) ending prior to the Closing Date and, with respect to any Straddle Period, the portion of such Straddle Period ending on and including the Closing Date and (ii) all excise, sales, use, transfer (including real property transfer or gains), stamp, registration, documentary, filing, recordation and other similar Taxes which may be imposed or assessed as a result of the transactions effected pursuant to this Agreement (the “Transfer Taxes”), together with any interest, additions or penalties with respect thereto and any interest in respect of such additions or penalties; provided that Seller shall use reasonable best efforts to have all Transfer Taxes exempted pursuant to the Sale Order. Buyer shall be liable for and covenants to pay, and pursuant to Article IX shall indemnify and hold harmless Seller, its Affiliates, directors, officers, employees and agents from and against any and all Loss and Expense incurred by any of them in connection with or arising from, all Taxes (whether assessed or unassessed) applicable to the Business or the Purchased Assets, in each case attributable to periods (or portions thereof) beginning on or after the Closing

Date and, with respect to any Straddle Period, the portion of such Straddle Period beginning after the Closing Date; provided, however, that Buyer shall not be liable for or pay, and shall not indemnify or hold harmless Seller, its Affiliates, directors, officers, employees or agents from and against, any Taxes for which Seller is liable under this Agreement, including without limitation, pursuant to the preceding sentence or Section 5.3. For purposes of this Section 8.6, any Straddle Period shall be treated on a "closing of the books" basis as two partial periods, one ending at the close of the Closing Date and the other beginning on the day after the Closing Date, except that Taxes (such as property Taxes) imposed on a periodic basis shall be allocated on a daily basis.

(b) Seller or Buyer, as the case may be, shall provide reimbursement for any Tax paid by one party all or a portion of which is the responsibility of the other party in accordance with the terms of this Section 8.6 without regard to the terms of the Escrow Agreement. Within a reasonable time prior to the payment of any such Tax, the party paying such Tax shall give notice to the other party of the Tax payable and the portion which is the liability of each party, although failure to do so will not relieve the other party from its liability hereunder.

(c) After the Closing Date, each of Seller and Buyer shall (and cause their respective Affiliates to): (i) assist the other party in preparing any Tax Returns which such other party is responsible for preparing and filing; (ii) cooperate fully in preparing for any audits of, or disputes with taxing authorities regarding, any Tax Returns of the Business or the Purchased Assets; (iii) make available to the other and to any taxing authority as reasonably requested all information, records, and documents relating to Taxes of the Business or the Purchased Assets; (iv) provide timely notice to the other in writing of any pending or threatened Tax audits or assessments relating to Taxes of the Business or the Purchased Assets for taxable periods for which the other may have a liability under this Section 8.6; and (v) furnish the other with copies of all correspondence received from any taxing authority in connection with any Tax audit or information request with respect to any such taxable period. Any returns or reports with respect to Transfer Taxes that are required to be filed shall be prepared and, to the extent Seller is permitted by law or administrative practice, filed by Seller when due.

(d) Seller and Buyer shall each comply with all of their respective requirements and obligations under state tax bulk sales or similar laws that apply when a person sells some or all of its assets, including, in particular, the requirements and obligations under Sections 54:32B-22 and 54:50-38 of the New Jersey Revised Statutes.

(e) Notwithstanding anything to the contrary in this Agreement, the obligations of the parties set forth in this Section 8.6 shall be unconditional and absolute and shall remain in effect without limitation as to time.

#### 8.7. Access.

(a) Upon reasonable notice, Seller, each of its directors, officers, agents and employees shall afford Buyer and its representatives reasonable access during regular business hours from the date hereof through the Closing to the Premises and any and all

properties, contracts, books, records, data and personnel of Seller relating to the Business. After the filing of the Chapter 11 Cases, Seller shall afford to Buyer and its representatives reasonable access to and an opportunity to speak with any third parties to the Assumed Contracts. Seller, its directors, officers, agents and employees shall cooperate in connection with the foregoing. Seller shall provide to Buyer such information and documents concerning the Business as reasonably may be requested by Buyer. In exercising its rights under this Section 8.7(a), Buyer shall not unreasonably interfere with Seller's Business and shall coordinate the exercise of such rights through Seller.

(b) After entry of the Sale Order, upon reasonable notice, Seller shall permit Buyer access to all of the Premises in order to install wiring and equipment for communication devices and other store systems and to prepare for the integration of the Business with Buyer's own business, all at Buyer's cost and without causing material damage to such Premise. Buyer agrees to repair any damage which may be caused due to the exercise of its rights pursuant to this Section 8.7(b) and to indemnify, defend and hold harmless Seller from any and all Losses arising out of or in any way connected with Buyer's exercise of its rights pursuant to this Section 8.7(b). In exercising its rights under this Section 8.7(b), Buyer shall not unreasonably interfere with Seller's Business and shall coordinate the exercise of such rights through Seller.

8.8. Consent of Third Parties; Regulatory and Other Authorizations; HSR Act.

(a) During the period prior to the Closing Date, Seller and Buyer shall use commercially reasonable efforts, and shall cooperate with each other, to (1) secure any consents and approvals of any Governmental Body required to be obtained by them in order to permit the consummation of the transactions contemplated hereby or (2) otherwise satisfy the conditions set forth in Sections 10.1 and 10.2; provided, that Seller shall not make any agreement or understanding affecting, in any material respect, the Business or the Purchased assets as a condition for obtaining any such consents or waivers except with the prior written consent of Buyer, which consent shall not be unreasonably withheld.

(b) If, based upon the advice of counsel to Buyer, a filing under the HSR Act is required by law, as promptly as practicable after the date hereof and in no event more than ten (10) days after the date hereof, Buyer and Seller shall file with the FTC and the Antitrust Division the notifications and other information required to be filed under the HSR Act with respect to the transactions contemplated hereby. Seller and Buyer shall use commercially reasonable efforts to ensure that all such filings by it are, as of the date filed, true and accurate and in accordance with the requirements of the HSR Act. Each of Buyer and Seller agrees to make available to the other such information as each of them may reasonably request relative to its business, assets and property (including, in the case of Seller, the Business) as may be required of each of them to file any additional information requested by such agencies under the HSR Act. Each of Seller and Buyer agree to provide to the other copies of all significant correspondence between it (or its advisors) and any such agency relating to this Agreement or any of the matters described in this Section 8.8(b); provided that such correspondence does not contain or reveal

confidential information of Buyer, Seller or their respective Affiliates. All filing fees associated with this Section 8.8(b) shall be paid by Buyer.

8.9. Avoiding Abandonment.

(a) Seller hereby authorizes Buyer to operate under each Permit related to the Business after the Closing, to the extent permitted by applicable law, rule or regulation and to the extent necessary to enable Buyer to conduct the Business while Buyer seeks to replace such Permit with its own license, authorization, permit or waiver (such Permits, the "Transferable Permits"). Buyer shall promptly after execution of this Agreement prepare and submit the necessary applications (the "Buyer Applications") to the applicable regulatory agencies, to obtain the licenses required to operate the Business. Seller will take all steps reasonably necessary to maintain its authorizations under the Transferable Permits that Buyer operates under during the period between Closing and the issuance of Buyer's own licenses, authorizations, permits or waivers and Seller will cooperate with Buyer in preparing and submitting the Buyer Applications. Buyer shall indemnify and hold Seller and its Affiliates harmless for any and all Loss and Expense incurred or suffered as a result of or relating to Buyer's operation under the Transferable Permits.

(b) Prior to the Closing, Seller agrees to use commercially reasonable efforts as may be reasonably requested by Buyer to assist Buyer to and Buyer shall take all commercially reasonable efforts to, as soon as practicable after the date hereof, to (i) obtain all licenses, authorizations, permits or waivers as may be necessary for Buyer to conduct the Business at the Operate Location Pharmacies (including, on the part of Seller taking all steps reasonably necessary to relinquish the Permits as applicable, as of Closing) and (ii) obtain such licenses, authorizations, permits or waivers effective as of the Closing Date or as promptly thereafter as is practicable. Buyer shall reimburse Seller for all out-of-pocket expenses incurred in connection therewith. Seller further agrees that, prior to the Closing, it will cooperate as may be reasonably necessary to enable Buyer to, and Buyer shall take all commercially reasonable efforts to, as soon as practicable after the date hereof, to (x) obtain either a new license or the approval of the transfer of Buyer's existing license issued by the pharmacy boards of the states in which the Operate Location Pharmacies are located, and (y) obtain any required Medicare or Medicaid authorizations or numbers, NCPDP numbers and Drug Enforcement Agency authorizations, permits or licenses.

(c) Seller shall execute a power of attorney, in form and substance reasonably acceptable to the parties, authorizing Buyer to operate the Business under the Transferable Permits (the "Power of Attorney") and such other powers of attorney, pharmacy management and other agreements; assignments, amendments, addenda and other documents as may be necessary to enable Buyer to conduct the Business, in each case as are reasonably requested by Buyer.

8.10. License.



(a) For a period of 60 days after the Closing Date, Buyer shall have the right to use the tradenames and Trademarks associated with the Operate Location Pharmacies in connection with store signage, advertisements, solicitations, announcements and similar matters related to any Operate Location Pharmacies,

(b) After the Closing Date, Buyer shall have the right to use existing packaging, labeling, containers, supplies, advertising materials and any similar materials bearing the tradenames and Trademarks primarily used in or related to the ownership or operation of the Operate Location Pharmacies for 60 days following the Closing Date. Buyer shall have the right to use the tradenames and Trademarks associated with the Operate Location Pharmacies in advertising that cannot be changed by Buyer or its Affiliates or resellers using commercially reasonable efforts for a period not to exceed 60 days after the Closing Date. Buyer shall comply with all applicable laws or regulations in any use of packaging or labeling containing the tradenames and Trademarks primarily used in or related to the ownership or operation of the Operate Location Pharmacies. Buyer shall not be obligated to change the tradenames and Trademarks primarily used in or related to the ownership or operation of the Operate Location Pharmacies on goods in the hands of dealers, distributors and customers at the time of the expiration of the time period set forth herein.

8.11. Remittance. The parties agree that (a) in the event Buyer receives payment from any parties for services rendered by Seller before the Closing Date (including payment from Medicare and Medicaid programs), Buyer will remit such payment to Seller as soon as reasonably practicable after receipt thereof (but in no event later than fifteen (15) days) and (b) in the event Seller receives payment from any parties for services rendered by Buyer after the Closing Date (including payment from Medicare and Medicaid programs), Seller will remit such payment to Buyer as soon as reasonably practicable after receipt thereof (but in no event later than fifteen (15) days).

8.12. Further Assurances; Transition Services.

(a) At any time and from time to time at or after the Closing, the Buyer and Seller agree to cooperate with each other to execute and deliver such other documents, instruments of transfer or assignment, files, books and records and do all such further acts and things as may be reasonably required in order to carry out the purposes of this Agreement.

(b) Promptly after the execution of this Agreement, Buyer and Seller will work cooperate with each other to develop a detailed transition plan reflecting, among other things, the agreements regarding Transition Services included in Section 8.12(c) below.

(c) Buyer and Seller agree that for a period of sixty (60) days following the Closing (the "Transition Services Period"), Seller shall provide to Buyer human resources, accounting, information technology (including access to the central pharmacy server) or other services reasonably requested by Buyer that are comparable to and consistent with the human resources, accounting, information technology and other

services provided by Seller to the Business prior to the Closing and that are reasonably necessary to facilitate a smooth transition of the ownership and operation of the Purchased Assets from Seller to Buyer (the "Transition Services"). Notwithstanding the foregoing, Seller shall be required to provide the Transition Services only to the extent and in the manner such Transition Services were being provided in connection with Seller's owning and operating of the Purchased Assets as of, or within the six (6) month period ending on, the Closing Date and only to the extent Seller's personnel at such time have the expertise and available working time to provide such services. To the extent Seller intends to terminate personnel necessary to provide the Transition Services or Seller's personnel at such time do not have the expertise and available working time to provide such services, Seller will give Buyer reasonable advance notice thereof and Buyer may, in its sole discretion, pay the salaries of the necessary personnel in order to maintain their employment, hire or pay for the costs of hiring the required personnel, or use its own employees in order to ensure the availability of the Transition Services, and Seller will afford such personnel with all access necessary to do so. Buyer shall reimburse Seller for all expenses incurred in connection therewith. Buyer and Seller shall use good faith efforts to cooperate with each other in all matters relating to the provision and receipt of the Transition Services.

8.13. Access to Records. From the Closing Date through the third anniversary of the Closing Date, Seller shall afford to Buyer and, upon request, Buyer's counsel, accountants and other representatives, reasonable access at reasonable times and occasions to access and inspect information not included in the Purchased Assets but relating to the Purchased Assets, the Business, any Transferred Employee, or a claim by any Buyer Group Member for indemnification pursuant to Section 9.1 if and to the extent Seller is legally required to maintain records relating to such information. In the event that Seller is not legally required to maintain such records or information through the third anniversary of the Closing Date and determines to dispose of such records or information, Seller shall provide Buyer with reasonably advanced notice of such disposal and an opportunity to copy or take possession of such records or information.

8.14. Limitations on Solicitation, etc. Except as provided in the Sale Procedures Order with respect to the period prior to the entry of the Sale Order, neither Seller nor its Affiliates, officers, directors, employees, agents or representatives (including attorneys, investment bankers, brokers and accountants) ("Restricted Persons") shall, directly or indirectly, (a) solicit, initiate, encourage or entertain the submission of proposals or offers from any Person (other than Buyer) for, or enter into any agreement or arrangement (whether or not binding) relating to, any possible transaction involving some or all of the assets that will constitute Purchased Assets (other than such assets that are disposed of in the ordinary course of business in compliance with Section 8.5 hereof), or the stock of Seller or CDI Group, Inc. (a "Transaction") or (b) participate in any substantive discussions or negotiations or provide any confidential information regarding, or furnish to any other Person any information with respect to or in contemplation of, a possible Transaction. Seller shall notify Buyer in writing as soon as possible, but in any event within twenty-four (24) hours, of the receipt of any inquiry or proposal (including all material terms and the identity of the proponent of the inquiry or proposal) covered by this Section 8.14. Notwithstanding the foregoing, at any time prior to the entry of the Sale Procedures Order, the Restricted Persons may furnish information to, and negotiate or otherwise engage in substantive

discussions with, any Person who delivers a bona fide written proposal (a "Proposal") for a Transaction which was not solicited or encouraged by a Restricted Person after the date of this Agreement, if and so long as the Board of Directors of Seller determines in good faith by resolutions duly adopted, after consultation with its outside counsel, that the failure to provide such information or engage in such negotiations or discussions is or would be a breach of the directors' fiduciary duties under applicable law and determines in good faith that such a Proposal is a Superior Proposal. Seller shall notify Buyer in writing within twenty-four (24) hours of such inquiries, proposals or offers received by, or any such discussions or negotiations sought to be initiated or continued with, any of the Restricted Persons, at any time prior to the entry of the Sale Procedures Order, indicating the name of such Person and providing to Buyer a copy of such written proposal or offer for an Alternative Transaction. At any time prior to the entry of the Sale Procedures Order, prior to providing any information or data to, or engaging in any discussions with, any Person in connection with a Proposal, Seller shall notify Buyer in writing if Seller or the Restricted Persons intend to engage in any such activities with any such Person other than providing written notice to such Person that an auction of the Purchased Assets is expected to occur under the Sale Procedures Order and that Seller will provide the Person with a copy of the Sale Procedures Order when it has been entered by the Court ("Selling Activities"). At any time prior to the entry of the Sale Procedures Order, Seller shall keep Buyer advised of the status of any Selling Activities and, without limiting Buyer's rights under this Agreement or the 363/365 Orders, provide Buyer a reasonable opportunity to submit its own proposal in response to any proposals or offers received by Seller. "Superior Proposal" means a Proposal made by a Person other than Buyer, and which is on terms which Seller's Board of Directors determines in good faith would result in a Transaction that is materially more favorable (a) to Seller than the transaction contemplated by this Agreement taking into account all the terms and conditions of such proposal and this Agreement and the transactions contemplated hereby and (b) is reasonably capable of being completed on the terms proposed, taking into account all financial, regulatory, legal and other aspects of such Proposal; provided, however, that no Proposal shall be deemed to be a Superior Proposal if the Proposal is subject to a financing contingency. Seller shall use commercially reasonable efforts to include in the Sale Procedures Order certain similar notice provisions as are included in this Section 8.14, with respect to the period between the day the Sale Procedures Order is approved and the Closing Date.

8.15. Estoppels. Prior to the Closing, Seller and Buyer shall use commercially reasonable efforts to secure estoppels from any third parties to the Assumed Contracts in form and substance reasonably satisfactory to Buyer.

## ARTICLE IX

### INDEMNIFICATION

#### 9.1. Indemnification by Seller.

(a) Seller agrees to indemnify and hold harmless each Buyer Group Member from and against any and all Losses and Expenses incurred by such Buyer Group Member in connection with or arising from:

- (i) any breach of any warranty or the inaccuracy of any representation of Seller contained or referred to in this Agreement or any certificate delivered by or on behalf of Seller pursuant hereto;
- (ii) any breach by Seller of any of its covenants or agreements, or any failure of Seller to perform any of its obligations, in this Agreement;
- (iii) the failure of Seller to pay, perform or discharge any Excluded Liability;
- (iv) the failure of Seller to comply with any applicable bulk sales law in connection with the transactions contemplated by this Agreement or the File Transfer Purchase Agreement; or
- (v) any and all claims from or on behalf of any former, current or future (A) holder of capital stock of, or other rights or interests in Seller or (B) creditor of Seller, in either case, arising from or relating to the execution, delivery and performance of this Agreement or the File Transfer Purchase Agreement and/or the transactions contemplated hereby or thereby;

provided, however, that Seller shall not be required to indemnify and hold harmless under clause (i) of this Section 9.1(a) with respect to Losses and Expenses incurred by Buyer Group Members (other than Losses and Expenses incurred as a result of inaccuracies of the representations and warranties contained in Sections 5.1, 5.3, 5.4 and 5.15, as to which this proviso shall have no effect) unless the aggregate amount of such Losses and Expenses subject to indemnification by Seller exceeds \$50,000, and once such amount is exceeded, Seller shall indemnify the Buyer Group Members only for the amount in excess of such amount; and

provided further, however, that the aggregate amount that Seller shall be required to indemnify and hold harmless pursuant to Section 9.1(a) shall not exceed \$5,400,000.

(b) The indemnification provided for in Section 9.1(a) shall terminate 90 days after the Closing Date (and no claims shall be made by any Buyer Group Member under Section 9.1(a) thereafter), except that the indemnification by Seller shall continue as to any Loss or Expense arising under or related to a claim pursuant to Section 9.1(a) of which any Buyer Group Member has notified Seller in accordance with the requirements of Section 9.4 on or prior to the date such indemnification would otherwise terminate in accordance with this Section 9.1, as to which the obligation of Seller shall continue until the liability of Seller shall have been determined pursuant to this Article IX, and Seller shall have reimbursed all Buyer Group Members for the full amount of such Loss and Expense in accordance with this Article IX.

9.2. Indemnification by Buyer. Buyer agrees to indemnify and hold harmless Seller, its Affiliates, directors, officers, employees and agents from and against any and all Loss and Expense incurred by any of them in connection with or arising from: (a) any breach by Buyer of any of its representations or warranties in this Agreement or in any agreement or document required to be delivered by Buyer hereunder; (b) any breach by Buyer of any of its covenants, agreements or obligations in this Agreement or in any agreement or document required to be delivered by Buyer hereunder, and (c) any Assumed Liability. The indemnification provided for

in Section 9.1(a) shall terminate 90 days after the Closing Date (and no claims shall be made by Seller under Section 9.1(a) thereafter).

9.3. Escrow Fund; Termination of Escrow Fund.

(a) For purposes of satisfying any amounts owed to any Buyer Group Member under this Agreement, the Buyer Group Members shall be entitled (subject to final determination of the right to, and amount of, indemnification pursuant to Section 9.4(b)) to either (a) set off and reduce any amounts owed to Seller under this Agreement, or (b) charge the amount of any Loss and Expense against (and be entitled to receive payment from) the Escrow Fund, until the amounts owed under this Article IX exceed the Escrow Fund.

(b) In the event that on the 90 day anniversary of the Closing Date, no claims for indemnification by any Buyer Group Member are pending or remain unpaid, the Escrow Fund shall terminate and any funds then remaining in the Escrow Fund shall be distributed in accordance with the terms of the Escrow Agreement. Alternatively, in the event that on the 90 day anniversary of the Closing Date, any such good faith claims for indemnification are pending or remain unpaid, the Escrow Fund shall not terminate and any funds remaining in the Escrow Fund shall not be distributed to Seller or any of its creditors or stockholders unless and until all such claims have been resolved and, if appropriate, paid in accordance with this Article IX; provided, however, that if the aggregate maximum amount of such claims are less than the then existing Escrow Fund, the Escrow Agent shall distribute such difference in accordance with the terms of the Escrow Agreement.

9.4. Notice and Determination of Claims.

(a) The party which is entitled to indemnification hereunder (for purposes of this Section 9.4, the "Indemnified Person") may make claims for indemnification hereunder by promptly giving written notice thereof to the party required to indemnify (for purposes of this Section 9.4, the "Indemnitor") within the period in which indemnification claims can be made hereunder. If indemnification is sought for a claim or liability asserted by a third party (the "Third Person Claim"), the Indemnified Person shall also give written notice thereof to the Indemnitor promptly after it receives notice of the claim or liability being asserted, but the failure to do so, or any delay in doing so, shall not relieve the Indemnitor of its indemnification obligation under this Article IX, unless, and then only to the extent that, the rights and remedies of the Indemnitor are materially prejudiced as a result of the failure to give, or delay in giving, such notice. Such notice shall in good faith summarize the bases for the claim for indemnification (the "Claim Notice") describing such Loss or Expense, the amount thereof, if known, and the method of computation of such Loss or Expense, all with reasonable particularity and containing a reference to the provisions of this Agreement, any certificate or other agreement delivered pursuant hereto in respect of which such Loss or Expense shall have occurred.

(b) Within fourteen (14) days after receiving such notice (or sooner as is reasonably necessary, in the case of a Third Person Claim), the Indemnitor shall give written notice to the Indemnified Person stating whether it in good faith disputes the claim for indemnification and whether it will defend against any Third Person Claim at its own cost and expense. If the Indemnitor fails to give notice that it disputes an indemnification claim within 14 days after receipt of notice thereof (or sooner as is reasonably necessary, in the case of a Third Person Claim), it shall be deemed to have accepted and agreed to the claim, and the amount of indemnification to which an Indemnified Person shall be entitled under this Article IX shall be determined: (i) by the written agreement between the Indemnified Person and the Indemnitor; (ii) by a final, non-appealable judgment or decree of any court of competent jurisdiction; or (iii) by any other means to which the Indemnified Person and the Indemnitor shall agree. The judgment or decree of a court shall be deemed final when the time for appeal, if any, shall have expired and no appeal shall have been taken or when all appeals taken shall have been finally determined.

9.5. Indemnification as Sole Remedy. Except as permitted under Section 12.9, and except with respect to claims for Losses and Expenses which cannot be waived as a matter of law (including fraud), the indemnity provided herein will be the sole and exclusive remedy of the Buyer Group Members and Seller and their respective Affiliates, directors, officers, employees and agents with respect to any and all claims for Losses and Expenses sustained, incurred or suffered, directly or indirectly, relating to or arising out of this Agreement.

## ARTICLE X

### CONDITIONS TO CLOSING

10.1. Seller's Condition to Closing. The obligations of Seller under this Agreement are subject to the satisfaction at or prior to the Closing of each of the following conditions, but compliance with any or all of such conditions may be waived, in writing, by Seller:

(a) The representations and warranties of Buyer contained in this Agreement that are qualified as to materiality shall be true and correct in all respects and those representations and warranties not so qualified shall be true and correct in all material respects, in each case, on the date hereof and on the Closing Date (except to the extent that they expressly relate to an earlier date);

(b) Buyer shall have performed and complied in all material respects with all of the covenants and agreements contained in this Agreement and satisfied all of the conditions required by this Agreement to be performed or complied with or satisfied by Buyer at or prior to the Closing;

(c) If, based upon the advice of counsel to Buyer, a filing under the HSR Act is required by law, the waiting period under the HSR Act shall have expired or been terminated and, on the Closing Date, there shall be no injunction, restraining order or decree of any nature of any court or Governmental Body in effect that restrains or prohibits the consummation of the transactions contemplated by this Agreement and no

action, suit or proceeding shall have been instituted by any Person or entity, or threatened by any Governmental Body, before a court or Governmental Body, to restrain or prevent the carrying out of the transactions contemplated by this Agreement; and

(d) Buyer shall have delivered all documents required to be delivered under Section 4.2.

(e) The Bankruptcy Court shall have entered the Sale Order substantially in the form attached hereto as Exhibit D, without modification or the imposition of conditions or limitations with respect thereto, except for such immaterial modifications, conditions or limitations which do not, individually or in the aggregate, adversely affect Seller and the Sale Order shall not have been vacated, stayed, amended, reversed or modified.

10.2. Buyer's Conditions to Closing. The obligations of Buyer under this Agreement are subject to the satisfaction at or prior to the Closing of each of the following conditions, but compliance with any or all of any such conditions may be waived, in writing, by Buyer:

(a) The representations and warranties of Seller contained in this Agreement that are qualified as to materiality shall be true and correct in all respects and those representations and warranties not so qualified shall be true and correct in all material respects, in each case, on the date hereof and on the Closing Date (except to the extent that they expressly relate to an earlier date);

(b) Seller shall have performed and complied in all material respects with all the covenants and agreements contained in this Agreement and satisfied all the conditions required by this Agreement to be performed or complied with or satisfied by it or them at or prior to the Closing Date;

(c) If, based upon the advice of counsel to Buyer, a filing under the HSR Act is required by law, the waiting period under the HSR Act shall have expired or been terminated and, on the Closing Date, there shall be no injunction, restraining order or decree of any nature of any court or Governmental Body in effect that restrains or prohibits the consummation of the transactions contemplated by this Agreement and no action, suit or proceeding shall have been instituted by any Person or entity, or threatened by any Governmental Body, before a court or Governmental Body, to restrain or prevent the carrying out of the transactions contemplated by this Agreement;

(d) Seller shall have delivered all documents required to be delivered under Section 4.3;

(e) Buyer shall have obtained all licenses, permits, NCPDP numbers, Medicaid or Medicare numbers, or similar items required to operate the Business (either by transfer of Seller's Transferable Permits to the extent permitted by law or its receipt of new licenses, permits or numbers), provided, however that as soon as practicable after the date hereof Buyer will file its application for all required licenses, numbers, or similar items required to operate the Business and thereafter shall use all commercially

reasonable efforts to obtain such licenses, numbers or similar items as soon as possible; and

(f) The Bankruptcy Court shall have entered the Sale Order substantially in the form attached hereto as Exhibit D (together with any related findings of fact or conclusions of Law), without modification or the imposition of conditions or limitations with respect thereto, except for such immaterial modifications, conditions or limitations which do not, individually or in the aggregate, adversely affect Buyer and the Sale Order shall not have been violated, vacated, withdrawn, overruled, resolved or stayed, amended, reversed or modified and shall have become final and nonappealable.

## ARTICLE XI

### TERMINATION

11.1. Termination. Notwithstanding anything contained in this Agreement to the contrary, this Agreement may be terminated at any time prior to the Closing Date:

- (a) by the mutual written consent of Buyer and Seller;
- (b) by Buyer if the Chapter 11 Cases shall not have been filed by March 19, 2009;
- (c) by Buyer if the Sale Procedures Order shall not have been entered by the Bankruptcy Court in substantially the form attached hereto as Exhibit D without modification or the imposition of any conditions or limitations with respect thereto (except for such immaterial modifications, conditions or limitations which do not individually or in the aggregate adversely affect Buyer) on or prior to the 20<sup>th</sup> calendar day following the date of this Agreement;
- (d) by Buyer if the Sale Order shall not have been entered by the Bankruptcy Court in substantially the form attached hereto as Exhibit D approving this Agreement and the transactions contemplated hereby without modification or the imposition of any conditions or limitations with respect thereto (except for such immaterial modifications, conditions or limitations which do not individually or in the aggregate adversely affect Buyer) on or prior to the 35<sup>th</sup> calendar day after the entry of the Sale Procedures Order;
- (e) by Buyer in the event of any material breach by Seller of any of Seller's agreements, covenants, representations or warranties contained herein and such material breach is incapable of being cured or, if capable of being cured, shall not have been cured within thirty (30) days following receipt by Seller of notice of such material breach from Buyer;
- (f) by Seller in the event of any material breach by Buyer of any of Buyer's agreements, covenants, representations or warranties contained herein and such material breach is incapable of being cured or, if capable of being cured, shall not have been cured



within thirty (30) days following receipt by Buyer of notice of such material breach from Seller;

(g) by Buyer, if Seller's Chapter 11 Cases are (i) dismissed, (ii) converted to Chapter 7 or (iii) a trustee is appointed with respect to Seller;

(h) by Buyer, if (i) the DIP Credit Agreement is terminated, (ii) the DIP Credit Agreement is amended or modified, in any manner that materially decreases the amount of available cash thereunder, or (iii) if Seller is in default or breach of the DIP Credit Agreement, or a condition precedent to its borrowing thereunder has not been satisfied, and such default, breach or condition precedent is not waived and materially limits Seller's ability to borrow funds thereunder; unless, in each case, Seller obtains substitute financing on terms that are not materially less favorable to Seller than the terms of the DIP Credit Agreement;

(i) by either Buyer or Seller if (a) an Alternate Transaction is consummated, or (b) the Bankruptcy Court shall have approved an Alternate Transaction; provided however, that if Buyer is the "Back-up Bidder" (as defined in the Sale Procedures Order), neither Buyer nor Seller will terminate this Agreement, pursuant to this Section 11.1(i), until 15 days after entry of the order approving such Alternate Transaction;

(j) by either Buyer or Seller if any Governmental Body shall have issued a final and non-appealable order, decree or ruling permanently restraining, enjoining or otherwise prohibiting the consummation of the transactions contemplated hereby; or

(k) by either Buyer or Seller if the Closing shall not have occurred on or before ninety (90) days after the date hereof (or such later date as may be mutually agreed to in writing by Buyer and Seller); provided that the party seeking to exercise such right of termination has not breached its obligations hereunder.

#### 11.2. Effect of Termination.

(a) In the event of the termination of this Agreement pursuant to Section 11.1 hereof, all further obligations of the parties under this Agreement shall be terminated without further liability of any party or its stockholders, directors or officers to the other parties, except that (i) the parties shall perform their obligations contained in this Section 11.2 and Sections 12.2, 12.7 and 12.12; provided that nothing in this Article XI shall relieve any party of its liability for a breach of its obligations under this Agreement, and (ii) Buyer's right to the Break-Up Fee and Expense Reimbursement under Section 7.3 shall remain in effect notwithstanding a termination of this Agreement under Section 11.1(i).

(b) If Buyer shall terminate this Agreement pursuant to Section 11.1(b), (c), (d), (e), (g), (h) or (i), then Seller shall, on the date of such termination, pay to Buyer the Expense Reimbursement.

**ARTICLE XII****GENERAL PROVISIONS**

12.1. Survival of Obligations. Subject to Section 9.1, all representations, warranties, covenants and obligations contained in this Agreement shall survive the consummation of the transactions contemplated by this Agreement.

12.2. No Public Announcement. Neither party shall, without the approval of the other party, make any press release or other public announcement concerning the transactions contemplated by this Agreement, except as and to the extent that a party may be so obligated by law, in which case the parties shall use their best efforts to cause a mutually agreeable release or announcement to be issued.

12.3. Notices. All notices or other communications required or permitted under this Agreement shall be in writing, shall be deemed to have been given when delivered in person, by telex or telecopier, when delivered to a recognized next business day courier, or, if mailed, when deposited in the United States mail, first class, registered or certified, return receipt requested, with proper postage prepaid, addressed as follows or to such other address as notice shall have been given pursuant hereto:

If to Seller:

Drug Fair Group, Inc.  
800 Cottontail Lane  
Somerset, NJ 08873  
Attn: Chief Executive Officer  
Fax: 732-748-7200

with a copy to:

Klehr, Harrison, Harvey, Branzburg & Ellers, LLP  
919 Market Street  
Suite 1000  
Wilmington, DE 19801  
Attn: Domenic Pacitti  
Fax: 302-426-9193

If to Buyer, to:

Walgreen Eastern Co., Inc.  
c/o Walgreen Co. Law Department  
1415 Lake Cook Road, MS #L145  
Deerfield, Illinois 60015  
Attention: Oren B. Azar  
Phone: (847) 964-8988  
Fax: (847) 964-8939

with a copy to:

Sidley Austin LLP  
One South Dearborn  
Chicago, Illinois 60603  
Attention: Chris Abbinante  
Phone: (312) 853-7000  
Fax: (312) 853-7036

12.4. Successors and Assigns; No Third Party Beneficiaries. Either party may assign any of its rights hereunder, but no such assignment shall relieve it of its obligations hereunder. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their successors and permitted assigns. Except as set forth in Article IX, nothing in this Agreement, expressed or implied, is intended or shall be construed to confer upon any Person other than the parties and successors and assigns permitted by this Section 12.4 any right, remedy or claim under or by reason of this Agreement.

12.5. Entire Agreement; Amendments. This Agreement and the Exhibits and Schedules referred to herein and the documents delivered pursuant hereto contain the entire understanding of the parties hereto with regard to the subject matter contained herein or therein, and supersede all prior agreements, understandings or letters of intent between or among any of the parties hereto, including any confidentiality agreement between the parties or their Affiliates. This Agreement shall not be amended, modified or supplemented except by a written instrument signed by an authorized representative of each of the parties hereto.

12.6. Waivers. Any term or provision of this Agreement may be waived, or the time for its performance may be extended, by the party or parties entitled to the benefit thereof. Any such waiver shall be validly and sufficiently authorized for the purposes of this Agreement if, as to any party, it is authorized in writing by an authorized representative of such party. The failure of any party hereto to enforce at any time any provision of this Agreement shall not be construed to be a waiver of such provision, nor in any way to affect the validity of this Agreement or any part hereof or the right of any party thereafter to enforce each and every such provision. No waiver of any breach of this Agreement shall be held to constitute a waiver of any other or subsequent breach.

12.7. Expenses. Except as set forth in Section 7.3 or Section 11.2(b), and except for the Shared Expenses, each party hereto will pay all costs and expenses incident to its negotiation and preparation of this Agreement and to its performance and compliance with all agreements and conditions contained herein on its part to be performed or complied with, including the fees, expenses and disbursements of its counsel and accountants. All items of income and expense incurred in connection with the Business of the Operate Location Pharmacies (including rent, expenses, utilities, prepayments, deposits and similar items) shall be prorated between Seller and Buyer such that Seller shall receive and be responsible for all items of income and expense earned or incurred on or prior to the Closing Date. For administrative convenience, Buyer agrees to pay and be liable for the Shared Expenses. In consideration therefore, the parties agree that

Buyer will be reimbursed, through a credit against the Purchase Price, equal to one-half of the Shared Expenses.

12.8. Partial Invalidity. Wherever possible, each provision hereof shall be interpreted in such manner as to be effective and valid under applicable law, but in case any one or more of the provisions contained herein shall, for any reason, be held to be invalid, illegal or unenforceable in any respect, such provision shall be ineffective to the extent, but only to the extent, of such invalidity, illegality or unenforceability without invalidating the remainder of such invalid, illegal or unenforceable provision or provisions or any other provisions hereof, unless such a construction would be unreasonable.

12.9. Injunctive Relief; Remedies.

(a) The parties agree that any breach or threatened breach by Seller of or its Affiliates of this Agreement, including Section 8.2, would result in substantial and irreparable damage to Buyer, the amount of which would be difficult, if not impossible, to ascertain. Therefore, Seller agrees that in the event of any such breach or threatened breach thereof, Buyer shall have the right to enforce this Agreement by preliminary or permanent injunctive or other relief in equity, without the necessity of proving any actual damages or providing any bond or other security. The right of Buyer to obtain injunctive or other equitable relief to enforce the terms hereof shall be in addition to all other rights and remedies it may otherwise have at law, in equity, or otherwise. Such right to obtain injunctive or other equitable relief may be exercised, at the option of Buyer, concurrently with, prior to, after, or in lieu of the exercise of any other rights or remedies which Buyer may have as a result of any breach or threatened breach of any of the terms hereof.

(b) The prevailing party or parties in any action brought to enforce any provision of this Agreement shall be entitled to recover all reasonable attorneys' fees and disbursements and other out-of-pocket costs incurred in connection therewith.

12.10. Compliance with Law. Seller acknowledges that Buyer intends to (a) comply with applicable law in its exercise of all rights under this Agreement, including its rights under Sections 3.5, 8.5 and 8.7 and (b) restrict competitively sensitive information to Buyer's employees who are not involved in sales, marketing or pricing of business operations that compete with Seller. If provided with reasonable notice of procedures being implemented by Buyer to facilitate such compliance, Seller agrees to use commercially reasonable efforts to observe such procedures, subject to compliance with the Bankruptcy Code and order of the Bankruptcy Court. Buyer acknowledges that it intends to comply with all applicable privacy laws and any applicable privacy policies of Seller relating to the handling of customer information and data.

12.11. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be considered an original instrument, but all of which shall be considered one and the same agreement.

12.12. **GOVERNING LAW; SUBMISSION TO JURISDICTION;  
SELECTION OF FORUM. THIS AGREEMENT SHALL BE GOVERNED BY, AND**

CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF DELAWARE. EACH PARTY HERETO AGREES THAT IT SHALL BRING ANY ACTION OR PROCEEDING IN RESPECT OF ANY CLAIM ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE TRANSACTIONS CONTAINED IN OR CONTEMPLATED BY THIS AGREEMENT, WHETHER IN TORT OR CONTRACT OR AT LAW OR IN EQUITY, EXCLUSIVELY (A) IN THE BANKRUPTCY COURT TO THE EXTENT THAT THE BANKRUPTCY COURT HAS JURISDICTION OVER SUCH ACTION OR PROCEEDING, AND (B) IN ALL OTHER CASES IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE (THE "CHOSEN COURTS") AND (I) IRREVOCABLY SUBMITS TO THE EXCLUSIVE JURISDICTION OF THE CHOSEN COURTS, (II) WAIVES ANY OBJECTION TO LAYING VENUE IN ANY SUCH ACTION OR PROCEEDING IN THE CHOSEN COURTS, (III) WAIVES ANY OBJECTION THAT THE CHOSEN COURTS ARE AN INCONVENIENT FORUM OR DO NOT HAVE JURISDICTION OVER ANY PARTY HERETO, (IV) AGREES THAT SERVICE OF PROCESS UPON SUCH PARTY IN ANY SUCH ACTION OR PROCEEDING SHALL BE EFFECTIVE IF NOTICE IS GIVEN IN ACCORDANCE WITH SECTION 12.3 OF THIS AGREEMENT AND (V) ACKNOWLEDGES THAT THE OTHER PARTIES WOULD BE IRREPARABLY DAMAGED IF ANY OF THE PROVISIONS OF THIS AGREEMENT ARE NOT PERFORMED IN ACCORDANCE WITH THEIR SPECIFIC TERMS AND THAT ANY BREACH OF THIS AGREEMENT COULD NOT BE ADEQUATELY COMPENSATED IN ALL CASES BY MONETARY DAMAGES ALONE AND THAT, IN ADDITION TO ANY OTHER RIGHT OR REMEDY TO WHICH A PARTY MAY BE ENTITLED, AT LAW OR IN EQUITY, IT SHALL BE ENTITLED TO ENFORCE ANY PROVISION OF THIS AGREEMENT BY A DECREE OF SPECIFIC PERFORMANCE AND TO TEMPORARY, PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF TO PREVENT BREACHES OR THREATENED BREACHES OF ANY OF THE PROVISIONS OF THIS AGREEMENT, WITHOUT POSTING ANY BOND OR OTHER UNDERTAKING.

\*\*\*\*\*

WALGREENS EXEC DEPT Fax 847-914-3652

Mar 17 2009 04:05pm P001/001

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed the day and year first above written.

WALGREEN EASTERN CO., INC.

OBA

By: *Dana Green*  
Name: DANA GREEN  
Title: PRESIDENT

DRUG FAIR GROUP, INC.


By: \_\_\_\_\_  
Name:  
Title:

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed the day and year first above written.

WALGREEN EASTERN CO., INC.

By: \_\_\_\_\_  
Name:  
Title:

DRUG FAIR GROUP, INC.

By:   
Name: Timothy D. Boates  
Title: CEO

**EXHIBIT INDEX**

**Exhibits**

Exhibit A	Operate Location Pharmacies
Exhibit B	Instrument of Assignment and Assumption
Exhibit C	Inventory Procedures
Exhibit D	Sale Order and Sale Procedures Order



## EXHIBIT A

## OPERATE LOCATION PHARMACIES

Store	Store Address	City
1	140 S Plainfield Ave	So. Plainfield
2	Browntown Shopping Center	Old Bridge
3	1153 Valley Rd	Stirling
4	738 Union Avenue	Middlesex
5	27 South Main St.	Manville
7	Adelphia Rd & Rt 9	So. Freehold
8	Wood Ave & Oak Tree Rd	Edison
9	260 North Ave	Westfield
11	342 Claremont Ave	Verona
12	Rte 46 & Hollywood Ave	Fairfield
13	Rt 35	Hazlet
14	25 North Spruce St.	Ramsey
16	2933 Vauxhall Rd	Vauxhall
18	110 Mountain Blvd	Warren
19	519 Cedar Hill Ave	Wyckoff
20	201 E Main Street	Little Falls
*22	521 Livingstone Ave	Norwood
26	4345 Rte 9	Freehold
31	20 W Hudson Ave	Englewood
35	1470 US Hwy 46	Parsippany
39	Rt 202 & Comley Rd	Lincoln Park
42	1760 Easton Ave	Somerset
45	1303 North Broad St.	Hillside
46	14 James St.	Florham Park
48	375 Highway 36 & Main St	Port Monmouth
49	345 Franklin Ave.	Belleville
51	321 Valley Rd	Wayne
52	521 Raritan St.	Sayreville
54	600 Myrtle Avenue	Boontown
56	4011 Rt 9 North	Howell
**60	4971 Stelton Road	South Plainfield
**62	Gordons Corner Rd	Englishtown

\* No pharmacy.

\*\* New store.

**EXHIBIT B****INSTRUMENT OF ASSIGNMENT AND ASSUMPTION**

This INSTRUMENT OF ASSIGNMENT AND ASSUMPTION (this “Instrument”) is made and entered into as of \_\_\_\_\_, 2009.

*Assignment of Assets*

Pursuant to that certain Asset Purchase Agreement (the “Agreement”), made and entered into as of March 17, 2009, by and among Walgreen Eastern Co., Inc., a New York corporation (“Buyer”) and Drug Fair Group, Inc., a Delaware corporation, (“Seller”), for good and valuable consideration paid to Seller by or on behalf of Buyer, the receipt and sufficiency of which is hereby acknowledged by Seller, Seller does hereby sell, transfer, assign, convey and deliver to Buyer the Purchased Assets, relating to or associated with the Operate Location Pharmacies listed immediately below.

Store	Store Address	City
1	140 S Plainfield Ave	So. Plainfield
2	Browntown Shopping Center	Old Bridge
3	1153 Valley Rd	Stirling
4	738 Union Avenue	Middlesex
5	27 South Main St.	Manville
7	Adelphia Rd & Rt 9	So. Freehold
8	Wood Ave & Oak Tree Rd	Edison
9	260 North Ave	Westfield
11	342 Claremont Ave	Verona
12	Rte 46 & Hollywood Ave	Fairfield
13	Rt 35	Hazlet
14	25 North Spruce St.	Ramsey
16	2933 Vauxhall Rd	Vauxhall
18	110 Mountain Blvd	Warren
19	519 Cedar Hill Ave	Wyckoff
20	201 E Main Street	Little Falls
22	521 Livingstone Ave	Norwood
26	4345 Rte 9	Freehold
31	20 W Hudson Ave	Englewood
35	1470 US Hwy 46	Parsippany
39	Rt 202 & Comley Rd	Lincoln Park
42	1760 Easton Ave	Somerset
45	1303 North Broad St.	Hillside
46	14 James St.	Florham Park
48	375 Highway 36 & Main St	Port Monmouth
49	345 Franklin Ave.	Belleville
51	321 Valley Rd	Wayne
52	521 Raritan St.	Sayreville
54	600 Myrtle Avenue	Boontown
56	4011 Rt 9 North	Howell
60	4971 Stelton Road	South Plainfield

Store	Store Address	City
62	Gordons Corner Rd	Englishtown

All capitalized terms not defined herein shall have the meanings specified in the Agreement.

TO HAVE AND TO HOLD the Purchased Assets, unto Buyer, its successors and assigns to and for its own use and benefit forever.

From time to time following the date hereof, Seller agrees to execute and deliver, or cause to be executed and delivered, to Buyer such other instruments of conveyance and transfer as Buyer may reasonably request or as may be otherwise necessary to more effectively convey and transfer to, and vest in, Buyer and put Buyer in possession of, any part of the Purchased Assets.

This assignment shall be binding upon Seller, its successors and assigns, and shall inure to the benefit of Buyer, its successors and assigns; provided, however, that this assignment shall not be construed as conferring and is not intended to confer any rights or benefit to any person other than Buyer and its successors and assigns.

#### *Assumption of Liabilities*

Buyer does hereby assume and agree to discharge, in accordance with their respective terms and subject to the respective conditions thereof, the Assumed Liabilities relating to or associated with the Operate Location Pharmacies listed above.

This assumption shall be binding upon the successors and assigns of Buyer and shall inure to the benefit of the successors and assigns of Seller; provided, however, that this assignment shall not be construed as conferring and is not intended to confer any rights or benefit to any person other than Seller and its successors and assigns.

#### *General*

This Instrument of Assignment and Assumption is subject to all the terms and conditions of the Agreement. No provision of this Instrument of Assignment and Assumption will be deemed to enlarge, alter or amend the terms or provisions of the Agreement. Notwithstanding anything to the contrary set forth herein, if there is any conflict between the terms and conditions of this Instrument and the terms and conditions of the Agreement, the terms and conditions of the Agreement will control.

If, for any reason, any provision of this Instrument of Assignment and Assumption is held invalid, such invalidity shall not affect any other provision of this Instrument of Assignment and Assumption not held so invalid, such other provisions shall to the full extent consistent with law continue in full force and effect. If any provision of this Instrument of Assignment and Assumption shall be held invalid in part, such invalidity shall in no way affect the rest of such provision not held so invalid, and the rest of such provision, together with all other provisions of this Instrument of Assumption, shall to the full extent consistent with law

continue in full force and effect. The validity, interpretation, performance and enforcement shall be governed by the laws of the State of Delaware.

This Instrument of Assignment and Assumption may be executed in counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument; and shall become binding when two or more counterparts have been signed by each of the parties hereto and delivered to Buyer and Seller.

*[Remainder of Page Intentionally Left Blank; Signature Page Follows]*

IN WITNESS WHEREOF, Buyer and Seller hereto have caused this Instrument of Assignment and Assumption to be executed the day and year first above written.

**WALGREEN EASTERN CO., INC.**

By: \_\_\_\_\_  
Name:  
Title:

**DRUG FAIR GROUP, INC.**

By: \_\_\_\_\_  
Name:  
Title:

**EXHIBIT C****INVENTORY PROCEDURES**

In connection with the Asset Purchase Agreement (the "Agreement") among Walgreen Eastern Co., Inc. ("Buyer") and Drug Fair Group, Inc. (f/k/a Community Distributors, Inc.) ("Seller") this Exhibit C sets forth the agreed upon methods, standards and procedures for counting and determining the value of the inventory to be purchased by Buyer.

**I. GENERAL INSTRUCTIONS**

A. At least one qualified representative of both Buyer and Seller must be present throughout the inventory taking.

B. The cost of taking inventory will be paid by Buyer. Such costs shall be the regular charge by the Inventory Service. The Inventory Service shall invoice Buyer.

C. No pre-counting of inventory will be permitted.

D. Buyer's pharmacy supervisor will prepare a "Physical Inventory Valuation Report" in the form shown on page 4 of this Exhibit at the conclusion of the inventory and furnish both Buyer and Seller with a copy of such report. This report must be signed by representatives of both Buyer and Seller at the conclusion of the inventory.

**II. CUT-OFF PROCEDURE**

A. All merchandise received up to and including the day of the inventory shall be included in the inventory. Seller shall be responsible for the payment of all invoices for merchandise received up to and including the day of inventory.

B. Seller shall not accept or permit the transfer of merchandise from any other store or from any warehouse of Seller as of the day before the Closing Date.

**III. PHARMACEUTICAL INVENTORY**

A. In calculating the value of the aggregate value of the inventory and determining the Inventory Amount (as defined in the Agreement), the Inventory Service shall value the Inventory based on Seller's actual acquisition cost for the Inventory as previously provided to Buyer; provided, that (a) in the event the Inventory has not been labeled with Seller's actual acquisition cost in a manner reasonably satisfactory to Buyer or such cost is not readily available, then the Inventory Service shall value the Inventory using either of the following methods to be selected by Buyer in its discretion: (i) Seller's acquisition cost, determined based on Seller's paper or electronic records; or (ii) 98% of what Buyer's acquisition cost would have been for the Inventory had Buyer purchased it, as indicated in Buyer's most recent cost file, and (b) the Inventory Service shall not ascribe any value to Excluded Inventory.

B. Open containers will be counted in tenths.

C. Items to be excluded from the sale will be pulled and accumulated, prior to the Inventory count, at a predesignated location for disposition at Seller's expense.

D. Matters Related to Prescriptions. Prior to the Closing, Seller shall use reasonable efforts to fill and deliver to pharmacy customers any partial-fill prescriptions with a remaining quantity balance ("IOU Prescriptions"). For any IOU Prescriptions remaining on the Closing Date, Seller shall credit the prescription to the customer or to the third-party payer, as appropriate, on the Closing Date. Buyer assumes no liability for IOU Prescriptions. In addition, prior to the Closing, Seller shall reverse and return to stock any filled prescriptions that have not been picked up, providing all necessary notice to any third-party payors, and shall provide Buyer with a list of such prescriptions so that Buyer is prepared to fill such prescriptions on or after the Closing Date.

#### IV. FRONT-END INVENTORY

A. In calculating the value of the aggregate value of the inventory and determining the Inventory Amount (as defined in the Agreement), the Inventory Service shall value the Inventory based on Seller's actual acquisition cost for the Inventory as previously provided to Buyer; provided, that (a) in the event the Inventory has not been labeled with Seller's actual acquisition cost in a manner reasonably satisfactory to Buyer or such cost is not readily available, then the Inventory Service shall value the Inventory using either of the following methods to be selected by Buyer in its discretion: (i) Seller's acquisition cost, determined based on Seller's paper or electronic records; or (ii) 98% of what Buyer's acquisition cost would have been for the Inventory had Buyer purchased it, as indicated in Buyer's most recent cost file, and (b) the Inventory Service shall not ascribe any value to Excluded Inventory.

B. Open containers will be counted in tenths.

C. Items to be excluded from the sale will be pulled and accumulated, prior to the Inventory count, at a predesignated location for disposition at Seller's expense.

#### V. EXCLUDED INVENTORY

As used herein, "Excluded Inventory" means (i) all items of pharmaceutical inventory that fit within one or more of the following categories: (a) sample inventory; (b) inventory out of date within ninety (90) days from the Closing Date (or already expired), as shown by manufacturer's labeled expiration date; (c) prescription items over three years old; (d) diagnostic equipment, test strips, labels, vials, bottles and similar items; (e) inventory that is spoiled, has been damaged or broken, is shopworn or faded (including faded labels), or has visible deterioration; (f) any compounding inventory; (g) any chemicals deemed by Buyer to constitute hazardous materials; (h) obsolete inventory not currently being supplied by distributors to retail stores; (i) all non-retail inventory that is not otherwise salable in the ordinary course of business (e.g., register tapes, labels, shopping bags, etc.); (j) inventory that does not have a NDC, lot number or legible expiration date and (k) any items subject to a mandatory or voluntary recall; (ii) all items of front-end inventory that fit within one or more of the following categories (in addition to items of front-end inventory that fit within one or more of the categories set forth in clause (i) above): (w)

inventory not in its original packaging or in damaged packaging; (x) seasonal merchandise; (y) live plants and (z) furniture or similar items; and (iii) any other items that the parties agree to exclude.



Physical Inventory Valuation Report

DATE OF INVENTORY \_\_\_\_\_

TIME STARTED \_\_\_\_\_

TIME COMPLETED \_\_\_\_\_

STORE LOCATION \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

SECTION TO BE COMPLETED BY SERVICE SUPERVISOR

-----

Pharmaceutical Inventory \$ \_\_\_\_\_

Generic Inventory \$ \_\_\_\_\_

Over-the-counter Inventory \$ \_\_\_\_\_

Miscellaneous \$ \_\_\_\_\_

TOTAL \$ \_\_\_\_\_

UPON COMPLETION, PLEASE GET THIS DOCUMENT SIGNED BY THE INVENTORY CREW CHIEF, DRUG FAIR REPRESENTATIVE AND WALGREENS REPRESENTATIVE. IMMEDIATELY THEREAFTER, FAX TO 847.368.6577. PLEASE INCLUDE A COVERPAGE SHOWING THE NAME OF EACH PERSON WHO SIGNED THE DOCUMENT AND THEIR TITLE, AS WELL AS THE STORE NUMBER AND ADDRESS OF THE LOCATION INVENTORIED. PLEASE CONTACT MATT HICKEY 847.275.7870 OR MICHAEL CAIRO 224.565.6142 WITH ANY QUESTIONS.

-----

The above and foregoing is accepted by both Buyer and Seller as the final total dollar value of the pharmaceutical merchandise located at the captioned store.

SELLER:

BUYER:

By: \_\_\_\_\_  
Authorized Representative

By: \_\_\_\_\_  
Authorized Representative

WITNESS: Inventory Crew Supervisor/Leader

By \_\_\_\_\_ DATE \_\_\_\_\_, 2009

**EXHIBIT D**

**SALE ORDER AND SALE PROCEDURES ORDER**

**ASSET PURCHASE AGREEMENT**

**Dated July 30, 2009**

**Among**

**JEOFFREY L. BURTCH, as the trustee of  
ECLIPSE AVIATION CORPORATION and  
ECLIPSE IRB SUNPORT, LLC (and not in his personal capacity),**

**And**

**ECLIPSE AEROSPACE, INC., as Buyer**

---

## TABLE OF CONTENTS

	<u>Page</u>
<b>ARTICLE I</b>	
	<b>DEFINITIONS .....1</b>
Section 1.1	Definitional and Interpretive Matters.....1
Section 1.2	Accounting Terms and Determinations .....2
<b>ARTICLE II</b>	
	<b>PURCHASE AND SALE .....3</b>
Section 2.1	Purchase and Sale of Purchased Assets .....3
Section 2.2	Assumption of Liabilities.....3
Section 2.3	Assignments.....3
Section 2.4	Further Assurances.....4
<b>ARTICLE III</b>	
	<b>PURCHASE PRICE .....5</b>
Section 3.1	Purchase Price .....5
Section 3.2	Closing Date Payment; Issuance of Buyer Notes .....5
Section 3.3	Allocation of Purchase Price.....5
Section 3.4	Closing Date.....6
Section 3.5	Buyer's Deliveries .....6
Section 3.6	Seller's Deliveries .....6
<b>ARTICLE IV</b>	
	<b>REPRESENTATIONS AND WARRANTIES OF SELLER.....8</b>
Section 4.1	Organization of the Companies .....8
Section 4.2	Subsidiaries and Investments.....8
Section 4.3	Authority of Seller .....8
Section 4.4	Title to Purchased Assets.....8
Section 4.5	Intellectual Property Assets .....8
<b>ARTICLE V</b>	
	<b>REPRESENTATIONS AND WARRANTIES OF BUYER .....8</b>
Section 5.1	Organization and Authority of Buyer .....9
Section 5.2	No Finder .....9
<b>ARTICLE VI</b>	
	<b>ACTIONS PRIOR TO THE CLOSING DATE.....10</b>
Section 6.1	Information Regarding the Business.....10

Section 6.2	Contact with Customers, Vendors and Employees.....	10
Section 6.3	Third Party Consents.....	10
Section 6.4	Purchased Deposits .....	11
Section 6.5	Governmental Approvals.....	11
Section 6.6	Certain Intellectual Property Matters.....	12
Section 6.7	Certain Provisions relating to Consents, Cooperation and Adequate Assurance.....	13
Section 6.8	Conduct of Business Prior to the Closing Date .....	13
Section 6.9	Notification of Breach; Disclosure .....	13
Section 6.10	Insurance .....	13
Section 6.11	Bankruptcy Matters; Bidding Process .....	13
Section 6.12	Best Efforts .....	14
Section 6.13	Bidding Procedures Order.....	15
Section 6.14	Takeover Proposal; Confidential Information .....	15
Section 6.15	DayJet Transaction.....	15
Section 6.16	Access to Premises.....	15

## ARTICLE VII

	<b>ADDITIONAL AGREEMENTS .....</b>	<b>15</b>
Section 7.1	Taxes .....	15
Section 7.2	No Successor Liability to Employees.....	17
Section 7.3	Employment.....	17
Section 7.4	Collection of Receivables .....	18
Section 7.5	Adequate Assurances Regarding Assumed Contracts and Assumed Leases.....	18
Section 7.6	Certifications.....	18
Section 7.7	Certain Actions .....	19
Section 7.8	Substitution of Parties .....	19
Section 7.9	Cure Amounts .....	19
Section 7.10	Reasonable Access to Records and Certain Personnel .....	19
Section 7.11	Deposit .....	20
Section 7.12	Seller Post-Closing Obligations.....	20

## ARTICLE VIII

	<b>CONDITIONS TO CLOSING .....</b>	<b>20</b>
Section 8.1	Conditions to Obligations of Each Party .....	20
Section 8.2	Conditions to Obligations of Buyer .....	20
Section 8.3	Conditions to Obligations of Seller.....	21

## ARTICLE IX

	<b>TERMINATION .....</b>	<b>22</b>
Section 9.1	Termination.....	22
Section 9.2	Effect of Termination.....	23

**ARTICLE X**

**INDEMNIFICATION .....24**  
 Section 10.1 No Survival of Representations, Warranties, Covenants and  
 Agreements .....24

**ARTICLE XI**

**GENERAL PROVISIONS.....24**  
 Section 11.1 Confidential Nature of Information .....24  
 Section 11.2 No Public Announcement.....25  
 Section 11.3 Notices .....25  
 Section 11.4 Successors and Assigns.....26  
 Section 11.5 Entire Agreement; Amendments; Disclosure Schedules .....27  
 Section 11.6 Waivers .....27  
 Section 11.7 Expenses .....27  
 Section 11.8 Partial Invalidity.....27  
 Section 11.9 Execution in Counterparts.....27  
 Section 11.10 Governing Law and Dispute Resolution.....28  
 Section 11.11 No Third Party Beneficiaries .....28

## ASSET PURCHASE AGREEMENT

This **ASSET PURCHASE AGREEMENT** (this "Agreement") dated July 30, 2009 (the "Effective Date"), by and among Jeffrey L. Burtch as the duly appointed Chapter 7 trustee of the Chapter 7 estates of each of Eclipse Aviation Corporation ("Eclipse") and Eclipse IRB Sunport, LLC ("Eclipse LLC"), and not in his personal capacity ("Seller" or "Trustee") and Eclipse Aerospace, Inc., a Delaware corporation ("Buyer"). Capitalized terms used herein and not otherwise defined herein shall have the meanings set forth in Annex 1.

**WHEREAS**, Eclipse and Eclipse LLC were formerly engaged primarily in (i) the design, production and sale of very light jet aircraft ("VLJs") and (ii) the support of the VLJs including training, maintenance, flight and data services and other product support (the "Business");

**WHEREAS**, each of Eclipse and Eclipse LLC (collectively, the "Companies") have filed voluntary petitions commencing Chapter 11 Bankruptcy Cases (hereinafter, the "Bankruptcy Cases") pursuant to Title 11 of United States Code, 11 U.S.C. Sections 101 et seq. (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"), the date such petitions are filed the "Petition Date," which cases have been converted to Chapter 7 Bankruptcy Cases;

**WHEREAS**, Jeffrey L. Burtch has been appointed as the trustee for each of Eclipse and Eclipse LLC in the Chapter 7 Bankruptcy Cases;

**WHEREAS**, Seller desires to sell the Purchased Assets to Buyer and Buyer desires to purchase from Seller the Purchased Assets and assume the Assumed Liabilities, upon the terms and conditions hereinafter set forth;

**WHEREAS**, the Parties intend to effectuate the transactions contemplated by this Agreement through a sale of the Purchased Assets pursuant to section 363 of the Bankruptcy Code; and

**WHEREAS**, the execution and delivery of this Agreement and Seller's ability to consummate the transactions set forth in this Agreement are subject, among other things, to the entry of the Sale Order.

**NOW, THEREFORE**, in consideration of the premises and the mutual promises herein made, and in consideration of the representations, warranties and covenants herein contained, the Parties agree as follows:

### ARTICLE I

#### DEFINITIONS

Section 1.1 Definitional and Interpretive Matters. Unless otherwise expressly

provided, for purposes of this Agreement, the following rules of interpretation shall apply:

(a) Calculation of Time Period. When calculating the period of time before which, within which or following which any act is to be done or step taken pursuant to this Agreement, the date that is the reference date in calculating such period shall be excluded. If the last day of such period is a non-Business Day, the period in question shall end on the next succeeding Business Day. A "Business Day" means any day other than a Saturday, a Sunday or a day on which banks in New York City are required or authorized to close.

(b) Dollars. Any reference in this Agreement to \$ shall mean U.S. dollars.

(c) Exhibits/Schedules. All Exhibits and Schedules annexed hereto or referred to herein are hereby incorporated in and made a part of this Agreement as if set forth in full herein. Any capitalized terms used in any Schedule or Exhibit but not otherwise defined therein shall be defined as set forth in Annex 1.

(d) Gender and Number. Any reference in this Agreement to gender shall include all genders, and words imparting the singular number only shall include the plural and vice versa.

(e) Headings. The provision of a Table of Contents, the division of this Agreement into Articles, Sections and other subdivisions and the insertion of headings are for convenience of reference only and shall not affect or be utilized in construing or interpreting this Agreement. All references in this Agreement to any "Section" are to the corresponding Section of this Agreement unless otherwise specified.

(f) Herein. The words such as "herein," "hereof" and "hereunder" refer to this Agreement as a whole and not merely to a subdivision in which such words appear unless the context otherwise requires. References to the "date hereof" are to the Effective Date.

(g) Including. The word "including" or any variation thereof means "including, without limitation" and shall not be construed to limit any general statement that it follows to the specific or similar items or matters immediately following it.

(h) No Strict Construction. The Parties participated jointly in the negotiation and drafting of this Agreement and, in the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as jointly drafted by the Parties 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.

Section 1.2 Accounting Terms and Determinations. Unless otherwise specified herein, all accounting terms used herein shall be interpreted, all determinations with respect to accounting matters hereunder shall be made, and all financial statements and certificates and reports as to financial matters required to be furnished hereunder shall be prepared, in accordance with GAAP.



## ARTICLE II

### PURCHASE AND SALE

#### Section 2.1 Purchase and Sale of Purchased Assets.

(a) On the terms and subject to the conditions set forth in this Agreement, at the Closing (and on the applicable Assumption Date with respect to Purchased Assets consisting of rights under any Designated Contract assumed by Seller and assigned to Buyer after the Closing Date as provided herein), Buyer shall purchase from Seller, and Seller shall sell, transfer, assign, convey and deliver or cause to be sold, transferred, assigned, conveyed and delivered to Buyer, all of the Purchased Assets, free and clear of all Liens and free and clear of all Liabilities (other than the Assumed Liabilities).

(b) Indivisible Transaction. The sale of all of the Purchased Assets to Buyer constitutes a single, indivisible transaction and the Purchased Assets are intended to be sold to Buyer as a single, indivisible group of assets.

#### Section 2.2 Assumption of Liabilities.

(a) On the terms and subject to the conditions set forth in this Agreement, at the Closing (and on the applicable Assumption Date with respect to Assumed Liabilities under any Designated Contract assumed by a Seller and assigned to Buyer after the Closing Date as provided herein), Buyer shall assume and become responsible for the Assumed Liabilities.

(b) ANYTHING CONTAINED HEREIN TO THE CONTRARY NOTWITHSTANDING, EXCEPT FOR THE ASSUMED LIABILITIES DESCRIBED IN THIS SECTION 2.2, BUYER SHALL NOT AND BUYER DOES NOT ASSUME ANY LIABILITIES, TAXES, OR OBLIGATIONS (FIXED OR CONTINGENT, KNOWN OR UNKNOWN, MATURED OR UNMATURED) OF THE SELLER OR THE COMPANIES WHETHER OR NOT ARISING OUT OF OR RELATING TO THE ASSETS OR THE BUSINESS OR ANY OTHER BUSINESS OF THE SELLER OR THE COMPANIES, ALL OF WHICH LIABILITIES, TAXES, AND OBLIGATIONS SHALL, AT AND AFTER THE CLOSING, REMAIN THE EXCLUSIVE RESPONSIBILITY OF THE SELLER (AS APPLICABLE).

#### Section 2.3 Assignments.

(a) Schedule 2.3 lists all Assumed Contracts and Assumed Leases that Buyer may elect to assume and have Seller assume and assign to Buyer (the "Designated Contracts"). Buyer shall have, except as otherwise provided below with respect to contracts with the City of Albuquerque, until that date which is five (5) business days prior to the date scheduled for hearing on the entry of the Sale Order to designate which of such Contracts it wishes to assume and have the Seller assume and assign to Buyer at Closing (such date being referred to herein as the "Contract Designation Date"); provided that Buyer shall have until thirty (30) days after the Closing to designate any contract identified on Schedule 2.3 with the City of Albuquerque. In all cases, appropriate additions and deletions to Schedule 2.3 (and

corresponding additions and deletions to Schedule A-1 and Schedule A-2) shall be made to reflect such elections made by Buyer. Any amendment to Schedule 2.3 as provided for above, shall be served by Buyer on the parties to the Designated Contracts who have been added to Schedule 2.3.

(b) With respect to each Designated Contract, on the Closing Date, Seller shall (i) assume such Designated Contract in the Bankruptcy Cases and (ii) subject to Buyer paying any amounts necessary to cure any default under such Designated Contract (the "Cure Costs") and providing adequate assurance of performance to the counterparty thereto to the extent required by the Bankruptcy Court, assign such Designated Contract to Buyer pursuant to an Order of the Bankruptcy Court (which may be the Sale Order). Seller shall provide Buyer with a credit against the Purchase Price by reducing the Cash Consideration in an amount equal to the lesser of (x) \$175,000 and (y) the actual amount of Cure Costs attributable to breaches occurring after the Petition Date of the Designated Contracts actually assumed by Buyer. Effective on the Closing Date, or as otherwise provided in Section 2.3(a) with respect to contracts with the City of Albuquerque, Buyer shall assume each such Designated Contract.

(c) The Sale Order shall provide that, as of the Closing, Seller (as applicable) shall assign to Buyer the Designated Contracts and the Designated Contracts shall be identified by (i) the name and date of the Designated Contracts (if available), (ii) the other party to the Designated Contract, and (iii) the address of such party for notice purposes, all included on an exhibit attached to either the motion filed in connection with the Sale Order or a motion for authority to assume and assign such Designated Contracts or a notice filed pursuant to the Bidding Procedures Order. Such exhibit shall also (A) set forth the amounts necessary to cure any defaults under each of the Designated Contracts as determined by Seller based on the Companies' books and records or as otherwise determined by the Bankruptcy Court, and (B) delineate a procedure for transferring to Buyer the rights to any security deposits in the form of cash or letters of credit on deposit with the other party to any Designated Contract.

(d) In the case of licenses, certificates, approvals, permits, authorizations, leases, Contracts and other commitments included in the Purchased Assets that cannot be transferred or assigned effectively without the consent of any third party, which consent has not been obtained prior to the Closing (after giving effect to the Sale Order and the Bankruptcy Code), Seller shall, subject to any approval of the Bankruptcy Court that may be required and the terms set forth in Section 6.3, cooperate with Buyer in endeavoring to obtain such consent.

#### Section 2.4 Further Assurances.

(a) At the Closing, and at all times thereafter as may be necessary, upon the request of the Buyer, Seller shall execute and deliver (or use his best efforts to have any applicable third party execute and deliver) such instruments of transfer and instruments of release as shall be reasonably necessary to vest in Buyer title to the Purchased Assets free and clear of all Encumbrances, and such other instruments, agreements and documents as shall be reasonably necessary to evidence the assignment by Seller and the assumption by Buyer or its designee of the Assumed Liabilities, including the Assumed Contracts and the Assumed

Leases. Seller and Buyer shall cooperate with one another to execute and deliver such other documents and instruments as may be reasonably required to carry out the transactions contemplated hereby.

(b) At the Closing, and at all times thereafter as may be necessary, Seller shall, at the reasonable request of Buyer, execute, deliver, and file, or cause to be executed, delivered, and filed by any applicable third party, such other instruments of conveyance, transfer and release and take such other actions as Buyer may reasonably request, in order to more effectively consummate the transactions contemplated by this Agreement and to vest in Buyer title to the Seller Intellectual Property free and clear of all Encumbrances, including, without limitation, executing, filing, and recording, with all appropriate intellectual property registration authorities and other relevant entities, all assignment instruments and other filings that are necessary to correctly record the prior chain of title with respect to ownership of the Seller Intellectual Property. Any out-of-pocket expenses incurred by Seller pursuant to this Section 2.4 shall be subject to the provisions of Section 7.12.

### ARTICLE III

#### PURCHASE PRICE

Section 3.1 Purchase Price. Subject to the terms and conditions set forth in this Agreement and in reliance upon the representations and warranties of the Parties set forth herein, at the Closing, the aggregate purchase price to be paid by Buyer to the Seller in exchange for the Purchased Assets shall be an amount equal to (i) the Cash Consideration which amount shall be payable as set forth in Section 3.2 below, plus (ii) the Note Consideration (collectively, the "Purchase Price"). The Buyer and Seller agree that the aggregate value of the Purchase Price is \$40,000,000. Upon the entry by the Bankruptcy Court of the Bidding Procedures Order, Buyer shall deposit the amount of \$5,000,000 of the Cash Consideration pursuant to the Deposit Escrow Agreement.

Section 3.2 Closing Date Payment; Issuance of Buyer Notes. At the Closing, Buyer shall (i) pay to Seller or as otherwise provided in the Sale Order wire transfer of immediately available funds to the account(s) designated by Seller, the Cash Purchase Price, plus any amount Buyer is required to credit Seller pursuant to Section 6.4, less any amount Buyer is entitled to offset pursuant to Section 2.3(b), any amounts pursuant to the last sentence of Section 7.1(b), and the last sentence of Section 7.6, and (ii) issue to the Seller or such other Person or Agent as otherwise provided in the Sale Order, the Notes in an aggregate principal amount equal to the Note Consideration.

Section 3.3 Allocation of Purchase Price. Buyer shall determine the allocation of the consideration paid by Buyer for the Purchased Assets. Each party hereto agrees (i) that any such allocation shall be consistent with the requirements of Section 1060 of the Code and the regulations thereunder, (ii) to complete jointly and to file separately Form 8594 with its Federal income Tax Return consistent with such allocation for the tax year in which the Closing Date occurs and (iii) that no party will take a position on any income, transfer or gains Tax Return,

before any Governmental Authority charged with the collection of any such Tax or in any judicial proceeding, that is in any manner inconsistent with the terms of any such allocation without the consent of the other party.

Section 3.4 Closing Date. Upon the terms and conditions set forth in this Agreement, the closing of the sale of the Purchased Assets and the assumption of the Assumed Liabilities contemplated hereby (the "Closing") shall take place at the offices of Cooch & Taylor P.A., 1000 West Street, Wilmington, Delaware 19801, as promptly as practicable, and at no time later than the fifth Business Day, following the date on which the conditions set forth in Article VIII have been satisfied or waived (other than the conditions which by their nature are to be satisfied at the Closing, but subject to the satisfaction or waiver of such conditions), or at such other place or time as Buyer and Seller may mutually agree. The date and time at which the Closing actually occurs is hereinafter referred to as the "Closing Date."

Section 3.5 Buyer's Deliveries. At or prior to the Closing, Buyer shall deliver to Seller, in addition to the Cash Purchase Price:

(a) an assumption and assignment agreement having terms and conditions consistent with this Agreement and otherwise in form and substance reasonably satisfactory to Buyer (the "Assumption and Assignment Agreement") and each other Ancillary Document to which Buyer is a party, duly executed by Buyer;

(b) the Notes, having an aggregate principal amount of \$20,000,000 issued in the name of the Seller or such other Persons as designated by the Seller;

(c) the certificates required to be delivered pursuant to Sections 8.3(a) and 8.3(b);

(d) a certificate of an authorized Person of Buyer, dated the Closing Date, in form and substance reasonably satisfactory to Seller, as to (i) Buyer's authorization to execute and perform its obligations under this Agreement and the Ancillary Documents to which Buyer is a party and (ii) incumbency and signatures of the authorized Persons of Buyer executing this Agreement and such Ancillary documents; and

(e) such other assignments and other good and sufficient instruments of assumption and transfer, in form reasonably satisfactory to Seller, as Seller may reasonably request to transfer and assign the Assumed Liabilities to Buyer.

Section 3.6 Seller's Deliveries. At or prior to the Closing, Seller shall deliver to Buyer:

(a) a bill of sale, in form and substance reasonably satisfactory to Buyer (the "Bill of Sale"), the Assumption and Assignment Agreement and each other Ancillary Document to which any of the Companies or Seller is a party, duly executed by Seller;

(b) instruments of assignment of the Patents, Trademarks, Copyrights and Domain Names that are owned by Seller and included in the Purchased Assets, if any, duly executed by Seller, in form and substance reasonably satisfactory to Buyer and any other assignments or instruments with respect to any Seller Intellectual Property for

which an assignment or instrument is required to assign, transfer and convey such assets to Buyer;

- (c) a certified copy of the Sale Order;
- (d) Seller's certificates required to be delivered pursuant to Sections 8.2(a) and 8.2(b);
- (e) a certificate executed by Seller, in the form prescribed under Treasury Regulation Section 1.1445-2(b), that Seller is not a foreign person within the meaning of Section 1445(f)(3) of the Code;
- (f) to the extent approved by the Sale Order, instruments of assumption and assignment of the Assumed Leases in form and substance reasonably satisfactory to Buyer (the "Assumption and Assignment of Leases"), duly executed by Seller, in form for recordation with the appropriate public land records, if necessary, and any other related documentation or instruments with respect to any Assumed Lease reasonably requested by Buyer;
- (g) to the extent in Seller's possession: (i) all lease files for the Assumed Leases (including copies of any plans of the Leased Real Property), and (ii) keys for the Leased Real Property, the combination of any safes located in the Leased Real Property, and the access codes for any electronic security system located at the Leased Real Property, in each case, in respect of the Assumed Leases;
- (h) an executed security agreement and intercreditor agreement with respect to the Notes in a form to be agreed to among the Buyer and the holders of a majority in principal amount of the Prior Notes on or before a date which is at least two (2) days prior to the entry of the Bidding Procedures Order.
- (i) a certificate of Seller, dated the Closing Date, in form and substance reasonably satisfactory to Buyer, as to Seller's authorization to execute and perform his obligations under this Agreement and the Ancillary Documents to which Seller or the Companies is a party;
- (j) all instruments and documents necessary to release (or evidence the release of) any and all Encumbrances, including, without limitation, appropriate UCC financing statement amendments (termination statements), mortgage release instruments and certificates of title;
- (k) such other bills of sale, deeds, endorsements, assignments and other good and sufficient instruments of conveyance and transfer, in form reasonably satisfactory to Buyer, as Buyer may reasonably request to vest in Buyer all the right, title and interest of Seller in, to or under any or all the Purchased Assets; and
- (l) all other documents required to be entered into by the Seller pursuant to this Agreement or reasonably requested by the Buyer to convey the Purchased Assets to Buyer or to otherwise consummate the transactions contemplated by this Agreement.

## ARTICLE IV

### REPRESENTATIONS AND WARRANTIES OF SELLER

As an inducement to Buyer to enter into this Agreement and to consummate the transactions contemplated hereby, Seller represents and warrants to Buyer as of the date hereof and as of the Closing Date as follows:

Section 4.1 Intentionally Omitted.

Section 4.2 Subsidiaries and Investments. Except as set forth on Schedule 4.2, each of the Companies do not, directly or indirectly, own, of record or beneficially, any outstanding voting securities, membership interests or other equity interests in any Person.

Section 4.3 Authority of Seller. Seller has full power and authority to execute, deliver and, subject to the entry of the Sale Order, perform his obligations under, and consummate the transactions contemplated by, this Agreement and each of the Ancillary Documents to which Seller is a party. This Agreement, subject to the entry of the Sale Order, is the legal, valid and binding obligation of Seller enforceable in accordance with its terms, and each of the Ancillary Documents to which Seller is a party has been duly authorized by Seller and upon execution and delivery by Seller and subject to the entry of the Sale Order, will be a legal, valid and binding obligation of Seller enforceable in accordance with its terms in each case.

Section 4.4 Title to Purchased Assets. Seller has, and, upon delivery to Buyer on the Closing Date of the instruments of transfer contemplated by Section 3.6, and subject to the terms of the Sale Order, Seller will thereby transfer to Buyer, good and valid title to, or, in the case of property leased or licensed by Seller, a valid and subsisting leasehold interest in or a legal, valid and enforceable licensed interest in or right to use, all of the material Purchased Assets (other than any Non-Transferable Agreement), free and clear of all Encumbrances, except for the Assumed Liabilities and Permitted Liens.

Section 4.5 Intellectual Property Assets. Seller has listed on Schedule 4.5, all of Seller's Intellectual Property that is subject to registration with the United States Patent and Trademark Office or any foreign patent or trademark agency.

## ARTICLE V

### REPRESENTATIONS AND WARRANTIES OF BUYER

As an inducement to Seller to enter into this Agreement and to consummate the transactions contemplated hereby, Buyer hereby represents and warrants to Seller as of the date hereof and as of the Closing Date as follows:

Section 5.1 Organization and Authority of Buyer.

(a) Buyer is a Delaware corporation, duly organized, validly existing and in good standing under the laws of the State of Delaware. Buyer has full corporate power and authority to execute, deliver and perform its obligations under this Agreement and all of the Ancillary Documents to which it is a party. The execution, delivery and performance of this Agreement and such Ancillary Documents by Buyer have been duly authorized and approved by Buyer's board of directors and do not require any further authorization or consent of Buyer or any stockholder. This Agreement has been duly authorized, executed and delivered by Buyer and is the legal, valid and binding agreement of Buyer enforceable against Buyer in accordance with its terms, and each Ancillary Document to which Buyer is a party has been duly authorized by Buyer and upon execution and delivery by Buyer will be a legal, valid and binding obligation of Buyer enforceable against Buyer in accordance with its terms, except as (i) enforceability may be limited by bankruptcy, insolvency, reorganization or other similar laws affecting creditors rights generally and (ii) the remedy of specific performance and injunctive and other forms of equitable relief may be subject to equitable defenses.

(b) Subject to the receipt of the Required Consents, neither the execution and delivery of this Agreement or any of such Ancillary Documents or the consummation of any of the transactions contemplated hereby or thereby nor compliance with or fulfillment of the terms, conditions and provisions hereof or thereof will:

(i) conflict with, result in a breach of the terms, conditions or provisions of, or constitute a default, or an event of default under (1) Buyer's certificate of incorporation or bylaws, (2) any Order to which Buyer is a party or by which it is bound or (3) any Legal Requirement affecting Buyer; or

(ii) require the approval, consent, authorization or act of, or the making by Buyer of any declaration, filing or registration with Committee on Foreign Investment in the United States (CFIUS), or any Person, other than filings with the Bankruptcy Court or under the HSR Act or other anti-trust or competition laws.

Section 5.2 No Finder. Except as set forth on Schedule 5.2, neither Buyer nor any Person acting on its behalf has paid or become obligated to pay any fee or commission to any broker, finder or intermediary for or on account of the transactions contemplated by this Agreement for which any Seller is or will become liable, and Buyer shall hold harmless and indemnify Seller from any claims with respect to any such fees or commissions.

Section 5.3 Financing. Buyer has provided Seller with information concerning financing necessary to fund the Purchase Price. Buyer does not have any reason to believe that such financing will not be available at Closing.

## ARTICLE VI

### ACTIONS PRIOR TO THE CLOSING DATE

The Parties, as applicable to the extent set forth below, covenant and agree to take the following actions between the date hereof and the earlier of the termination of this Agreement and the Closing Date:

Section 6.1 Information Regarding the Business. In connection with consummating the transactions contemplated herein, Seller will, to the extent practicable (a) provide Buyer and its officers, employees, counsel, accountants, partners, affiliates, financial advisors, consultants and other representatives (collectively, "Representatives") with full access, upon reasonable prior notice and during normal business hours, to the offices and properties of the Companies, (b) furnish Buyer and its Representatives with such information and data not contained in the Data Room (including without limitation copies of Contracts, licenses, personal property Leases and other books and records) concerning the former Business, the Purchased Assets and the Assumed Liabilities as Buyer or any of its Representatives may reasonably request in connection with such investigation, except to the extent that furnishing any such information or data would violate any Law, Order, Contract or license applicable to Seller or by which any of the assets and properties is bound, and permit Buyer and its authorized Representatives to make copies of such materials at the sole expense of the Buyer or its authorized Representatives as those Representatives reasonably request relating to the Former Business, the Purchased Assets and the Assumed Liabilities, (c) furnish or make available to Buyer or its authorized Representatives such additional information concerning the Purchased Assets, the Former Business and the Assumed Liabilities as shall be reasonably requested by Buyer or its authorized Representatives and (d) use commercially reasonable efforts to cause his outside counsel and any other professional representatives of the Trustee to cooperate with Buyer in its consummation of the transactions. Nothing in this Agreement shall give the Buyer any rights of access to Design Information until upon and after the Closing. Buyer agrees that all Representatives are within the scope of and covered by the Non-Disclosure Agreement executed by Mason Holland for Eclipse Aerospace on June 30, 2009.

Section 6.2 Contact with Customers, Vendors and Employees. Subject to applicable Law, Seller shall use its commercially reasonable efforts to facilitate Buyer's contact and communication with employees of the Companies, and customers, suppliers, vendors and distributors of the Business of the Companies to the extent agreed to by Seller, as requested by Buyer at any time from and after the execution of this Agreement, provided, however, that nothing herein shall be construed to permit or require any communication in violation of any contract or agreement with an employee. All such contact and communication will be requested through, and arranged by, the Seller, or Seller's agent, to be designated in writing to Buyer.

Section 6.3 Third Party Consents. Seller shall use his commercially reasonable efforts to obtain all Third Party Consents; provided, that Seller shall not be required to pay or commit to pay any amount to (or incur any obligation in favor of) any person from whom any such consent may be required (other than nominal filing or application fees).



Section 6.4 Purchased Deposits. Seller will take all commercially reasonable steps necessary to transfer to Buyer on the Closing Date all of Seller's right, title and interest in and to the Purchased Deposits. The Buyer shall pay to Seller at Closing on behalf of the Chapter 7 Estates the cash value of the Purchased Deposits.

Section 6.5 Governmental Approvals.

(a) During the period prior to the Closing Date, Seller and Buyer shall act diligently and reasonably, and shall cooperate with each other, to do or cause to be done, all things necessary, proper or advisable consistent with applicable confidentiality and Legal Requirements to cause the conditions precedent to the Closing to be satisfied and to cause the Closing to occur, including to secure any consents and approvals of any governmental authority required to be obtained by them under non-United States antitrust or competition laws, in order to assign or transfer any Permits to Buyer, to permit the consummation of the transactions contemplated by this Agreement, or to otherwise satisfy the conditions set forth in Article VIII, in each case as necessary to the extent such consents are not provided for or satisfied by the Sale Order; provided, however, that Seller shall not make any agreement or understanding affecting the Purchased Assets or the Business (excluding the Excluded Assets or Excluded Liabilities) as a condition for obtaining any such consents or approvals except with the prior written consent of Buyer. Subject to the limitations set forth in this Section 6.5, Buyer shall act diligently and reasonably to cooperate with Seller, to the extent commercially reasonable, to obtain the consents and approvals contemplated by this Section 6.5(a); provided, however, Buyer shall not be required to waive any of the conditions to Closing set forth in Article VIII.

(b) Subject to all applicable confidentiality and Legal Requirements, each Seller and Buyer (i) shall promptly inform each other of any communication from any Governmental Authority concerning this Agreement, the transactions contemplated hereby, and any filing, notification or request for approval and (ii) shall permit the other Party to review in advance any proposed written communication or information submitted to any such Governmental Authority in response thereto; provided, however, that no Party shall be required to provide any other Party with copies of confidential documents or information included in any filings and submissions, and provided, further, that a Party may request entry into a joint defense agreement as a condition to providing any such materials and that, upon receipt of that request, the Parties shall work in good faith to enter into a joint defense agreement to create and preserve attorney-client privilege in a form and substance mutually acceptable to the Parties. In addition, none of the Parties shall agree to participate in any meeting with any Governmental Authority in respect of any filings, investigation or other inquiry with respect to this Agreement or the transactions contemplated hereby, unless such Party consults with the other Parties in advance and, to the extent permitted by any such Governmental Authority, gives the other Parties the opportunity to attend and participate thereat, in each case to the maximum extent practicable. Subject to any restrictions under applicable laws, rules or regulations, each Party shall furnish the other with copies of all correspondence, filings and communications (and memoranda setting forth the substance thereof) between it and its Affiliates and their respective Representatives on the one hand, and the Governmental Authority or members of its staff on the other hand, with respect to this Agreement, the transactions contemplated hereby (excluding documents and communications

which are subject to preexisting confidentiality agreements or to the attorney-client privilege or work product doctrine) or any such filing, notification or request for approval. Each Party shall also furnish the other Party with such necessary information and assistance as such other party and its Affiliates may reasonably request in connection with their preparation of necessary filings, registration or submissions of information to the Governmental Authority in connection with this Agreement, the transactions contemplated hereby and any such filing, notification or request for approval. Seller and Buyer shall prosecute all required requests for approval with all necessary diligence and otherwise use their respective commercially reasonable efforts to obtain the grant thereof by an Order as soon as possible.

(c) Notwithstanding anything else to the contrary in this Agreement, in the event that any administrative or judicial action or proceeding is instituted (or threatened to be instituted) by a Governmental Authority or private party challenging the transactions hereunder or any other agreement contemplated hereby, (i) each Party shall cooperate in all respects with each other and use its respective best efforts to contest and resist any such action or proceeding and 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 (ii) Buyer must defend, at its sole cost and expense, any action or actions, whether judicial or administrative, in connection with the transactions contemplated by this Agreement. Notwithstanding the foregoing, in no event shall Buyer be required to divest any of the Purchased Assets in order to comply with this Section 6.5(c).

Section 6.6 Certain Intellectual Property Matters. Seller covenants and agrees to authorize Buyer, at Buyer's expense and with Seller's full cooperation, to take all actions useful or necessary, to assist with the transfer, assignment, full cooperation, in regard to the Seller Intellectual Property as soon as practicable following the Closing Date:

(a) the Australian trademarks (Registration Nos. 890219 and 890220) shall have been assigned to the Companies or to Seller from 5 Star Hill Holdings PTY LTD;

(b) the Japanese patent (Registration No. 3868500) shall have been assigned to the Companies or to Seller from Hunting Research and Engineering;

(c) the European patent (Registration No. EP0932432) shall have been assigned to the Companies or to Seller in Germany, France, the United Kingdom, the Netherlands, Belgium and Switzerland;

(d) the outstanding security interests on United States patents (Registration Nos. 5,957,405; 6,089,504; 6,199,795; 6,170,780; 7,225,966; and 2006/0273223) shall have been released by the appropriate termination statement under the Uniform Commercial Code; and

(e) the United States patent applications (Application Nos. 11/427,783; 11/456,548 and 11/929,743) shall have been assigned to the Companies or to Seller.

Seller shall be responsible for paying all maintenance fees and annuity payments related to foreign patents through August 31, 2009.

Section 6.7 Certain Provisions relating to Consents, Cooperation and Adequate Assurance. Seller shall use commercially reasonable efforts prior to and after the Closing Date to obtain all consents of Governmental Agencies and counterparties to Contracts and Leases that Buyer has designated as Assumed Contracts or Assumed Leases that are required in connection with the transactions contemplated by this Agreement; provided, however, that Seller shall not be obligated to offer or to pay any consideration or grant any financial accommodation in connection therewith.

Section 6.8 Conduct of Business Prior to the Closing Date. To the extent permitted or required by the Bankruptcy Cases, and consistent with the availability of the Employees, Seller shall use commercially reasonable efforts to (i) maintain the Purchased Assets and the assets and properties of, or used by, the Seller relating to the Business in their current condition (ordinary wear and tear excepted), and (ii) maintain the Documents of the Business. In connection therewith, the Seller shall not terminate any Employee without notice to the Buyer. or cancel, terminate or amend any Assumed Contract.

Section 6.9 Notification of Breach; Disclosure. Each Party shall promptly notify the other of any event, condition or circumstance of which such Party becomes aware prior to the Closing Date that would cause, or would reasonably be expected to cause, a violation or breach of this Agreement (or a breach of any representation or warranty contained in this Agreement). During the period prior to the Closing Date, each Party will promptly advise the other in writing of any written notice or other communication from any Person alleging that the consent of such Person is or may be required in connection with the transactions contemplated by this Agreement. It is acknowledged and understood that no notice given pursuant to this Section 6.9 shall have any effect on the representations, warranties, covenants or agreements contained in this Agreement for purposes of determining satisfaction of the conditions contained herein.

Section 6.10 Insurance. Until the Closing, Seller shall maintain (including necessary renewals thereof) Insurance Policies against risk and liabilities to the extent and in the manner and at the levels maintained by Seller as of the date hereof with respect to the Business and the Purchased Assets. If requested by Buyer, Seller shall in good faith cooperate with Buyer and take all actions reasonably requested by Buyer that are necessary or desirable to permit Buyer to have available to it following the Closing the benefits (whether direct or indirect) of the insurance policies maintained by or on behalf of Seller with respect to the Business, the Purchased Assets or the Assumed Liabilities that are currently in force and in the manner and at the levels maintained by Seller as of the date hereof, including, but not limited to, taking those actions which may be necessary to assign the Insurance Policies to Buyer.

Section 6.11 Bankruptcy Matters; Bidding Process.

(a) Seller and Buyer acknowledge that this Agreement and the sale of the Purchased Assets are subject to Bankruptcy Court approval. Seller and Buyer acknowledge that (i) to obtain such approval, Seller must demonstrate that they have taken reasonable steps to obtain the highest or otherwise best offer possible for the Purchased Assets, including, but not limited to, giving notice of the transactions contemplated by this Agreement to creditors and certain other interested parties as ordered by the Bankruptcy Court, and conducting an

auction in respect of the Purchased Assets (the "Auction"), and (ii) Buyer must pay the Cure Costs and cure all defaults and provide adequate assurance of future performance under the Designated Contracts

(b) Seller has filed or will promptly file with the Bankruptcy Court a motion (the "Sale Motion"), notices and proposed orders, to the extent amended as of the date hereof each in form and substance reasonably satisfactory to Buyer seeking the Bankruptcy Court's issuance of:

(i) the bidding procedures Order attached hereto as Exhibit A (the "Bidding Procedures Order"); and

(ii) the sale Order attached hereto as Exhibit B (the "Sale Order").

(c) Seller shall serve a copy of the Sale Motion on: (i) all entities known to assert any interest in or lien upon the Purchased Assets; ~~(ii) all parties to Designated Contracts;~~ (iii) all parties that are entitled to notice under Bankruptcy Rule 2002; (iv) the attorneys general of all states in which the Purchased Assets are located; (v) the Office of the United States Trustee; (vi) the Securities and Exchange Commission; (vii) the Internal Revenue Service and any governmental taxing authority that has filed a claim against the Chapter 7 Estates; (viii) all entities that expressed to the Seller an interest in purchasing the Purchased Assets; (ix) any party appearing in the Bankruptcy Cases and claiming a secured interest in the Purchased Assets; or any party known to the Seller and claiming a secured interest in the Purchased Assets; and (x) any and all other parties directed by the Court.

(d) Seller shall use <sup>its</sup> ~~his~~ reasonable best efforts to provide Buyer with copies of all motions, applications and supporting papers prepared by or on behalf of the Seller (including forms of orders and notices to interested parties) directly relating to the Purchased Assets or this Agreement at least two (2) Business Days, unless the exigencies of time prevent the period from being that long, prior to the filing thereof in the Bankruptcy Cases so as to allow Buyer to provide reasonable comments for incorporation into same; except that the Sale Motion (including forms of orders and notices to interested parties) shall be provided to Buyer at least three (3) Business Days prior to its filing.

Section 6.12 Best Efforts. Upon the terms and subject to the conditions of this Agreement, each of the Parties hereto shall use its best efforts to take, or cause to be taken, all action, and to do, or cause to be done, all things necessary, proper or advisable consistent with applicable Legal Requirements to consummate and make effective in the most expeditious manner practicable the transactions contemplated hereby. Without limiting the foregoing, Seller shall not voluntarily dismiss the Bankruptcy Cases and shall use his reasonable best efforts to:

(a) obtain the Bidding Procedures Order on or before \_\_, 2009;

(b) obtain the Sale Order on or prior to, August \_\_, 2009 and, upon entry, cause it not to be (i) vacated, stayed or reversed or (ii) (except with the express written consent of the Buyer, or as would not be adverse to Buyer in any material respect) amended, supplemented or otherwise modified; and

(c) subject to the fiduciary duties of the Trustee, prevent the dismissal of the Bankruptcy Cases.

Section 6.13 Bidding Procedures Order. Seller agrees to comply (and cause his Representatives to comply) with each of the procedures, terms, conditions and provisions set forth in the Bidding Procedures Order.

Section 6.14 Takeover Proposal; Confidential Information.

(a) Seller shall not furnish information concerning their business, properties or assets to any Third Party, except pursuant to a confidentiality agreement with terms and conditions no less restrictive than those contained in the Confidentiality Agreement between the parties. Seller shall not release any Third Party from, or waive any provision of, any such confidentiality agreement or any similar confidentiality or standstill agreement to which any Seller is a party. To the extent that this Section 6.14 conflicts with the Bidding Procedures Order, the Bidding Procedures Order shall govern.

(b) Seller shall promptly (and in any event within one (1) Business Day) notify Buyer in writing at such time as any Takeover Proposal has been determined to be a Qualified Bid.

Section 6.15 DayJet Transaction. Seller agrees that upon the Closing, Buyer shall have acquired all of the Seller's right, title and interest in the DayJet aircraft and any and all obligations from DayJet Leasing LLC and or its affiliates and no further or additional consideration shall be due Seller on account of such interest.

Section 6.16 Access to Premises. Seller shall before and after the Closing Date, use its reasonable efforts to take those steps necessary to permit Buyer to have access to all property, buildings and facilities at which the Purchased Assets are located, including, but not limited to, any locations subject to leases which Buyer may elect not to assume, for purposes of Buyer's taking possession of the Purchased Assets under this Agreement.

## ARTICLE VII

### ADDITIONAL AGREEMENTS

Section 7.1 Taxes.

(a) Seller shall be liable for and shall pay, and pursuant to Section 7.1(c) shall reimburse Buyer for, all Taxes (whether assessed or unassessed) applicable to the Business and the Purchased Assets, in each case attributable to periods (or portions of Straddle Periods) ending on or prior to the Closing Date. Buyer shall be liable for and shall pay all Taxes (whether assessed or unassessed) applicable to the Business, the Purchased Assets and the Assumed Liabilities, in each case attributable to periods (or portions of Straddle Periods) beginning after the Closing Date. For purposes of this paragraph (a), any period beginning before and ending after the Closing Date (a "Straddle Period") shall be treated as two partial

periods, one ending on the Closing Date and the other beginning on the day after the Closing Date and items of income, gain, deduction, loss or credit, and state and local apportionment factors for the Straddle Period shall be allocated between such two partial periods on a "closing of the books basis" by assuming that the books of the Person subject to such Tax were closed at the close of the day on the Closing Date, provided, however, that exemptions, allowances or deductions that are calculated on an annual basis (such as the deduction for depreciation), and Taxes (such as property Taxes) imposed on a periodic basis shall be allocated on a daily basis.

(b) Without limiting the other terms set forth in this Agreement, any sales Tax, use Tax, real property transfer or gains Tax, real property records recordation fees, documentary stamp Tax or similar Tax attributable to the sale or transfer of the Purchased Assets and not exempted under the Sale Order ("Transfer Taxes") shall be borne by Buyer. Seller and Buyer shall use reasonable efforts and cooperate in good faith to exempt the sale and transfer of the Purchased Assets from any such Transfer Taxes. Buyer shall be entitled to offset against the Cash Consideration 50% of the amount of Transfer Taxes actually paid by Buyer.

(c) In the event that any Party pays the Tax that is the responsibility of the other Party in accordance with the terms of this Section 7.1, such responsible Party shall provide reimbursement to the paying Party for such Tax. Within a reasonable time prior to the payment of any such Tax, the Party that is to pay such Tax shall give notice to the other Party of the Tax payable and its liability therefor, although failure to do so will not relieve the Party responsible for the Tax under this Section 7.1 from its liability hereunder.

(d) Buyer and Seller agree to furnish or cause to be furnished to each other, upon request, as promptly as practicable, such information and assistance relating to the Business and the Purchased Assets (including access to books and records) as is reasonably necessary for the filing of all Tax Returns, the making of any election relating to Taxes, the preparation for any audit by any taxing authority, and the prosecution or defense of any claim, suit or proceeding relating to any Tax. Buyer and Seller shall retain all books and records with respect to Taxes pertaining to the Purchased Assets for a period of at least six years following the Closing Date. On or after the end of such period, each party shall provide the other with at least 10 days prior written notice before destroying any such books and records, during which period the party receiving such notice can elect to take possession, at its own expense, of such books and records. Seller and Buyer shall cooperate with each other in the conduct of any audit or other proceeding relating to Taxes involving the Purchased Assets or the Business.

(e) Seller shall use all commercially reasonable efforts to obtain certificates, releases or other appropriate documentation from all Governmental Agencies that may seek to collect property Taxes or impose on Seller, Buyer or any Purchased Assets penalties for any property Taxes, to the extent such Governmental Agencies provide such certificates, releases or documentation in the ordinary course, providing that such property Taxes have been paid or are not owed.

Section 7.2 No Successor Liability to Employees. Under no circumstances shall Buyer assume or be obligated to pay, and the Purchased Assets shall not be or become liable for or subject to, any claims of or liabilities of the Companies' Employees, including but not limited to, any claims or liabilities related to employment practices, COBRA, equal employment opportunity, nondiscrimination, harassment, wrongful termination, breach of contract, immigration, wage and hour laws, any other state, federal or local labor and employment laws, liability under the WARN Act, salaries, vacations, sick pay, incentives, severance pay, bonus, overtime, meal period, pension profit sharing retirement and/or deferred compensation and any other compensation or benefits (the "Employee Claims"), which Employee Claims shall be and remain the liability, responsibility and obligation (if any) of Seller and the Chapter 7 Estates.

Section 7.3 Employment.

(a) Buyer may (but shall not be required to), in its sole and absolute discretion, offer employment to any and all individuals employed, or formerly employed, by Seller or the Companies in connection with the Business as of the Closing Date to commence immediately following the Closing, each such offer contingent upon the issuance of the Sale Order of the Bankruptcy Court and the Closing. Buyer's employment of any individuals previously employed by Seller or the Companies shall be on an "at will" basis and on such other terms and conditions of employment as Buyer shall offer in its sole discretion. Except as otherwise agreed to in writing, Buyer shall be under no obligation to employ or continue to employ any individual for any period. The employees who accept Buyer's offer of employment and who commence employment with Buyer from and after the Closing Date shall be referred to herein as the "Hired Employees." Under no circumstance shall any individual employed or formerly employed by Seller or the Companies become an employee of Buyer unless such individual becomes a Hired Employee.

(b) With respect to each Hired Employee, Seller hereby waives and releases each such individual from any and all contractual, common law or other restrictions enforceable by Seller on the employment, activities or other conduct of such individuals after their termination of employment with Seller; provided, however, that Seller shall assign to Buyer Seller's rights to all obligations of each Hired Employee not to disclose confidential information relating to the Business and all obligations not to compete with the Business owed to Seller by such Hired Employee.

(c) Except as expressly provided herein, nothing herein shall be construed as transferring to Buyer (i) any Contract or agreement with any current or former employee of the Companies or for the employment of any Person or engagement of any independent contractor by Seller or (ii) any rights or obligation Seller or the Companies may owe to or be owed by any current or former employee, officer, director, consultant, independent contractor or agent of the Companies.

(d) Nothing herein, express or implied, shall confer upon any employee or former employee of the Companies any rights or remedies (including any right to employment or continued employment for any specific period) of any nature or kind whatsoever, under or by reason of this Agreement. Buyer and Seller agree that the provisions contained herein are

not intended to be for the benefit of or otherwise be enforceable by, any third party, including any employee or former employee of the Companies.

(e) Buyer shall have no obligation to pay any severance obligation of any Employee or former Employee of the Companies, irrespective of whether such individual becomes a Hired Employee, and any such obligations remain obligations of the Seller or Chapter 7 Estates.

(f) Subject to Section 7.3(h), nothing contained in this Agreement shall be construed to require, or prevent the termination of, employment of any individual, require minimum benefit or compensation levels or prevent any change in the employee benefits provided to any individual Employee. No provision of this Agreement shall create any third party beneficiary rights in any employee or former employee of the Companies or any other Persons or entities (including any beneficiary or dependent thereof), in respect of continued employment (or resumed employment) for any specified period of any nature or kind whatsoever.

(g) Within ten Business Days of the date hereof, Seller shall deliver to Buyer a list of all of the Employees of the Companies or Seller together with the particulars of the date of commencement of employment or service, periods of continuous employment or service, job description or grade, and holiday entitlements.

Section 7.4 Collection of Receivable. If, after the Closing Date, Seller shall receive payment from any account debtor with respect to any Accounts Receivable included in the Purchased Assets, Seller shall promptly thereafter deliver such funds and assets to Buyer.

Section 7.5 Adequate Assurances Regarding Assumed Contracts and Assumed Leases. With respect to each Assumed Contract and each Assumed Lease, Buyer will use commercially reasonable efforts to cure all defaults and provide adequate assurance as required under the Bankruptcy Code of the future performance by Buyer of each such Assumed Contract and Assumed Lease and will pay all Cure Costs necessary to cure any defaults. Buyer and Seller agree that they will promptly take all actions reasonably required to assist in obtaining a Bankruptcy Court finding that all defaults have been cured and there has been an adequate demonstration of adequate assurance of future performance under the Assumed Contracts and the Assumed Leases, such as furnishing affidavits, non-confidential financial information or other documents or information for filing with the Bankruptcy Court and making Buyer's and Seller's employees and representatives available to testify before the Bankruptcy Court.

Section 7.6 Certifications. Prior to the Closing Date, Seller shall cooperate with and provide reasonable assistance to the Buyer in connection with the Buyer's negotiation with (i) all EASA authorities, employees, officials and personnel to transfer to Buyer the Eclipse EASA Certificate and (ii) all FAA authorities, employees, officials and personnel to transfer to Buyer the Eclipse Type Certificate. Seller shall use its reasonable efforts to maintain the EASA certificate until the date of Closing; provided that Seller shall not be obligated to pay any amounts or incur any obligations. Buyer shall be entitled to offset against the Cash Purchase Price at the Closing any and all fees due to EASA.



Section 7.7 Certain Actions. As soon as practicable following the Closing Date, the Seller shall take such corporate and other actions necessary to change the names of the Companies with respect to the Bankruptcy Cases, to names that are not similar to, or confusing with, the current names of the Companies. In connection with enabling Buyer, at or as soon as practicable after the Closing Date, to use the current corporate names of each of the Companies, the Seller shall execute and deliver to Buyer all consents related to such change of name as may be requested by Buyer, and will otherwise cooperate with Buyer in effecting such name change as soon as is practicable before or after the Closing. Within ten (10) days after Closing, and at Buyer's expense, Seller shall file in all jurisdictions in which the Companies are qualified to do business any documents necessary to reflect such change of name or to terminate their qualification therein.

Section 7.8 Substitution of Parties. As soon as practicable following the Closing Date, the Seller shall take such actions as necessary to substitute the Buyer in place of the Seller or, as appropriate, to allow Buyer to intervene, in the adversary proceedings described on Schedule 7.8 (the "WIP Adversary Proceedings") and the adversary proceeding styled Opinicus Corporation v. Jeoffrey L. Burtch et al Adversary Proceeding No. 09-50406-MFW and pursuant to the terms of this Agreement shall assign to Buyer any and all rights, defenses, cause of actions, claims or other interests in these proceedings, against the parties to these proceedings and the property which is the subject of those proceedings, provided, however, that Buyer's liability pursuant to these proceedings shall be strictly limited to any liability which is included in Assumed Liabilities and shall not include, to the extent applicable, any claims against Seller, the Companies or the Chapter 7 Estate for (a) specific performance or (b) any monetary claims of any kind or nature, including but not limited to, any claims to deposits or segregated funds.

Section 7.9 Cure Amounts. Set forth on Schedule 2.3 is a list of the costs that pursuant to Bankruptcy Code Section 365(b) will be required to cure any default on the part of the Seller under the Designated Contracts, which costs must be delivered to the nondebtor under the Designated Contracts, or with respect to which adequate assurance of prompt delivery by such Seller must be provided as a prerequisite to the assumption of such Designated Contracts under Bankruptcy Code Section 365(a) (the "Cure Costs"). Appropriate additions and deletions shall be made to Schedule 2.3, and the Cure Costs shall be correspondingly amended, to reflect additions and deletions to Schedule 2.3 made from time to time in accordance with Section 2.3. Prior to the Closing, Seller shall cooperate with Buyer to resolve any disputes with the nondebtor party to any of the Designated Contracts regarding the amount of the Cure Costs. Subject to entry of the Approval Order and it becoming a Final Order, Buyer shall pay the Cure Costs designated in Schedule 2.3, subject to any reduction in the Cash Consideration provided in Section 2.3(b), in accordance with the terms and conditions of any Order approving the assumption and assignment of the Assumed Contracts.

Section 7.10 Reasonable Access to Records and Certain Personnel. In order to facilitate Trustee's efforts to (i) administer and close the Bankruptcy Cases, and (ii) prepare tax returns (together, the "Post-Close Filings"), Buyer shall permit Trustee's counsel, accountants and any other professional representative of the Trustee, during regular business hours, with reasonable notice, and subject to reasonable rules and regulations, reasonable access to any information acquired by the Buyer pursuant to this Agreement, including financial information of the Companies, and other books and records which comprised part of the Purchased Assets,

that are required for the Trustee to complete the Post-Close Filings, or to facilitate the administration of these Bankruptcy Cases. Buyer shall retain all any information acquired by the Buyer pursuant to this Agreement for a period of at least six (6) years following the Closing Date. On or after the end of such period, the Buyer shall provide the Trustee with at least forty-five (45) days prior written notice before destroying any such information, during which period the Trustee can elect to take possession, at its own expense, of such books and records. The obligations created by this Section 7.10 shall terminate 30 days after the entry of a final non-appealable order by the Bankruptcy Court approving the Trustee's Final Report.

Section 7.11 Deposit. Immediately upon the Bankruptcy Court's entry of the Bidding Procedures Order and its approval of this Agreement as the stalking horse bid, Buyer will deposit \$5,000,000 (the "Deposit") with a third party escrow agent pursuant to a deposit escrow agreement in substantially the form of Exhibit C (the "Deposit Escrow Agreement").

Section 7.12 Seller Post-Closing Obligations. Notwithstanding any provision in this Agreement to the contrary, in no event shall the Seller be obligated to incur any expense or expenses that aggregate over \$100,000 in connection with any obligations to cooperate or facilitate actions specified to occur following the Closing. This shall not apply to those offsets against the Cash Consideration provided for in Section 3.2 and described with particularity in Sections 2.3(b), 7.1(b) and 7.6.

Section 7.13 Organization of the Companies. To the extent reasonably required to consummate the transactions contemplated by this Agreement, Seller will pay, or allow Buyer to pay and deduct from the Cash Consideration (a reasonable time prior to the Closing) subject to the limitations set forth in Section 7.12, any amounts due and owing to the Secretary of the State of Delaware which may be necessary to cause each Company to be an organization in good standing pursuant to its jurisdiction of incorporation. For the avoidance of doubt, to the extent there is no requirement that the Companies be in good standing to consummate the transactions contemplated by this Agreement, neither Buyer nor Seller desire to incur any cost pursuant to this Section 7.13.

## ARTICLE VIII

### CONDITIONS TO CLOSING

Section 8.1 Conditions to Obligations of Each Party. The respective obligations of each Party to affect the sale and purchase of the Purchased Assets shall be subject to the fulfillment (or, if permitted by applicable law, waiver) on or prior to the Closing Date, of the conditions as set forth in Section 8.2 in the case of the Buyer and Section 8.3 in the case of the Seller.

Section 8.2 Conditions to Obligations of Buyer. The obligation of Buyer to effect the purchase of the Purchased Assets contemplated by this Agreement shall be subject to the fulfillment (unless waived in writing by Buyer) on or prior to the Closing Date of the following additional conditions:

(a) the representations and warranties of Seller contained in Article IV of this Agreement shall be true and correct on and as of the Closing Date with the same effect as if such representations and warranties had been made on and as of such date (other than any such representations and warranties that address matters only as of a particular date, which shall be true and correct as of such date), in each case except for breaches as to matters that, individually or in the aggregate, would not have a Material Adverse Effect. For purposes of determining the satisfaction of this condition, the representations and warranties of Seller contained in Article IV of this Agreement shall be deemed not qualified by any references therein to materiality generally or to whether or not any breach results in a Material Adverse Effect. Buyer shall have received a certificate of each Seller to such effect signed by a duly authorized officer of such Seller.

(b) each covenant and obligation that Seller is required to perform or to comply with pursuant to this Agreement at or prior to the Closing shall have been duly performed and complied with in all material respects. Buyer shall have received a certificate of the Seller to such effect.

(c) the Sale Order shall have been entered on or before August \_\_, 2009; and shall not have been (i) stayed, vacated, or reversed, or be the subject of any pending motion seeking such relief (ii) (except with the express written consent of the Buyer not to be unreasonably withheld or delayed) amended, supplemented or otherwise modified or (iii) subject to an appeal, other than an appeal by any party to any of the WIP Adversary Proceedings, which, in the Buyer's reasonable judgment, would not be mooted as a result of the Closing;

(d) each of the deliveries required to be made to Buyer pursuant to Section 3.6 shall have been so delivered;

(e) each of the Governmental Authority authorizations, consents or waiting periods set forth on Schedule 8.2(e) shall have been obtained or expired, as applicable;

(f) no Governmental Authority shall have enacted, issued, promulgated, entered any Order that is in effect and has the effect of making illegal or otherwise prohibiting the consummation of the transactions contemplated by this Agreement that has not been withdrawn or terminated; and

(g) No event shall have occurred which has had or will have a Material Adverse Effect.

Any condition specified in this Section 8.2 may be waived by Buyer; provided that no such waiver shall be effective against Buyer unless it is set forth in a writing executed by Buyer.

Section 8.3 Conditions to Obligations of Seller. The obligation of Seller to effect the sale of the Purchased Assets contemplated by this Agreement shall be subject to the fulfillment (unless waived in writing by Seller) on or prior to the Closing Date of the following additional conditions:

(a) the representations and warranties of Buyer contained in this Agreement shall be true and correct in all material respects when made and on and as of the Closing Date with the same effect as if such representations and warranties had been made on and as of such date (other than representations and warranties that address matters only as of a particular date, which shall be true and correct in all material respects as of such date), except that any representations and warranties made by Buyer that by their terms are subject to any materiality or material adverse effect qualifier or exception, shall be true and correct in all respects when made on and as of the Closing Date with the same effect as if such representations and warranties had been made on and as of such date (other than representations and warranties that address matters only as of a particular date, which shall be true and correct in all respects as of such date) and Seller shall have received a certificate of Buyer to such effect signed by a duly authorized officer thereof;

(b) each covenant and obligation that Buyer is required to perform or to comply with pursuant to this Agreement at or prior to the Closing shall have been duly performed and complied with in all material respects, and Seller shall have received a certificate of Buyer to such effect signed by a duly authorized officer thereof;

(c) each of the deliveries required to be made to Seller pursuant to Section 3.5 shall have been so delivered;

(d) Buyer shall have delivered the Purchase Price to Seller or as otherwise directed by the Sale Order;

(e) the Sale Order shall have been entered and shall not have been (i) stayed, vacated or reversed or (ii) except with the express written consent of Trustee or as would not be adverse to Trustee in any material respect, amended, supplemented or otherwise modified; and

(f) as of and immediately after giving effect to the Closing, there shall be no default, and no event that with notice, or the passage of time, or both, would constitute a default under the Notes.

Any condition specified in this Section 8.3 may be waived by Seller; provided that no such waiver shall be effective against Seller unless it is set forth in a writing executed by the Seller.

## ARTICLE IX

### TERMINATION

Section 9.1 Termination. Anything in this Agreement to the contrary notwithstanding, this Agreement and the transactions contemplated hereby may be terminated in any of the following ways at any time prior to the Closing Date and in no other manner:

(a) By mutual written consent of Buyer and Seller; *provided* that such written consent is approved in writing by the holders of a majority in principal amount of the Prior Notes.

(b) By Buyer, immediately without further notice, if Seller and Buyer are unable to reach agreement on the form of the Notes and related security agreement and intercreditor agreement at least two (2) days prior to the entry of the Bidding Procedures Order;

(c) By Buyer upon five (5) Business Days notice if, at or prior to the Closing Date, satisfaction of any condition set forth in Section 8.2 is or becomes impossible (other than through the breach by Buyer of any of its representations or warranties or the failure of Buyer to perform any of its obligations pursuant to this Agreement) and Buyer shall not have waived such condition in writing at or prior to the Closing Date.

(d) By Seller upon five (5) Business Days notice if, at or prior to the Closing Date, satisfaction of any condition set forth in Section 8.3 is or becomes impossible (other than through the breach by Seller of any of their representations or warranties or the failure of Seller to perform any of their obligations pursuant to this Agreement) and Seller shall not have waived such condition in writing at or prior to the Closing Date.

(e) By Buyer or Seller, immediately upon the occurrence of any of the following events:

(i) The Bankruptcy Court approves an Alternative Transaction, or an Alternative Transaction is consummated; or

(ii) The Sale Order is not entered on or before August \_\_, 2009.

(f) By either party, provided the terminating party is not in default of its obligations under this Agreement, if the Closing shall not have occurred for any reason within thirty days after the entry of the Sale Order.

(g) By either party if a Governmental Authority issues a final and non-appealable Order prohibiting the transactions contemplated by this Agreement.

#### Section 9.2 Effect of Termination.

(a) In the event this Agreement is terminated pursuant to Section 9.1, all further obligations of the parties hereunder shall terminate, except for this Section 9.2 and Article XI (to the extent applicable to the aforesaid surviving provisions), and except that nothing in this Section 9.2 shall relieve any party hereto of any liability for the willful breach of any of the covenants or of any of the representations or warranties contained in this Agreement prior to such termination.

(b) If this Agreement is terminated pursuant to Section 9.1(c)(i), then Seller shall pay to Buyer in immediately available funds a cash fee equal to \$1,600,000 (the "Break-Up Fee"), such fee to be paid, as applicable, promptly following the closing of the Alternative

Transaction; provided, however, that no Break-Up Fee shall be payable by Seller in the event that a material breach by Buyer of any representation or warranty contained in this Agreement shall have occurred or Buyer fails to perform and comply with all of its covenants and agreements under this Agreement, which breach or failure, as applicable, results in the termination of this Agreement by Seller. The Break-Up Fee, payable under the circumstances provided in the immediately preceding sentence shall be the exclusive remedy of Buyer for any termination of this Agreement pursuant to Section 9.1(e)(i). The claims of Buyer to the Break-Up Fee shall constitute a first priority administrative expense against the Chapter 7 Estates, jointly and severally, under 11 U.S.C. § 507(a)(2).

## ARTICLE X

### INDEMNIFICATION

Section 10.1 No Survival of Representations, Warranties, Covenants and Agreements. The representations, warranties, covenants and agreements contained in this Agreement shall not survive beyond the Closing Date, and there shall be no liability in respect thereof, whether such liability has accrued prior to the Closing Date or after the Closing Date, on the part of either party or its officers, directors, employees, agents and Affiliates; provided, however, that all covenants and agreements, which, by their terms, contemplate performance after the Closing Date, shall survive in accordance with their terms. Nothing in the foregoing sentence shall preclude any party from bringing an action for fraud involving intentional and wanton conduct involving the entire transaction provided for in this Agreement.

## ARTICLE XI

### GENERAL PROVISIONS

Section 11.1 Confidential Nature of Information. Each Party agrees that it will treat in confidence all documents, materials and other information that it shall have obtained regarding the other Party during the course of the negotiations leading to the consummation of the transactions contemplated hereby (whether obtained before or after the date of this Agreement), the investigation provided for herein and the preparation of this Agreement and other related documents. Such documents, materials and information shall not be disclosed or communicated to any third Person (other than, in the case of Buyer, to its counsel, accountants, financial advisors and potential lenders, and in the case of Seller, to the holders of a majority in principal amount of the Prior Notes and to the respective counsel, accountants and financial advisors of Seller and the holders of a majority in principal amount of the Prior Notes). No Party shall use any confidential information referred to in the second immediately preceding sentence in any manner whatsoever except solely for the purpose of evaluating the proposed purchase and sale of the Purchased Assets and the enforcement of its rights hereunder and under the Ancillary Documents; provided, however, that after the Closing, Buyer may use or disclose any confidential information included in the Purchased Assets and may use or disclose other confidential information that is otherwise reasonably related to the Business or the Purchased

Assets, subject to any restrictions imposed by non-bankruptcy law. The obligation of each Party to treat such documents, materials and other information in confidence shall not apply to any information that (i) is or becomes available to such Party from a source other than the disclosing Party, provided such other source was not, and such Party would have no reason to believe such source was, subject to a confidentiality obligation in respect of such information, (ii) is or becomes available to the public other than as a result of disclosure by such Party or its agents, (iii) is required to be disclosed under applicable law or judicial process, including the Bankruptcy Cases, but only to the extent it must be disclosed, or (iv) such Party reasonably deems necessary to disclose to obtain any of the consents or approvals contemplated hereby.

Section 11.2 No Public Announcement. Neither Seller nor Buyer shall, without the approval of Seller (in the case of a disclosure by Buyer) or Buyer (in the case of a disclosure by Seller), make any press release or other public announcement concerning the transactions contemplated by this Agreement, except as and to the extent that any such party shall be so obligated by law, including as may be required by the Bankruptcy Cases, securities laws, or the rules of any stock exchange, in which case the other party or parties shall be advised prior to such disclosure and the parties shall use their reasonable best efforts to cause a mutually agreeable release or announcement to be issued.

Section 11.3 Notices. All notices, demands or other communications to be given or delivered under or by reason of the provisions of this Agreement shall be in writing and shall be deemed to have been given (a) when delivered personally to the recipient, (b) one (1) Business Day after the date when sent to the recipient by reputable express courier service (charges prepaid), or (c) seven (7) Business Days after the date when mailed to the recipient by certified or registered mail, return receipt requested and postage prepaid, if delivered personally (with written confirmation of receipt), on the date of such delivery or, if sent via facsimile, on the date of the transmission of the facsimile, provided that the sender thereof receives written confirmation that the facsimile was successfully delivered to the intended recipient. Notice by Buyer to Eclipse shall be deemed to be notice to all Seller. Such notices, demands and other communications shall be sent to Seller and to Buyer at the addresses indicated below:

If to Buyer, to:

Eclipse Aerospace, Inc.  
125 Fairchild St.  
Suite 100, Charleston, SC 29492  
Attn: Mason Holland, President  
Facsimile: 843-849-9298

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

Nelson Mullins Riley & Scarborough LLP  
Atlantic Station  
201 17<sup>th</sup> Street, Suite 1700  
Atlanta, Georgia 30363  
Attn: William J. Ching, Esq.  
Michael E. Hollingsworth II, Esq.  
Facsimile: (404) 322-6050

If to Seller, to:

The Trustee:  
Jeffrey L. Burtch, Esq.  
Cooch & Taylor, P.A.  
1000 West Street  
Wilmington, Delaware 19801  
Facsimile: (302) 984-3939

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

Cooch & Taylor, P.A.  
1000 West Street  
Wilmington, Delaware 19801  
Attn: Adam Singer, Esq.  
Facsimile: (302) 984-3939

or to such other address or facsimile number as such party may indicate by a notice delivered to the other party hereto.

#### Section 11.4 Successors and Assigns.

(a) Except as expressly permitted in this Agreement, the rights and obligations of the Parties under this Agreement shall not be assignable by such parties without the written consent of the other parties hereto; provided, however, that concurrent with the Closing, Buyer may, without the prior written consent of the Seller or the holders of a majority in principal amount of the Prior Notes, assign the right to receive the assets owned by Seller to one or more affiliates of the Buyer, *provided* that no such assignment shall release Buyer from any of its obligations under this Agreement. Notwithstanding the foregoing, from and after the Closing Buyer shall have the unrestricted right to assign this Agreement as collateral and in connection therewith to delegate all or any part of its obligations hereunder to any lender in connection with any financing or to any Affiliate of Buyer, but in such event Buyer shall remain fully liable for the performance of all of such obligations in the manner prescribed in this Agreement.

(b) This Agreement shall be binding upon and inure to the benefit of the Parties and their successors and permitted assigns. The successors and permitted assigns hereunder shall include any permitted assignee as well as the successors in interest to such



permitted assignee (whether by merger, consolidation, liquidation (including successive mergers, consolidations or liquidations) or otherwise). Nothing in this Agreement, expressed or implied, is intended or shall be construed to confer upon any Person other than the parties and successors and assigns permitted by this Section 11.4 any right, remedy or claim under or by reason of this Agreement.

Section 11.5 Entire Agreement; Amendments; Disclosure Schedules. This Agreement, the Ancillary Documents and Disclosure Schedules referred to herein contain the entire understanding of the parties hereto with regard to the subject matter contained herein or therein, and supersede all prior agreements, understandings or letters of intent between or among any of the parties hereto with respect to such subject matter. This Agreement shall not be amended, modified or supplemented except by a written instrument signed by the Buyer and Seller and approved in writing by the holders of a majority of the principal amount of the Prior Notes.

Section 11.6 Waivers. Any term or provision of this Agreement may be waived, or the time for its performance may be extended, by an instrument in writing executed by the party or parties entitled to the benefit thereof; *provided*, that any such waiver is approved in writing by the holders of a majority in principal amount of the Prior Notes. Any such waiver shall be validly and sufficiently authorized for the purposes of this Agreement if, as to any party, it is authorized in writing by an authorized representative of such party. Except as otherwise provided herein, the failure of any party hereto to enforce at any time any provision of this Agreement shall not be construed to be a waiver of such provision, nor in any way to affect the validity of this Agreement or any part hereof or the right of any party thereafter to enforce each and every such provision. No waiver of any breach of this Agreement shall be held to constitute a waiver of any other or subsequent breach. No failure on the part of any Party to exercise, and no delay in exercising, any right, power or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of such right, power or remedy by such party preclude any other or further exercise thereof or the exercise of any right, power or remedy. All remedies hereunder are cumulative and are not exclusive of any other remedies provided by law.

Section 11.7 Expenses. Each Party hereto will pay all costs and expenses incident to its negotiation and preparation of this Agreement and to its performance and compliance with all agreements and conditions contained herein on its part to be performed or complied with, including the fees, expenses and disbursements of its counsel and accountants.

Section 11.8 Partial Invalidity. Wherever possible, each provision hereof shall be interpreted in such manner as to be effective and valid under applicable law, but in case any one or more of the provisions contained herein shall, for any reason, be held to be invalid, illegal or unenforceable in any respect, such provision shall be ineffective to the extent, but only to the extent, of such invalidity, illegality or unenforceability without invalidating the remainder of such invalid, illegal or unenforceable provision or provisions or any other provisions hereof, unless such a construction would be unreasonable.

Section 11.9 Execution in Counterparts. This Agreement may be executed in counterparts, each of which shall be considered an original instrument, but all of which shall be considered one and the same agreement, and shall become binding when one or more

counterparts have been signed by and delivered to each of the Parties hereto. Delivery of an executed counterpart of a signature page to this Agreement by facsimile shall be effective as delivery of a manually executed counterpart of this Agreement.

Section 11.10 Governing Law and Dispute Resolution.

(a) This Agreement and the legal relations between the parties hereto shall be governed by and construed in accordance with the laws of the State of New York applicable to contracts made and performed therein and the Bankruptcy Code, to the extent applicable.

(b) During the pendency of the Bankruptcy Cases any Proceeding seeking to enforce any provision of, or based on any right arising out of, this Agreement may only be brought against any of the parties in the Bankruptcy Court, and each of the parties consents to the jurisdiction of the Bankruptcy Court (and of the appropriate appellate courts) in any such action or proceeding and waives any objection to venue laid therein.

(c) At any time after the entry of a final non appealable order of the Bankruptcy Court approving the Trustee's Final Report, any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in New York, New York before one arbitrator. The parties hereby waive all right to trial by jury with respect to the foregoing. The arbitration shall be administered by JAMS ([www.jamsadr.com](http://www.jamsadr.com)) pursuant to its Streamlined Arbitration Rules and Procedures. Judgment on the award may be entered in any court having jurisdiction. The arbitrator may, in his or her sole discretion, allocate all or part of the costs of the arbitration in the award, including the fees of the arbitrator and the reasonable attorneys' fees of the parties. The arbitrator shall not have the power to award punitive damages.

Section 11.11 No Third Party Beneficiaries. This Agreement is for the sole benefit of the Parties and their permitted assigns and nothing herein, express or implied, is intended to or shall confer upon any other Person any legal or equitable benefit, claim, cause of action, remedy or right of any kind.

[SIGNATURE PAGES FOLLOW]

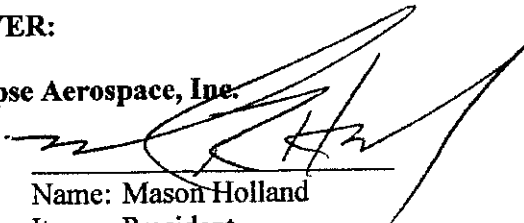
IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed the day and year first above written.

**BUYER:**

**Eclipse Aerospace, Inc.**

By: \_\_\_\_\_

Name: Mason Holland  
Its: President



**SELLER:**

**Jeffrey L. Burch, Chapter 7 Trustee of Eclipse Aviation Corporation**

By: \_\_\_\_\_

Name: Jeffrey L. Burch  
Title: Chapter 7 Trustee

**Jeffrey L. Burch, Chapter 7 Trustee of Eclipse IRB Sunport, LLC**

By: \_\_\_\_\_

Name: Jeffrey L. Burch  
Title: Chapter 7 Trustee

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed the day and year first above written.

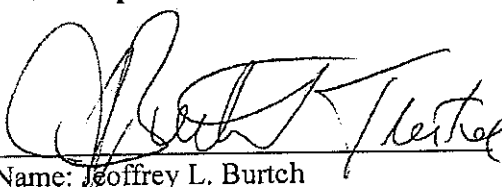
**BUYER:**

**Eclipse Aerospace, Inc.**

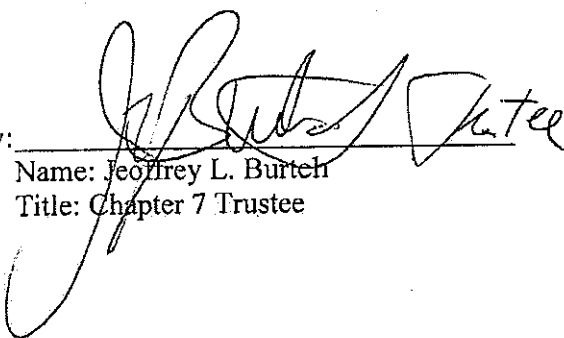
By: \_\_\_\_\_  
Name: Mason Holland  
Its: President

**SELLER:**

**Jeffrey L. Burtch, Chapter 7 Trustee of Eclipse Aviation Corporation**

By:   
Name: Jeffrey L. Burtch  
Title: Chapter 7 Trustee

**Jeffrey L. Burtch, Chapter 7 Trustee of Eclipse IRB Support, LLC**

By:   
Name: Jeffrey L. Burtch  
Title: Chapter 7 Trustee

## ANNEX 1

DEFINITIONS

“Accounts Receivable” means, with respect to a Seller, all accounts receivable and other rights to payment of such Seller and the full benefit of all security for such accounts receivable or rights to payment, including, but not limited to, all accounts receivable in respect of goods shipped or products sold or services rendered to customers by such Seller, any other miscellaneous accounts receivable of such Seller, and any claim, remedy or other right of such Seller related to any of the foregoing.

“Action” means any legal action, suit or arbitration, or any inquiry, proceeding or investigation, by or before any Governmental Authority.

“Administrative Claim” means a Claim for payment of an administrative expense solely in the Chapter 11 Bankruptcy Cases of a kind specified in section 503(b) of the Bankruptcy Code and entitled to priority pursuant to section 507(a)(1) of the Bankruptcy Code.

“Affiliate” means, as to any Person, any other Person which directly or indirectly controls, or is under common control with, or is controlled by, such Person. As used in this definition, “control” (including, with its correlative meanings, “controlled by” and “under common control with”) shall mean possession, directly or indirectly, of the power to direct or cause the direction of management or policies (whether through ownership of securities or partnership or other ownership interests, by contract or otherwise) of such Person.

“Agreement” has the meaning specified in the preamble.

“Alternative Transaction” means any one of the following transactions with or by a Third Party resulting in the sale of the Business: (a) a merger, consolidation or similar transaction involving the Seller, or (b) a sale, lease or other disposition directly or indirectly by merger, consolidation, tender offer, share exchange or otherwise of assets of Seller constituting a majority of the consolidated assets of Seller, excluding the Excluded Assets.

“Ancillary Documents” means a Bill of Sale, the Assumption and Assignment Agreement, an Assignment of Patents, an Assignment of Trademarks, an Assignment of Copyrights, an Assignment of Domain Names, an Assumption and Assignment of Leases, each in form and substance reasonably satisfactory to Buyer, and each other agreement, document or instrument (other than this Agreement) executed and delivered by the parties hereto in connection with the consummation of the transactions contemplated by this Agreement.

“Approval Order” means the Sale Order or any other order entered by the Bankruptcy Court approving the assumption and assignment of the Designated Contracts.

“Assumed Capitalized Leases” has the meaning specified below in the definition of “Purchased Assets.”

“Assumed Contracts” has the meaning specified below in the definition of “Purchased Assets.”

“Assumed Leases” has the meaning specified below in the definition of “Purchased Assets.”

“Assumed Liabilities” shall only mean only the following liabilities and obligations (without duplication):

(i) All obligations of the Companies or the Seller with respect to the Companies arising at and after the Closing under the Assumed Contracts and the Assumed Leases, in each case solely to the extent such obligations are required to be performed from and after the Closing Date;

(ii) the Cure Costs;

(iii) the obligation of Seller to return any aircraft or aircraft parts held by the Seller as of the date of the Closing or arising out of any Final Order in the WIP Adversary Proceedings set forth on Schedule 7.8, but not including, to the extent applicable, any claims against Seller, the Companies or the Chapter 7 Estate for (a) specific performance; or (b) any monetary claims against the Seller, including but not limited to, any claims to deposits or segregated funds; and

(iv) the obligation to return any Eclipse 500 Full Flight Simulators or Flight Training Devices to OPINICUS Corporation if ordered by the Bankruptcy Court by any final order entered in the adversary proceeding styled Opinicus Corporation v. Jeffrey L. Burch et al Adversary Proceeding No. 09-50406-MFW.

“Assumption and Assignment Agreement” has the meaning specified in Section 3.5.

“Assumption and Assignment of Leases” has the meaning specified in Section 3.6(f).

“Assumption Date” means the date as of which a Designated Contract is assumed by a Seller in the Bankruptcy Cases and assigned to the Buyer pursuant to an Order of the Bankruptcy Court (which may be the Sale Order), in accordance with the terms of this Agreement.

“Auction” has the meaning specified in Section 6.11(a).

“Avoidance Actions” means any and all claims of the Seller under Chapter 5 of the Bankruptcy Code and any other causes of action the Seller (or the Companies) may have against Third Parties; provided, however, that such actions will expressly not include any claims relating in any manner to the WIP Adversary Proceedings, the Opinicus Adversary Proceeding or any claims which constitute or relate to claims for the recovery of property of the estate removed during the pendency of the Bankruptcy Cases and claims for the enforcement of non competition agreements, non disclosure or confidentiality agreements, all of which claims shall be expressly reserved for the benefit of the Buyer.

“Bankruptcy Cases” has the meaning specified in the recitals.

“Bankruptcy Code” means Title 11 of the United States Code 11 U.S.C. Sections 101 et. seq.

“Bankruptcy Court” has the meaning specified in the recitals.

“Benefit Plan” means any benefits plans provide by the Companies to any Employee.

“Bidding Procedures” means the bidding procedures set forth in the Bidding Procedures Order.

“Bidding Procedures Order” has the meaning set forth in Section 6.11(b)(i).

“Bill of Sale” has the meaning set forth in Section 3.6(a).

“Break-Up Fee” has the meaning set forth in Section 9.2(b).

“Business” has the meaning specified in the recitals.

“Business Day” has the meaning specified in Section 1.1(a).

“Buyer” has the meaning specified in the preamble.

“Buyer Protections” means the procedures, provisions and conditions set forth in the Bidding Procedures Order.

“Bidding Procedures Order” has the meaning set forth in Section 6.11(b)(i).

“Cash Consideration” means an amount equal to Twenty Million Dollars (\$20,000,000).

“Cash Purchase Price” means an amount equal to the Cash Consideration.

“Chapter 7 Estates” means the bankruptcy estates of both Eclipse Aviation Corporation, and Eclipse IRB Sunport, LLC.

“Claim” means a claim against the Companies (all or either of them) as defined in section 101(5) of the Bankruptcy Code.

“Closing” has the meaning specified in Section 3.4.

“Closing Date” has the meaning specified in Section 3.4.

“COBRA” means the United States Consolidated Omnibus Budget Reconciliation Act of 1985.

“Code” means the United States Internal Revenue Code of 1986, as amended.

“Computers” means all computer equipment and hardware, including, without limitation, all central processing units, terminals, disk drives, tape drives, electronic memory units, printers, keyboards, screens, peripherals (and other input/output devices), modems and other

communication controllers, and any and all parts and appurtenances thereto, together with all Intellectual Property used in connection with the operation of such computer equipment, including all Software and rights under any licenses related to such use.

“Contract” means any agreement, contract, obligation, promise, instrument, undertaking or other arrangements (whether written or oral), and any amendment thereto, that is legally binding, other than a Lease, to which any Seller is party.

“Contract Designation Date” has the meaning specified in Section 2.3(a).

“Copyrights” means all U.S. and common law works of authorship and copyrightable subject matter, and copyrights, whether registered or unregistered, copyright registrations and applications therefor, all rights to register and obtain renewals and extensions of copyright registrations, and all other rights corresponding to any of the foregoing throughout the world, including “moral” rights.

“Cure Costs” has the meaning specified in Section 7.9.

“Deposit” has the meaning specified in Section 7.11.

“Deposit Escrow Agreement” has the meaning set forth in Section 7.11.

“Designated Contract” has the meaning specified in Section 2.3(a).

“Design Information” means all information, whether in physical form or electronic form, including all software and electronic information hosted on Eclipse computer servers and in hard copy that relates to: (1) Engineering and technical information concerning either the Eclipse 500 aircraft Type Design or the Eclipse 400 concept airplane; (2) All engineering documents pertaining to the software and hardware design of the Eclipse 500 aircraft or the Eclipse 400 concept airplane; and (3) all supporting, specifications documents and drawings relating to the Eclipse 500 aircraft or the Eclipse 400 concept airplane.

“Disclosure Schedules” means the disclosure schedules attached hereto that Seller has prepared and delivered to Buyer pursuant to the terms of this Agreement, setting forth information regarding the Business, the Purchased Assets, the Assumed Liabilities and other matters with respect to the Companies as set forth therein.

“Documents” means all books, records, files, invoices, inventory records, product specifications, advertising materials, customer lists, cost and pricing information, supplier lists, business plans, catalogs, customer literature, quality control records and manuals, research and development files, records and laboratory books and credit records of customers, and all records, notes, and documents relating to any Software (including all data and other information stored on discs, tapes or other media) to the extent used in or to the extent relating to the assets, properties, including the Seller Intellectual Property, business or operations of the Business.

“Domain Names” means any alphanumeric designation registered with or assigned by a domain name registrar, registry or domain name registration authority as part of an electronic address on the Internet.



“EASA” means the European Aviation Safety Agency.

“Eclipse” has the meaning specified in the preamble.

“Eclipse EASA Certificate” means the Type Certificate for Eclipse 500 (EA500), identified as NBR: EASA.IMA.A.171 and issued to Eclipse on November 21, 2008.

“Eclipse Production Certificate” means Production Certificate Number 500 issued to Eclipse on April 26, 2007 by the U.S. Department of Transportation Federal Aviation Administration.

“Eclipse Type Certificate” means Type Certificate Number A00002AC reissued to Eclipse on September 30, 2006 by the U.S. Department of Transportation Federal Aviation Administration.

“Employee” means any full- or part-time employee or independent contractor of any Seller as of the date of this Agreement.

“Employee Claims” has the meaning specified in Section 7.2.

“Encumbrance” means any interest, charge, lien, claim (as defined in section 101(5) of the Bankruptcy Code), mortgage, sublease, hypothecation, deed of trust, pledge, security interest, option, right of use, first offer or first refusal, easement, servitude, restrictive covenant, encroachment, encumbrance, or other similar restriction of any kind.

“Environmental Laws” means any Legal Requirement relating to protection of human health, safety, the environment, and natural resources, including without limitation Hazardous Materials, drinking water, groundwater, wetlands, landfills, open dumps, storage tanks, underground storage tanks, solid waste, waste water, storm water runoff, waste emissions or wells. Without limiting the generality of the foregoing, the term will encompass each of the following statutes, and the regulations promulgated thereunder, in each case as in effect as of Closing: (a) the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (codified in scattered sections of 26 U.S.C., 33 U.S.C., 42 U.S.C. and 42 U.S.C. § 9601 et seq., “CERCLA”); (b) the Resource Conservation and Recovery Act of 1976 (42 U.S.C. § 6901 et seq., “RCRA”); (c) the Hazardous Materials Transportation Act (49 U.S.C § 1801 et seq., “HMTA”); (d) the Toxic Substances Control Act (15 U.S.C. § 2061 et seq., “TSCA”); (e) the Clean Water Act (33 U.S.C. § 1251 et seq.); (f) the Clean Air Act and Amendments (42 U.S.C. § 7401 et seq.); (g) the Safe Drinking Water Act (21 U.S.C. § 349); 42 U.S.C. § 201 and § 300 et seq.); (h) the National Environmental Policy Act of 1969 (42 U.S.C. § 4321); (i) the Superfund Amendment and Reauthorization Act of 1986 (codified in scattered sections of 10 U.S.C., 29 U.S.C., 33 U.S.C. and 42 U.S.C., “SARA”); and (j) Title III of the Superfund Amendment and Reauthorization Act (42 U.S.C. § 11,001 et seq.).

“Equipment” means all furniture, fixtures, equipment, Computers, machinery, apparatus, appliances, spare parts, signage, supplies, vehicles, forklifts and all other tangible personal property of every kind and description in which Seller have an interest, including simulators.

“ERISA” means the United States Employee Retirement Income Security Act of 1974, as amended.

“Excluded Assets” means:

- (a) all cash, cash equivalents and marketable securities of the Companies;
- (b) any customer lists or other customer data maintained or collected by Sellers that constitutes or incorporates personally identifiable information, to the extent such information is required to be excluded from the transaction by an Order of the Bankruptcy Court;
- (c) all shares of capital stock or other equity interests of either of the Companies or any securities convertible into, exchangeable or exercisable for shares of capital stock or other equity interest of either of the Companies;
- (d) all minute books, stock ledgers, corporate seals and stock certificates of the Companies;
- (e) any Contracts with Employees or otherwise pertaining to employee matters except to the extent such Contracts are Purchased Assets;
- (f) any Contracts listed or described in Schedule A-1 (the “Excluded Contracts”);
- (g) any Leases, and rights thereunder, listed or described in Schedule A-2 (the “Excluded Leases”);
- (h) any rights, claims or causes of action of Seller against the Buyer under this Agreement or the Ancillary Documents, including all right, title and interest to the Cash Purchase Price and the Note Consideration;
- (i) all receivables, claims or causes of action related solely to any Excluded Asset;
- (j) rights under director and officer liability policies, ERISA and trustee liability policies and employment practices liability policies, and all rights under insurance policies relating to claims for losses related solely to any Excluded Asset or Excluded Liability;
- (k) subject to Section 7.3(h), all Benefit Plans;
- (l) all Documents relating solely to an Excluded Asset or an Excluded Liability;
- (m) all refunds, if any, of Taxes due to any Seller for any taxable period ending on or before the Closing Date; and

- (n) any and all Avoidance Actions.

“Excluded Contracts” has the meaning specified above in this Annex 1.

“Excluded Leases” has the meaning specified above in this Annex 1.

“Excluded Liabilities” shall mean all Liabilities of Seller, other than the Assumed Liabilities. For the avoidance of doubt, the Excluded Liabilities include, but are not limited to, the following (other than the Assumed Liabilities):

(a) any Liability of Seller, arising out of, or relating to, this Agreement or the transactions contemplated by this Agreement, whether incurred prior to, at or subsequent to the Closing Date, including, without limitation, all finder's or broker's fees and expenses, any and all fees and expenses of any Representatives of Seller, and any severance, change in control, termination or similar payments to any employees of Seller;

(b) any Liability relating to (x) events or conditions occurring or existing in connection with, or arising out of, the Business as operated prior to the Closing Date, or (y) the ownership, possession, use, operation or sale or other disposition prior to the Closing Date of any Purchased Assets (or any other assets, properties, rights or interests associated, at any time prior to the Closing Date, with the Business);

(c) any (i) Liability for Taxes; (ii) Liability or obligation of the Chapter 7 Estates, or any member of any consolidated, affiliated, combined or unitary group of which one or more of the Companies is or has been a member, for Taxes and (iii) Taxes of any other Person pursuant to an agreement or otherwise;

(d) any Liability incurred by the Companies or their respective directors, officers, stockholders, agents or employees (acting in such capacities) whether arising prior to or after the Closing;

(e) any Liability of Seller to any Person on account of any Action or Proceeding;

(f) Employee Claims;

(g) any Liability relating to or arising out of an Excluded Asset;

(h) any liability or obligation, whether known or unknown, (i) arising under Environmental Laws attributable to or incurred as a result of any acts, omissions, or conditions first occurring or in existence as of or prior to the Closing Date, including, but not limited to, any liability or obligation with respect to the release, handling, discharge, treatment, storage, generation, disposal, or presence of Hazardous Substances at any location, (ii) claims relating to employee health and safety, including claims for injury, sickness, disease or death of any Person or (iii) compliance with any Legal Requirement relating to any of the foregoing;

(i) any Liability or obligation relating to or arising out of any Benefit Plan;

(j) fees or expenses of Seller incurred with respect to the transactions contemplated herein; and

(k) any severance, termination, change of control or other similar payment obligations of the Seller (whether arising prior to or after the Closing).

“FAA” means the Federal Aviation Administration of the United States of America and any successor Governmental Agency.

“Final Order” means an action taken or Order issued by the applicable Governmental Authority as to which: (i) no request for stay of the action or Order is pending, no such stay is in effect, and, if any deadline for filing any such request is designated by statute or regulation, it is passed, including any extensions thereof; (ii) no petition for rehearing or reconsideration of the action or Order, or protest of any kind, is pending before the Governmental Authority and the time for filing any such petition or protest is passed; (iii) the Governmental Authority does not have the action or Order under reconsideration or review on its own motion and the time for such reconsideration or review has passed; and (iv) the action or Order is not then under judicial review, there is no notice of appeal or other application for judicial review pending, and the deadline for filing such notice of appeal or other application for judicial review has passed, including any extensions thereof.

“FTC” has the meaning specified in Section 6.5(a).

“GAAP” means generally accepted accounting principles employed in the United States, as strictly applied.

“Governmental Agency” or “Governmental Authority” means (a) any international, foreign, federal, state, county, local or municipal government or administrative agency or political subdivision thereof, (b) any governmental agency, authority, board, bureau, commission, department or instrumentality, (c) any court or administrative tribunal, (d) any non-governmental agency, tribunal or entity that is vested by a governmental agency with applicable jurisdiction, or (e) any arbitration tribunal or other non-governmental authority with applicable jurisdiction.

“Hazardous Materials” means each and every element, compound, chemical mixture, contaminant, pollutant, material, waste or other substance which is defined, determined or identified as hazardous or toxic under any Environmental Law or the Release of which is prohibited or regulated under any Environmental Law. Without limiting the generality of the foregoing, the term will include: (a) “*hazardous substances*” as defined in CERCLA, SARA, or Title III of the Superfund Amendments and Reauthorization Act, each as amended to date, and regulations promulgated thereunder; (b) “*hazardous waste*” as defined in RCRA and regulations promulgated thereunder; (c) “*hazardous materials*” as defined in the HMTA, as amended to date, and regulations promulgated thereunder; (d) “*chemical substance or mixture*” as defined in the TSCA as amended to date, and regulations promulgated thereunder; (e) “*petroleum*,” including crude oil or any fraction; and (f) “*natural gas*,” including liquids and synthetic gas usable for fuel.

“Hired Employees” has the meaning specified in Section 7.3(a).

“Insurance Policies” means insurance policies of the Seller as of the date hereof, other than those described under clause (j) of the definition of “Excluded Assets”.

“Intellectual Property” means all of the following:

- (a) all Trademarks;
- (b) all Patents;
- (c) all Copyrights;
- (d) all inventions (whether patentable or not), invention disclosures, discoveries, and improvements;
- (e) all Trade Secrets;
- (f) all industrial designs and any registrations and applications therefor throughout the world;
- (g) all databases and data collections and all rights therein throughout the world;
- (h) all Software;
- (i) licenses, immunities, covenants not to sue and the like relating to the foregoing;
- (j) books and records describing or used in connection with the foregoing, including all contracts, licenses, and other agreements to which any Seller is a party or by which it is bound either as licensee or licensor relating to any intellectual property described above;
- (k) any and all other intellectual property rights and proprietary rights relating to any of the foregoing; and
- (l) all goodwill, franchises, licenses, permits, consents, approvals and claims or causes of action arising out of or related to infringement or misappropriation of any of the foregoing.

“Law” means each provision of any currently implemental federal, state, local or foreign law, statute, ordinance, decree, injunction, judgment, order, code, rule or regulation, promulgated or issued by any Governmental Authority.

“Leased Real Property” has the meaning specified below in the definition of “Purchased Assets.”

“Leases” means any Contract pertaining to leased real property.

“Legal Requirement” means any federal, state, provincial, local, municipal, foreign, international, multinational, or other administrative Order, constitution, law, ordinance, principle of common law, regulation, statute or treaty.

“Liability” means any debt, loss, claim (as defined in section 101(5) of the Bankruptcy Code), damage, demand, fine, judgment, penalty, liability or obligation (whether direct or indirect, known or unknown, absolute or contingent, asserted or unasserted, accrued or unaccrued, matured or unmatured, determined or determinable, liquidated or unliquidated, or due or to become due, and whether in contract, tort, strict liability, successor liability or otherwise), and including all costs and expenses relating thereto (including fees, discounts and expenses of legal counsel, experts, engineers and consultants and costs of investigations).

“Lien” means, with respect to any asset, (a) any mortgage, deed of trust, lien, pledge, hypothecation, encumbrance, charge, equitable interest, conditional sale or other title retention device or arrangement, occupancy agreement, license or lease, or security interest in, on or of such asset, (b) the interest of a vendor or a lessor under any conditional sale agreement, capital lease or title retention agreement (or any financing lease having substantially the same economic effect as any of the foregoing) relating to such asset and (c) in the case of securities, any purchase option, call or similar right of a third party with respect to such securities.

“Material Adverse Effect” means a loss by the Company of either its Eclipse Type Certificate or Eclipse EASA Certificate.

“Non-Transferable Agreement” means any Assumed Contract or Assumed Lease that (i) Buyer does not timely elect to assume pursuant to Section 2.3(a), or (ii) that may not be assigned to Buyer due to Buyer’s failure to cure all defaults of Seller thereunder and/or provide adequate assurance of performance to the counterparty thereto to the extent required by the Bankruptcy Court.

“Note Consideration” means Twenty Million Dollars (\$20,000,000), the aggregate principal amount of Notes issued at Closing.

“Notes” means the 7% senior subordinated secured notes due on September 1, 2011.

“Order” means any decree, writ, assessment, award, decision, injunction, judgment, order, ruling, subpoena, verdict or arbitration award entered, issued, made, or rendered by any Governmental Agency or Governmental Authority.

“Ordinary Course of Business” means the ordinary and usual course of day-to-day operations of the Business (including acts and omissions of Seller in the ordinary and usual course) through the date hereof, consistent with the past practice of the Trustee and the Chapter 7 Estates.

“Party” or “Parties” means, individually or collectively, Buyer and each Seller.

“Patents” means (a) patent rights, inventions, discoveries and invention disclosures (whether or not patentable) and (b) U.S. and foreign patents (including certificates of invention and other patent equivalents), utility models, and applications for any of the foregoing, including

provisional applications, and all continuations, and continuations-in-part, divisionals, reissues, re-examinations, renewals, and extensions thereof or related thereto, and all applications or counterparts in any jurisdiction pertaining to the any of the foregoing.

“Permits” means all franchises, grants, authorizations, licenses, permits, easements, variances, exceptions, consents, certificates, approvals, clearances and orders of any Governmental Authority which are necessary or required for Seller to own, lease and operate their properties and assets or to carry on the Business as it was or is now being conducted or as is presently intended to be conducted.

“Permitted Liens” means (i) easements, covenants, conditions, restrictions and other similar matters of record on real property, leasehold estates or personalty that do not in any material respect detract from the value thereof and do not individually or in the aggregate in any material respect interfere with the use of the property subject thereto, (ii) Encumbrances that constitute Assumed Liabilities and (iii) foreign, local, county, state and federal laws, ordinances or governmental regulations now or hereafter in effect relating to the real property, which do not, individually or in the aggregate, materially detract from the value thereof and do not individually or in the aggregate in any material respect interfere with the use of the property subject thereto, (iv) statutory liens for current property Taxes and assessments not yet due and payable, including, without limitation, liens for *ad valorem* Taxes and statutory liens not yet due and payable arising other than by reason of any default by the Chapter 7 Estates that, in each case, are not material to the Business or the value of the Purchased Assets, and (v) landlords’, carriers’, warehousemen’s, mechanics’, suppliers’, materialmen’s, repairmen’s liens or other like Encumbrances arising in the Ordinary Course of Business that, in each case, are not material to the Business, and are with respect to amounts not yet overdue.

“Person” means any individual, corporation, partnership, joint venture, limited liability company, association, joint-stock company, trust, unincorporated organization, Governmental Authority or other entity.

“Petition Date” has the meaning specified in the recitals.

“Post-Close Filings” has the meaning specified in Section 7.9.

“Prior Notes” means those certain pre petition obligations of the Companies representing senior secured notes due May 31, 2012.

“Proceeding” means any action, arbitration, audit, claim, cause of action, hearing, investigation, litigation, or suit (whether civil, criminal, administrative or investigative) commenced, brought, conducted, or heard by or before, or otherwise involving, any Governmental Authority or arbitrator.

“Products” means any and all products and services, and related documentation, currently or previously researched, designed, developed, manufactured, sold, leased, licensed, delivered, distributed, installed, or otherwise made commercially available by or on behalf of a Seller, including, without limitation, any VLJs.

“Purchase Price” has the meaning specified in Section 3.1.

“Purchased Assets” shall mean all of the properties and assets of the Companies (other than the Excluded Assets) and Chapter 7 Estates of every kind and description, wherever located, real, personal or mixed, tangible or intangible, owned, leased, licensed, used or held for use in or relating to the Business, including, but not limited to, all right, title and interest of Seller in, to or under:

- (a) all Accounts Receivable;
- (b) any customer lists or other customer data maintained or collected by Sellers to the extent, and only to the extent, not prohibited to be transferred by order of the Bankruptcy Court;
- (c) the right to receive and retain payments in respect of any Accounts Receivable and the right to receive and retain the Companies and the Seller's mail and other communications relating to the Business;
- (d) all Equipment;
- (e) all Contracts listed or described on Schedule 2.3, as updated from time to time by Buyer prior to the Contract Designation Date (the “Assumed Contracts”);
- (f) all Contracts pertaining to the lease of any real property (“Leased Real Property”) listed or described on Schedule 2.3, as updated from time to time by Buyer prior to the Contract Designation Date (such Leases, the “Assumed Leases”);
- (g) all Permits and pending applications therefor;
- (h) all Seller Intellectual Property;
- (i) all Products, including all products in development by the Companies;
- (j) to the extent permitted by applicable law, all Documents except those (i) relating solely to any Excluded Asset or Excluded Liability; or (ii) relating to employees of Seller who are not Hired Employees;
- (k) all telephone, telex and telephone facsimile numbers and other directory listings used in connection with the Business;
- (l) all Purchased Deposits;
- (m) inventories of raw materials, work-in-process, finished goods, spare parts, supplies, products under research and development, and other accessories related thereto which are held at, or are in transit from or to, the locations at which the Business is conducted, or located at customers' or suppliers' premises on consignment, in each case, which are used by any Seller in the conduct of the Business, and expressly including the work in progress performed for all parties, including, but not limited to, for those plaintiffs in the WIP Adversary Proceedings;



(n) all of the Seller's right, title and interest in the DayJet aircraft and any and all obligations from DayJet Leasing LLC and or its affiliates and no further or additional consideration shall be due Seller on account of such interest.

(o) all rights to proceeds under insurance policies relating to claims for losses related to any Purchased Asset or Assumed Liability;

(p) the capitalized leases listed or described on Schedule 2.3 (the "Assumed Capitalized Leases");

(q) except for Avoidance Actions, any rights, claims, refunds, causes of action, choses in action, rights of recovery and rights of setoff of Seller against third parties arising out of events occurring prior to the Closing Date;

(r) all goodwill and other intangible assets associated with the Business or the Purchased Assets;

(s) any proprietary or licensed rights in Internet protocol addresses, ideas, concepts, methods, processes, formulae, models, methodologies, algorithms, reports, data, customer lists, mailing lists, business plans, market surveys, market research studies, websites, information contained on drawings and other documents, information relating to research, development or testing, and documentation and media constituting, describing or relating to the Seller Intellectual Property, including memoranda, manuals, technical specifications and other records wherever created throughout the world, but excluding reports of accountants, investment bankers, crisis managers, turnaround consultants and financial advisors or consultants;

(t) all advertising, marketing and promotional materials, studies, reports and all other printed or written materials relating to the Business;

(u) all rights of Seller under non-disclosure or confidentiality, non-disparagement, non-compete, or non-solicitation agreements with former employees of the Companies, agents of Seller or with third parties;

(v) all other or additional assets, properties, privileges, rights (including prepaid expenses) and interests of Seller related to the Business of every kind and description and wherever located, whether known or unknown, fixed or unfixed, tangible or intangible, accrued, absolute, contingent or otherwise, and whether or no specifically referred to in this Agreement;

(w) the Insurance Policies;

(x) all real property owned by the Seller; and

(y) all tax credits and similar Tax attributes relating to the Business or the Purchased Assets.

(z) any and all of Seller's rights, defenses, cause of actions, claims or other interests in the *Opinicus Corporation v. Jeoffrey L. Burtch et al*, Adversary Proceeding No. 09-50406 MFW and the WIP Adversary Proceedings, including, but not limited to, any such claims or defenses that have been, or could have been, asserted at any time, against the parties to those proceedings or the property which is the subject of those proceedings, provided, however that to the extent, the Seller shall remain a party to any of the adversary proceedings described above, Seller shall retain those rights, claims and defenses to the extent of any claims against Seller or as otherwise agreed to between Buyer and Seller.

“Purchased Deposits” means all deposits (including customer deposits and security deposits for rent and electricity (including such deposits made by Seller in connection with the Assumed Leases)) and prepaid charges and expenses of Seller, other than any deposits or prepaid charges and expenses paid in connection with or relating solely to any Excluded Assets or any Excluded Liability.

“Qualified Bid” shall have the meaning set forth in the Bidding Procedures.

“Representative” has the meaning specified in Section 6.1.

“Required Consents” means the filings by Seller and Buyer required by the HSR Act and the expiration or earlier termination of all waiting periods under the HSR Act.

“Sale Motion” has the meaning set forth in Section 6.11(b).

“Sale Order” has the meaning set forth in Section 6.11(b).

“Seller” has the meaning specified in the preamble.

“Seller Copyrights” means all Copyrights owned by each Seller or used or held for use by a Seller in the Business.

“Seller Intellectual Property” means all of the following, owned, used or held for use in connection with the Business:

- (a) all Seller Trademarks;
- (b) all Seller Patents;
- (c) all Seller Copyrights;
- (d) all inventions (whether patentable or not), invention disclosures, discoveries, and improvements;
- (e) all Seller Trade Secrets;
- (f) all industrial designs and any registrations and applications therefor throughout the world;

- (g) all databases and data collections and all rights therein throughout the world;
- (h) all Software;
- (i) licenses, immunities, covenants not to sue and the like relating to the foregoing;
- (j) books and records describing or used in connection with the foregoing, including all contracts, licenses, and other agreements to which any Seller is a party or by which it is bound either as licensee or licensor relating to any intellectual property described above;
- (k) any and all other intellectual property rights and proprietary rights relating to any of the foregoing; and
- (l) all goodwill, franchises, licenses, permits, consents, approvals and claims or causes of action arising out of or related to infringement or misappropriation of any of the foregoing.

“Seller Patents” means all Patents owned by each Seller or used or held for use by a Seller in the Business.

“Software” means all computer software (whether in source code, object code, or other form), including firmware, development tools, files, records, specifications, and data, all media on which any of the foregoing is recorded; and all systems, databases and platforms owned, licensed or used by a Seller, including all compilations, tool sets, compilers, higher level or “proprietary” languages, related documentation, technical manuals and materials, and any licenses to use or other rights relating to the foregoing, including all documentation and tools reasonably necessary for a skilled programmer to maintain, modify, and create derivative works of the applicable Software.

“Straddle Period” has the meaning specified in Section 7.1(a).

“Takeover Proposal” means any inquiry, proposal or offer from any Third Party, whether in writing or otherwise, relating to any Alternative Transaction.

“Tax” or “Taxes” (and with correlative meaning, “Taxable” and “Taxing”) means (i) any federal, state, provincial, local, foreign or other income, alternative, minimum, add-on minimum, accumulated earnings, personal holding company, franchise, capital stock, net worth, capital, profits, intangibles, windfall profits, gross receipts, value added, sales, use, goods and services, excise, customs duties, transfer, conveyance, mortgage, registration, stamp, documentary, recording, premium, severance, environmental, natural resources, real property, personal property, ad valorem, intangibles, rent, occupancy, license, occupational, employment, unemployment insurance, social security, disability, workers’ compensation, payroll, health care, withholding, estimated or other similar taxes, duty, levy or other governmental charge or assessment or deficiencies thereof (whether payable directly or by withholding and whether or not requiring the filing of a Tax Return), whether disputed or not and including any obligations

to indemnify or otherwise assume or succeed to Taxes of any other Person, and including all interest and penalties thereon and additions thereto, (ii) any liability in respect of any items described in clause (i) above arising as a result of being a member of a combined, consolidated, unitary or affiliated group of which the Seller (or any predecessor) is or was a member on or prior to the Closing Date, including pursuant to Treasury Regulations Section 1.1502-6 or any analogous or similar provision of state, local or foreign laws and (iii) any and all Taxes referenced in clauses (i) and (ii) hereof of any Person (other than the Seller) imposed on the Seller (x) as a transferee or successor, (y) by Contract or Law or (z) otherwise, which Taxes relate to an event occurring prior to or on the Closing Date.

“Tax Return” means any return, report or similar statement required to be filed with respect to any Taxes (including any attached schedules), including any information return, claim for refund, amended return or declaration of estimated Tax.

“Third Party” means any Person or group other than Buyer and its Affiliates.

“Third Party Consents” means each material consent, waiver, authorization or approval of any governmental or regulatory authority, domestic or foreign, or of any other Person, and each material declaration to or filing or registration with any such governmental or regulatory authority, that is required in connection with the execution and delivery of this Agreement and the Ancillary Documents by the Seller or the performance by the Seller of their obligations thereunder.

“Trademarks” means all trademarks, service marks, trade and business names (including all assumed or fictitious names under which the Business is conducted), brand names, trade dress, designs, logos, packaging design, slogans, Internet domain names and other commercial symbols in any and all forms, whether registered or unregistered, all registrations and pending applications to register any of the foregoing (including intent to use applications), throughout the world.

“Trade Secrets” means rights in all confidential, non-public, or proprietary information, including, ideas, research and development, know-how, trade secrets, processes, formulae, compositions, processes, technology, methodologies, blueprints, drawings, schematics, flow charts, models, prototypes, testing procedures and results, specifications, designs, plans, concepts, ideas, inventor’s notes, invention disclosures, algorithms, techniques, technical data, customer and supplier lists, pricing and cost information, and business and marketing plans and proposals formulae, and customer lists, all documentation relating to any of the foregoing, and the right in any jurisdiction to limit the use or disclosure thereof.

“Transfer Taxes” has the meaning specified in Section 7.1(b).

“VLJ” has the meaning specified in the recitals.

“WARN Act” means The Worker Adjustment and Retraining Notification Act of 1988, as amended, and the relevant rules and regulations promulgated thereunder.

“WIP Adversary Proceedings” means those adversary proceedings set forth on Schedule 7.8.

Amended Schedule 2.3  
Designated Contracts

Name of other parties to lease or contract	Address 1	Address 2	City	State	Zip	Country	Description of contract or lease and nature of debtor's interest.	Cure Cost
AVIDYNE CORPORATION	ATTN: VP. CORPORATE DEVELOPMENT PO BOX 9948	55 OLD BEDFORD ROAD	LINCOLN	MA	01773		IP License Agreement - dated 02/21/2007	\$0
CITY OF ALBUQUERQUE			ALBUQUERQUE	NM	87119-1048		Albuquerque International Support III Hangar Lease	\$356,318.38
CITY OF ALBUQUERQUE	2200 SUNPORT BLVD SE 3RD FLOOR		ALBUQUERQUE	NM	87106		Albuquerque International Support I & II Office & Hangar Lease	\$150,612.20
CITY OF ALBUQUERQUE	2200 SUNPORT BLVD SE 3RD FLOOR		ALBUQUERQUE	NM	87106		Albuquerque International Support IV Hangar Lease	\$29,464.66
CITY OF ALBUQUERQUE	2200 SUNPORT BLVD SE 3RD FLOOR		ALBUQUERQUE	NM	87106		Apron Area Lease and Agreement	\$8,085.00
COMANT INDUSTRIES INC	577 BURNING TREE RD		FULLERTON	CA	92833		Supply Chain Agreement	\$0
ESSEX INDUSTRIES INC MANUFACTURING DIVISION	6 SUNNEN DR		ST. LOUIS	MS	63143		Supply Chain Agreement	\$0
EXPRESS LOGISTICS dba Pilot Freight Services	MELANIE TRUJILLO	2430 ALAMO AVE SE	ALBUQUERQUE	NM	87106		Sub-Lease Agreement	\$6,485.00
INTELLIGENCE INNOVATIVE SOLUTIONS, INC. (software reseller)	MARK CUMMINGS, GENERAL COUNSEL (Intelligence)	3400 WATERVIEW PARKWAY STE 100	RICHARDSON	TX	75080		Certified Business Solutions Provider End-User License Agreement	\$3,585.83
SAP AMERICA, INC (party in interest)	DONALD K. LUDMAN, ESQ. BROWN & CONNERY, LLP (SAP America, Inc.)	6 NORTH BROAD STREET	WOODBURY	NJ	08096			
JD LOCKAWAY, LLC	C/O TERRESA CURRIER, ESQUIRE	SAUL EWING LLP, 222 DELAWARE AVE., SUITE 1200	WILMINGTON	DE	19801		Real Property Commercial Lease: 2800 Karsten CT, SE, Albuquerque, NM - Support 10	\$0
JNJ PROPERTY MANAGEMENT, LLC	NICK CHAVEZ	2601 KARSTEN COURT SE STE B	ALBUQUERQUE	NM	87102		Commercial Lease	\$13,017.00

Name of other parties to lease or contract	Address 1	Address 2	City	State	Zip	Country	Description of contract or lease and nature of debtor's interest.	Cure Cost
KABA BENZING AMERICA INC	PRESIDENT & CEO	3015 NORTH COMMERCE PARKWAY	MIRAMAR	FL	33025		Software License and Professional Services Agreement	\$0
PARAMETRIC TECHNOLOGY CORPORATION	PO BOX 945722		ATLANTA	GA	30394-5722		Software Maintenance Agreement (arbotext/Math/CAD) and License Agreements	\$0
PETER HAALAND/PHYRIX, LTD. LIABILITY CO.	518 WEST LINDEN STREET		LOUISVILLE	CO	80027-3124		Patent and Asset Purchase Agreement - dated 03/23/2007	\$140,000.00
PS ENGINEERING INC	MARK SCHEUER-PRESIDENT	9800 MARTEL RD	LENOIR CITY	TN	37772		Supply Chain Agreement	\$0
RANCH JOINT VENTURE LLP	WILLIAM L. ROGERS	200 CRESCENT COURT, SUITE 1040	DALLAS	TX	75201		Special Warranty Deed	\$0
RESUME MIRROR	RESUME MIRROR, A DIVISION OF TALENT TECHNOLOGY CORPORATION	STE 300 10991 SHELLBRIDGE PARKWAY	RICHMAND	BC	V6X 3C6	CANADA	License Agreement	\$0
REYNOLDS MASON INDUSTRIES INC	1900 WELD BLVD STE 110		EL CAJON	CA	92020		Supply Chain Agreement	\$66,304.00
S TEC CORPORATION	KEN PAUL, VP SALES AND MARKETING	ONE S TEC WAY	MINERAL WELLS	TX	76067		Supply Chain Agreement	\$183,894.00
SAINT GOBAIN PERFORMANCE PLASTICS CORP	PO BOX 642625		PITTSBURGH	PA	15264-2625		Supply Chain Agreement	\$0
SOUTHWEST RESEARCH INSTITUTE	DIRECTOR OF CONTRACTS	6220 CULEBRA RD	SAN ANTONIO	TX	78238		Purchase Agreement	\$360,697.08
TALEO	RAYMOND INGRASSIA	4140 DUBLIN BLVD STE 400	DUBLIN	CA	94568		Taleo Business Edition Services Agreement	\$31,350.00
THE WELDING INSTITUTE	ATTN: INTELLECTUAL PROPERTY MANAGER	GRANTA PARK; GREAT ABBINGTON	CAMBRIDGE		CB1 6AL	UK	License Agreement - dated 11/07/2001	\$38,808.75
THYSSENKRUPP ELEVATOR	THYSSENKRUPP ELEVATOR CORPORATION	8920 ADAMS ST NE STE B	ALBUQUERQUE	NM	87113		Extended Warranty Service Agreement	\$512.00
TIGHTCO INC	VP-NEW BUSINESS DEVELOPMENT	1375 SEABOARD INDUSTRIAL BLVD	ATLANTA	GA	30319		Supply Chain Agreement	\$5,706.00
UNIGRAPHIC SOLUTIONS	JAMES R. MENEGGO	13736 RIVERPORT DR	MARYLAND HIGHTS	MO	63043		End User Purchase/License Agreement	\$126,591.00

-Doc# 1028243.1~

Name of other parties to lease or contract	Address 1	Address 2	City	State	Zip	Country	Description of contract or lease and nature of debtor's interest.	Cure Cost
UGS CORP	BETTY RICHARDS, BUSINESS MANAGEMENT	8822 S REITGLEINE BLVD STE 120	HIGHLAND RANCH	CO	80129		Professional Services Agreement; Teamcenter	\$0
WILLIAMS SCOTSMAN, INC.	4015 HAWKINS NE		ALBUQUERQUE	NM	87109-4534		Lease Agreement; Flight Test Trailer located at 2503 Clark Carr Loop	\$29,544.19

**SCHEDULE 4.1**  
**ORGANIZATION OF SELLERS**

**Intentionally Omitted.**



**SCHEDULE 4.2**

**SUBSIDIARIES AND INVESTMENTS**

- Eclipse IRB Support, LLC is a wholly-owned subsidiary of Eclipse Aviation Corporation
- Eclipse Aviation Corporation owns 101,819 shares of common stock of Aspen Avionics, Inc., which was obtained by Eclipse Aviation Corporation in connection with the settlement of a claim against Aspen Avionics, Inc. in February 2007.

## Schedule 4.5

## Intellectual Property

## PATENT – Foreign

	Country	Application /Patent No.	Title
154494-0048	Japan	2004527783	Method of Welding, by Using for Example Friction Stir Welding Surfaces with Polymer Sealant and Welded Structure
154494-0089	Japan	2007551432	Fire Suppression Systems
154494-0093	Japan	517468/98 /3868500	Labile Bromine Fire Suppressants
154494-0051	Australia	2003258106	Method of Welding, by Using for Example Friction Stir Welding Surfaces with Polymer Sealant and Welded Structure
154494-0083	Australia	1996073952	Labile Bromine Fire Suppressants
154494-0084	Australia	2006204755	Fire Suppression Systems
154494-0058	Spain	03784945.2 EP1556186	Method of Welding, by Using for Example Friction Stir Welding Surfaces with Polymer Sealant and Welded Structure
154494-0059	Italy	03784945.2 EP1556186	Method of Welding, by Using for Example Friction Stir Welding Surfaces with Polymer Sealant and Welded Structure
154494-0060	United Kingdom	03784945.2 EP1556186	Method of Welding, by Using for Example Friction Stir Welding Surfaces with Polymer Sealant and Welded Structure
154494-0061	France	03784945.2 EP1556186	Method of Welding, by Using for Example Friction Stir Welding Surfaces with Polymer Sealant and Welded Structure
154494-0062	Germany	03784945.2 EP1556186	Method of Welding, by Using for Example Friction Stir Welding Surfaces with Polymer Sealant and Welded Structure
	<b>European Patent Office</b>	<b>EP1861174</b>	<b>Fire Suppressant Systems</b>
154494-0077	Germany	69608707.3 EP0932432	Labile Bromine Fire Suppressants
154494-0078	United Kingdom	96936260.7 EP0932432	Labile Bromine Fire Suppressants
154494-0079	France	96936260.7 EP0932432	Labile Bromine Fire Suppressants

--Doc# 1028243.1--

	Country	Application /Patent No.	Title
154494-0080	Netherlands	96936260.7 EP0932432	Labile Bromine Fire Suppressants
154494-0081	Belgium	96936260.7 EP0932432	Labile Bromine Fire Suppressants
154494-0082	Switzerland	96936260.7 EP0932432	Labile Bromine Fire Suppressants
154494-0050	Russia	2005106228 RU2325981	Method of Welding, by Using for Example Friction Stir Welding Surfaces with Polymer Sealant and Welded Structure
154494-0091	Russia	2007130445	Fire Suppression Systems
154494-0053	China	03819156.3	Method of Friction Stir Welding
154494-0086	China	200680002236.2	Fire Suppression Systems
154494-0098	Hong Kong	08105868.0	Fire Suppression Systems
154494-0047	Israel	166643	Method of Welding, by Using for Example Friction Stir Welding Surfaces with Polymer Sealant and Welded Structure
154494-0088	Israel	183869	Fire Suppression Systems
154494-0049	Korea	10-2005-7002026	Method of Welding, by Using for Example Friction Stir Welding Surfaces with Polymer Sealant and Welded Structure
154494-0090	Korea	1020077015807	Fire Suppression Systems
154494-0085	Canada	2,591,669	Fire Suppression Systems
154494-0052	Canada	2,494,143	Method of Welding, by Using for Example Friction Stir Welding Surfaces with Polymer Sealant and Welded Structure

## PATENT – USA

	Country	Application /Patent No.	Title
154494-0030	USA	08/897,771/ 5,957,405	Twin Engine Aircraft
154494-0031	USA	08/898,138/ 6,089,504	Single Engine Aircraft
154494-0032	USA	09/132,273/ 6,199,795	Twin Engine Aircraft
154494-0033	USA	09/143,047/ 6,170,780	Twin Engine Aircraft

	Country	Application /Patent No.	Title
154494-0034	USA	10/635,829/ 7,225,966	Welded Joints with Polymer Sealant
154494-0044	USA	11/331,524 2006/60273223	Fire Suppression Systems
154494-0065	USA	11/427,783 2007/0119602	Fire Suppression Systems
154494-0066	USA	11/456,548 2007/0119603	Fire Suppression Systems
154494-0074	USA	08/423,209/ 5,626,786	Labile Bromine Fire Suppressants
154494-0095	USA	11/929,743 2008/0115950	Fire Suppression Systems

**TRADEMARK**

Country	Mark	Date of Filing	App. No./ Reg. No.
Australia	ECLIPSE AVIATION AUSTRALIA	9/25/01	890219
Australia	EAA ECLIPSE AVIATION AUSTRALIA & Design	9/25/01	890220
Australia	ECLIPSE AVIATION & Design	4/15/2004	998221
Australia	ECLIPSE AVIATION	4/15/2004	998230
U.S.	ECLIPSE	1/20/00	75/899,693 3,557,904
U.S.	JETCOMPLETE	7/12/05	78/669,039 3,525,722
U.S.	ECLIPSE	10/9/06	77/017,234
India	ECLIPSE	6/19/08	<b>1701261</b>
India	ECLIPSE 500	6/19/08	<b>1701262</b>
India	Design Only (Airplane Design)	6/19/08	<b>1701263</b>
Uruguay	ECLIPSE	5/12/06	370,856
U.S.	PHOSTREX	5/23/05	3,469,367
U.S.	ECLIPSE 500	10/9/06	77/017249
U.S.	ECLIPSE 500	10/11/00	3,373,394
U.S.	Design Only (Circles)	8/15/00	2,992,733
U.S.	ECLIPSE 500 JET	5/11/00	3,373,395
U.S.	ECLIPSE AVIATION	2/3/00	3,169,023

**Schedule 5.2**

**Brokers and Finders**

**None.**

~Doc# 1028243.1~

## Schedule 7.8

## WIP Adversaries

<b>Adversary Proceeding No.</b>	
08-51891-MFW	Mata et al v. Eclipse Aviation et al
08-51904-MFW	Vermeer Manufacturing Company v. Eclipse Aviaion Corporation et al
09-50027-MFW	Alpha-Airways GMBH v. Eclipse Aviation Corporation et al
09-50028-MFW	La Scogliera, S.p.A, an Italian Corporation v. Eclipse Aviation Corp.
09-50030-MFW	Maverik, Inc. v. Eclipse Aviation Corporation et al

**Schedule 8.2(e)**  
**Governmental Consents**

~Doc# 1028243.1~

**Schedule A-1****Excluded Contracts**

1. Amended and Restated Shareholders Agreement, among Eclipse Aviation Corporation and certain Shareholders, dated as of June 8, 1999, as amended and restated on February 15, 2008.
2. Any Purchase Agreements related to any equity or security in Eclipse Aviation Corporation.
3. Note, Conversion Share and Redemption Equity Warrants Subscription Agreement by and between Eclipse Aviation Corporation and certain Investors, dated as of May 26, 2006.
4. Third Amended and Restated Intercreditor Agreement, among Bank of New York and Eclipse Aviation Corporation, dated as of May 31, 2006.
5. Security Agreement by Bank of New York, Eclipse Aviation Corporation, dated as of March 15, 2007.
6. Collateral Agent Agreement, by Bank of New York, Eclipse Aviation Corporation and certain Lenders, dated as of March 13, 2007.
7. Accession Agreement, among Bank of New York and Eclipse Aviation Corporation, dated as of March 31, 2006.
8. Convertible Loan Agreement, among Eclipse Aviation Corporation and Alfred E. Mann Living Trust, dated as of July 29, 2008.
9. Promissory Note, by Eclipse Aviation Corporation, dated as of August [ ], 2008.
10. Convertible Loan Agreement, among Eclipse Aviation Corporation and ETIRC Aviation S.a.r.l., dated as of August [ ], 2008.
11. Warrant to Purchase Series A Common Stock of Eclipse Aviation Corporation, by Eclipse Aviation Corporation and Roel Pieper, dated as of August [ ], 2008.
12. Limited Waiver of Change of Control Redemption Provision by Parker [ ] LP, dated as of August 1, 2008.
13. Limited Waiver of Change of Control Redemption Provision by Daniel J. McElroy, dated as of August 4, 2008.
14. Limited Waiver of Change of Control Redemption Provision by JBJK Investments, LLC, dated as of August 4, 2008.



15. Limited Waiver of Change of Control Redemption Provision by Richard Novel, dated as of August 1, 2008.
16. Limited Waiver of Change of Control Redemption Provision by Lars Thuesen, dated as of August 1, 2008.
17. Limited Waiver of Change of Control Redemption Provision by Texas Eclipse Group, dated as of August 7, 2008.
18. Limited Waiver of Change of Control Redemption Provision by Melinda Mason, dated as of August 4, 2008.
19. Limited Waiver of Change of Control Redemption Provision by Monte Ahuja Family Trust and Usha Ahuja Family Trust, dated as of August 6, 2008.
20. Limited Waiver of Change of Control Redemption Provision by Robert A. Mittedorf, Peggy A. Mittedorf TTE FBO the Mittedorf Family Trust, dated as of August 5, 2008.
21. Limited Waiver of Change of Control Redemption Provision by Brian L. Mittedorf, dated as of August 5, 2008.
22. Limited Waiver of Change of Control Redemption Provision by Irell & Manella LLP, dated as of August 5, 2008.
23. Limited Waiver of Change of Control Redemption Provision by William Luterman, dated as of August 5, 2008.
24. Limited Waiver of Change of Control Redemption Provision by Jeffrey M. Rubenstein, dated as of July 30, 2008.
25. Limited Waiver of Change of Control Redemption Provision by Rapid Prototypes, Inc. dated as of August 5, 2008.
26. Limited Waiver of Change of Control Redemption Provision by Klaborde Revocable Trust, dated as of July 31, 2008.
27. Limited Waiver of Change of Control Redemption Provision by Lloyd Marcum DDS Inc. Profit Sharing Plan, dated as of July 30, 2008.
28. Limited Waiver of Change of Control Redemption Provision by Brook J. Lenfest, dated as of August 1, 2008.
29. Limited Waiver of Change of Control Redemption Provision by Global Light Industrial, Inc., dated as of July 31, 2008.

30. Limited Waiver of Change of Control Redemption Provision by Sand Hill Sakura Fund, LP, dated as of August 1, 2008.
31. Limited Waiver of Change of Control Redemption Provision by Eric M. Kobern, dated as of July 31, 2008.
32. Limited Waiver of Change of Control Redemption Provision by James Teng, dated as of [\_\_\_\_\_].
33. Amended and Restated Security Agreement made by Eclipse IRB Sunport LLC in favor of the Bank of New York, dated as of February 15, 2008.
34. Second Amendment to Mortgage with Assignment of Rents and Fixture Filing, by and between Eclipse Aviation Corporation and the Bank of New York, dated as of February 15, 2008.
35. Fourth Accession Agreement, by the Bank of New York and Eclipse Aviation Corporation, dated as of February 15, 2008.
36. Amended and Restated Shareholders Agreement, by Eclipse Aviation Corporation and certain Investors named therein, dated as of February 15, 2008.
37. J-1 and J-2 Preferred Stock Subscription Agreement, by and between ETIRC Aviation S.a.r.l. and Eclipse Aviation Corporation, dated as of January 17, 2008.
38. Joinder Agreement to Amended and Restated Shareholders Agreement by ETIRC Aviation S.a.r.l., dated as of June 8, 1999.
39. Exchange Agent Agreement, by Eclipse Aviation Corporation and accepted by The Bank of New York Trust Company, N.A., dated as of January 17, 2008.
40. Exchange Offer Agreement by and among Eclipse Aviation Corporation, Kings Road Investments Ltd., Citadel Horizon S.a.r.l. and HBK Master Fund L.P., dated as of February 12, 2008.
41. July 2008 Restructuring Agreement by and among Eclipse Aviation Corporation, ETIRC Aviation S.a.r.l., Alfred E. Mann as defined therein, and the Consenting Holders as defined therein, dated as of July 28, 2008.
42. Air Taxi Financing Agreement between Eclipse Aviation Corporation and UT Finance Corporation, dated as of April 5, 2005.
43. Air Taxi Financing Agreement by and among Eclipse Aviation Corporation, UT Finance Corporation and Pratt & Whitney Canada Corp., dated as of June 30, 2007.

44. Option Agreement to Subscribe Shares of Capital of ETIRC Aviation S.a.r.l. between Eclipse Aviation Corporation and ETIRC Aviation S.a.r.l., dated as of May 9, 2008.
45. Option and Factory Extension Agreement between ETIRC Aviation S.a.r.l. and Eclipse Aviation Corporation, dated as of June 30, 2008, to extend the Memorandum of Understanding between ETIRC Aviation S.a.r.l. and Eclipse Aviation Corporation, dated as of December 15, 2007.
46. Distributor Agreement between Eclipse Aviation Corporation and ETIRC Aviation Cyprus Ltd., dated as of September 17, 2007.
47. Confidentiality and Non-Disclosure Agreement by and among Eclipse Aviation Corporation, ETIRC Aviation Cyprus Ltd., and ETIRC Aviation S.a.r.l., dated as of September 17, 2007.
48. Eclipse 500 Fleet Aircraft Purchase Agreement between ETIRC Aviation Europe and Eclipse Aviation Corporation, dated as of January 12, 2006.
49. Pilot Training Services Agreement between Eclipse Aviation Corporation and United Air Lines, Inc., dated as of November 11, 2004, as terminated by Eclipse Aviation Corporation and United Air Lines, Inc. by the Amendment to Agreement – Pilot Training Services, dated as of February 15, 2007.
50. Aircraft Lease Agreement between Eclipse Aviation Corporation and Vern Raburn, dated as of August 27, 2008.
51. Severance Agreement and General Release between Vern Raburn, Eclipse Aviation Corporation and ETIRC Aviation S.a.r.l., dated as of July 25, 2008, as amended by Vern Raburn and Eclipse Aviation Corporation by the Amendment to Severance Agreement and General Release, dated as of August 27, 2008.
52. Letter Agreement between Vern Raburn, King Road Investments, Ltd., Citadel Horizons S.a.r.l., and HBK Master Fund, L.P., dated as of July 28, 2008.
53. Severance Agreement and General Release between Chris Herzog and Eclipse Aviation, Inc., dated as of October 31, 2004.
54. Severance Agreement and General Release between Eugene Garnes and Eclipse Aviation, Inc., dated as of December 30, 2006.
55. Severance Agreement and General Release between Don Taylor and Eclipse Aviation, Inc., dated as of November 5, 2007.
56. Severance Agreement and General Release between William Bonder and Eclipse Aviation, Inc., dated as of June 7, 2008.

57. Employment Agreement between Eclipse Aircraft Corporation and Oliver Masefield, dated as of July 1, 2001.
58. Employment Agreement between Eclipse Aviation Corporation and J. Mark Borseth, dated as of June 11, 2008.
59. Bonus Letter from Eclipse Aviation Corporation to J. Mark Borseth, dated as of August 25, 2008.
60. Bonus Letter from Eclipse Aviation Corporation to Michael McConnell, dated as of August 25, 2008.
61. Bonus Letter from Eclipse Aviation Corporation to Peg Billson, dated as of August 25, 2008.
62. All Contracts relating to the Jet Complete Program.
63. All Contracts with Irell & Manella LLP.
64. All Contracts with International Business Machines.
65. All Contracts with BAE Systems.
66. All Contracts with Mach 2 Management, Inc.
67. All Contracts with Unifist Corporation.
68. All Contracts with Albuquerque Isotopes.
69. All Contracts with Productivity Team LLC.
70. All Contracts with Wexler & Walker Public Policy Association.
71. All Contracts with Castle & Cooke Aviation Services, I.
72. All Contracts with Gallagher & Kennedy.
73. All Contracts with The Santa Fe Opera.
74. All Contracts with Pool Aviation.
75. All Contracts with Jack Harrington.
76. Contract with Axon Solutions Inc.
77. License and Cooperation Agreement with Jeppesen Sanderson Inc.

78. Subject to Section 2.3(b) of the Agreement, any Contract not identified as a Designated Contract or a Pending Designated Contract shall be deemed an Excluded Contract.

**Schedule A-2****Excluded Leases**

1. Sublease between Castle & Cooke Aviation Services Inc. and Eclipse Aviation Corporation, dated as of December 1, 2006 pertaining to 7415, 7501, 7530 and 7405 Hayvenhurst Place, Van Nuys, California.
2. Memorandum of Agreement between Lian Tien Ventures, LLC and Eclipse Aviation Corporation, dated as of June 14, 2007.
3. Lease between SKAR, LLC and Eclipse Aviation Corporation, dated as of February 28, 2008 pertaining to 2811 Karsten Court SE, Albuquerque, New Mexico.
4. Sub-Lease between Bode Aero Services, Inc. and Eclipse Aviation Corporation, dated as of September 1, 2007 pertaining to 7401 Paseo Del Volcan NW, Albuquerque, New Mexico.
5. Subject to Section 2.3(b) of the Agreement, any Lease not identified as a Designated Contract or a Pending Designated Contract shall be deemed to be an Excluded Lease.

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 7
	)	
ECLIPSE AVIATION CORPORATION, <i>et al.</i> ,	)	Case No. 08-13031 (MFW)
	)	
	)	Jointly Administered
Debtors.	)	

**ORDER (A) APPROVING BID PROCEDURES RELATING TO SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS; (B) BREAK UP FEE; (C) SCHEDULING A HEARING TO CONSIDER THE SALE AND APPROVING THE FORM AND MATTER OF NOTICES; (D) ESTABLISHING PROCEDURES RELATING TO ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES, INCLUDING NOTICE OF PROPOSED CURE AMOUNTS; AND (E) GRANTING RELATED RELIEF**

Upon the Motion<sup>1</sup>, dated July \_\_, 2009 (the "Sale Motion"), of Jeffrey L. Burtch, as the Chapter 7 trustee (the "Trustee") of the above-captioned debtors (collectively, the "Debtors") for the entry of an order (A) approving bid procedures which are attached as Exhibit 1 hereto (the "Bid Procedures") with respect to the proposed sale of substantially all of the Debtors' assets, as more fully set forth in that certain asset purchase agreement (the "Agreement") dated as of July \_\_, 2009 by and between the Trustee and Eclipse Aerospace, Inc. ("Buyer"); (B) scheduling a hearing (the "Sale Hearing") and approving the form and manner of notice of the Auction and the Bid Procedures; (C) establishing procedures relating to the assumption and assignment of certain Designated Contracts, including notice of proposed cure amounts; and (D) granting related relief; and the Court having determined that, to the extent set forth herein, the relief requested in the Motion is in the best interests of the Debtors, the Chapter 7 estates, creditors and

---

<sup>1</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Agreement (as defined below), or in the Bid Procedures (defined below).

other parties in interest; due and appropriate notice of the Motion and the relief requested therein was provided by the Trustee pursuant to Bankruptcy Rules 2002, 4001, 6004, 6006 and 9014 on the following parties: (i) all entities known to assert any interest in or lien upon the Purchased Assets; (ii) all parties to Designated Contracts; (iii) all parties that are entitled to notice under Bankruptcy Rule 2002; (iv) the attorneys general of all states in which the Purchased Assets are located; (v) the Office of the United States Trustee; (vi) the Securities and Exchange Commission; (vii) the Internal Revenue Service and any governmental taxing authority that has filed a claim against the Chapter 7 Estates; (viii) all entities that expressed to the Seller an interest in purchasing the Purchased Assets; (ix) any party appearing in the Bankruptcy Cases and claiming a secured interest in the Purchased Assets; or any party known to the Seller and claiming a secured interest in the Purchased Assets; and (x) any and all other parties directed by the Court (collectively, the "Notice Parties"); and after consideration of the Sale Motion to the extent of the relief granted herein; and the remainder of the record herein; and after due deliberation thereon; and good and sufficient cause appearing therefore, it is hereby FOUND, CONCLUDED, AND DECLARED THAT:<sup>2</sup>

A. The Court has jurisdiction over this matter and over the property of the Debtors and their bankruptcy estates pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

B. Notice of the Hearing, the Motion and proposed entry of this Order has been provided to the Notice Parties. Under the urgent circumstances, requisite notice of the Motion and the relief requested thereby and this Order has been provided in accordance with Bankruptcy

---

<sup>2</sup> Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. See Fed. R. Bankr. P. 7052.



Rules 2002, 4001, 6004, 6006 and 9014, which notice is sufficient for all purposes under the Bankruptcy Code, including, without limitation, Bankruptcy Code § 102(1), and no further notice of, or hearing on, the Motion or this Order is necessary or required.

C. The proposed notices (in substantially the form attached hereto as Exhibit 2) of (i) the Proposed Sale of the Assets, (ii) the assumption and assignment of the Designated Contracts and any Cure Costs payable in respect thereof, as described or referred to in the Agreement, (iii) the Agreement, and the terms contained therein, and (iv) the Bid Procedures, are appropriate and reasonably calculated to provide all interested parties with timely and proper notice of the Proposed Sale of the Assets, the Auction, the assumption and assignment of Designated Contracts and the cure associated therewith, the Agreement and the Bid Procedures to be employed in connection therewith.

D. The approval of the Bidding Procedures is in the best interest of the estates, their creditors and other parties in interest. The Trustee has articulated good and sufficient reasons for this Court to grant the relief requested in the Motion regarding the Bid Procedures and has demonstrated sound business justifications to support such relief. The Bidding Procedures, including the Break Up Fee, are fair, reasonable and reasonably calculated to enhance the prospect of competitive bidding and maximize recovery for the estates and their creditors.

E. The entry of this Order and the relief contained herein are in the best interests of the Debtors, their estates, creditors and other parties-in-interest; and it is therefore

**ORDERED, ADJUDGED AND DECREED THAT:**

1. The relief requested in the Motion is granted, to the extent set forth herein.

2. The Bid Procedures attached hereto as Exhibit 1 are hereby approved and fully incorporated into this Order, and shall apply with respect to the Proposed Sale of the Assets. The Trustee is authorized to take any and all actions necessary to implement the Bid Procedures.

3. All objections to the relief requested in the Motion that have not been withdrawn, waived, or settled as announced to the Court at the hearing on the Motion or by stipulation filed with the Court, are overruled.

4. A Qualified Bidder that desires to make a Bid shall deliver written copies of its bid to the parties set forth below not later than 12:00 noon (prevailing Eastern time) on August \_\_, 2009 (the "Bid Deadline") and shall comply with the requirements set forth in the Bid Procedures for making such bid: (a) Jeffrey L. Burtch, Esq., Cooch & Taylor, P.A., 1000 West Street, Wilmington, Delaware 19801 with a copy to Cooch & Taylor, P.A., 1000 West Street, Wilmington, Delaware 19801 Attn.: Adam Singer, Esq.; (b) Buyer: Eclipse Aerospace, Inc., 125 Fairchild St., Suite 100, Charleston, SC 29492, Attn.: Mason Holland, President, with a copy to: Nelson Mullins Riley & Scarborough LLP, Atlantic Station, 201 17th Street, Suite 1700, Atlanta, Georgia 30363, Attn.: William J. Ching, Esq. and Michael E. Hollingsworth II, Esq; and (c) the Ad Hoc Committee: Covington & Burling LLP, The New York Times Building, 620 Eighth Avenue, New York, New York 10018, Attn: Benjamin Hoch and Andrew Ment.

5. The Trustee shall have the right to reject any and all bids that he believes in his reasonable discretion, in consultation with the Ad Hoc Committee of Senior Secured Noteholders, do not comply with the Bid Procedures. Buyer is deemed to be a Qualified Bidder, and Buyer's Bid as embodied in the Agreement, is deemed to be a Qualified Bid.

6. As further described in the Bid Procedures, if a Qualified Bid other than Buyer's Bid is timely received, the Auction will be held on August \_\_, 2009 at \_\_\_\_\_m. (prevailing

Eastern time), and the Trustee shall, not later than \_\_\_\_\_ m. (prevailing Eastern time) on August \_\_, 2009, notify Buyer, all Qualified Bidders who have submitted a Qualified Bid and expressed their intent to participate in the Auction, counsel for the Ad Hoc Committee of Senior Secured Noteholders and the United States Trustee that the Auction will be held on August \_\_, 2009 at \_\_\_\_\_ at the offices of Cooch & Taylor, 1000 West Street, Wilmington, Delaware 19801.

7. Not later than three (3) days after entry of this Order, the Trustee will cause the Auction and Sale Notice, substantially similar to the form attached hereto as Exhibit 2 to be sent by first-class mail postage prepaid to the Notice Parties.

8. In addition, to facilitate the sale, assumption and assignment of any Designated Contracts, the Trustee will serve a notice (the "Cure Amount Notice"), similar to the form attached hereto as Exhibit 3 hereto not later than three (3) days after the entry of this Order upon each counterparty to a Designated Contract under the Agreement. Buyer shall have the right until the date provided in the Agreement to amend the Designated Contracts schedule to include additional executory contracts and unexpired leases or to exclude executory contracts or unexpired leases previously included as provided in the Agreement. To the extent that Buyer is not the Successful Bidder and an alternative Successful Bidder is seeking to have certain Designated Contracts assumed and assigned as part of an alternative transaction, the Trustee will provide financial information for the alternative bidder with respect to all non-debtor parties to such Designated Contracts immediately following the Auction via facsimile or Federal Express or email.

9. The Trustee will attach to the Cure Amount Notice his calculation of the undisputed cure amounts that the Trustee believes must be paid to cure all prepetition defaults

under all Designated Contracts (the "Prepetition Cure Amounts"). If no such amount is listed, then the Trustee believes that there is no Prepetition Cure Amount. Unless the non-debtor party to a Designated Contract files an objection (the "Cure Amount Objection") to its scheduled Prepetition Cure Cost or any other objection to the proposed assumption and assignment of its Designated Contract no later than 4:00 p.m. (prevailing Eastern time) on August \_\_, 2009 (or in the event Buyer is not the Successful Bidder, at or prior to the Sale Hearing), and serves the objection, so that it is actually received before such deadline, upon (a) counsel to the Trustee: Jeoffrey L. Burtch, Esq., Cooch & Taylor, P.A., 1000 West Street, Wilmington, Delaware 19801, (b) Buyer: Eclipse Aerospace, Inc., 125 Fairchild St., Suite 100, Charleston, SC 29492, Attn.: Mason Holland, President, with a copy to: Nelson Mullins Riley & Scarborough LLP, Atlantic Station, 201 17th Street, Suite 1700, Atlanta, Georgia 30363, Attn.: William J. Ching, Esq. and Michael E. Hollingsworth II, Esq.; and (c) counsel for the Ad Hoc Committee of Senior Secured Noteholders: Covington & Burling LLP, The New York Times Building, 620 Eighth Avenue, New York, New York 10018, Attn: Benjamin Hoch and Andrew Ment; such non debtor party shall (i) be forever barred from objecting to the Prepetition Cure Amount and from asserting any additional cure or other amounts with respect to such Designated Contract or any other objection to the proposed assumption and assignment of its Designated Contract and the Trustee shall be entitled to rely solely upon the Prepetition Cure Amount; and (ii) be forever barred and estopped from asserting or claiming against the Debtors, Buyer, or such other Successful Bidder or any other assignee of the relevant Designated Contract that any additional amounts are due or defaults exist under such Designated Contract.

10. In the event that a Cure Amount Objection is timely filed, the Cure Amount Objection must set forth (i) the basis for the objection, (ii) with specificity, the amount the party

asserts as the Prepetition Cure Amount, and (iii) appropriate documentation in support of the Prepetition Cure Amount.

11. Hearings on Cure Amount Objections may be held (a) at the Sale Hearing, or (b) on such other date as this Court may designate upon request by the Trustee with the prior written consent of Buyer.

12. The Trustee's decision to assume and assign Designated Contracts is subject to Court approval and consummation of the Proposed Sale of the Assets. Absent consummation of the Proposed Sale of the Assets, each of the Designated Contracts shall neither be deemed assumed nor assigned and shall in all respects be subject to further administration under the Bankruptcy Code.

13. Except to the extent otherwise provided in the Agreement or any agreement with a Successful Bidder, subject to any required Prepetition Cure Amount payments, the assignee of any assumed Designated Contract will not be subject to any liability to the assigned Designated Contract counterparty that accrued or arose before the closing date of the Proposed Sale of the Assets and the Debtors and the Chapter 7 estates shall be relieved of all liability accruing or arising thereafter pursuant to Bankruptcy Code § 365(k).

14. Recognizing the value and benefits that the Buyer has provided to the estates by entering into the Asset Purchase Agreement, as well as Buyer's expenditure of time, energy and resources, Buyer is hereby granted a fee equal to \$1,600,000 (the "Break Up Fee"), such fee payable in the event the Court fails to approve a sale to Buyer and instead approves a sale of some or all of the Purchased Assets to an entity that has submitted a Qualified Bid and such sale closes. The Break Up Fee shall be payable at the closing of the sale in connection with such Bid from the first proceeds of such sale without further order of the Court. The Break Up Fee, when

earned, shall constitute an administrative claim against the estate under Bankruptcy Code Sections 503(b)(1) and 507(a)(2).

15. If Buyer elects to participate in bidding at the Auction, the amount of the Break Up Fee shall be considered if added to Buyer's bid in determining whether Buyer's bid is a higher and better offer for the Purchased Assets.

16. Objections, if any, to the relief requested in the Sale Motion must: (1) be in writing; (2) comply with the Bankruptcy Rules and the Local Bankruptcy Rules; (3) be filed with the clerk of the Bankruptcy Court for the District of Delaware, 3rd Floor, 824 Market Street, Wilmington, Delaware 19801, on or before 12:00 p.m. (prevailing Eastern Time) on January 15, 2009 and (4) be served so as to be received no later than 4:00 p.m. (prevailing Eastern Time) on such date, upon (a) counsel to the Trustee: Jeffrey L. Burtch, Esq., Cooch & Taylor, P.A., 1000 West Street, Wilmington, Delaware 19801, (b) Buyer: Eclipse Aerospace, Inc., 125 Fairchild St., Suite 100, Charleston, SC 29492, Attn.: Mason Holland, President, with a copy to: Nelson Mullins Riley & Scarborough LLP, Atlantic Station, 201 17th Street, Suite 1700, Atlanta, Georgia 30363, Attn.: William J. Ching, Esq. and Michael E. Hollingsworth II, Esq.; and (c) counsel for the Ad Hoc Committee of Senior Secured Noteholders: Covington & Burling LLP, The New York Times Building, 620 Eighth Avenue, New York, New York 10018, Attn: Benjamin Hoch and Andrew Ment; provided however, to the extent that Buyer is not the Successful Bidder and an alternative Successful Bidder is seeking to have certain unexpired leases, license agreements and executory contracts assumed and assigned as part of an alternative transaction, the non-debtor parties to such unexpired leases, license agreements and executory contracts shall have until the Sale Hearing to raise objections under Bankruptcy Code § 365(b)(1)(C).

17. The Sale Hearing shall be held before this Court on August \_\_, 2009 at \_\_\_\_\_m. (prevailing Eastern Time). The Sale Hearing may be adjourned, from time to time, without further notice to creditors or other parties-in-interest other than by announcement of said adjournment before this Court or on this Court's calendar on the date scheduled for said hearing.

18. The notices to be issued in connection with the Proposed Sale of the Assets, substantially in the form of the notices annexed hereto as [Exhibits 2 and 3] are approved in all respects.

19. This Order shall constitute findings of fact and conclusions of law and shall take effect immediately upon execution hereof.

20. As provided by Bankruptcy Rules 6004(g) and 6006(d), this Order shall not be stayed for ten (10) days after the entry thereof and shall be effective and enforceable immediately upon its entry on this Court's docket.

21. All time periods set forth in this Order shall be calculated in accordance with Bankruptcy Rule 9006(a).

22. This Court shall retain jurisdiction over any matters related to or arising from the implementation of this Order and the Bid Procedures.

Dated August \_\_\_\_\_, 2009  
Wilmington, Delaware

\_\_\_\_\_  
Mary F. Walrath  
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 7
	)	
Eclipse Aviation Corporation, <i>et al.</i> , <sup>1</sup>	)	Case No. 08-13031 (MFW)
	)	
Debtors.	)	Jointly Administered
	)	

**BID PROCEDURES**

On November 25, 2008 (the "Petition Date"), Eclipse Aviation Corporation and its affiliated debtors (collectively, the "Debtors") filed chapter 11 cases pending in the Bankruptcy Court and jointly administered under Case No. 08-13031 (MFW). On March 5, 2009, the Debtors' cases converted to cases under Chapter 7 of the Bankruptcy Code. Jeffrey L. Burtch was appointed as interim chapter 7 trustee on March 5, 2009, and serves as the chapter 7 trustee (the "Trustee") in these cases pursuant to section 702(d) of the Bankruptcy Code. On July [ ], 2009, the Trustee entered into an asset purchase agreement (the "Agreement")<sup>2</sup> with Eclipse Aerospace Inc. ("Buyer") in which Buyer proposes to purchase substantially all of the Debtors' assets. By motion dated July [ ], 2009 (the "Motion"), the Trustee sought, among other things, approval for the sale of substantially all the assets (the "Assets") of the Debtors and of the process and procedures set forth below (the "Bid Procedures") through which the Trustee, with the consultation of the Ad Hoc Committee of Senior Secured Noteholders, will determine the highest and best offer for the Assets. On July [ ], 2009, the Bankruptcy Court entered its order (the "Bidding Procedures Order"), which, among other things, approved the Bid Procedures.

On August [ ], 2009, at \_\_\_\_ . m. (prevailing Eastern Time) as further described below, in the Motion and in the Bidding Procedures Order, the Bankruptcy Court shall conduct the Sale Hearing at which the Trustee shall seek entry of the Sale Order authorizing and approving the sale of the Assets (the "Proposed Sale") to Buyer (defined below) or to one or more other Qualified Bidders (defined below) that the Trustee, in consultation with the Ad Hoc Committee of Senior Secured Noteholders, determines to have made the highest and best offer.

*Agreement*

Pursuant to the terms and conditions of the Agreement, Buyer would provide consideration for the Assets equal to the following (the "Purchase Price"): (i) the Cash Consideration, which amount shall be payable as set forth in Section 3.2 of the Agreement, plus (ii) the Note Consideration. The transaction contemplated by the Agreement is subject to

---

<sup>1</sup> The Debtors in these proceedings are: Eclipse Aviation Corporation (Tax I.D. No. XX-XXX9000) and Eclipse IRB Sunport, LLC, a wholly-owned subsidiary of Eclipse Aviation Corporation (Tax I.D. No. XX-XX4013), each with a mailing address of 2503 Clark Carr Loop SE, Albuquerque, NM 87106.

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Agreement.



competitive bidding as set forth herein, and approval by the Bankruptcy Court pursuant to sections 363 and 365 of the Bankruptcy Code.

#### *Assets for Sale*

The Trustee is offering for sale in one or more transactions all or substantially all of the assets of Eclipse Aviation Corporation and its affiliated debtor. The assets proposed to be sold to the Buyer consist of the Purchased Assets as set forth in the Agreement. The assets for sale to the Buyer do not include the Excluded Assets, which shall mean (i) the excluded assets specified in the Agreement.

#### *Participation Requirements*

In order to participate in the bidding process and to or otherwise be considered for any purpose hereunder, a person interested in all or portions of the Assets (a "Potential Bidder") must first deliver (unless previously delivered) to the Trustee and his counsel no later than 12:00 noon (prevailing Eastern Time) on August \_\_, 2009:

- (a) Confidentiality Agreement. An executed confidentiality agreement in form and substance acceptable to the Trustee and his counsel; such form attached as Exhibit I hereto (if not already provided); and
- (b) Identification of Potential Bidder. Identification of the Potential Bidder and any Principals (defined below), and the representatives thereof who are authorized to appear and act on their behalf for all purposes regarding the contemplated transaction.

#### *Designation as Qualified Bidder*

A "Qualified Bidder" is a Potential Bidder (or combination of Potential Bidders whose bids for the Debtors' assets do not overlap and who agree to have their bids combined for purposes of the determination of whether such Potential Bidders together constitute a Qualified Bidder, and who shall also be referred to herein as a single Qualified Bidder) that delivers the documents described in subparagraphs (a)-(b) above, and that the Trustee in his discretion and with assistance from his advisors, and in consultation with the Ad Hoc Committee of Senior Secured Noteholders, determines is reasonably likely to submit a *bona fide* offer that would result in greater total consideration being received for the benefit of the Debtors' creditors than under the Agreement and to be able to consummate a sale if selected as a Successful Bidder (defined below).

Upon the receipt from a Potential Bidder of the information required under subparagraphs (a)-(b) above, the Trustee, in consultation with the Ad Hoc Committee of Senior Secured Noteholders, as soon as is practicable, shall determine and notify the Potential Bidder with respect to whether such Potential Bidder is a Qualified Bidder.

Buyer is a Qualified Bidder.

#### *Access to Due Diligence Materials*

Only Potential Bidders that comply with the Participation Requirements are eligible to receive due diligence access or additional non-public information. If the Trustee, in consultation with the Ad Hoc Committee of Senior Secured Noteholders, determines that a Potential Bidder who has satisfied the Participation Requirements does not constitute a Qualified Bidder, then such Potential Bidder's right to receive due diligence access or additional non-public information shall terminate. The Trustee will designate a representative to coordinate all reasonable requests for additional information and due diligence access from such Qualified Bidders. The Trustee shall not be obligated to furnish any due diligence information after the Bid Deadline (as hereinafter defined). The Trustee is not responsible for, and will bear no liability with respect to, any information obtained by Qualified Bidders in connection with the sale of the Assets.

#### *Due Diligence From Bidders*

Each Potential Bidder and Qualified Bidder (collectively, a "Bidder") shall comply with all reasonable requests for additional information and due diligence access by the Trustee, the Ad Hoc Committee of Senior Secured Noteholders or their advisors regarding such Bidder and its contemplated transaction. Failure by a Potential Bidder to comply with requests for additional information and due diligence access will be a basis for the Trustee to determine that the Potential Bidder is not a Qualified Bidder. Failure by a Qualified Bidder to comply with requests for additional information and due diligence access will be a basis for the Trustee to determine that a bid made by a Qualified Bidder is not a Qualified Bid.

#### **Bidding Process**

The Trustee and his advisors, in consultation with the Ad Hoc Committee of Senior Secured Noteholders, shall: (i) determine whether a Potential Bidder is a Qualified Bidder; (ii) coordinate the efforts of Bidders in conducting their due diligence investigations, as permitted by the provisions, above; (iii) receive offers from Qualified Bidders; and (iv) negotiate any offers made to purchase the Assets (collectively, the "Bidding Process"). The Trustee shall have the right to adopt such other rules for the Bidding Process (including rules that may depart from those set forth herein) that will better promote the goals of the Bidding Process and that are not inconsistent with any of the other provisions hereof or of any Bankruptcy Court order.

#### *Bid Deadline*

**The deadline for submitting bids by a Qualified Bidder shall be August \_\_, 2009, at 12:00 noon (Eastern Time) (the "Bid Deadline").**

Prior to the Bid Deadline, a Qualified Bidder that desires to make an offer, solicitation or proposal (a "Bid") shall deliver written copies of its bid to: (a) counsel to the Trustee, Cooch & Taylor P.A., The Brandywine Building, 1000 West Street, 10th Floor, P.O. Box 1680, Wilmington, Delaware 19899-1680, Attn: Adam Singer; (b) Eclipse Aerospace, Inc., 125 Fairchild St., Suite 100, Charleston, SC 29492, Attn.: Mason Holland, President, with a copy to: Nelson Mullins Riley & Scarborough LLP, Atlantic Station, 201 17th Street, Suite 1700, Atlanta, Georgia 30363, Attn.: William J. Ching, Esq. and Michael E. Hollingsworth II, Esq; and (c) counsel to the Ad Hoc Committee of Senior Secured Noteholders, Covington & Burling LLP,

The New York Times Building, 620 Eighth Avenue, New York, New York 10018, Attn: Benjamin Hoch and Andrew Ment (collectively, the "Notice Parties"), so that the bid is actually received by the Bid Deadline.

A Bid received after the Bid Deadline shall not constitute a Qualified Bid unless otherwise agreed by the Trustee in consultation with the Ad Hoc Committee of Senior Secured Noteholders.

#### *Bid Requirements*

To be eligible to participate in the Auction, each Bid and each Qualified Bidder submitting such a Bid must be determined by the Trustee, in consultation with the Ad Hoc Committee of Senior Secured Noteholders, to satisfy each of the following conditions:

- (a) Good Faith Deposit: Each Bid must be accompanied by a deposit (the "Good Faith Deposit") in the form of cash or a certified check payable to the order of the Trustee in an amount of not less than \$5.0 million.
- (b) Minimum Overbid: The aggregate consideration must exceed the sum of the Purchase Price by at least \$2,000,000.
- (c) Irrevocable: A bid must be irrevocable until two (2) business days after the Assets have been sold pursuant to the Closing of the sale or sales approved by the Bankruptcy Court (the "Termination Date").
- (d) The Same or Better Terms: The Bid may be for the Purchased Assets under the Agreement, as applicable for the Purchased Assets subject to the Bid (provided, however, that any variations from one or more material terms must, in the aggregate constitute an improvement, as determined by the Trustee in consultation with the Ad Hoc Committee of Senior Secured Noteholders, upon such term or terms as set forth in the Agreement). The Bid must be on terms that, in the Trustee's business judgment, in consultation with the Ad Hoc Committee of Senior Secured Noteholders, are substantially the same or better than the terms of the Agreement. A Bid must include executed transaction documents pursuant to which the Qualified Bidder proposes to effectuate the contemplated transaction (the "Contemplated Transaction Documents"). A Bid shall include a copy of the Agreement marked to show all changes requested by the Bidder (including those related to Purchase Price). The Contemplated Transaction Documents must include a written commitment satisfactory to the Trustee and the Ad Hoc Committee of Senior Secured Noteholders of its financial ability and intention to complete the transaction and contain a representation that the Qualified Bidder shall make all necessary regulatory filings, if any, and pay all costs and expenses of such filings (including the Trustee's costs and expenses).

For all Qualified Bidders seeking to acquire all or substantially all assets of the Debtors:

- (a) Contingencies: A Bid may not be conditioned on obtaining financing or any internal approval, or on the outcome or review of due diligence, but may be subject to the accuracy in all material respects at the closing of specified representations and warranties or the satisfaction in material respects at the closing of specified conditions, none of which shall be more burdensome than those set forth in the Agreement, as applicable.
- (b) Corporate Authority: A Bid must include written evidence of the Qualified Bidder's chief executive officer or other appropriate senior executive's approval of the contemplated transaction; provided, however, that if the Qualified Bidder is an entity specially formed for the purpose of effectuating the contemplated transaction, then the Qualified Bidder must furnish written evidence reasonably acceptable to the Trustee of the approval of the contemplated transaction by the equity holder(s) of such Potential Bidder (the "Principals").
- (c) Financing Sources: A Bid must contain written evidence satisfactory to the Trustee, in consultation with the Ad Hoc Committee of Senior Secured Noteholders, that demonstrates the Qualified Bidder has the necessary financial ability to close the contemplated transaction and provide adequate assurance of future performance under all contracts to be assumed in such contemplated transaction. Such information should include, *inter alia*, the following:
- (i) the Qualified Bidder's current financial statements (audited if they exist);
  - (ii) contact names and numbers for verification of financing sources,
  - (iii) evidence of the Qualified Bidder's internal resources and proof of any debt or equity funding commitments that are needed to close the contemplated transaction; and
  - (iv) any such other form of financial disclosure or credit quality support information or enhancement reasonably acceptable to the Trustee in consultation with the Ad Hoc Committee of Senior Secured Noteholders demonstrating that such Qualified Bidder has the ability to close the contemplated transaction provided, however, that the Trustee shall determine, in his reasonable discretion, in consultation with his advisors and the Ad Hoc Committee of Senior Secured Noteholders, whether the written evidence of such financial wherewithal is reasonably acceptable, and shall not unreasonably withhold acceptance of a Qualified Bidder's financial qualifications.

- (d) No Fees payable to Qualified Bidder: A Bid may not request or entitle the Qualified Bidder to any breakup fee, termination fee, expense reimbursement or similar type of payment. Moreover, by submitting a Bid a Bidder shall be deemed to waive the right to pursue a substantial contribution claim under section 503 of the Bankruptcy Code related in any way to the submission of its Bid or the Bid Procedures.

A Bid received from a Qualified Bidder before the Bid Deadline that meets the above requirements, and that satisfies the Bid Deadline requirement above, shall constitute a "Qualified Bid," if the Trustee believes, in his reasonable discretion and after consultation with the Ad Hoc Committee of Senior Secured Noteholders, that such bid would be consummated if selected as the Successful Bid. For purposes hereof, the Agreement shall constitute a Qualified Bid. Promptly upon such determination, the Trustee shall provide any other Qualified Bids to the Buyer and to any Qualified Bidders.

In the event that any Bid is determined by the Trustee, in consultation with the Ad Hoc Committee of Senior Secured Noteholders, not to be a Qualified Bid, the Qualified Bidder shall be refunded its deposit and all accumulated interest thereon within three (3) business days after that determination.

#### Auction

Only if a Qualified Bid (other than Buyer's) is received by the Bid Deadline, shall the Trustee conduct an auction (the "Auction") to determine the highest and best bid with respect to the Purchased Assets under the Agreement. The Trustee shall provide Buyer and all Qualified Bidders with copies of all Qualified Bids at least eighteen (18) hours prior to the Auction. The Auction shall commence on August \_\_\_, 2009 at 10:00 a.m. (prevailing Eastern time).

No later than 4:00 p.m. (prevailing Eastern time) on August \_\_\_, 2009, the Trustee will notify all Qualified Bidders of (i) the highest and best Qualified Bid(s), as determined in the Trustee's discretion after consultation with the Ad Hoc Committee of Senior Secured Noteholders (the "Baseline Bid") and (ii) the time and place of the Auction, and provide copies of all submitted bids to all Qualified Bidders. If, however, no other such Qualified Bid is received by the Bid Deadline, then the Auction will not be held, Buyer will be the Successful Bidder, the Agreement will be the Successful Bid, and, at the August \_\_\_, 2009 Sale Hearing, the Trustee will seek approval of and authority to consummate the Proposed Sale contemplated by the Agreement.

The Auction shall be conducted according to the following procedures:

- (a) Participation at the Auction

Only a Qualified Bidder that has submitted a Qualified Bid is eligible to participate at the Auction. The auction shall be conducted openly and all creditors shall be entitled to attend. Each Qualified Bidder shall have at least one representative physically present at the location of the Auction. During the Auction, bidding shall begin initially with the highest Baseline Bid as to the Purchased Assets under the Agreement and subsequently continue in minimum increments of at least \$100,000. Bidding at the auction shall be transcribed or

videotaped. Other than otherwise set forth herein, the Trustee may conduct the Auction in the manner he determines, in consultation with the Ad Hoc Committee of Senior Secured Noteholders, will result in the highest and best offer for the Purchased Assets under the Agreement.

(b) The Trustee Shall Conduct the Auction

The Trustee and his professionals shall direct and preside over the Auction. At the start of the Auction the Trustee shall describe the terms of the Baseline Bid. The determination of which Qualified Bid constitutes the Baseline Bid shall take into account any factors the Trustee, in consultation with the Ad Hoc Committee of Senior Secured Noteholders, reasonably deems relevant to the value of the Qualified Bid to the estate, including, *inter alia*, the following: (A) the amount and nature of the consideration; (B) the proposed assets to be purchased and the assumption of any liabilities, if any; (C) the ability of the Qualified Bidder to close the proposed transaction; (D) the proposed Closing Date and the likelihood, extent and impact of any potential delays in Closing; (E) any purchase price adjustments; (F) the impact of the contemplated transaction on any actual or potential litigation; (G) the net economic effect of any changes from the Agreement, if any, contemplated by the Contemplated Transaction Documents and (H) the net after-tax consideration to be received by the Debtors' estates (collectively, the "Bid Assessment Criteria"). All Bids made thereafter shall be Overbids (as defined below), and shall be made and received on an open basis, and all material terms of each Bid shall be fully disclosed to all other Qualified Bidders. The Trustee shall maintain a transcript of all Bids made and announced at the Auction, including the Baseline Bid, all Overbids and the Successful Bid.

(c) Terms of Overbids

An "Overbid" is any bid made at the Auction subsequent to the Trustee's announcement of the Baseline Bid. To submit an Overbid for purposes of this Auction, a Qualified Bidder seeking to acquire all or substantially all of the Debtors' assets must comply with the following conditions:

(i) Minimum Overbid Increment

Any Overbid after the Baseline Bid shall be made in increments of at least \$100,000.

(ii) Remaining Terms are the Same as for Qualified Bids

Except as modified herein, an Overbid must comply with the conditions for a Qualified Bid set forth above, provided, however, that the Bid Deadline shall not apply. Any Overbid made by a Qualified Bidder must remain open and binding on the Qualified Bidder until and unless (a) the Trustee, in consultation with the Ad Hoc Committee of Senior Secured Noteholders, accepts a higher Qualified Bid as an Overbid and (b) such Overbid is not selected as the Back-up Bid (as defined below).

To the extent not previously provided (which shall be determined by the Trustee), a Qualified Bidder submitting an Overbid must submit, as part of its Overbid, written evidence (in the form of financial disclosure or credit-quality support information or enhancement reasonably acceptable to the Trustee and the Ad Hoc Committee of Senior Secured Noteholders) demonstrating such Qualified Bidder's ability to close the transaction proposed by such Overbid.

(iii) Announcing Overbids

The Trustee shall announce at the Auction the material terms of each Overbid, the basis for calculating the total consideration offered in each such Overbid and the resulting benefit to the Debtors' estates based on, *inter alia*, the Bid Assessment Criteria.

(d) Additional Procedures

The Trustee, in consultation with the Ad Hoc Committee of Senior Secured Noteholders, may adopt rules for the Auction at or prior to the Auction that, in his reasonable discretion, will better promote the goals of the Auction and that are not inconsistent with any of the provisions of the Bidding Procedures Order. All such rules will provide that all bids shall be made and received in one room, on an open basis, and all other Qualified Bidders shall be entitled to be present for all bidding with the understanding that the true identity of each Qualified Bidder (*i.e.*, the principals submitting the Bid) shall be fully disclosed to all other Qualified Bidders and that all material terms of each Qualified Bid will be fully disclosed to all other Qualified Bidders throughout the entire Auction. Subject to the prior consent of the Buyer, the Trustee, in consultation with the Ad Hoc Committee of Senior Secured Noteholders, in his reasonable discretion, may adjourn without further notice the Auction (and Sale Hearing) if in his reasonable discretion an adjournment will better promote the goals of the Auction and allow parties to make progress towards modifications of any Qualified Bid that could result in a higher and better Qualified Bid.

(e) Consent to Jurisdiction as Condition to Bidding

All Qualified Bidders at the Auction shall be deemed to have consented to the core jurisdiction of the Bankruptcy Court and waived any right to a jury trial in connection with any disputes relating to the Auction, and the construction and enforcement of the Bidder's Contemplated Transaction Documents, as applicable.

(f) Closing the Auction

Upon conclusion of the bidding, the Auction shall be closed, and the Trustee, in consultation with the Ad Hoc Committee of Senior Secured Noteholders, shall (i) immediately review each Qualified Bid on the basis of financial and contractual terms and the factors relevant to the sale process, including those factors affecting the speed and certainty of consummating the Proposed Sale, and (ii) immediately identify the highest and best offer for the Purchased Assets

under the Agreement (the "Successful Bid") and the entity submitting such Successful Bid (the "Successful Bidder"), which highest and best offer will provide the greatest amount of net value to the Debtors' estates, and the next highest or otherwise best offer after the Successful Bid (the "Back-up Bid"), and advise the Qualified Bidder of such determination. If Buyer's final bid is deemed to be highest and best at the conclusion of the Auction, Buyer will be the Successful Bidder, and such bid, the Successful Bid.

#### **Acceptance of Successful Bid**

The Trustee shall sell the assets subject to the Successful Bid(s) to the Successful Bidder(s) upon the approval of the Successful Bid by the Bankruptcy Court after the Sale Hearing. The Trustee's presentation of a particular Qualified Bid to the Bankruptcy Court for approval does not constitute the Trustee's acceptance of the bid. The Trustee will be deemed to have accepted a Bid only when the Bid has been approved by the Bankruptcy Court at the Sale Hearing. All interested parties reserve their right to object to the Trustee's selection of the Successful Bidder (including the assignment of any of such objector's Designated Contract thereto, provided, however, that any objection to such assignment on the basis of the Cure Amount must be made and/or reserved as set forth in the order approving these Bid Procedures).

#### **"As Is, Where Is"**

The sale of the Assets shall be on an "as is, where is" basis and without representations or warranties of any kind, nature, or description by the Trustee, his agents or the Chapter 7 estates except to the extent set forth in the Agreement or the purchase agreement of another Successful Bidder. Buyer and each Qualified Bidder shall be deemed to acknowledge and represent that it has had an opportunity to conduct any and all due diligence regarding the Assets prior to making its offer, that it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Assets in making its bid, and that it did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express, implied, by operation of law or otherwise, regarding the Assets, or the completeness of any information provided in connection therewith or the Auction, except as expressly stated in these Bid Procedures or, (i) as to Buyer, the terms of the sale of the Purchased Assets under the Agreement shall be set forth in the Agreement, or (ii) as another Successful Bidder, the terms of the sale of the Assets shall be set forth in the applicable purchase agreement.

#### **Free Of Any And All Interests**

Except as otherwise provided in the Agreement or another Successful Bidder's purchase agreement, all of Chapter 7 estates' right, title and interest in and to the Assets subject thereto shall be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options and interests thereon and there against (collectively, the "Interests") in accordance with section 363 of the Bankruptcy Code, with such Interests to attach to the net proceeds of the sale of the Assets.



### Sale Hearing

The Sale Hearing shall be conducted by the Bankruptcy Court on August \_\_\_\_, 2009 or on such date as may be established by the Bankruptcy Court. Following the approval of the sale of the Assets to the Successful Bidder(s) at the Sale Hearing, if any Successful Bidder fails to consummate an approved sale within ten (10) days after entry of an Order approving the Sale, the Trustee, unless such Order approving the Sale is otherwise stayed by order of a court with competent jurisdiction, shall be authorized, but not required, to deem the Back-Up Bid, as disclosed at the Sale Hearing, the Successful Bid, and the Trustee shall be authorized, but not required, to consummate the sale with the Qualified Bidder submitting such Bid without further order of the Bankruptcy Court.

### Return of Good Faith Deposit

Good Faith Deposits of the Successful Bidder(s) shall be applied to the purchase price of such transaction at Closing. The Good Faith Deposit of the Back-up Bidder shall be held in an interest-bearing account until five (5) days after the Closing of the transactions contemplated by the Successful Bid, and thereafter returned to the Back-up Bidder. Good Faith Deposits of all other Qualified Bidders shall be held in an interest-bearing escrow account until no later than two (2) business days after the Sale Hearing, and thereafter returned to the respective bidders. If a Successful Bidder or the Back-up Bidder, as appropriate, fails to consummate an approved sale because of a breach or failure to perform on the part of such Bidder, the Trustee shall be entitled to retain the Good Faith Deposit as part of the Debtors' damages resulting from the breach or failure to perform by such Bidder.

### Modifications

The Trustee, after consultation with the Ad Hoc Committee of Senior Secured Noteholders, may (a) determine, which Qualified Bid, if any, is the highest and best offer; and (b) reject at any time before entry of an order of the Bankruptcy Court approving a Qualified Bid, any Bid that is (i) inadequate or insufficient, (ii) not in conformity with the requirements of the Bankruptcy Code, the Bid Procedures or the terms and conditions of sale, or (iii) contrary to the best interests of the Debtors' estates and creditors. The Trustee shall not make material modifications to these Bidding Procedures without Bankruptcy Court approval, provided, however, that, to the extent not contrary to the Bidding Procedures Order, the Trustee in consultation with the Ad Hoc Committee of Senior Secured Noteholders and the Buyer, may make other non-material modifications to such procedures if their reasonable judgment such modifications would be in the best interests of the Debtors' estates and promote an open and fair sale process.

In all cases where the Bid Procedures require the Trustee to obtain consent or consult with the Buyer or the Ad Hoc Committee of Senior Secured Noteholders, the Trustee's fiduciary duties shall not be limited by such requirement.

**EXHIBIT 1 TO BID PROCEDURES**

**Confidentiality Agreement**

1835973

## CONFIDENTIALITY AGREEMENT

In connection with your consideration of materials relating to a possible acquisition (the "**Transaction**") of part or all of the assets of Eclipse Aviation Corporation and Eclipse IRB Sunport, LLC (the "**Company**"), you are being or have been provided with certain Confidential Information (as defined below). All information concerning the Company that is non-public, confidential or proprietary, whether written, in electronic or other tangible or intangible form, in any other medium whatsoever, or oral, including without limitation, trade secrets, inventions, system designs, processes, business plans, marketing strategies, pricing information, budgets, financial statements, lists or other information relating to suppliers, customers, clients, and employees, together with any evaluations, ideas, analyses, reports, notes, compilations, interpretations, or other documents or technical, business or financial data of any kind, furnished to you by or on behalf of the Chapter 7 Trustee or the Company, or containing all or any part of, or derived from, any of the foregoing, from the date hereof through the term of this Confidentiality Agreement (this "**Agreement**") is hereinafter referred to as the "**Confidential Information.**" Notwithstanding the foregoing, Confidential Information does not include any information that (A) is or becomes generally available to the public other than as a result of disclosure or actions by you or your Representatives (as defined below) in breach of this Agreement, (B) is or becomes available to you or your Representatives on a nonconfidential basis from a source (other than the Chapter 7 Trustee or his representatives, or the Company or its Representatives) which, to your knowledge, had no obligation to the Chapter 7 Trustee or the Company or any other party to maintain the confidentiality of such information, (C) was in your possession prior to the date of this Agreement and the source of such information, to your knowledge, had no obligation to the Chapter 7 Trustee or the Company or any other party to maintain the confidentiality of such information or (D) has been independently developed or acquired by you or your Representatives without violating your or any of their respective obligations under this Agreement.

In consideration of the Chapter 7 Trustee furnishing you with the Confidential Information, the Chapter 7 Trustee and you hereby agree that:

1. Non-Disclosure; Limitations On Use; Representatives. Except as otherwise expressly provided herein, without the prior consent of the Chapter 7 Trustee or the Company, you and your Representatives (A) will not disclose to any person (i) the fact that any discussions or negotiations took place concerning an Transaction; (ii) the economic or other terms of the Transaction; and (iii) the Confidential Information, the fact that the Confidential Information has been made available to you or that you have inspected or have knowledge of any portion of the Confidential Information, and (B) will use the Confidential Information solely for the purpose of evaluating, negotiating, documenting and/or consummating the Transaction, will keep the Confidential Information confidential and will not disclose the Confidential Information to any third party whatsoever; provided, however, that the Confidential Information may be disclosed to any of your directors, officers, employees, representatives, accountants, advisers, potential financing sources, agents and legal counsel (collectively, "**Representatives**") who need the Confidential Information solely for the purpose of evaluating, negotiating, documenting and/or consummating the Transaction on your behalf, so long as such Representatives agree to maintain the confidentiality thereof in accordance with the terms of this Agreement. The obligations of you and your Representatives with respect to Confidential Information shall terminate two (2) years from the date of this Agreement (the "**Term**"). You shall be responsible for any breach of the confidentiality provisions of this Agreement by any of your Representatives.

You agree that, for a period of 24 months after the date of this Agreement, you will not, without the prior written consent of the Chapter 7 Trustee or the Company, directly or indirectly, solicit for employment or hire any employee of the Company or any of its subsidiaries provided, however, that you shall not be precluded or otherwise restricted from hiring or employing, or from having employment or hiring discussions with, any such person (i) who is not then employed by the Company or any of its subsidiaries, (ii) who contacts you without any solicitation by you or (iii) who responds to a general solicitation for employment placed by you or your agents in newspapers, trade journals, the Internet, through recruiters or by any similar media; and provided further that no such general solicitation shall constitute a breach of this Agreement. You also agree that until 24 months after the date of this Agreement, you will not, without the prior written consent of the Chapter 7 Trustee, initiate or maintain contact (except in the ordinary course of business) with any officer, director, employee, supplier, vendor, distributor, broker, customer or agent of the Company for purposes of discussing the Transaction.

2. Termination. The Chapter 7 Trustee may at any time terminate this Agreement and cease to provide to you Confidential Information and you may at any time terminate this Agreement with respect to any information furnished to you after receipt by the Chapter 7 Trustee of your notice of termination. At such time that this Agreement is terminated, upon written request by the Chapter 7 Trustee you and your Representatives shall promptly destroy or return to the Chapter 7 Trustee all instances and copies of the Confidential Information, in any medium, and shall destroy analyses, reports, notes, compilations, studies, summaries, extracts or other documents containing any of, or derived from, the Confidential Information prepared by you or your Representatives; provided that, in the event that you destroy rather than return any such Confidential Information to the Chapter 7 Trustee, upon the written request of the Chapter 7 Trustee, you shall confirm such destruction in writing to the Chapter 7 Trustee; and provided, further, that you may retain copies of such Confidential Information in accordance with your internal record retention policies, so long as such Confidential Information continues to be treated as such and all such Confidential Information shall continue to be subject to this Agreement through the remainder of the Term. The termination of this Agreement will not affect the respective obligations of you and your Representatives hereunder, all of which obligations shall continue in effect through the remainder of the Term for any Confidential Information obtained from the Chapter 7 Trustee or the Company prior to such termination.

3. Compelled Disclosure. If you or any of your Representatives reasonably believe that you are legally required to disclose any of the Confidential Information to a third party or you are requested by regulatory authority to provide Confidential Information, unless legally prohibited you will before such disclosure has occurred provide as soon as is practical, written notice to the Chapter 7 Trustee of the proposed disclosure; provided in the case of a broad regulatory request with respect to your business (not specifically targeted at the Chapter 7 Trustee or the Company) you may promptly comply with the request and provide notice (if permitted by such regulator) to the Chapter 7 Trustee thereafter of such disclosure. You and your Representatives will use commercially reasonable efforts to cooperate with the Chapter 7 Trustee in his efforts to decline, resist or narrow such request and, if reasonably necessary, to assist Chapter 7 Trustee in his efforts to obtain an appropriate protective order or other reliable assurance that confidential treatment, if available, will be accorded to such disclosure.

4. No Representations or Warranties. You shall assume full responsibility for all conclusions you derive from the Confidential Information. The Confidential Information is being provided "as is" without representation or warranty hereunder of any kind. You acknowledge and agree that none of the Chapter 7 Trustee or the Company and their respective Representatives makes any express or implied representations or warranties as to the accuracy, completeness or fitness for a particular purpose of any Confidential Information, and you agree that none of such persons shall

have any liabilities to you or any of your Representatives relating to or arising from your or their use of any Confidential Information or for any errors therein or omissions therefrom except to the extent otherwise provided in a definitive agreement.

5. Privilege Issues; Work Product. To the extent that any Confidential Information may include material subject to the attorney-client privilege, work product doctrine or any other applicable privilege concern pending or threatened legal proceedings or governmental investigations, you understand and agree that we have a commonality of interest with respect to such matters and it is our desire, intention and mutual understanding that the disclosure of such material is not intended to, and shall not, waive or diminish in any way the confidentiality of such material or its continued protection under the attorney-client privilege, work product doctrine or other applicable privilege and any such Confidential Information shall remain entitled to all protection under these privileges, this agreement, and under the joint defense doctrine. Nothing in this agreement obligates any party to reveal material subject to the attorney-client privilege, work product doctrine or any other applicable privilege.

6. Equitable Remedies. You agree that money damages may not be a sufficient remedy for any breach of this Agreement by you or your Representatives, and that the Chapter 7 Trustee and the Company would be irreparably harmed in the event of such a breach. Accordingly the Chapter 7 Trustee and the Company shall, in addition to any other remedies or money damages to which it may be entitled, be entitled to specific performance and injunctive or other equitable relief as a remedy for any such threatened or actual breach. The parties hereby waive any requirement of the posting of a bond or other security in connection with the granting to the Chapter 7 Trustee or the Company of any such injunctive relief.

7. Waiver; Governing Law; Assignment; Severability; Counterparts. It is understood and agreed that no failure or delay in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege hereunder. The agreements set forth herein may only be waived or modified by an agreement in writing signed on behalf of the parties hereto. This Agreement shall be governed by the laws of the State of Delaware without regard to the principles of choice of law thereof. This Agreement is not assignable by either party; any purported assignment will be void and without effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors. Except as set forth in Section 1 hereof, there are no third-party beneficiaries of this Agreement. In case specific provisions of this Agreement shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions of the Agreement shall not in any way be affected or impaired thereby. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of such counterparts taken together shall be deemed to constitute one and same instrument.

8. Term. This Agreement shall expire two years following the date hereof.

9. By execution below, the signatory represents and warrants that he has fully authority to bind the entity for which he is signing.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed by their respective authorized representatives as of the later of the dates under the signatures below.

[Name of Entity and Address]

Jeffrey L. Burtch, Chapter 7 Trustee for  
Eclipse Aviation Corporation and  
Eclipse IRB Sunport, LLC,

By: \_\_\_\_\_

Name:

Title:

Date:

By: \_\_\_\_\_

Name: Adam Singer

Title: Counsel to the Chapter 7 Trustee

Date:

EXHIBIT 2

**Notice of Auction and Sale Hearing**

DB02:7587602.2

067809.1001

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	)	
	)	Chapter 7
Eclipse Aviation Corporation, <i>et al.</i> , <sup>1</sup>	)	Case No. 08-13031 (MFW)
	)	
Debtors.	)	(Jointly Administered)
	)	
	)	Re: Docket No. 763, ____

**NOTICE OF AUCTION AND SALE**

**PLEASE TAKE NOTICE** that on July 31, 2009, Jeffrey L. Burtch, the Chapter 7 Trustee (the "Trustee") for the above caption cases filed his *Motion Of The Chapter 7 Trustee To Approve Sale Procedures And Approve Sale And For Related Relief* (the "Sale Motion") with the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). The Trustee has received a Qualified Bid<sup>2</sup> from Eclipse Aerospace, Inc. (the "Buyer"), subject to higher and better offers, and under certain circumstances, an Auction (as defined below), all pursuant to the Bid Procedures Order (as defined below), and with respect to the asset purchase agreement dated as of July 30, 2009 between the Trustee and the Buyer (the "Agreement").

**PLEASE TAKE FURTHER NOTICE** that at a hearing held on August 10, 2009, the Bankruptcy Court entered an order (the "Bid Procedures Order") approving the Bidding Procedures sought as part of the Sale Motion and scheduled a hearing to consider granting final relief as to the Sale Motion for August \_\_\_\_\_ 2009, at \_\_\_\_ (prevailing Eastern Time). At that hearing, the Bankruptcy Court will consider approving the sale of the assets of the Chapter 7 estates, free and clear of all claims, liens, and encumbrances.

<sup>1</sup>The Debtors in these proceedings are: Eclipse Aviation Corporation (Tax ID No. XX-XXX9000) and Eclipse IRB Sunport, LLC, a wholly owned subsidiary of Eclipse Aviation Corporation (Tax ID No. XX-XXX4013), each with a mailing address of 2503 Clark Carr Loop SE, Albuquerque, NM 87106.

<sup>2</sup> All capitalized terms not defined herein have the meaning ascribed to them in the Bid Procedures Order.



**PLEASE TAKE FURTHER NOTICE** that only those parties that submit Qualified Bids may participate in the Auction (as defined below). If you are interested in determining how to submit such a Qualified Bid, you must comply with the terms of the Bid Procedures as referenced in the Bid Procedures Order. Any party in interest wishing to receive the Agreement may do so free of charge upon request of Trustee's Counsel: Cooch and Taylor, The Brandywine Building, 1000 West Street, 10th Floor, Wilmington, DE 19801, Attn: Claire McCudden (cmccudden@coochtaylor.com). Any party that wishes to take part in this process and submit a bid for the Eclipse Assets must submit its competing bid prior to August \_\_, 2009 at noon (prevailing Eastern Time) (the "Bid Deadline") to: (a) The Trustee, c/o Cooch and Taylor, The Brandywine Building, 1000 West Street, 10th Floor, Wilmington, DE 19801, Attn: Adam Singer (asinger@coochtaylor.com); (b) the Ad Hoc Committee: Covington & Burling LLP, The New York Times Building, 620 Eighth Avenue, New York, New York 10018, Attn: Benjamin Hoch and Andrew Ment.

**PLEASE TAKE FURTHER NOTICE** that if a Qualified Bid (other than the Buyer's Qualified Bid) is received by the Bid Deadline, an auction (the "Auction") with respect to a contemplated transaction shall take place on August \_\_, 2009 at 10:00 a.m. (prevailing Eastern Time), at the offices of Cooch and Taylor, The Brandywine Building, 1000 West Street, 10th Floor, Wilmington, DE 19801. If, however, no such Qualified Bid is received by the Bid Deadline, then the Auction will not be held, the Buyer will be deemed the Successful Bidder, the Agreement will be the Successful Bid, and, at the Sale Hearing scheduled for August \_\_, 2009, at \_\_\_\_ (prevailing Eastern Time), the Trustee will seek approval of and authority to consummate the transaction contemplated by the Agreement.

**PLEASE TAKE FURTHER NOTICE** that only a Qualified Bidder who has submitted a Qualified Bid will be eligible to participate at the Auction. Each Qualified Bidder must appear in person. The Auction shall be conducted openly and all creditors shall be entitled to attend. At the Auction, Qualified Bidders will be permitted to increase their bids. The bidding at the Auction shall start at the purchase price stated in the highest or otherwise best Qualified Bid as disclosed to all Qualified Bidders prior to commencement of the Auction, and continue in increments of at least \$100,000.

**PLEASE TAKE FURTHER NOTICE** that at the Sale Hearing, the Trustee will present the Successful Bid to the Bankruptcy Court for approval. The Trustee will sell the Assets or any portion thereof to the Successful Bidder, or to the Buyer in accordance with the applicable Agreements if a higher or otherwise better Qualified Bid is not received and accepted as the Successful Bid. If the Successful Bidder fails to consummate an approved Sale, the next highest or otherwise best Qualified Bid, as approved at the Sale Hearing, shall be deemed to be the Successful Bid and the Trustee shall be authorized to effect such Sale without further order of the Bankruptcy Court.

**PLEASE TAKE FURTHER NOTICE** that if you seek to object to the sale of the Assets or any portion thereof, you must comply with the terms for making such objections as set forth in the Bid Procedures Motion and the Bidding Procedures Order. Any objections to the relief requested in the Sale Motion must be (a) in writing, (b) comply with the Federal Rules of Bankruptcy Procedures and the Local Bankruptcy Rules, (c) be filed with the clerk of the Bankruptcy Court for the District of Delaware, Third Floor, 824 Market Street, Wilmington, Delaware 19801, no later than 12:00 p.m. prevailing Eastern time on August \_\_, 2009 and (d) be served so as to be **received** no later than 12:00 p.m. (prevailing Eastern Time) on the same

day, upon: The Trustee, c/o Cooch and Taylor, The Brandywine Building, 1000 West Street, 10th Floor, Wilmington, DE 19801, Attn: Adam Singer (asinger@coochtaylor.com); (b) the Ad Hoc Committee: Covington & Burling LLP, The New York Times Building, 620 Eighth Avenue, New York, New York 10018, Attn: Benjamin Hoch and Andrew Ment; and (c) Buyer: Eclipse Aerospace, Inc., 125 Fairchild St., Suite 100, Charleston, SC 29492, Attn.: Mason Holland, President, with a copy to: Nelson Mullins Riley & Scarborough LLP, Atlantic Station, 201 17th Street, Suite 1700, Atlanta, Georgia 30363, Attn.: William J. Ching, Esq. and Michael E. Hollingsworth II, Esq. If any party fails to timely file and serve an objection in accordance with the Bidding Procedures Order, the Bankruptcy Court may disregard such objection and such person shall be deemed to consent to the sale and will be forever bound by any conclusions or findings by the Bankruptcy Court with respect to the sale.

**PLEASE TAKE FURTHER NOTICE** that the proposed sale contemplates the sale of substantially all of the Eclipse Assets free and clear of all liens, claims, and encumbrances and the assumption and assignment of certain executory contracts and unexpired leases. Any person purporting to hold a lien, claim, or other encumbrance against the Eclipse Assets and who does not file an objection in accordance with the terms for making such objections set forth in the Bid Procedures Motion and the Bidding Procedures Order (and as set forth above), shall be deemed to consent to the sale of the Eclipse Assets free and clear of any lien, claim, or other encumbrance such person purports to hold.

**PLEASE TAKE FURTHER NOTICE** that any party to a Designated Contract who does not file an objection in accordance with the terms for making such objections as set forth in the Bid Procedures Motion and the Bidding Procedures Order (and as set forth above), shall be

deemed to consent to the assumption and assignment of such Designated Contract including the proposed cure amounts in connection therewith.

Dated: August , 2009

COOCH AND TAYLOR, P.A.

---

Adam Singer (No. 2472)  
M. Claire McCudden (No. 5036)  
The Brandywine Building  
1000 West Street, 10<sup>th</sup> Floor  
Wilmington, DE 19801  
Telephone: (302) 984-3800  
Facsimile: (302) 984-3939

Attorneys for Jeffrey L. Burch,  
Chapter 7 Trustee

**EXHIBIT 3**

**Notice of Cure Amounts**

NY: 632734-1

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 11
	)	
ECLIPSE AVIATION CORPORATION, <i>et al.</i> ,	)	Case No. 08-13031 (MFW)
	)	
	)	
Debtors.	)	<b>Re: Docket No. 763, ___</b>

**NOTICE OF AUCTION AND SALE, POTENTIAL ASSUMPTION AND ASSIGNMENT OF DESIGNATED CONTRACTS, AND CURE AMOUNTS ASSOCIATED THEREWITH**

PLEASE TAKE NOTICE that July 31, 2009, Jeffrey L. Burtch, the Chapter 7 Trustee (the "Trustee") for the above caption cases filed his *Motion Of The Chapter 7 Trustee To Approve Sale Procedures And Approve Sale And For Related Relief* (the "Sale Motion") with the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). The Trustee has received a Qualified Bid<sup>1</sup> from Eclipse Aerospace, Inc. (the "Buyer"), subject to higher and better offers, and under certain circumstances, an Auction (as defined below), all pursuant to the Bid Procedures Order (as defined below), and with respect to the asset purchase agreement dated as of July 30, 2009 between the Trustee and the Buyer (the "Agreement").

You may obtain a copy of the Agreement by making a written request to the undersigned counsel.

PLEASE TAKE FURTHER NOTICE that at a hearing held on August 10, 2009, the Bankruptcy Court entered an order (the "Bid Procedures Order") approving the Bidding Procedures sought as part of the Sale Motion and scheduled a hearing to consider granting final relief as to the Sale Motion for August \_\_\_\_\_ 2009, at \_\_\_\_\_ (prevailing Eastern Time). At that hearing, the Bankruptcy Court will consider approving the sale of the assets of the Chapter 7 estates, free and clear of all claims, liens, and encumbrances.

---

<sup>1</sup> All capitalized terms not defined herein have the meaning ascribed to them in the [Bid Procedures Order] (as defined below).

**PLEASE TAKE FURTHER NOTICE** that pursuant to the Sale Motion, the Trustee may assume, sell and assign certain of the unexpired leases, license agreements, and executory contracts (collectively referred to as the "Contracts") free and clear of all liens, claims, encumbrances, and interests upon satisfaction of the cure amounts required under section 365(b)(1)(A) of the Bankruptcy Code (the "Cure Costs"). The Contracts that the Trustee **MAY** seek to assume, sell and assign (the "Designated Contracts") and corresponding Cure Costs are listed on the attached Exhibit A.

**PLEASE TAKE FURTHER NOTICE** that the listing of any Contract on Exhibit A may not necessarily result in any such Contract ultimately becoming a Designated Contract or being assumed, sold and assigned.

**PLEASE TAKE FURTHER NOTICE** that the Buyer shall have the right until [date which is five (5) business days prior to the date scheduled for hearing on the entry of the Sale Order ] \_\_\_\_\_, to amend the list of Designated Contracts to include additional executory contracts or unexpired leases or to exclude executory contracts and unexpired leases previously included on the list of Designated Contracts and to amend the Cure Costs.

**PLEASE TAKE FURTHER NOTICE** that with respect to contracts with the City of Albuquerque, the Buyer shall have until thirty (30) days after the Closing to designate any contract with the City of Albuquerque.

**PLEASE TAKE FURTHER NOTICE** that any objections to the relief requested in the Sale Motion, including the assumption, sale and assignment of the Designated Contracts and the corresponding Cure Costs, must be (a) in writing, (b) comply with the Federal Rules of Bankruptcy Procedures and the Local Bankruptcy Rules, (c) be filed with the clerk of the Bankruptcy Court for the District of Delaware, Third Floor, 824 Market Street, Wilmington, Delaware 19801, no later than 4:00 p.m. prevailing Eastern time on August \_\_, 2009 (the "Cure Objection Deadline") and (d) be served so as to be received no later than 4:00 p.m. (prevailing Eastern Time) on the same day, upon: The Trustee, c/o Cooch and Taylor, The Brandywine Building, 1000 West Street, 10th Floor, Wilmington, DE

19801, Attn: Adam Singer (asinger@coochtaylor.com); (b) the Ad Hoc Committee: Covington & Burling LLP, The New York Times Building, 620 Eighth Avenue, New York, New York 10018, Attn: Benjamin Hoch and Andrew Ment; and (c) Buyer: Eclipse Aerospace, Inc., 125 Fairchild St., Suite 100, Charleston, SC 29492, Attn.: Mason Holland, President, with a copy to: Nelson Mullins Riley & Scarborough LLP, Atlantic Station, 201 17th Street, Suite 1700, Atlanta, Georgia 30363, Attn.: William J. Ching, Esq. and Michael E. Hollingsworth II, Esq.; provided however, to the extent that the Buyer is not the Successful Bidder and the alternative Successful Bidder is seeking to have certain unexpired leases, license agreements and executory contracts assumed and assigned as part of an alternative transaction, the non-debtor parties to such unexpired leases, license agreements and executory contracts shall have until the Sale Hearing to raise objections under section 365(b)(1)(C).

**PLEASE TAKE FURTHER NOTICE** that any person or entity receiving notice of the Sale Hearing and this Notice that fails to file an objection on a timely basis shall (i) be forever barred from objecting to the Cure Costs and from asserting any additional cure or other amounts with respect to such unexpired lease, license agreement or executory contract and the Trustee and the Buyer shall be entitled to rely solely upon the Cure Costs; (ii) be deemed to have consented to the assumption and assignment of such unexpired lease, license agreement or executory contract; and (iii) be forever barred and estopped from asserting or claiming against the Trustee, the Chapter 7 estates, or the Successful Bidder or any other assignee of the relevant Designated Contract that any additional amounts are due or defaults exist under such Designated Contract.

**PLEASE TAKE FURTHER NOTICE** that any person or entity receiving notice of the Sale Hearing and this Notice that fails to file an objection on a timely basis shall be



deemed to have been provided with adequate assurance of future performance under any assumed and assigned unexpired lease, license agreement or executory contract and shall be forever barred from raising any defense, claim, or objection with respect to the assignment of such lease, license agreement or executory contract on account of the Successful Bidder's financial condition.

**PLEASE TAKE FURTHER NOTICE** that the Sale Hearing may be adjourned from time to time without further notice to creditors or parties-in-interest other than by announcement of said adjournment in the Bankruptcy Court or on the Bankruptcy Court's calendar on the date scheduled for the Sale Hearing.

Dated: August           , 2009

COOCH AND TAYLOR, P.A.

---

Adam Singer (No. 2472)  
M. Claire McCudden (No. 5036)  
The Brandywine Building  
1000 West Street, 10<sup>th</sup> Floor  
Wilmington, DE 19801  
Telephone: (302) 984-3800  
Facsimile: (302) 984-3939

Attorneys for Jeffrey L. Burtch,  
Chapter 7 Trustee

**Exhibit B**  
**Sale Order**  
**(see attached)**

## FORM OF ESCROW AGREEMENT

THIS ESCROW AGREEMENT (this "Agreement"), is made and entered into as of this \_\_\_\_\_ day of \_\_\_\_\_, 2009, by and among Eclipse Aerospace, Inc., a Delaware corporation ("Purchaser"), Jeffrey L. Burch, as the trustee of Eclipse Aviation Corporation and Eclipse IRB Sunport, LLC ("Seller"), and SUNTRUST BANK, a Georgia banking corporation, as escrow agent (the "Escrow Agent"). Purchaser, Seller and the Escrow Agent are each referred to herein as a "Party" and collectively as the "Parties."

### BACKGROUND

A. Purchaser and Seller have entered into an Asset Purchase Agreement (the "Asset Purchase Agreement"), dated as of July \_\_, 2009, pursuant to which Purchaser will purchase all of the assets used or held by Seller in the conduct of its business, and Purchaser will assume certain of the liabilities and obligations of Seller.

B. Purchaser and Seller have agreed to establish an escrow fund pursuant to Section 3.1 of the Asset Purchase Agreement, providing for the delivery on the entry of the Bidding Procedures Orders to the Escrow Agent of the sum of \$5,000,000 (the "Escrow Amount").

C. The Escrow Agent is willing to act as escrow agent under this Agreement.

### AGREEMENT

In consideration of the premises and the mutual promises and agreements contained herein, the Parties, intending to be legally bound, hereby agree as follows:

1. Definitions. Capitalized terms used but not otherwise defined in this Agreement shall have the meanings ascribed to such terms in the Asset Purchase Agreement.

2. The Escrow Agent Appointment. Purchaser and Seller hereby appoint and designate SunTrust Bank as the Escrow Agent, to receive, hold, and distribute the Escrow Fund (as hereinafter defined) in accordance with the terms of this Agreement. The Escrow Agent hereby accepts its appointment as the escrow agent and agrees to hold, administer, invest, and disburse the Escrow Fund in accordance with the terms hereof.

3. Escrow Fund.

3.1 Escrow Fund. Simultaneously with the execution of this Agreement, Purchaser has delivered to the Escrow Agent, by wire transfer of immediately available funds, the amount of \$5,000,000 (such sum, as adjusted from time to time pursuant to the terms hereof, together with any investment proceeds thereon, being referred to collectively herein as the "Escrow Fund"). The Escrow Agent shall invest the Escrow Fund as instructed by Purchaser in writing in a SunTrust Non-Interest Deposit Account, which shall be fully insured by the FDIC until December 31, 2009. Any payments of income from the Escrow Fund shall be subject to

withholding regulation then in force with respect to United States taxes. Except for the delivery of Forms 1099, the Escrow Agent shall have no duty to prepare or file any federal or state tax report or return with respect to the Escrow Fund.

3.2 Disbursement of the Escrow Fund. The Escrow Agent shall disburse the amounts on deposit in the Escrow Fund as follows:

- (a) as provided in a joint written direction of Purchaser and Seller;
- (b) as provided in an order of the Bankruptcy Court or other court of competent jurisdiction; or
- (c) if neither (a) nor (b) above has occurred on or before September 15, 2009 and Purchaser and Seller have not theretofore notified Escrow Agent in writing of an extension, then the Escrow Agent shall distribute the Escrow Funds to Purchaser pursuant to written instructions provided by Purchaser; provided, however, that in the event Seller shall notify Escrow Agent of any good-faith dispute with Purchaser regarding the disbursement of the amounts on deposit, Escrow Agent shall retain the amounts on deposit until receipt of a joint written direction or order of the Bankruptcy Court or other court of competent jurisdiction as provided for in (a) or (b) above.

3.3 Termination of Escrow Fund. The escrow provided for hereunder shall terminate upon the disbursement of the Escrow Fund pursuant to the terms of this Agreement.

4. Escrow Agent.

4.1 Duties. In performing its duties under this Agreement or upon the claimed failure to perform its duties hereunder, the Escrow Agent shall have no liability except for liability caused by or arising out of Escrow Agent's fraud, willful misconduct or gross negligence. The Escrow Agent's sole responsibility shall be for the safekeeping and disbursement of the Escrow Fund in accordance with the terms of this Agreement. The Escrow Agent shall have no implied duties or obligations and shall not be charged with knowledge or notice of any fact or circumstance not specifically set forth herein. The Escrow Agent shall be entitled to rely upon and shall be protected in acting upon any request, instruction, statement or other instrument, not only as to its due execution, validity and effectiveness, but also as to the truth and accuracy of any information contained therein, which the Escrow Agent shall in good faith believe to be genuine, to have been signed or presented by the person or parties purporting to sign the same and to conform to the provisions of this Agreement. In no event shall the Escrow Agent be liable for incidental, indirect, special, consequential or punitive damages. The Escrow Agent shall not be obligated to take any legal action or to commence any proceeding in connection with the Escrow Fund, any account in which the Escrow Fund is deposited, or this Agreement, or to appear in, prosecute or defend any such legal action or proceedings. The Escrow Agent may consult legal counsel selected by it in the event of any dispute or question as to the construction of any of the provisions hereof or of any other agreement or of its duties

hereunder, and shall incur no liability and shall be fully protected from any liability whatsoever in acting in accordance with the advice, opinion or instruction of such counsel. Purchaser and Seller shall be jointly and severally liable for, and shall promptly pay, upon demand, the reasonable fees and expenses (with each of Purchaser, on the one hand, and Seller, on the other hand, being responsible for such expenses consistent with Section 4.2(b)) of any such counsel pursuant to the terms of Section 4.6 hereof. The Escrow Agent shall not be required to take notice of or have any obligations or responsibilities in connection with the Asset Purchase Agreement, the transactions contemplated thereby or any other agreement between any other parties to the Asset Purchase Agreement, other than this Agreement.

#### 4.2 Indemnification.

- (a) From and at all times after the date of this Agreement, Purchaser and Seller shall, subject to the last sentence of Section 4.2(b) hereof, jointly and severally (with each of Purchaser, on the one hand, and Seller, on the other hand, being responsible for such expenses consistent with Section 4.2(b)), to the fullest extent permitted by law and to the extent provided herein, indemnify and hold harmless the Escrow Agent and each director, officer, employee, attorney, agent and affiliate of the Escrow Agent (collectively, the "Indemnified Parties") against any and all actions, claims (whether or not valid), losses, damages, liabilities, costs and expenses of any kind or nature whatsoever (including, without limitation, reasonable attorneys' fees, costs and expenses) incurred by or asserted against any of the Indemnified Parties from and after the date hereof in connection with the Escrow Agent's good faith acceptance of and performance of its duties and obligations under this Agreement; provided, however, that no Indemnified Party shall have the right to be indemnified hereunder for any liability (or any cost or expense related to such liability, including, without limitation, attorneys' fees, costs and expenses) finally determined by an arbitrator or a court of competent jurisdiction, subject to no further appeal, to the extent such liability results from fraud, gross negligence or willful misconduct of such Indemnified Party. If any such action or claim shall be brought or asserted against any Indemnified Party, such Indemnified Party shall promptly notify Purchaser and Seller in writing, and Purchaser and Seller shall assume the defense thereof, including the employment of counsel and the payment of all expenses (which expenses shall be subject to Section 4.2(b)). Such Indemnified Party shall, in its sole discretion, have the right to employ separate counsel in any such action and to participate in the defense thereof, and the fees and expenses of such counsel shall be paid by such Indemnified Party unless (i) Purchaser and Seller agree in writing to pay such fees and expenses (with Seller's portion deducted from the Escrow Fund), (ii) Purchaser or Seller shall fail to assume the defense of such action or proceeding or shall fail, in the reasonable

discretion of such Indemnified Party, to employ counsel reasonably satisfactory to the Indemnified Party in any such action or proceeding, or (iii) the named parties to any such action or proceeding (including any impleaded parties) include both the Indemnified Party, on the one hand, and Purchaser or Seller, on the other hand, and the Indemnified Party shall have been advised by counsel that there may be one or more legal defenses available to it which are different from or additional to those available to Purchaser or Seller. All such fees and expenses payable by Purchaser or Seller pursuant to the foregoing sentence shall be paid from time to time as incurred, both in advance of and after the final disposition of such action or claim. All of the foregoing losses, damages, costs and expenses of the Indemnified Parties shall be payable upon demand of such Indemnified Party, in accordance with Sections 4.2(b) and 4.6 hereof, jointly and severally (with each of Purchaser, on the one hand, and Seller, on the other hand, being responsible for such expenses consistent with Section 4.2(b)). The obligations of Purchaser and Seller under this Section 4.2 shall survive any termination of this Agreement and the resignation or removal of the Escrow Agent.

- (b) The Parties agree that neither the payment by Purchaser or Seller of any claim by the Escrow Agent for indemnification hereunder nor the disbursement of any amounts to the Escrow Agent from the Escrow Fund in respect of a claim by the Escrow Agent for indemnification shall impair, limit, modify, or affect, as between Purchaser and Seller, the respective rights and obligations of Seller, on the one hand, and Purchaser, on the other hand, under this Agreement. Seller and Purchaser agree among themselves that any obligation for indemnification under this Section 4.2 (or for fees and expenses of the Escrow Agent described in the penultimate sentence of Section 4.1) shall be borne by the Party or Parties determined by an arbitrator or a court of competent jurisdiction to be responsible for causing the loss, damage, liability, cost or expense against which the Escrow Agent is entitled to indemnification or, if no such determination is made, then one-half by Purchaser and one-half by Seller.

4.3 Disputes. If, at any time, there shall exist any dispute between Purchaser and Seller with respect to the holding or disposition of any portion of the Escrow Fund or any other obligations of the Escrow Agent hereunder, or if at any time the Escrow Agent is unable to determine, to the Escrow Agent's sole satisfaction, the proper disposition of any portion of the Escrow Fund or the Escrow Agent's proper actions with respect to its obligations hereunder, or if Purchaser and Seller have not, within thirty (30) days of the furnishing by the Escrow Agent of a notice of resignation pursuant to Section 4.4 below, appointed a successor escrow agent to act hereunder, then the Escrow Agent may, in its sole discretion, take either or both of the following actions:

- (a) suspend the performance of any of its obligations under this Agreement until such dispute or uncertainty shall be resolved to the sole satisfaction of the Escrow Agent or until a successor escrow agent shall have been appointed (as the case may be); or
- (b) petition (by means of an interpleader action or any other appropriate method) any court of competent jurisdiction, for instructions with respect to such dispute or uncertainty, and pay into or deposit with such court all disputed Escrow Funds held by it in the Escrow Fund for holding and disposition in accordance with the instructions of such court and Escrow Agent shall thereupon be discharged from all further obligations as Escrow Agent under this Agreement.

The Escrow Agent shall have no liability to Purchaser, Seller or any other person with respect to any such suspension of performance or disbursement into court, specifically including any liability that may arise, or be alleged to have arisen, out of or as a result of any delay in the disbursement of funds held in the Escrow Fund or any delay in or with respect to any other action required or requested of the Escrow Agent.

4.4 Resignation of Escrow Agent. The Escrow Agent may resign from the performance of its duties hereunder at any time by giving thirty (30) days' prior written notice to Purchaser and Seller or may be removed, with or without cause, by Purchaser and Seller, acting jointly, at any time by the giving of ten (10) days' prior written notice to the Escrow Agent. Such resignation or removal shall take effect upon the appointment of a successor escrow agent as provided herein. Upon any such notice of resignation or removal, Purchaser and Seller, acting jointly, shall appoint a successor escrow agent hereunder, which shall be a commercial bank, trust company or other financial institution with a combined capital and surplus in excess of \$1 Billion, unless otherwise agreed by Purchaser and Seller. In the event Purchaser and Seller shall fail to appoint a successor escrow agent within sixty (60) days after the resignation or removal of the Escrow Agent, as contemplated hereby, the Escrow Agent may deposit the Escrow Fund into the registry of a court of competent jurisdiction and shall thereupon be discharged from all further duties as Escrow Agent under this Agreement. Upon the acceptance in writing of any appointment as Escrow Agent hereunder by a successor escrow agent, such successor escrow agent shall thereupon succeed to and become vested with all the rights, powers, privileges and duties of the retiring Escrow Agent, and the retiring Escrow Agent shall be discharged from its duties and obligations under this Agreement, but shall not be discharged from any liability for actions taken as Escrow Agent hereunder prior to such succession. After any retiring Escrow Agent's resignation or removal, the provisions of this Agreement shall inure to its benefit as to any actions taken or omitted to be taken by it while it was Escrow Agent under this Agreement.

4.5 Receipt. By its execution and delivery of this Agreement, the Escrow Agent acknowledges receipt of the Escrow Amount.

4.6 Fees. Purchaser and Seller shall compensate the Escrow Agent for its services hereunder in accordance with Schedule I attached hereto and, in addition, shall reimburse the Escrow Agent for all of its reasonable out-of-pocket expenses, including attorneys'



fees (actually incurred by outside counsel), travel expenses, telephone and facsimile transmission costs, postage (including express mail and overnight delivery charges), copying charges and the like (other than indemnification obligations of the parties, which shall be subject to Section 4.2 hereof) in accordance with Schedule I attached hereto. All of the compensation and reimbursement obligations set forth in the previous sentence shall be payable upon demand by the Escrow Agent and, with respect to the Escrow Agent, shall be a joint and several obligation of Purchaser and Seller, and, solely as between Purchaser and Seller, shall be paid one-half by Purchaser and one-half by Seller, subject to Section 4.2(b). The obligations of Purchaser and Seller under this Section 4.6 shall survive any termination of this Agreement and the resignation or removal of the Escrow Agent. All fees, expenses or other amounts payable by Seller in accordance with the terms of this Agreement shall be paid from the Escrow Fund to the extent available therefor.

5. Miscellaneous.

5.1 Notices. All notices, communications and deliveries hereunder shall be made in writing signed by or on behalf of the Party making the same and shall be delivered personally or sent by registered or certified mail (return receipt requested) or by any national overnight courier service (with postage and other fees prepaid) as follows:

To Purchaser: Eclipse Aerospace, Inc.  
125 Fairchild St.  
Suite 100  
Charleston, SC 29492  
Attn: Mason Holland, President  
Tel. 843-971-5025  
Fax 843-849-9298

with copies to: William J. Ching, Esq.  
Nelson Mullins Riley & Scarborough LLP  
Atlantic Station  
201 17<sup>th</sup> Street, N.W., Suite 1700  
Atlanta, GA 30363  
Tel. 404.322.6000  
Fax 404-322-6050

To Seller: The Trustee:  
Jeoffrey L. Burtch, Esq.  
Cooch & Taylor, P.A.  
1000 West Street  
Wilmington, Delaware 19801  
Facsimile: (302) 984-3939

with a copy to: Cooch & Taylor, P.A.  
1000 West Street  
Wilmington, Delaware 19801  
Attn: Adam Singer, Esq.  
Facsimile: (302) 984-3939

If to Escrow Agent: SunTrust Bank  
Escrow Services  
Nickida Colbert  
Trust Officer  
Mail Code HDQ-5307  
919 E. Main Street  
Richmond, VA 23219  
Tel. 804-782-7610  
Fax 804-782-5858  
Email: nickida.colbert@suntrust.com

or to such other representative or at such other address of a Party as such Party hereto may furnish to the other Parties in writing. Any such notice, communication or delivery shall be deemed given or made (a) on the date of delivery if delivered in person (by courier service or otherwise), (b) on the fifth (5<sup>th</sup>) business day after it is mailed by registered or certified mail, or (c) on the next day if sent for next day delivery to a domestic address by a recognized overnight delivery service; provided that no notice, communication or delivery to the Escrow Agent shall be deemed effective prior to the Escrow Agent's actual receipt thereof.

5.2 Time of the Essence; Computation of Time. Time is of the essence for each and every provision of this Agreement. Whenever the last day for the exercise of any privilege or the discharge of any duty under this Agreement shall fall upon a Saturday, Sunday or any date on which banks in Georgia are closed, the Party having such privilege or duty may exercise such privilege or discharge such duty on the next succeeding day which is a regular business day.

5.3 Assignment; Binding Effect. No party may assign this Agreement or its rights or obligations hereunder without, if Seller intends to assign, the consent of Purchaser and the Escrow Agent, or, if Purchaser intends to assign, the consent of Seller and the Escrow Agent, which consent, in either case, will not be unreasonably withheld or delayed. This Agreement shall inure to the benefit of and shall be binding upon the Parties hereto and their respective successors and assigns.

5.4 Headings. The headings of the sections of this Agreement are inserted for reference purposes only and shall not affect the meaning or interpretation of any provisions of this Agreement.

5.5 Waiver. Any Party may, at its option, waive in writing any or all of the conditions herein contained to which its obligations hereunder are subject. No waiver of any provision of this Agreement, however, shall constitute a waiver of any other provision (whether

or not similar), nor shall such waiver constitute a continuing waiver unless otherwise expressly provided.

5.6 Construction. The provisions of this Agreement shall be construed according to their fair meaning and neither for nor against any Party hereto irrespective of which Party caused such provisions to be drafted. Each of the Parties acknowledges that it has been represented by an attorney in connection with the preparation and execution of this Agreement.

5.7 No Limitation. The Parties (other than the Escrow Agent) agree that the rights and remedies of any Party under this Agreement shall not operate to limit any other rights and remedies otherwise available to any party under the Asset Purchase Agreement.

5.8 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument.

5.9 Severability. It is the desire and intent of the Parties hereto that the provisions of this Agreement be enforced to the fullest extent permissible under the laws and public policies applied in each jurisdiction in which enforcement is sought. Accordingly, if any particular provision of this Agreement shall be adjudicated by a court of competent jurisdiction to be invalid, prohibited or unenforceable for any reason, such provision, as to such jurisdiction, shall be ineffective, without invalidating the remaining provisions of this Agreement or affecting the validity or enforceability of this Agreement or affecting the validity or enforceability of such provision in any other jurisdiction. Notwithstanding the foregoing, if such provision could be more narrowly drawn so as not to be invalid, prohibited or unenforceable in such jurisdiction, it shall, as to such jurisdiction, be so narrowly drawn, without invalidating the remaining provisions of this Agreement or affecting the validity or enforceability of such provision in any other jurisdiction.

5.10 Governing Law and Choice of Forum. THIS AGREEMENT WILL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE DOMESTIC LAWS OF THE STATE OF GEORGIA, WITHOUT GIVING EFFECT TO ANY CHOICE OF LAW OR CONFLICTING PROVISION OR RULE (WHETHER OF THE STATE OF GEORGIA OR ANY OTHER JURISDICTION) THAT WOULD CAUSE THE LAWS OF ANY JURISDICTION OTHER THAN THE STATE OF GEORGIA TO BE APPLIED. IN FURTHERANCE OF THE FOREGOING, THE INTERNAL LAWS OF THE STATE OF GEORGIA WILL CONTROL THE INTERPRETATION AND CONSTRUCTION OF THIS AGREEMENT, EVEN IF UNDER SUCH JURISDICTION'S CHOICE OF LAW OR CONFLICT OF LAW ANALYSIS, THE SUBSTANTIVE LAW OF SOME OTHER JURISDICTION WOULD ORDINARILY APPLY.

5.11 Other Transactions with Purchaser. The Escrow Agent and any stockholder, director, officer or employee of the Escrow Agent may become pecuniarily interested in any transaction in which Purchaser may be interested, and contract and lend money to Purchaser and otherwise act as fully and freely as though it were not Escrow Agent under this Agreement. Nothing herein shall preclude the Escrow Agent from acting in any other capacity for Purchaser or for any other entity.

5.12 Authorized Signatures. Contemporaneously with the execution and delivery of this Agreement and, if necessary, from time to time thereafter, each of the parties to this Agreement (other than the Escrow Agent) shall execute and deliver to the Escrow Agent a Certificate of Authority substantially in the form of Schedule II hereto (a "Certificate of Authority") for the purpose of establishing the identity and authority of persons entitled to issue notices, instructions or directions to the Escrow Agent on behalf of each such party. Until such time as the Escrow Agent shall receive an amended Certificate of Authority replacing any Certificate of Authority theretofore delivered to the Escrow Agent, the Escrow Agent shall be fully protected in relying, without further inquiry, on the most recent Certificate of Authority furnished to the Escrow Agent. Whenever this Agreement provides for joint written notices, joint written instructions or other joint actions to be delivered to the Escrow Agent, the Escrow Agent shall be fully protected in relying, without further inquiry, on any joint written notice, instructions or action executed by persons named in such Certificate of Authority.

\* \* \* \* \*

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the date first above written.

PURCHASER:

ECLIPSE AEROSPACE, INC.

By: \_\_\_\_\_

Name:

Title:

SELLER:

By: \_\_\_\_\_

Name: Jeffrey L. Burtch

Title: Chapter 7 Trustee

ESCROW AGENT:

SUNTRUST BANK

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_



**Schedule I**

**SunTrust Bank, as Escrow Agent**

**Eclipse Aerospace, Inc.**

**and**

**Jeffrey L. Burch, as the trustee of  
Eclipse Aviation Corporation and Eclipse IRB Sunport, LLC**

**Schedule of Fees & Expenses**

**Acceptance/Legal Review Fee:**           **\$500.00** – one time only payable at the time of signing the escrow agreement

The Legal Review Fee includes review of all related documents and accepting the appointment of Escrow Agent on behalf of SunTrust Bank. The fee also includes setting up the required account(s) and accounting records, document filing, and coordinating the receipt of funds/assets for deposit to the Escrow Account. This is a one-time fee payable upon execution of the Escrow Agreement. As soon as SunTrust Bank's attorney begins to review the escrow agreement, the legal review fee is subject to payment regardless if the parties decide to appoint a different escrow agent or a decision is made that the escrow agreement is not needed.

**Administration Fee:**                   **[\$]** – payable at the time of signing the escrow agreement and on the anniversary date thereafter, if applicable

The Administration Fee includes providing routine and standard services of an Escrow Agent. The fee includes administering the escrow account, performing investment transactions, processing cash transactions (including wires and check processing), disbursing funds in accordance with the Agreement (note any pricing considerations below), and providing trust account statements to applicable parties for a twelve (12) month period. If the account remains open beyond the twelve (12) month term, the parties will be invoiced each year on the anniversary date of the execution of the Escrow Agreement. Additional fees will be billed for processing claim notices and/or objections. Extraordinary expenses, including legal counsel fees, will be billed as out-of-pocket. The Administration Fee is due upon execution of the Escrow Agreement.

**Out-of-Pocket Expenses:**           **At Cost**

Out-of-pocket expenses such as, but not limited to, postage, courier, overnight mail, insurance, money wire transfer, long distance telephone charges, facsimile, stationery, travel, legal (out-of-pocket to counsel) or accounting, will be billed at cost.

**Note: This fee schedule is based on the assumption that the escrowed funds will be invested in SunTrust Bank's money market cash sweep account, the RidgeWorth Money Market Funds.**

All escrow agent fees and expense reimbursements shall be paid jointly and severally to the Escrow Agent, provided that, as between Seller and Purchaser, one-half shall be paid by Seller and one-half shall be paid by Purchaser, subject to Section 4.2(b) of this Agreement. All fees and expense reimbursements to be paid by Seller may be paid from the Escrow Fund at Purchaser's sole discretion.

\* \* \* \* \*

**Schedule II**

**Certificate As To Authorized Signatures**

Re: Escrow Agreement dated \_\_\_\_\_, 2009, among SunTrust Bank, Eclipse Aerospace, Inc. and Jeffrey L. Burch, as the trustee of Eclipse Aviation Corporation and Eclipse IRB Sunport, LLC (the "Escrow Agreement")

The specimen signatures set forth below are the specimen signatures of the persons authorized to execute and deliver documents and to initiate and approve transactions pertaining to the Escrow Agreement on behalf of Eclipse Aerospace, Inc.

Name/Title	Specimen Signature
_____ Name and Title	_____ Signature
_____ Name and Title	_____ Signature
_____ Name and Title	_____ Signature

The specimen signatures set forth below are the specimen signatures of the persons authorized to execute and deliver documents and to initiate and approve transactions pertaining to the Escrow Agreement on behalf of Jeffrey L. Burch, as the trustee of Eclipse Aviation Corporation and Eclipse IRB Sunport, LLC.

Name/Title	Specimen Signature
_____ Name and Title	_____ Signature
_____ Name and Title	_____ Signature
_____ Name and Title	_____ Signature



## **EXHIBIT 2**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 7
	)	
ECLIPSE AVIATION CORPORATION, <i>et</i>	)	Case No. 08-13031 (MFW)
<i>al.</i> , <sup>1</sup>	)	
	)	Jointly Administered
Debtors.	)	

**ORDER (A) AUTHORIZING THE TRUSTEE TO SELL SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES, (B) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES AND (C) GRANTING RELATED RELIEF**

Upon the motion, dated July [ ], 2009 (the "Sale Motion"), of Jeoffrey L. Burtch, the appointed chapter 7 trustee (the "Trustee") for the debtors in the above-captioned cases (the "Debtors") for the entry of an order pursuant to sections 105, 363 and 365 of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code") and Rules 2002, 6004, 6006 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") authorizing the Trustee to, *inter alia*, (i) enter into that certain Asset Purchase Agreement, dated as of July 30, 2009, between Eclipse Aerospace, Inc. (the "Buyer") and the Trustee (the "Agreement," attached hereto as Exhibit 1),<sup>2</sup> (ii) sell substantially all of the Debtors' assets free and clear of all Encumbrances (as defined below), with such sale to be in accordance with the terms and conditions of the Agreement; (iii) assume and sell and assign certain executory contracts and unexpired leases to the Buyer; and (iv) granting related relief; and this Court having entered an order dated August [ ], 2009 (the "Procedures Order," and attached hereto as

---

<sup>1</sup> The Debtors in these proceedings are: Eclipse Aviation Corporation (Tax I.D. No. XX-XXX9000) and Eclipse IRB Sunport, LLC, a wholly-owned subsidiary of Eclipse Aviation Corporation (Tax I.D. No. XX-XX4013), each with a mailing address of 2503 Clark Carr Loop SE, Albuquerque, NM 87106.

<sup>2</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Agreement.

NY: 632978-1

Exhibit 2, the "Bid Procedures") authorizing the Trustee to conduct, and approving the terms and conditions of, the Auction and Bid Procedures to consider higher and better offers for the Assets, establishing a date for the Auction and approving, inter alia, (i) the Bid Procedures in connection with the Auction; (ii) the form and manner of notice of the Auction and Bid Procedures; (iii) procedures relating to certain Designated Contracts, including notice of proposed cure amounts; and (iv) the Break-Up Fee; and the Court having established the date of the Sale Hearing; and the Court having jurisdiction to consider the Sale Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157(b)(2) and 1334; and after consideration of the Sale Motion, the relief requested therein, and the responses thereto, if any; and this being a core proceeding in accordance with 28 U.S.C. § 157(b); and the appearance of all interested parties and all responses and objections, if any, to the Sale Motion having been duly noted in the record of the Sale Hearing; and upon the record of the Sale Hearing, and all other pleadings and proceedings in this case, including the Sale Motion; and it appearing that the relief requested in the Sale Motion is in the best interests of the Debtors, the Chapter 7 estates, their creditors and all other parties in interest; and after due deliberation and sufficient cause appearing therefore;

I. FINDINGS OF FACT:

IT IS HEREBY FOUND, DETERMINED AND CONCLUDED THAT:<sup>3</sup>

**Jurisdiction, Final Order, Statutory Predicates**

A. The findings and conclusions set forth herein constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014.

B. The Court has jurisdiction over this matter and over the property of the Debtors,

---

<sup>3</sup> To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. See FED. R. BANKR. P. 7052.

including the Purchased Assets to be sold, transferred or conveyed pursuant to the Agreement, and the Chapter 7 estates pursuant to 28 U.S.C. § § 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue of this chapter 7 case and the Sale Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

C. The statutory predicates for the relief sought in the Sale Motion and the basis for the approvals and authorizations herein are (i) sections 363 and 365 of the Bankruptcy Code and (ii) Bankruptcy Rules 2002, 6004, 6006 and [9014].

D. This Order constitutes a final and appealable order within the meaning of 28 U.S.C. § 158(a). Notwithstanding Bankruptcy Rules 6004(g) and 6006(d), the parties may consummate the transactions provided for under the terms and conditions of the Agreement immediately upon entry of this Order. To any extent necessary under Bankruptcy Rule 9014 and Rule 54(b) of the Federal Rules of Civil Procedure, as made applicable by Bankruptcy Rule 7054, the Court expressly finds that there is no just reason for delay in the implementation of this Order.

#### **Retention of Jurisdiction**

E. It is necessary and appropriate for the Court to retain jurisdiction to, among other things, interpret and enforce the terms and provisions of this Order and the Agreement, and to adjudicate, if necessary, any and all disputes relating in any way to the transactions provided for under the terms and conditions of the Agreement.

#### **Time Is of the Essence**

F. On November 25, 2008 (the "Petition Date"), the Debtors filed voluntary petitions for reorganization under chapter 11 of the Bankruptcy Code. On March 5, 2009 (the "Conversion Date"), the Court entered an order converting the Debtors' chapter 11 cases to cases under chapter 7 of the Bankruptcy Code. On the Conversion Date, Jeffrey L. Burtch was

appointed as interim chapter 7 trustee and currently serves as the Trustee in these cases pursuant to section 702(d) of the Bankruptcy Code.

G. Time is of the essence in consummating the sale. In order to maximize the value of the Purchased Assets, it is essential that the sale of the Purchased Assets occur within the time constraints set forth in the Agreement. Accordingly, there is cause to lift the stays contemplated by Bankruptcy Rules 6004 and 6006.

#### **Notice of the Sale Motion**

H. As evidenced by the affidavits of service filed with the Court, (i) proper, timely, adequate and sufficient notice of the Sale Motion, the Auction and the Sale Hearing (including due and proper notice of the assumption, sale and assignment of each Designated Contract to each non-Debtor party under each such Designated Contract) have been provided in accordance with sections 102(1) and 363(b) of the Bankruptcy Code, Bankruptcy Rules 2002, 6004, 6006, 9006, 9007, 9008 and 9014, the local rules of this Court, the procedural due process requirements of the United States Constitution and in compliance with the Procedures Order; (ii) such notice was good and sufficient and appropriate under the particular circumstances; and (iii) no other or further notice of the Sale Motion, the Auction, the Sale Hearing, the assumption and assignment of the Designated Contracts or of the entry of this Order is necessary or shall be required.

I. Actual written notice of the Sale Motion, the Auction and the Sale Hearing (including due and proper notice of the assumption, sale and assignment of each Designated Contract to each non-Debtor party under each such Designated Contract) and a reasonable opportunity to object or be heard regarding the requested relief has been afforded to all interested persons and entities, including, without limitation, (i) all entities known to assert any interest in

or lien upon the Purchased Assets; (ii) all parties to Designated Contracts; (iii) all parties that are entitled to notice under Bankruptcy Rule 2002; (iv) the attorneys general of all states in which the Purchased Assets are located; (v) the Office of the United States Trustee; (vi) the Securities and Exchange Commission; (vii) the Internal Revenue Service and any governmental taxing authority that has filed a claim against the Chapter 7 Estates; (viii) all entities that expressed to the Seller an interest in purchasing the Purchased Assets; (ix) any party appearing in the Bankruptcy Cases and claiming a secured interest in the Purchased Assets; or any party known to the Seller and claiming a secured interest in the Purchased Assets. Other parties interested in bidding on the Purchased Assets were provided, upon request, sufficient information to make an informed judgment on whether to bid on the Purchased Assets.

**Compelling Circumstances for Immediate Sale**

J. The Trustee has demonstrated a sufficient basis and the existence of exigent circumstances requiring it to enter into the Agreement, sell the Purchased Assets and assume and assign the Designated Contracts under sections 363 and 365 of the Bankruptcy Code, and such actions are appropriate exercises of the Trustee's business judgment and in the best interests of the Debtors, the Chapter 7 estates and their creditors, in that:

1. The holders of Senior Secured Notes would not consent to the use of additional cash collateral absent a sale of substantially all of the assets.
2. If the sale and related transactions under the Agreement is not approved and consummated promptly, the Trustee will exhaust any cash collateral available, thereby potentially consigning the Debtors to a piecemeal liquidation that would achieve far less value for creditors than the transactions contemplated by the Agreement.

3. A sale pursuant to section 363(b) of the Bankruptcy Code is the only viable alternative for preserving and capturing the maximum value of the Purchased Assets and allow for the Debtors to begin operations again for the benefit of current owners of Eclipse aircraft and other customers. Thus, the only way to preserve and maximize value is to consummate the sale and sell the Purchased Assets pursuant to section 363(b) of the Bankruptcy Code, thereby ensuring an orderly and equitable sales process and distribution of proceeds.
4. A sale of the Purchased Assets at this time to Buyer would result in the highest possible purchase price therefore.

#### Consent of Senior Secured Noteholders

K. Pursuant to the terms of the Debtors' Senior Secured Notes, the liens securing the Senior Secured Notes may be released with the consent of the holders of more than 50% of the Debtors' Senior Secured Notes and the requisite consent of holders have so consented.

#### Good Faith

L. The Buyer is a purchaser in good faith, as that term is used in the Bankruptcy Code and court decisions thereunder, and is entitled to the protections of section 363(m) of the Bankruptcy Code. The Agreement was negotiated and entered into in good faith, based upon arm's length bargaining, and without collusion or fraud of any kind. The sales process and Auction were conducted in accordance with the Procedures Order and in good faith within the meaning of section 363(m) of the Bankruptcy Code. Neither the Trustee nor the Buyer have engaged in any conduct that would prevent the application of section 363(m) of the Bankruptcy Code or cause the application of or implicate section 363(n) of the Bankruptcy Code to the Agreement or to the consummation of the sale transaction and transfer of the Purchased Assets

and Designated Contracts to Buyer. The Buyer is entitled to all the protections and immunities of section 363(m) of the Bankruptcy Code. The Buyer will be acting in good faith within the meaning of section 363(m) of the Bankruptcy Code in closing the transactions pursuant to the terms and conditions of the Agreement any time after the entry of this Order, including immediately after its entry. The Court has found that the Buyer has acted in good faith in all respects in connection with these chapter 7 cases and the transactions under the Agreement in that, among other things:

1. The Trustee, as a fiduciary of this Court pursuant to section 702 of the Bankruptcy Code, conducted the sale process and negotiated with the Buyer;
2. The Buyer recognized that the Trustee was free to negotiate with any other party that expressed qualified interest in purchasing the Purchased Assets;
3. The Buyer agreed to subject its bid to the competitive bidding procedures set forth in the Bidding Procedures Order;
4. All payments to be made by the Buyer and other Agreement or arrangements entered into by Buyer with the Trustee in connection with the Agreement have been disclosed; and
5. The negotiation and execution of the Agreement and all other aspects of the transactions contemplated therein were conducted in good faith and at arms' length.

M. In the absence of a stay pending appeal, the Buyer will be acting in good faith, pursuant to section 363(m) of the Bankruptcy Code, in closing the transactions contemplated by the Agreement at any time on or after the entry of this Order and cause has been shown as to why this Order should not be subject to the stay provided by Bankruptcy Rules 6004(g) and 6006(d).



**No Collusion**

N. The Buyer has not violated section 363(n) of the Bankruptcy Code by any action or inaction. The sale price to be paid by Buyer was not controlled by an agreement among potential bidders at such sale. The transactions under the Agreement may not be avoided, and no damages may be assessed against the Buyer or any other party under section 363(n) of the Bankruptcy Code or any other applicable bankruptcy or non-bankruptcy law.

**Bid Procedures Fair**

O. The Bid Procedures set forth in the Procedures Order were non-collusive, substantively and procedurally fair to all parties and were the result of arms length negotiations between the Trustee and the Buyer.

P. The Trustee and his professionals have complied, in good faith, in all respects with the Procedures Order. As demonstrated by (i) the testimony and other evidence proffered or adduced at the Sale Hearing and (ii) the representations of counsel made on the record at the Sale Hearing. Through marketing, and an open and competitive sale process conducted in accordance with the Procedures Order, the Trustee (i) afforded interested potential purchasers a full, fair and reasonable opportunity to qualify as bidders and submit their highest or otherwise best offer to purchase substantially all of the Debtors' assets; (ii) provided potential purchasers, upon request, sufficient information to enable them to make an informed judgment on whether to bid on the Purchased Assets; (iii) considered any bids submitted on or before the Bid Deadline; and (iv) conducted the Auction on \_\_\_\_\_.

**Marketing Efforts Leading to Sale**

Q. Since the date of his appointment, the Trustee has identified interested parties who have previously expressed an interest in the Purchased Assets and continued to identify other parties who may have a strategic or financial interest in acquiring the Purchased Assets. The Trustee negotiated with several parties in an attempt to reach an asset purchase agreement and selected the Buyer as the most qualified and beneficial bid after several months of negotiations.

**Auction**

R. On August \_\_\_\_, 2009 the Trustee conducted an auction in accordance with the terms of the Court's Order approving the bidding procedures.

**Highest and Best Offer**

S. [At the conclusion of the Auction, the Trustee announced that, after consultation with the Ad Hoc Committee, he had determined that the offer submitted by the Buyer in the Agreement was the highest and best offer and the Buyer is the Successful Bidder for the Purchased Assets in accordance with the Procedures Order.] The Bidding Procedures obtained the highest value for the Purchased Assets.

T. The offer of the Buyer, upon the terms and conditions set forth in the Agreement, including the form and total consideration to be realized by the Trustee pursuant to the Agreement, (i) is the highest and best offer received by the Trustee; (ii) is fair and reasonable; (iii) is in the best interests of the Debtors' creditors and estates; (iv) constitutes full and adequate consideration and reasonably equivalent value for the Purchased Assets; and (v) will provide a greater recovery for the Debtors' creditors and other interested parties than would be provided by any other practical and available alternative. The Trustee's determination that the Agreement

constitutes the highest and best offer for the Purchased Assets constitutes a valid and sound exercise of the Trustee's business judgment.

U. The Agreement and the transactions thereunder is not being entered into to escape liability for the estates' debts. The Chapter 7 estates are unable to satisfy all of the Debtors' debts.

#### **No Fraudulent Transfer**

V. The total consideration provided by the Buyer for the Purchased Assets is the highest and best offer received by the Trustee, and the Purchase Price constitutes (i) reasonably equivalent value under the Bankruptcy Code and the Uniform Fraudulent Transfer Act; (ii) fair consideration under the Uniform Fraudulent Conveyance Act; and (iii) under any other applicable laws of the United States, any state, territory or possession or the District of Columbia, reasonably equivalent value, fair consideration and fair value for the Purchased Assets.

#### **Validity of Transfer**

W. Prior to the transactions contemplated under the Agreement, the Purchased Assets are property of the Chapter 7 estates and title thereto is vested in the Chapter 7 estates.

X. The Trustee has full power and authority to execute the Agreement and all other documents contemplated thereby, and the sale of the Purchased Assets has been duly and validly authorized by all necessary corporate authority by the Trustee to consummate the transactions contemplated by the Agreement. No consents or approvals, other than as may be expressly provided for in the Agreement, are required by the Trustee to consummate such transactions.

Y. The Trustee has advanced sound business reasons for seeking to enter into the Agreement and to sell and/or assume and sell and assign the Purchased Assets and the Designated Contracts, as more fully set forth in the Sale Motion and as demonstrated at the Sale

Hearing, and it is a reasonable exercise of the Trustee's business judgment to sell and assign the Purchased Assets and the Designated Contracts and to consummate the transactions contemplated by the Agreement. Notwithstanding any requirement for approval or consent by any person, the transfer of the Purchased Assets to the Buyer and the assumption and assignment of the Designated Contracts is a legal, valid and effective transfer of the Purchased Assets and any Designated Contracts.

Z. The terms and conditions of the Agreement, including the consideration to be realized by the Debtors pursuant to the Agreement, are fair and reasonable, and the transactions contemplated by the Agreement are in the best interests of the Chapter 7 estates.

**Section 363(f) of the Bankruptcy Code is Satisfied**

AA. Except as otherwise provided in the Agreement or otherwise specifically set forth in this Order, the Purchased Assets shall be sold free and clear of all of the following (collectively, the "Encumbrances"): mortgages, security interests, conditional sale or other retention agreement, pledges, liens (as that term is defined in section 101(37) of the Bankruptcy Code), claims (as that term is defined in section 101(5) of the Bankruptcy Code), obligations, guaranties, debts, obligations, rights, contractual commitments, interests, judgments, demands, easements, charges, encumbrances, defects, options, rights of first refusal, other Encumbrances (as defined in the Agreement), Liens (as defined in the Agreement) and restrictions of any kind or nature whether imposed by agreement, understanding, law, equity, or otherwise, including, without limitation (i) encumbrances that purport to give any party a right or option to effect any forfeiture, modification or termination of any Debtor or of the Buyer in the Purchased Assets or (ii) in respect of taxes, in each case accruing, arising or relating to a period prior to the Closing.

BB. The transfer of the Purchased Assets to the Buyer will be a legal, valid and effective transfer of the Purchased Assets, and, except as may otherwise be provided in the Agreement, shall vest Buyer with all right, title and interest of the Trustee to the Purchased Assets free and clear of any and all Encumbrances. Except as specifically provided in the Agreement or this Order, the Buyer shall not assume or become liable for any Encumbrances relating to the Purchased Assets being sold by the Debtor.

CC. The transfer of the Purchased Assets to the Buyer free and clear of all Encumbrances will not result in any undue burden or prejudice to any holders of any Encumbrances as all such Encumbrances of any kind or nature whatsoever shall attach to the net proceeds of the sale of the Purchased Assets received by the Trustee in the order of their priority, with the same validity, force and effect which they now have as against the Purchased Assets and subject to any claims and defenses the Debtors or other parties may possess with respect thereto. All persons having Encumbrances of any kind or nature whatsoever against or in any of the Debtors or the Purchased Assets shall be forever barred, estopped and permanently enjoined from pursuing or asserting such Encumbrances against the Buyer, any of its assets, property, successors or assigns, or the Purchased Assets.

DD. The Trustee may sell the Purchased Assets free and clear of all Encumbrances of any kind or nature whatsoever because, in each case, one or more of the standards set forth in section 363(f) of the Bankruptcy Code has been satisfied. Those (i) holders of Encumbrances and (ii) non-Debtor parties, who did not object, or who withdrew their objections, to the sale of the Purchased Assets and the Sale Motion are deemed to have consented pursuant to section 363(f)(2) of the Bankruptcy Code. Those holders of Encumbrances who did object fall within one or more of the other subsections of section 363(f) of the Bankruptcy Code and are

adequately protected by having their Encumbrances, if any, attach to the proceeds of the sale of the Purchased Assets ultimately attributable to the property against or in which they claim or may claim any Encumbrances, with such Encumbrances being subject to treatment as prescribed by separate order of this Court.

**Cure under Designated Contracts; Adequate Assurance of Future Performance**

EE. The Trustee and the Buyer have, to the extent necessary, satisfied the requirements of section 365 of the Bankruptcy Code. Pursuant to the terms and subject to the conditions of this Order and the Agreement, the Buyer shall, within the time period set forth in the Agreement, (i) cure or provide adequate assurance of cure of any undisputed default existing prior to the Closing under any of the assigned Designated Contracts, within the meaning of section 365(b)(1)(A) of the Bankruptcy Code and (ii) provide compensation or adequate assurance of compensation to any party other than the Trustee for any undisputed actual pecuniary loss to such party resulting from an undisputed default prior to the Closing under any of the assigned Designated Contracts, within the meaning of section 365(b)(1)(B) of the Bankruptcy Code. The Buyer has demonstrated adequate assurance of future performance with respect to the Designated Contracts, within the meaning of section 365(b)(1)(C) of the Bankruptcy Code. The Designated Contracts are assignable notwithstanding any provisions contained therein to the contrary pursuant to section 365(f) of the Bankruptcy Code. The assumption and assignment of the Designated Contracts pursuant to the terms of this Order is integral to the Agreement and is in the best interests of the Chapter 7 estates, creditors and other parties in interest, and represents the exercise of sound and prudent business judgment by the Trustee.

**No Successor Liability**

FF. The transactions contemplated under the Agreement do not amount to a consolidation, merger or *de facto* merger of the Buyer and the Chapter 7 estates, there is not substantial continuity between the Buyer and the Debtors, there is no continuity of enterprise between the Debtors and the Buyer, the Buyer is not a mere continuation of the Debtors or the Chapter 7 estates, and the Buyer does not constitute a successor to the Debtors or the Chapter 7 estates.

GG. Except as expressly set forth in the Agreement, the transfer of the Purchased Assets to the Buyer and assumption and assignment to Buyer of the Designated Contracts and the Assumed Liabilities by Buyer do not and will not subject the Buyer or any of its affiliates or subsidiaries to any liability by reason of such transfer under (i) the laws of the United States, any state, territory, or possession thereof, or the District of Columbia, based in whole or part on, directly or indirectly, including without limitation, any theory of antitrust, environmental, products liability, successor or transferee liability, labor law, *de facto* merger or substantial continuity or (ii) any employment contract, understanding or agreement, including without limitation collective bargaining agreements, employee pension plans or employee welfare or benefit plans.

HH. Pursuant to the terms of the Asset Purchase Agreement, the Buyer has agreed to assume certain liabilities of the Debtor Eclipse Aviation Corporation and the related Chapter 7 estate which are the subject of pending adversary proceedings described in Schedule 7.8 of the Asset Purchase Agreement, those liabilities assumed by the Buyer are expressly limited to the obligations of the Chapter 7 estate to return to the Plaintiffs in those actions any aircraft parts, or in the case of the Opinicus Corporation, aircraft simulators, to the extent such rights, if any, are

established by the Court. Any claims against Buyer pursuant to those actions, shall be, and hereby are, limited to the obligation to return to the Plaintiffs, if such rights are established, any property which is part of the Purchased Assets and which the Court may later determine the Plaintiffs are entitled to possession of under applicable law. The Buyer shall not be liable for; (1) specific performance; or (2) any monetary claims against the Seller, including but not limited to, any claims to deposits or segregated funds. The Buyer shall be substituted for the chapter 7 Trustee as party in the adversary proceedings set forth on Schedule 7.8, or, as procedurally appropriate, and at the election of Buyer, shall be allowed to intervene, and shall have all rights, claims and defenses to which the Debtors, chapter 7 estates and/ or the Trustee could assert against the parties to those actions or the property which is the subject of those actions; however that to the extent the Trustee or the Debtors shall remain a party to any of the adversary proceedings described above, the Trustee and the Debtors shall retain those rights, claims and defenses to the extent of any claims against Trustee or as otherwise agreed to between Buyer and Trustee.

II. The sale contemplated by this Order is a sale of all or substantially all of the Estates' assets in a single sale pursuant to section 363 of the Bankruptcy Code, to which the Senior Secured Notes consent.

#### CONCLUSIONS OF LAW:

NOW, THEREFORE, BASED UPON ALL OF THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:<sup>4</sup>

1. The relief requested in the Sale Motion is granted in its entirety, subject to the terms and conditions contained herein.

---

<sup>4</sup> To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such. See FED. R. BANKR. P. 7052.



2. All objections, responses and requests for continuance concerning the Sale Motion are resolved in accordance with the terms of this Order and as set forth in the record of the Sale Hearing. To the extent any such objection, response or request for continuance was not otherwise withdrawn, waived, or settled, it, and all reservations of rights contained therein, is overruled and denied on the merits.

3. Notice of the Sale Hearing was fair and adequate under the circumstances and complied in all respects with section 102(1) of the Bankruptcy Code and Bankruptcy Rules 2002, 6004 and 6006.

#### **Approval of Sale**

4. The sale of the Purchased Assets, the terms and conditions of the Agreement (including all schedules and exhibits affixed thereto), the bid by the Buyer and the transactions contemplated thereby be, and hereby are, authorized and approved in all respects.

5. The sale of the Purchased Assets and the consideration provided by the Buyer under the Agreement is fair and reasonable and shall be deemed for all purposes to constitute a transfer for reasonably equivalent value and fair consideration under the Bankruptcy Code and any other applicable law.

6. The Buyer is hereby granted and is entitled to all of the protections provided to a good faith buyer under section 363(m) of the Bankruptcy Code, including with respect to the transfer of the Designated Contracts as part of the sale of the Purchased Assets pursuant to section 365 of the Bankruptcy Code and this Order.

7. The Trustee be, and hereby is, authorized and directed to fully assume, perform under, consummate and implement the terms of the Agreement together with any and all additional instruments and documents that may be reasonably necessary or desirable to

implement and effectuate the terms of the Agreement, this Order and sale of the Purchased Assets contemplated thereby including, without limitation, deeds, assignments, stock powers and other instruments of transfer, and to take all further actions as may reasonably be requested by the Buyer for the purpose of assigning, transferring, granting, conveying and conferring to the Buyer, or reducing to possession any or all of the Purchased Assets or Assumed Liabilities and the assumption and assignment of the Designated Contracts, as may be necessary or appropriate to the performance of the Trustee's obligations as contemplated by the Agreement, without any further corporate action or orders of this Court. The Buyer shall have no obligation to proceed with the Closing of the Agreement until all conditions precedent to its obligations to do so have been met, satisfied or waived. The Buyer may consummate the transactions under the Agreement at any time after the entry of this Order (including immediately thereafter) by waiving all closing conditions set forth in the Agreement that have not been satisfied and by proceeding to close such transactions, without any notice to the Court, any pre-petition or post-petition creditor of the Debtors or any other party in interest.

8. The Trustee is authorized and directed to deposit and hold in escrow the Cash Consideration (as defined in the Agreement), and furthermore to make distributions from the Cash Consideration and of the Notes on the Closing Date as follows:

- a. The Trustee shall deposit \$3,324,944.73 (the "Chapter 11 Professional Fee Amount") in a separate account for payment of the chapter 11 professional fees pursuant to the *Omnibus Order Awarding Allowance of Compensation for Services Rendered and Reimbursement Or Expenses of Chapter 11 Professionals Employed in This Case* [Docket No. 733].
- b. The Trustee shall deposit [\$ \_\_\_\_\_] (the "U.S. Trustee Fee Amount")

- in a separate account for payment of outstanding U.S. Trustee fees.
- c. The Trustee shall deposit \$636,250.00 (the "Trustee Compensation Reserve") in a separate account for payment of compensation to which the Chapter 7 Trustee may be entitled pursuant to section 326 of the Bankruptcy Code subject to further order of the Court.
  - d. The Trustee shall deposit \$5,000.00 (the "Trustee Expense Reserve") in a separate account to reimburse him for his reasonable expenses subject to further order of the Court.
  - e. The Trustee shall deposit an amount sufficient to pay unpaid fees and expenses of professionals employed by the Chapter 7 Trustee in excess of the Chapter 7 Carve-Out (as defined in the Stipulation And Agreed Order Authorizing Limited Use Of Cash Collateral (the "Cash Collateral Order") [Docket no. 714] (the "Chapter 7 Professional Fee Amount") in a separate account to pay unpaid fees and expenses of professionals employed by the Chapter 7 Trustee after further order of this Court.
  - f. The Trustee shall deposit \$100,000.00 (the "Closing Expense Reserve") in a separate account to be available without further order of the Court to pay any necessary post-closing obligations of the Trustee as Seller that are contemplated by the Agreement.
  - g. The Trustee shall deposit an amount sufficient to pay any unpaid expense approved by the Stipulation And Agreed Order Authorizing Limited Use Of Cash Collateral [Docket no. 714] (and any agreed-upon extensions thereof) and any fees and expenses of counsel to the Ad Hoc

Committee of Secured Noteholders in excess of any amounts payable pursuant to the Cash Collateral Order (and any extensions thereof) that are incurred by the Ad Hoc Committee of Secured Noteholders through and including the Closing Date; and

- h. The Trustee shall distribute to each of (i) the Bank of New York, in its capacity as Collateral Agent under that certain Amended and Restated Security Agreement dated as of February 15, 2008, as payment for amounts due and owing the holders of the Debtors' Senior Secured Notes pursuant to the terms of the Senior Secured Notes and (ii) to the Alfred Mann Living Trust for his share pursuant to the Final Order Pursuant to 11 U.S.C. Sections 105, 362, 363 and 364 and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (1) Authorizing Incurrence by the Debtors of Post-Petition Secured Indebtedness with Priority Over All Other Secured Indebtedness and with Administrative Superpriority, (2) Granting Liens and (3) Modifying the Automatic Stay [Docket No. 230], their prorated share of the remaining Cash Consideration and the Note Consideration. Any funds held by the Trustee in escrow as stated above in subparagraphs 8(a) through 8(g), inclusive, that are not actually expended by the Trustee shall be distributed in accordance with subparagraph 8(h).

Pending distribution of the Cash Consideration the Trustee shall not commingle the Cash Consideration with any other of the Debtors' assets

9. The Trustee and each other person or entity having duties or responsibilities under the Agreement, any agreements related thereto or this Order, and their respective directors,

officers, employees, members, agents, representatives and attorneys, are authorized and empowered, subject to the terms and conditions contained in the Agreement, to carry out all of the provisions of the Agreement and any related agreements; to issue, execute, deliver, file and record, as appropriate, the documents evidencing and consummating the Agreement, and any related agreements; to take any and all actions contemplated by the Agreement, any related agreements or this Order; and to issue, execute, deliver, file and record, as appropriate, such other contracts, instruments, releases, indentures, mortgages, deeds, bills of sale, assignments, leases or other agreements or documents and to perform such other acts and execute and deliver such other documents, as are consistent with, and necessary or appropriate to implement, effectuate, and consummate, the Agreement, any related agreements and this Order and the transactions contemplated thereby and hereby, all without further application to, or order of, the Court. The Trustee shall be, and hereby is, authorized to certify or attest to any of the foregoing actions (but no such certification or attestation shall be required to make any such action valid, binding, and enforceable). The Trustee is further authorized and empowered to cause to be filed with the secretary of state of any state or other applicable officials of any applicable governmental units any and all certificates, agreements or amendments necessary or appropriate to effectuate the transactions contemplated by the Agreement, any related agreements and this Order, including amended and restated certificates or articles of incorporation and by-laws or certificates or articles of amendment, and all such other actions, filings, or recordings as may be required under appropriate provisions of the applicable laws of all applicable governmental units or as the Trustee may determine are necessary or appropriate. The execution of any such document or the taking of any such action shall be, and hereby is, deemed conclusive evidence of the authority of such person to so act. Without limiting the generality of the foregoing, this

Order shall constitute all approvals and consents, if any, required by the corporation laws of the State of Delaware and all other applicable business corporation, trust and other laws of the applicable governmental units with respect to the implementation and consummation of the Agreement, any related agreements and this Order, and the transactions contemplated thereby and hereby.

10. Effective as of the Closing, (a) the sale of the Purchased Assets by the Trustee to the Buyer shall constitute a legal, valid and effective transfer of the Purchased Assets notwithstanding any requirement for approval or consent by any person and shall vest Buyer with all right, title and interest of the Debtors in and to the Purchased Assets, free and clear of all Claims, Liens, Interests and Encumbrances of any kind, pursuant to section 363(f) of the Bankruptcy Code, and (b) the assumption of any Assumed Liabilities by the Buyer shall constitute a legal, valid and effective delegation of any Assumed Liabilities to the Buyer and shall divest the Debtors of all liability with respect to any Assumed Liabilities.

11. The sale of the Purchased Assets is not subject to avoidance, and no damages may be assessed against the Buyer or any other party, pursuant to section 363(n) of the Bankruptcy Code.

#### **Transfer of Purchased Assets**

12. Except to the extent specifically provided in the Agreement, upon the closing the Trustee shall be, and hereby is, authorized, empowered and directed, pursuant to sections 105 and 363(b) of the Bankruptcy Code, to sell the Purchased Assets to the Buyer. Except with respect to the Assumed Liabilities, the sale of the Purchased Assets shall vest Buyer with all right, title and interest of the Debtors to the Purchased Assets free and clear of any and all Encumbrances and other liabilities and claims, whether secured or unsecured, choate or inchoate,

filed or unfiled, scheduled or unscheduled, noticed or unnoticed, recorded or unrecorded, contingent or noncontingent, liquidated or unliquidated, matured or unmatured, disputed or undisputed, or known or unknown, whether arising prior to or subsequent to the Petition Date, whether imposed by agreement, understanding, law, equity or otherwise, with all such Encumbrances and other liabilities and claims to attach only to the proceeds of the sale (if any) with the same priority, validity, force and effect, if any, as they now have in or against the Purchased Assets, subject to all claims and defenses the Debtors may possess with respect thereto. Following the Closing Date, no holder of any Encumbrance in the Purchased Assets shall interfere with the Buyer's use and enjoyment of the Purchased Assets based on or related to such Encumbrance, or any actions that the Debtors may take in their chapter 11 cases and no person shall take any action to prevent, interfere with or otherwise enjoin consummation of the transactions contemplated in or by the Agreement or this Order. To the extent provided for in the Agreement, any and all of the Debtors' security deposits, or other security held by landlords, lessors and other counterparties to the contracts, leases and licenses that are to be assumed and assigned under the Agreement are being transferred and assigned to, and shall be the property of, the Buyer from and after the Closing, which transfer and assignment of security deposits, other deposits or security shall satisfy in full the requirements of section 365(l) of the Bankruptcy Code for all contracts, leases, and licenses assumed and assigned pursuant to this Order or the Agreement.

13. The provisions of this Order authorizing the sale of the Purchased Assets free and clear of Encumbrances, other than Assumed Liabilities, shall be self-executing, and neither the Trustee nor the Buyer shall be required to execute or file releases, termination statements, assignments, consents or other instruments in order to effectuate, consummate and implement the

provisions of this Order. However, the Trustee and the Buyer, and each of their respective officers, employees and agents are hereby authorized and empowered to take all actions and execute and deliver any and all documents and instruments that either the Trustee or the Buyer deem necessary or appropriate to implement and effectuate the terms of the Agreement and this Sale Order. Moreover, effective as of the Closing, the Buyer, its successors and assigns, shall be designated and appointed the Debtors' true and lawful attorney and attorneys, with full power of substitution, in the Debtors' name and stead, on behalf and for the benefit of the Buyer, its successors and assigns, to demand and receive any and all of the Purchased Assets and to give receipts and releases for and in respect of the Purchased Assets, or any part thereof, and from time to time to institute and prosecute in the Debtors' name, for the benefit of the Buyer, its successors and assigns, any and all proceedings at law, in equity or otherwise, which the Buyer, its successors and assigns, may deem proper for the collection or reduction to possession of any of the Purchased Assets, and to do all acts and things with respect to the Purchased Assets which the Buyer, its successors and assigns, shall deem desirable. The foregoing powers are coupled with an interest and are and shall be irrevocable by the Debtors.

14. On or before the Closing Date, all parties holding Encumbrances of any kind are authorized and directed to execute such documents and take all other actions as may be necessary to release any Encumbrances of any kind against the Purchased Assets, as such Encumbrances may have been recorded or may otherwise exist. If any person or entity that has filed financing statements or other documents or agreements evidencing any Encumbrances in or against the Purchased Assets shall not have delivered to the Trustee prior to the Closing after request therefor, in proper form for filing and executed by the appropriate parties, termination statements, instruments of satisfaction, or releases of all such Encumbrances that the person or



entity has with respect to the Purchased Assets, the Trustee is hereby authorized to execute and file such statements, instruments, releases and other documents on behalf of the person or entity with respect to such Purchased Assets prior to the Closing, and the Buyer is authorized to execute and file such documents after Closing.

15. To the greatest extent available under applicable law, the Buyer shall be authorized, as of the Closing Date, to operate under any license, permit, registration and governmental authorization or approval of the Trustee with respect to the Purchased Assets, and all such licenses, permits, registrations and governmental authorizations and approvals are deemed to have been, and hereby are, directed to be transferred to the Buyer as of the Closing Date.

16. All of the Debtors' interests in the Purchased Assets to be acquired by the Buyer under the Agreement shall be, as of the Closing Date and upon the occurrence of the Closing, transferred to and vested in the Buyer. Upon the occurrence of the Closing, this Order shall be considered and constitute for any and all purposes a full and complete general assignment, conveyance and transfer of the Purchased Assets acquired by the Buyer under the Agreement and/or a bill of sale or assignment transferring good and marketable, indefeasible title and interest in the Purchased Assets to the Buyer.

17. Except as expressly provided in the Agreement or this Order, the Buyer is not assuming nor shall it or any affiliate or subsidiary of Buyer be in any way liable or responsible, as a successor or otherwise, for any liabilities, debts or obligations of the Debtors in any way whatsoever relating to or arising from the Debtors' ownership or use of the Purchased Assets prior to the consummation of the transactions contemplated by the Agreement, or any liabilities calculable by reference to the Debtors or their operations or the Purchased Assets, or relating to

continuing or other conditions existing on or prior to consummation of the transactions contemplated by the Agreement, which liabilities, debts, and obligations are hereby extinguished insofar as they may give rise to liability, successor or otherwise, against Buyer or any affiliate or subsidiary of the Buyer.

18. With respect to the pending adversary proceedings described in Schedule 7.8 of the Asset Purchase Agreement, those liabilities assumed by the Buyer are expressly limited to the obligations of the chapter 7 estate to return to the Plaintiffs in those actions any aircraft parts, or in the case of the Opinicus Corporation, aircraft simulators, to the extent such rights, if any, are established by Final Order of the Court. Any claims against Buyer pursuant to those actions, shall be, and hereby are, limited to the obligation to return to the Plaintiffs, if such rights are established, any property which is part of the Purchased Assets and which the Court may later determine the Plaintiffs are entitled to possession of under applicable law. The Buyer shall not be liable for; (1) specific performance; or (2) any monetary claims against the Seller, including but not limited to, any claims to deposits or segregated funds. The Buyer shall be substituted for the chapter 7 Trustee as party in the adversary proceedings set forth on Schedule 7.8, or, as appropriate, and at the election of Buyer, shall be allowed to intervene, and shall have all rights, claims and defenses to which the Debtor, chapter 7 estates and/ or the Trustee could assert against the parties to those actions or the property which is the subject of those actions; however that to the extent the Trustee or the Debtors shall remain a party to any of the adversary proceedings described above, the Trustee and the Debtors shall retain those rights, claims and defenses to the extent of any claims against Trustee or as otherwise agreed to between Buyer and Trustee.

19. Except as otherwise provided in the Agreement, on the Closing Date, each of the Debtors' creditors is authorized and directed to execute such documents and take all other

actions as may be necessary to release their respective Interests or Claims against the Purchased Assets, if any, as may have been recorded or may otherwise exist.

20. Except as otherwise expressly provided in the Agreement, all persons or entities, presently or on or after the Closing Date, in possession of some or all of the Purchased Assets are directed to surrender possession of the Purchased Assets to the Buyer on the Closing Date or at such time thereafter as the Buyer may request.

#### **Designated Contracts**

21. Subject to the terms of the Agreement and the occurrence of the Closing Date, the assumption by the Trustee of the Designated Contracts and the sale and assignment of such agreements to the Buyer, as provided for or contemplated by the Agreement, be, and hereby is, authorized and approved pursuant to sections 363 and 365 of the Bankruptcy Code.

22. The Designated Contracts shall be deemed valid and binding and in full force and effect and assumed by the Trustee and sold and assigned to the Buyer at the Closing, pursuant to sections 363 and 365 of the Bankruptcy Code, subject only to (a) the payment by Buyer of all cures required to assume and assign the Designated Contracts to the Buyer as provided in this Order and the Agreement; and (b) the Buyer's right to exclude Designated Contracts from the definition of Designated Contracts in accordance with the terms of the Agreement. To the extent the Buyer excludes any Designated Contracts from the definition of Designated Contracts, the Trustee shall file a revised Schedule 2.3 to the Agreement with the Court and provide proper and adequate notice thereof.

23. Upon the Closing, in accordance with sections 363 and 365 of the Bankruptcy Code, the Buyer shall be fully and irrevocably vested in all right, title and interest of each Designated Contract. The Trustee shall cooperate with, and take all actions reasonably requested

by, the Buyer to effectuate the foregoing.

24. Pursuant to sections 365(b)(1)(A) and (B) of the Bankruptcy Code, pursuant to the terms and subject to the conditions of this Order and the Agreement, within the time period provided in the Agreement the Buyer shall pay or cause to be paid to the parties to any Designated Contracts the requisite Cure Amounts, if any, set forth in the notice served by the Trustee on each of the parties to the Designated Contracts, except to the extent that a cure amount was amended on the record of the Sale Hearing (the "Cure Amounts"), following the assumption and assignment thereof. The Cure Amounts are hereby fixed at the amounts set forth in the notice served by the Trustee, or the amounts set forth on the record of the Sale Hearing, as the case may be, and the non-Debtor parties to the Designated Contracts are forever bound by such Cure Amounts.

25. All defaults or other obligations under the Designated Contracts arising prior to the Closing (without giving effect to any acceleration clauses or any default provisions of the kind specified in section 365(b)(2) of the Bankruptcy Code) shall be deemed cured by payment of the Cure Amounts.

26. Any provision in any Designated Contract that purports to declare a breach, default or payment right as a result of an assignment or a change of control in respect of the Debtors is unenforceable, and all Designated Contracts shall remain in full force and effect, subject only to payment of the appropriate Cure Amount, if any. No sections or provisions of any Designated Contract that purport to provide for additional payments, penalties, charges or other financial accommodations in favor of the non-Debtor third party to the Designated Contracts shall have any force and effect with respect to the sale transaction and assignments authorized by this Order, and such provisions constitute unenforceable anti-assignment

provisions under section 365(f) of the Bankruptcy Code and/or are otherwise unenforceable under section 365(e) of the Bankruptcy Code and no assignment of any Designated Contract pursuant to the terms of the Agreement shall in any respect constitute a default under any Designated Contract. The non-Debtor party to each Designated Contract shall be deemed to have consented to such assignment under section 365(c)(1)(B) of the Bankruptcy Code, and the Buyer shall enjoy all of the rights and benefits under each such Designated Contract as of the applicable date of assumption without the necessity of obtaining each such non-Debtor party's written consent to the assumption or assignment thereof.

27. The Buyer has satisfied all requirements under sections 365(b)(1) and 365(f)(2) of the Bankruptcy Code to provide adequate assurance of future performance under the Designated Contracts.

28. The Debtors and the Chapter 7 estates shall be relieved of any liability for any breach of any of the Designated Contracts occurring from and after Closing, pursuant to and in accordance with section 365(k) of the Bankruptcy Code.

#### **Additional Provisions**

29. Each and every federal, state and local governmental agency or department is hereby directed to accept any and all documents and instruments necessary and appropriate to consummate the transactions contemplated by the Agreement and this Order.

30. The Buyer has not assumed and is otherwise not obligated for any of the Debtors' liabilities other than the Assumed Liabilities as set forth in the Agreement, and the Buyer has not purchased any of the Excluded Assets. Consequently, all persons, Governmental Units (as defined in sections 101(27) and 101(41) of the Bankruptcy Code) and all holders of Encumbrances based upon or arising out of liabilities retained by the Debtors are hereby

enjoined from taking any action against any of the Buyer, its affiliates and subsidiaries or the Purchased Assets to recover any Encumbrance or on account of any liabilities of the Debtors other than Assumed Liabilities pursuant to the Agreement. All persons holding or asserting any Encumbrance in the Excluded Assets are hereby enjoined from asserting or prosecuting such Encumbrance or cause of action against any of the Buyer, its affiliates, and subsidiaries or the Purchased Assets for any liability associated with the Excluded Assets.

31. The Buyer is not a "successor" to the Debtors or the Chapter 7 estates by reason of any theory of law or equity, and the Buyer, its affiliates and subsidiaries shall not assume, nor be deemed to assume, nor in any way be responsible for any liability or obligation of any of the Debtors and/or the Chapter 7 estates including, but not limited to, any bulk sales law, successor liability or similar liability except as otherwise expressly provided in the Agreement. Neither the purchase of the Purchased Assets by the Buyer or its affiliates or subsidiaries, nor the fact that the Buyer or its affiliates or subsidiaries are using any of the Purchased Assets previously operated by the Debtors, will cause the Buyer or any of its affiliates or subsidiaries to be deemed a successor in any respect to the Debtors' businesses within the meaning of any foreign, federal, state or local revenue, pension, ERISA, tax, labor, employment, environmental or other law, rule or regulation (including without limitation filing requirements under any such laws, rules or regulations), or under any products liability law or doctrine with respect to the Debtors' liability under such law, rule or regulation or doctrine, or under any product warranty liability law or doctrine with respect to the Debtors' liability under such law, rule or regulation or doctrine, and the Buyer, its affiliates and subsidiaries shall have no liability or obligation on account of any of the foregoing. Buyer and its affiliates shall have no liability or obligation under the WARN Act (29 U.S.C. § 210 *et seq.*) or the Comprehensive Environmental Response Compensation and

Liability Act, or any foreign, federal, state or local labor, employment, or environmental law by virtue of the Buyer's purchase of the Purchased Assets or assumption of the Assumed Liabilities.

32. Except to the extent expressly included in the Assumed Liabilities, pursuant to sections 105 and 363 of the Bankruptcy Code, all persons and entities, including, but not limited to, the Debtors, all debt security holders, equity security holders, the Debtors' employees or former employees, governmental, tax and regulatory authorities, lenders, parties to or beneficiaries under any benefit plan, any claimant asserting a products liability claim, trade and other creditors asserting or holding an Encumbrance of any kind or nature whatsoever against, in or with respect to any of the Debtors or the Purchased Assets (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or non-contingent, senior or subordinated), arising under or out of, in connection with, or in any way relating to the Debtors, the Purchased Assets, the operation of the Debtors' businesses prior to the Closing Date or the transfer of the Purchased Assets to the Buyer, shall be forever barred, estopped and permanently enjoined from asserting, prosecuting or otherwise pursuing such Encumbrance or other liability against the Buyer or any affiliate, subsidiary, successor or assign thereof and each of their respective current and former members, officers, directors, managed funds, investment advisors, attorneys, employees, partners, affiliates and representatives (each of the foregoing in its individual capacity) or the Purchased Assets. For the avoidance of doubt, the foregoing shall not prevent the Debtors, the Chapter 7 estates, successors or permitted assigns from pursuing claims, if any, against the Buyer and/or its successors and assigns in and only in accordance with the terms of the Agreement.

33. Subject to the terms of the Agreement, the Agreement and any related agreements may be waived, modified, amended, or supplemented by agreement of the Trustee, the Ad Hoc

Committee and the Buyer without further action or order of the Court; provided, however, that any such waiver, modification, amendment or supplement is not material and substantially conforms to and effectuates the Agreement and any related Agreement.

34. No bulk sale law or any similar law of any state or other jurisdiction shall apply in any way to the sale and the transactions contemplated by the Agreement.

35. The failure specifically to include any particular provisions of the Agreement or any related Agreement in this Order shall not diminish or impair the effectiveness of such provision, it being the intent of the Court, the Trustee and the Buyer that the Agreement and any related agreements are authorized and approved in their entirety with such amendments thereto as may be made by the parties in accordance with this Order prior to Closing. To the extent any provisions of this Order conflict with the terms and conditions of the Agreement, the terms and conditions of the Agreement shall govern and control. Nothing in this Order shall alter or amend the Agreement and the obligations of the Trustee and Buyer thereunder.

36. This Order and the Agreement shall be binding upon and govern the acts of all Persons and entities, including without limitation, the Debtors and the Buyer, their respective successors and permitted assigns, including, without limitation, any successor chapter 7 trustee hereinafter appointed for the Chapter 7 estates, all creditors of any Debtor (whether known or unknown), filing agents, filing officers, title agents, recording agencies, secretaries of state and all other persons and entities who may be required by operation of law, the duties of their office or contract to accept, file, register or otherwise record or release any documents or instruments or who may be required to report or insure any title in or to the Purchased Assets. All Encumbrances against the Chapter 7 estates of record as of the Closing shall forthwith be removed and stricken as against the Purchased Assets, without further order of the Court or act



of any party. Upon Closing, the entities listed above in this paragraph are authorized and directed to strike all such recorded Encumbrances against the Purchased Assets as provided for herein from their records, official and otherwise. Each and every federal, state and local governmental agency, unit or department are hereby directed to accept this Order as sole and sufficient evidence of the transfer of title of the Purchased Assets to the Buyer, and such agency, unit or department may rely upon this Order in consummating the transactions contemplated by the Agreement.

37. The provisions of this Order are non-severable and mutually dependent.

38. Nothing in any order of this Court shall conflict with or derogate from the provisions of the Agreement or the terms of this Order.

39. Notwithstanding Bankruptcy Rules 6004, 6006 and 7062, this Order shall be effective and enforceable immediately upon entry and its provisions shall be self-executing. In the absence of any person or entity obtaining a stay pending appeal, the Trustee and the Buyer are free to close under the Agreement at any time, subject to the terms of the Agreement. If, in the absence of any person or entity obtaining a stay pending appeal, the Trustee and the Buyer close under the Agreement, the Buyer shall be deemed to be acting in "good faith" and shall be entitled to the protections of section 363(m) of the Bankruptcy Code as to all aspects of the transactions under and pursuant to the Agreement if this Order or any authorization contained herein is reversed or modified on appeal.

40. This Order may be recorded by the Buyer in any registry or government office.

41. This Court shall retain jurisdiction even after the closing of these chapter 7 cases to:

a. Interpret, implement and enforce the terms and provisions of this Order, the

Procedures Order, and the Agreement, all amendments thereto and any waivers or consents thereunder and each of the Agreement executed in connection therewith in all respects;

- b. Decide any disputes concerning this Order, the Agreement or the rights and duties of the parties hereunder or thereunder or any issues relating to the Agreement and this Order including, but not limited to, the interpretation of the terms, conditions and provisions hereof and thereof, the status, nature and extent of the Purchased Assets and any Designated Contracts and all issues and disputes arising in connection with the relief authorized herein, inclusive of those concerning the transfer of the assets free and clear of all Encumbrances;
- c. Protect the Buyer or any of the Designated Contracts or Purchased Assets against any of the Encumbrances as provided herein including, without limitation, to enjoin the commencement or continuation of any action seeking to impose successor liability or bulk sale liability;
- d. Enter orders in aid or furtherance of the transactions contemplated by the Agreement or to ensure the peaceful use and enjoyment of the Designated Contracts or the Purchased Assets by the Buyer;
- e. Compel delivery of all Purchased Assets to the Buyer;
- f. Adjudicate any and all remaining issues concerning the Trustee's right and authority to assume and assign the Designated Contracts and the rights and obligations of the Debtors and the Buyer with respect to such assignment and the existence of any default under any such Designated Contract;

- g. Adjudicate any and all disputes concerning alleged pre-Closing Encumbrances in and to the Purchased Assets including without limitation the extent, validity, enforceability, priority, and nature of any and all such alleged Encumbrances; and
- h. Adjudicate any and all disputes relating to the Trustee's right, title or interest in the Purchased Assets and the proceeds thereof.

Dated: \_\_\_\_\_, 2009  
Wilmington, Delaware

---

The Honorable Mary F. Walrath  
United States Bankruptcy Judge

THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: ) Chapter 11
)
W. R. GRACE & CO., et al.<sup>1</sup> ) Case No. 01-01139 (JKF)
) (Jointly Administered)
Debtors. )

AFFIDAVIT OF JEREMY F. ROHEN IN SUPPORT OF
THE DEBTORS' MOTION FOR AN ORDER
AUTHORIZING THE SALE OF THE MEMBRANES BUSINESS

I, Jeremy F. Rohen, am a Managing Director of Seale & Associates, Inc. ("Seale"), a private financial advisory and investment banking firm that maintains offices at 4301 N. Fairfax Drive, Arlington, Virginia 22203. Seale is providing merger and acquisition and financial advisory services to the above-captioned debtors (the "Debtors") in connection with the sale of the Membranes Business. I am the senior member of the Seale team providing these services to the Debtors.

1 The Debtors consist of the following 62 entities: W. R. Grace & Co. (f/k/a Grace Specialty Chemicals, Inc.), W. R. Grace & Co.-Conn., A-1 Bit & Tool Co., Inc., Alewife Boston Ltd., Alewife Land Corporation, Amicon, Inc., CB Biomedical, Inc. (f/k/a Circe Biomedical, Inc.), CCHP, Inc., Coalgrace, Inc., Coalgrace II, Inc., Creative Food & Fun Company, Darex Puerto Rico, Inc., Del Taco Restaurants, Inc., Dewey and Almy, LLC (f/k/a Dewey and Almy Company), Ecarg, Inc., Five Alewife Boston Ltd., G C Limited Partners I, Inc. (f/k/a Grace Cocoa Limited Partners I, Inc.), G C Management, Inc. (f/k/a Grace Cocoa Management, Inc.), GEC Management Corporation, GN Holdings, Inc., GPC Thomasville Corp., Gloucester New Communities Company, Inc., Grace A-B Inc., Grace A-B II Inc., Grace Chemical Company of Cuba, Grace Culinary Systems, Inc., Grace Drilling Company, Grace Energy Corporation, Grace Environmental, Inc., Grace Europe, Inc., Grace H-G Inc., Grace H-G II Inc., Grace Hotel Services Corporation, Grace International Holdings, Inc. (f/k/a Dearborn International Holdings, Inc.), Grace Offshore Company, Grace PAR Corporation, Grace Petroleum Libya Incorporated, Grace Tarpon Investors, Inc., Grace Ventures Corp., Grace Washington, Inc., W. R. Grace Capital Corporation, W. R. Grace Land Corporation, Gracoal, Inc., Gracoal II, Inc., Guanica-Caribe Land Development Corporation, Hanover Square Corporation, Homco International, Inc., Kootenai Development Company, L B Realty, Inc., Litigation Management, Inc. (f/k/a GHSC Holding, Inc.), Grace JVH, Inc., Asbestos Management, Inc.), Monolith Enterprises, Incorporated, Monroe Street, Inc., MRA Holdings Corp. (f/k/a Nestor-BNA Holdings Corporation), MRA Intermedco, Inc. (f/k/a Nestor-BNA, Inc.), MRA Staffing Systems, Inc. (f/k/a British Nursing Association, Inc.), Remedium Group, Inc. (f/k/a Environmental Liability Management, Inc.), E&C Liquidating Corp., Emerson & Cuming, Inc.), Southern Oil, Resin & Fiberglass, Inc., Water Street Corporation, Axial Basin Ranch Company, CC Partners (f/k/a Cross Country Staffing), Hayden-Gulch West Coal Company, H-G Coal Company.

2. I submit this Affidavit in support of the Debtors' motion (the "Motion") for an order authorizing the sale of the Membranes Business to the Buyer. Capitalized terms used but not defined herein shall have the meaning ascribed to such terms in the Motion.

3. Except as otherwise noted, I have personal knowledge of the matters set forth herein.

#### Seale's Qualifications

4. I have considerable merger and acquisition advisory experience. Clients for whom I have provided advisory services include: American Standard Companies, Inc., Amkor Technology, Inc., Celanese Corporation, KBR, Inc., Lockheed Martin Corporation, and WGL Holdings, Inc., among others.

5. I graduated from The George Washington University School of Business, earning both a B.B.A. - Finance and a Masters of Taxation.

6. Prior to joining Seale in 2000, I worked as a consultant with PricewaterhouseCoopers LLP. Prior to joining PricewaterhouseCoopers LLP, I worked as a financial analyst for the U.S. Surface Transportation Board, the federal agency responsible for the economic regulation of interstate transportation, primarily railroads, including mergers, acquisitions, competitive practices, and safety.

#### Seale's Role in the Sale Process

7. Seale is a global advisory firm known for advising clients in the acquisition and divestiture of assets. In this role for the Debtors, Seale (A) performed an in-depth business evaluation, (B) identified and contacted pre-qualified potential acquirers, (C) prepared the information memorandum and other sale-related documents; (D) coordinated the sale process and due diligence; and (E) assisted with the negotiation of the final agreements.

8. In the spring of 2009, the Debtors' management engaged Seale to assist it in evaluating strategic options for the Membranes Business. The Membranes Business, a unit of Grace Davison, is a developer and producer of cellulose acetate polymer, spiral-wound membrane modules used to separate carbon dioxide (CO<sub>2</sub>) and hydrogen sulfide (H<sub>2</sub>S) from natural gas streams.

9. In April/May 2009, Seale and the Selling Debtor's management identified potential buyers (both financial and strategic) and prepared a detailed information memorandum. Seale contacted approximately one hundred fifteen potential strategic acquirers and seventy potential financial buyers with a demonstrated interest in opportunities with similar characteristics. These groups were provided a brief confidential overview of the Membranes Business. Thirty-two potential acquirers executed confidentiality agreements and received the detailed information memorandum. Of the thirty-two potential buyers, twelve submitted first-round indications of interest, and four potential buyers were chosen for the next round to receive management presentations and facility tours.

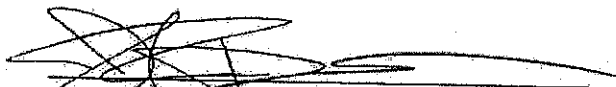
10. In my professional judgment, the parties contacted during the marketing process represent an exhaustive international list of potential buyers with an interest in an opportunity such as the Membranes Business. I believe the marketing process was thorough, and adequately assessed the market's level of interest in the Membranes Business.

11. The process demonstrated that a relatively small number of parties were interested in the Membranes Business at significant values meaningful to the estate, and that the Buyer, because of its operation of a similar business, was in a superior position to evaluate the business, offer an attractive price, and move quickly to negotiate a definitive agreement. Certain themes became apparent during the marketing process. First, many buyers were not interested in the small and unique market served by the Membranes Business. Second, buyers were concerned

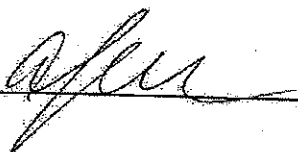
about the customer concentration and unpredictable cash flows of the business. Third, even though many potential acquirers had significant experience in the general industry they were reluctant to place significant value on the Membranes Business.

*[Signature page follows]*

The information contained in this Affidavit is true and correct to the best of my knowledge and belief.

  
Jeremy F. Rohen

Subscribed and sworn to before me  
this 20th day of July, 2009

  
\_\_\_\_\_

ELMIRA AIRAPETOVA  
Notary Public  
Commonwealth of Virginia  
319699  
My Commission Expires Sep 30, 2010



THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: ) Chapter 11
)
W. R. GRACE & CO., et al.1 ) Case No. 01-01139 (JKF)
) (Jointly Administered)
Debtors. )

AFFIDAVIT OF GEORGE W. YOUNG IN SUPPORT OF DEBTORS'
MOTION FOR AN ORDER (A) APPROVING THE AGREEMENTS
BY AND BETWEEN W. R. GRACE & CO.-CONN. AND BUYER; (B) AUTHORIZING
THE SALE OF W. R. GRACE & CO.-CONN.'S MEMBRANES BUSINESS TO BUYER
FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND OTHER
INTERESTS; (C) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT TO
BUYER OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED
LEASES; AND (D) GRANTING CERTAIN RELATED RELIEF

1. I am the Vice President Business Development of Grace Davison (one of the
Debtors' two operating segments), which has offices located at 7500 Grace Drive, Columbia,
Maryland 21044. I submit this Affidavit in support of the Debtors' Motion for an Order (A)
Approving the Agreements by and between W. R. Grace & Co.-Conn. and Buyer; (B) Authorizing

1 The Debtors consist of the following 62 entities: W. R. Grace & Co. (f/k/a Grace Specialty Chemicals, Inc.), W. R. Grace &
Co.-Conn., A-1 Bit & Tool Co., Inc., Alewife Boston Ltd., Alewife Land Corporation, Amicon, Inc., CB Biomedical, Inc.
(f/k/a Circe Biomedical, Inc.), CCHP, Inc., Coalgrace, Inc., Coalgrace II, Inc., Creative Food & Fun Company, Darex
Puerto Rico, Inc., Del Taco Restaurants, Inc., Dewey and Almy, LLC (f/k/a Dewey and Almy Company), Ecarg, Inc., Five
Alewife Boston Ltd., G C Limited Partners I, Inc. (f/k/a Grace Cocoa Limited Partners I, Inc.), G C Management, Inc. (f/k/a
Grace Cocoa Management, Inc.), GEC Management Corporation, GN Holdings, Inc., GPC Thomasville Corp., Gloucester
New Communities Company, Inc., Grace A-B Inc., Grace A-B II Inc., Grace Chemical Company of Cuba, Grace Culinary
Systems, Inc., Grace Drilling Company, Grace Energy Corporation, Grace Environmental, Inc., Grace Europe, Inc., Grace
H-G Inc., Grace H-G II Inc., Grace Hotel Services Corporation, Grace International Holdings, Inc. (f/k/a Dearborn
International Holdings, Inc.), Grace Offshore Company, Grace PAR Corporation, Grace Petroleum Libya Incorporated,
Grace Tarpon Investors, Inc., Grace Ventures Corp., Grace Washington, Inc., W. R. Grace Capital Corporation, W. R. Grace
Land Corporation, Gracoal, Inc., Gracoal II, Inc., Guanica-Caribe Land Development Corporation, Hanover Square
Corporation, Homco International, Inc., Kootenai Development Company, L B Realty, Inc., Litigation Management, Inc.
(f/k/a GHSC Holding, Inc., Grace JVH, Inc., Asbestos Management, Inc.), Monolith Enterprises, Incorporated, Monroe
Street, Inc., MRA Holdings Corp. (f/k/a Nestor-BNA Holdings Corporation), MRA Intermedco, Inc. (f/k/a Nestor-BNA,
Inc.), MRA Staffing Systems, Inc. (f/k/a British Nursing Association, Inc.), Remedium Group, Inc. (f/k/a Environmental
Liability Management, Inc., E&C Liquidating Corp., Emerson & Cuming, Inc.), Southern Oil, Resin & Fiberglass, Inc.,
Water Street Corporation, Axial Basin Ranch Company, CC Partners (f/k/a Cross Country Staffing), Hayden-Gulch West
Coal Company, H-G Coal Company.

*the Sale of W. R. Grace & Co.-Conn.'s Membranes Business to Buyer Free and Clear of Liens, Claims, Encumbrances and Other Interests; (C) Authorizing the Assumption and Assignment to Buyer of Certain Executory Contracts and Unexpired Leases; and (D) Granting Certain Related Relief (the "Sale Motion"). Capitalized terms not defined herein shall have the meaning ascribed to such terms in the Sale Motion.*

2. I am responsible for Grace Davison's Mergers and Acquisitions, Incubator Business Development, Process Engineering, and Process Development functions. In that capacity, I have reviewed the Sale Motion and the Agreements, and am, directly or through the Debtors' personnel, attorneys, and financial advisor familiar with the information contained therein and in the exhibits annexed thereto. Except as otherwise noted, I have personal knowledge of the matters set forth herein.

3. The Membranes Business, a unit of Grace Davison, is a developer and producer of cellulose acetate polymer, spiral-wound membrane modules used to separate carbon dioxide (CO<sub>2</sub>) and hydrogen sulfide (H<sub>2</sub>S) from natural gas streams. These membranes are used in the separation systems of natural gas producers, including private and public companies and state-owned enterprises. The Membranes Business maintains a portfolio of intellectual property that includes patents, trade secrets, and manufacturing know-how related to separation membranes for applications ranging from natural gas treatment, to pharmaceutical and semiconductor lithography applications, to "green" technologies such as CO<sub>2</sub> capture and bio-separations. The Membranes Business uses predominantly external sales channels in the distribution of its products.. Its principal distributor represents approximately 90% of Membrane Business sales.

4. As of July 15, 2009, the Membranes Business had sixteen (16) employees. Fifteen (15) employees are located at its production facility in Littleton, CO, and the business's senior principal scientist is based in Columbia, MD.

5. In the first quarter of 2009, I participated with management in the decision to sell the Membranes Business. This decision was based on a number of factors, including that the Membranes Business is not complementary to the Debtors' other business lines and represents less than 1% of the Debtors' 2008 consolidated revenues. Further, the Membranes Business is the Debtors' only operation that sells into the natural gas industry and, therefore, the Debtors have very little supplier leverage in this market. I believe the sale of the Membranes Business would generate value to the estate while enabling senior management to focus on higher-return, core activities.

6. In April 2009, under my supervision, certain of the Debtor's employees, in consultation with Seale & Associates Inc., our financial advisor, started pursuing the sale of the Membranes Business. Seale and the Debtors reviewed information on 1300 companies and I am informed that Seale contacted more than 100 potential strategic buyers and 70 potential financial buyers. I am informed that generally, strategic buyers were more interested than financial buyers because they are looking to add the Membranes Business to the package of goods and services that they already offer to natural gas producers.

7. I am informed that Seale provided a brief summary of the investment opportunity was provided to more than 115 potential buyers (both strategic and financial). Of these, I am informed that 32 potential buyers eventually entered into confidentiality agreements and received a detailed information memorandum, and I received 12 preliminary indications of interest containing a preliminary purchase price. Based on the preliminary purchase prices in the

indications of interest, I invited four potential buyers that participated in a tour of the Littleton, Colorado manufacturing facility, and presentations by the management of the business, followed by substantial due diligence through access to an electronic data room and follow-up questions that were answered by the Selling Debtor's management through Seale.

8. Each of the four potential buyers then submitted a revised firm bid, subject to negotiation of a definitive agreement for the transaction, which I reviewed.

9. In evaluating each bid, the Selling Debtor considered primarily the dollar amount of the bid, Seller Debtor's confidence that the bid would hold up, the bid's required closing conditions, and relative ease of transition of the Membranes Business to the potential buyer's organization. The Buyer's bid was the second highest; but taking into account all the evaluation criteria, its bid was the most attractive. The Buyer is in a similar business and therefore was able to quickly understand and evaluate many aspects of the Membranes Business. The Buyer had received pre-approval of the transaction by its senior executives, and was prepared to move on an accelerated timeline. By contrast, the highest bidder was unfamiliar with the business, and required an extra two weeks of evaluation before it was prepared to move forward. The highest bid was therefore basically a further indication of interest, and the Seller Debtor had no certainty whether a bona fide final offer would be forthcoming, much less whether the price would hold up. By contrast, the Buyer had provided a firm bid and was ready to begin negotiations immediately. Based on these factors and circumstances, the Selling Debtor determined, in its business judgment, that the offer from the Buyer was materially better than the three other bids submitted and, as such, constituted the highest and best offer for the Membranes Business.

10. In my best business judgment, the Buyer's offer represents the most attractive option along several dimensions, including purchase price, and conditions and timing to closing.

Moreover, to the best of my knowledge and belief, I have determined that the Buyer has the capability and operating expertise to close the transaction and integrate the Membranes Business into its own operations with only limited transitional assistance from the Debtors. Therefore, I recommended authorization of the Selling Debtor's entry into the Agreements with the Buyer for which the Selling Debtor now seeks approval from this Court.

11. Based on my business judgment, I believe that the most prudent course of action is to seek approval of the Sale to the Buyer as provided for in the Sale Motion. Among other reasons, I believe that further delays in completing the Sale could lead to deteriorating financial performance of the Membranes Business and eroded potential value.

12. I have determined that the Sale of the Membranes Business by private sale to the Buyer will obtain the highest and best offer for this business thereby maximizing the value to the Selling Debtor's estate. The Agreements represent the culmination of comprehensive, arms-length negotiations for the Sale of the Membranes Business in exchange for what, I believe, is the highest and best consideration available for such business. The Sale will generate value to the estate while enabling the Selling Debtor's management to focus on higher-return, core activities. Therefore, I believe that the Sale is in the best interests of the Selling Debtor and its affiliates, their estates, and their creditors.

13. The Selling Debtor also believes that the amount of the consideration received for the Membranes Business is fair and reasonable. The extensive marketing efforts have demonstrated that the offer made by the Buyer is the best offer that the Debtor has received for such assets. I believe that the fairness and reasonableness of the consideration to be paid by the Buyer ultimately has been demonstrated by adequate "market exposure" and a fair marketing process – the best means for establishing whether a fair and reasonable price is being paid.

14. If the Sale Agreement is not approved, then management will be forced to evaluate options that are not as attractive as the current offer. The alternative to the proposed Sale is to continue to market the Membranes Business, which would subject the estate to significant market risk with a low probability of identifying a higher and better offer. I believe that further delays in completing the Sale could lead to deteriorating financial performance of the Membranes Business and eroded potential value. Moreover, I believe that employees and customers of the Membranes Business would face uncertainty regarding the future of the Membranes Business. This uncertainty could potentially lead to loss of employees, weakened financial performance, and the further erosion of value.

15. The parties to the Agreements have always negotiated at arm's-length, and in good faith, and the Buyer has not exerted control or undue influence over the Selling Debtor. To the best of my knowledge and belief, I have determined that the Buyer is completely and wholly unrelated to the Selling Debtor. Extensive negotiations were held between the parties involving substantial time and energy by the parties and their professionals, and the Agreements reflect give-and-take and compromises by both sides.

16. To the best of my knowledge and belief, I have determined that the Buyer does not, and will not, share any common incorporators, officers, directors, or controlling stockholders with the Selling Debtor, and that the Buyer is not an insider of the Selling Debtor.

17. The Sale contemplates the assumption and assignment of certain executory contracts and unexpired leases of the Membranes Business to the Buyer, which are necessary to the Buyer for the continuation of the Membranes Business and, at the same time, will enhance the value of the Sale to the Selling Debtor's estate by curtailing further administrative liability to the estate and eliminating certain rejection claims. Furthermore, the Buyer has agreed to pay

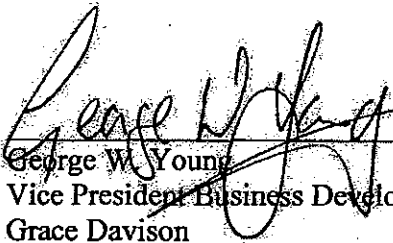
half of the Cure Amounts in connection with the Transferred Contracts. The estimated cure payments associated with all of the Transferred Contracts totals \$0; therefore, the maximum liability of the Selling Debtor is \$0.

18. I am further informed that, to the extent necessary, the Buyer is able and willing, at the Sale Hearing, to demonstrate to the satisfaction of this Court that adequate assurance of future performance is present. Accordingly, the Selling Debtor submits that the assumption of the Transferred Contracts by the Selling Debtor and assignment to the Buyer should be approved.

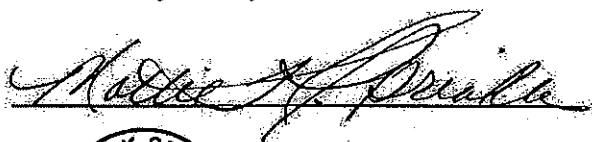
19. To preserve the value of the Membranes Business by bringing certainty to the sale process, and because both the Selling Debtor and Buyer desire to close the Sale on or before September 15, 2009, the Selling Debtor seeks to close the Sale as soon as possible after all closing conditions have been met or waived. Accordingly, the Selling Debtor requests that any order approving the Agreements be effective immediately.

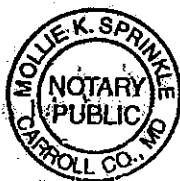
*[Signature page follows]*

The information contained in this Affidavit is true and correct to the best of my knowledge and belief.

  
George W. Young  
Vice President Business Development  
Grace Davison

Subscribed and sworn to before me  
this 20th day of July, 2009





**MOLLIE K. SPRINKLE**  
Notary Public, State of Maryland  
County of Carroll  
My Commission Expires December 1, 2010



**MEMBRANES ASSET SALE AGREEMENT**

July 15, 2009

1780151.3

**TABLE OF CONTENTS**

	<u>Page</u>
<b>ARTICLE 1</b> <b>Definitions</b> .....	1
1.01 <u>General</u> .....	1
1.02 <u>Defined Terms</u> .....	2
<b>ARTICLE 2</b> <b>Purchase and Sale of Transferred Assets, Purchase Price</b> .....	10
2.01 <u>Purchase and Sale of Transferred Assets; Assumption of Transferred Liabilities</u>	11
2.02 <u>Transferred and Excluded Assets</u> .....	11
2.03 <u>Transferred and Excluded Liabilities</u> .....	12
2.04 <u>Purchase Price</u> .....	14
2.05 <u>Purchase Price Allocation</u> .....	14
<b>ARTICLE 3</b> <b>Closing</b> .....	15
3.01 <u>Scheduled Closing Date</u> .....	15
3.02 <u>Time and Place of Closing, Simultaneity</u> .....	15
3.03 <u>Transfers at the Closing; Ancillary Agreements; Payments</u> .....	15
3.04 <u>Further Assurances</u> .....	16
<b>ARTICLE 4</b> <b>Purchase Price, Post-Closing Adjustments</b> .....	17
4.01 <u>Closing of Books</u> .....	17
4.02 <u>Definitions</u> .....	17
4.03 <u>Computations</u> .....	17
4.04 <u>Closing Statement</u> .....	17
4.05 <u>Acceptance</u> .....	18
4.06 <u>Non-Acceptance, Resolution of Disputes</u> .....	18
4.07 <u>Payment of Adjustments</u> .....	19
<b>ARTICLE 5</b> <b>Seller's Representations and Warranties</b> .....	19
5.01 <u>Corporate Organization and Existence</u> .....	20
5.02 <u>Corporate Power</u> .....	20
5.03 <u>Authorization</u> .....	20
5.04 <u>Execution and Delivery</u> .....	20
5.05 <u>No Conflict</u> .....	20
5.06 <u>Real Property</u> .....	21
5.07 <u>Title to and Sufficiency of Assets</u> .....	22
5.08 <u>Litigation; Investigations</u> .....	22
5.09 <u>Insurance</u> .....	22
5.10 <u>Material Contracts</u> .....	22
5.11 <u>Labor and Employment</u> .....	24
5.12 <u>Employee Benefit Plans</u> .....	25
5.13 <u>Environmental Compliance</u> .....	25
5.14 <u>Intellectual Property</u> .....	26
5.15 <u>Financial Statements</u> .....	28
5.16 <u>Taxes</u> .....	28
5.17 <u>Compliance with Laws</u> .....	28
5.18 <u>Transactions with Affiliates</u> .....	29

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
5.19 <u>Conduct of the Business</u> .....	29
5.20 <u>Permits</u> .....	30
5.21 <u>Product Warranty/Product Liability</u> .....	30
5.22 <u>No Premerger Obligations</u> .....	31
5.23 <u>Additional Representations</u> .....	31
<b>ARTICLE 6 Buyer Representations and Warranties</b> . . . . .	31
6.01 <u>Corporate Organization and Existence</u> .....	31
6.02 <u>Authorization</u> .....	32
6.03 <u>No Conflict</u> .....	32
6.04 <u>Sufficient Funds</u> .....	32
6.05 <u>No Premerger Obligations</u> .....	32
<b>ARTICLE 7 Buyer's Investigation</b> . . . . .	33
7.01 <u>Investigation</u> .....	33
7.02 <u>No Additional Representations</u> .....	33
<b>ARTICLE 8 Covenants of Seller and Buyer</b> . . . . .	33
8.01 <u>Bankruptcy Court Approval</u> .....	33
8.02 <u>Access and Inquiry</u> .....	34
8.03 <u>Licenses and Permits; Consents</u> .....	34
8.04 <u>Notices to Third Parties</u> .....	35
8.05 <u>Commercially Reasonable Efforts</u> .....	35
8.06 <u>Title Insurance and Survey</u> .....	35
8.07 <u>Termination of Intercompany Agreements</u> .....	35
8.08 <u>Delivery of Monthly Financials</u> .....	35
8.09 <u>Assumption and Assignment of Transferred Contracts; Cure Costs</u> .....	35
8.10 <u>Temporary Employees</u> .....	36
<b>ARTICLE 9 Conduct of Business Prior to the Closing</b> . . . . .	36
9.01 <u>Operation in Ordinary Course</u> .....	36
<b>ARTICLE 10 Conditions Precedent to Buyer's Obligations</b> . . . . .	38
10.01 <u>Performance of Covenants and Agreements</u> .....	38
10.02 <u>Permits, Consents, etc.</u> .....	38
10.03 <u>Litigation</u> .....	38
10.04 <u>Certificates of Seller</u> .....	38
10.05 <u>No Material Adverse Effect</u> .....	39
10.06 <u>Closing Deliveries</u> .....	39
10.07 <u>Bankruptcy Court Approval</u> .....	39
10.08 <u>Title and Survey</u> .....	39
<b>ARTICLE 11 Conditions Precedent to Seller's Obligations</b> . . . . .	39
11.01 <u>Accuracy of Representations and Warranties</u> .....	39
11.02 <u>Performance of Covenants and Agreements</u> .....	40
11.03 <u>Permits, Consents, etc.</u> .....	40
11.04 <u>Litigation</u> .....	40

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
11.05	<u>Certificates of Buyer</u> ..... 40
11.06	<u>Bankruptcy Court Approval</u> ..... 41
<b>ARTICLE 12</b>	<b><u>Employee Matters</u></b> ..... 41
12.01	<u>Employment</u> ..... 41
12.02	<u>Positions Offered to Subject Business Employees</u> ..... 41
12.03	<u>Inactive Subject Business Employees</u> ..... 42
12.04	<u>Terms of Employment</u> ..... 43
12.05	<u>Employment Related Indemnities</u> ..... 43
<b>ARTICLE 13</b>	<b><u>Termination</u></b> ..... 43
13.01	<u>Rights to Terminate</u> ..... 43
13.02	<u>Consequences of Termination</u> ..... 44
<b>ARTICLE 14</b>	<b><u>Indemnification</u></b> ..... 44
14.01	<u>Survival</u> ..... 44
14.02	<u>Seller's Indemnification</u> ..... 45
14.03	<u>Buyer's Indemnification</u> ..... 46
14.04	<u>Procedures for Indemnification</u> ..... 47
14.05	<u>No Consequential Damages</u> ..... 50
14.06	<u>Priority of Payments</u> ..... 50
14.07	<u>Treatment of Indemnity Payments</u> ..... 51
14.08	<u>Indemnification Limitations</u> ..... 51
14.09	<u>Additional Limitations</u> ..... 51
<b>ARTICLE 15</b>	<b><u>Cooperation in Various Matters</u></b> ..... 51
15.01	<u>Mutual Cooperation</u> ..... 51
15.02	<u>Buyer's Files and Records</u> ..... 51
<b>ARTICLE 16</b>	<b><u>Post-Closing Matters</u></b> ..... 52
16.01	<u>Reports</u> ..... 52
16.02	<u>Names</u> ..... 52
16.03	<u>Publicity</u> ..... 52
16.04	<u>Seller's Covenant Not to Compete</u> ..... 52
16.05	<u>Non Solicitation of Subject Business Employees</u> ..... 53
16.06	<u>Nonassignable Items</u> ..... 53
16.07	<u>Accounts Receivable and Other Payments Received After Closing</u> ..... 54
16.08	<u>Removal of Maryland Assets</u> ..... 54
16.09	<u>Confidentiality</u> ..... 54
16.10	<u>Release of Restrictions</u> ..... 55
<b>ARTICLE 17</b>	<b><u>Expenses</u></b> ..... 55
17.01	<u>Buyer's Expenses</u> ..... 55
17.02	<u>Seller's Expenses</u> ..... 55
17.03	<u>Transfer Taxes</u> ..... 55
17.04	<u>Real Estate Prorations</u> ..... 55

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b>ARTICLE 18</b> <b>Notices</b> .....	56
18.01 <b>Notices</b> .....	56
<b>ARTICLE 19</b> <b>General</b> .....	57
19.01 <b>Entire Agreement</b> .....	57
19.02 <b>Governing Law</b> .....	57
19.03 <b>Venue and Retention of Jurisdiction</b> .....	57
19.04 <b>Waiver of Jury Trial</b> .....	57
19.05 <b>Equitable Remedies</b> .....	57
19.06 <b>Assignment; Successors</b> .....	58
19.07 <b>Amendments and Waivers</b> .....	58
19.08 <b>Counterparts</b> .....	58
19.09 <b>Captions</b> .....	58
19.10 <b>Severability</b> .....	58
19.11 <b>No Third Party Beneficiaries</b> .....	59
19.12 <b>No Successor or Transferee Liability</b> .....	59
19.13 <b>Guaranty by Buyer Parent</b> .....	59

## Exhibits and Schedules

### Exhibits

1.02A	Knowledge Group
1.02B	Maryland Assets
1.02C	Sale Order
1.02D	Table A Items
1.02E	Title Policy Endorsements
1.02F	Transferred Contracts
3.03(a)	Form of Special Warranty Deed
3.03(b)	Form of Bill of Sale and Assignment and Assumption Agreement
3.03(c)	Form of Intellectual Property Assignment Agreement
3.03(d)	Form of Transition Services Agreement
14.09	Additional Limitations

**Disclosure Schedules**

1.02	IP Lease
2.02(a)	Equipment
2.02(a)(x)	Claims
2.02(b)	Excluded Assets
4.01	Inventory Taking Procedures
4.03(a)	Accounting Principles and Procedures
4.03(b)	Sample Closing Working Capital Amount
5.05	Conflicts
5.06(a)	Description of Subject Business Real Property
5.07	Title to and Sufficiency of Assets
5.08(a)	Litigation
5.08(b)	Investigations
5.09	Insurance
5.10(a)	Contracts
5.10(d)	Material Bids, Proposals and Purchase Orders
5.11(a)	Labor and Employment
5.11(b)	Labor Related Claims
5.12	Employee Benefit Plans
5.13	Environmental Compliance
5.14(a)	Intellectual Property
5.14(b)	Intellectual Property Exception
5.14(c)	Assignment Agreements
5.14(e)	Intellectual Property Ownership
5.14(f)	Employee Non-Disclosure Agreements
5.15(a)	Net Assets Statements
5.15(b)	Income Statements
5.18	Transactions with Affiliates
5.19	Conduct of Business
5.20	Permits
5.21(a)	Standard Terms and Conditions
5.21(b)	Proceedings
5.23	Additional Representation
9.01	Operation in Ordinary Course
9.01(o)	Inducement to Termination
12.01	Employment
16.06(b)	Restricted IP

## MEMBRANES ASSET SALE AGREEMENT

**MEMBRANES ASSET SALE AGREEMENT** (this "Agreement") dated July 15, 2009, by and among W. R. Grace & Co.-Conn., a Connecticut corporation ("Seller"), and [REDACTED],<sup>1</sup> a Delaware limited liability company ("Buyer"), and, with respect solely to Sections 6.01, 6.02, 6.03, 6.05 and 19.13, [REDACTED], a Delaware corporation ("Buyer Parent").

### WITNESSETH:

**WHEREAS**, pursuant to sections 363 and 365 of the Bankruptcy Code, Seller wishes to sell, transfer, assign, convey and deliver to Buyer, and Buyer wishes to purchase, accept and acquire, from Seller all of the Transferred Assets and assume all of the Transferred Liabilities, in each case, in accordance with the terms and subject to the conditions set forth in this Agreement and in the Bankruptcy Code;

**WHEREAS**, Buyer Parent wishes to guarantee the obligations of Buyer under this Agreement and the other Transaction Documents;

**NOW THEREFORE**, in consideration of the mutual covenants herein contained, and for other good and valuable consideration, the value, receipt and sufficiency of which are acknowledged, the parties hereby agree as follows:

### ARTICLE 1

#### Definitions

1.01 **General.** All Article and Section numbers, and Exhibit and Schedule references, used in this Agreement refer to Articles and Sections of this Agreement, and Exhibits and Schedules attached hereto or delivered simultaneously herewith, unless otherwise specifically stated. Any of the terms defined in this Agreement may be used in the singular or the plural. In this Agreement, unless otherwise specifically stated: "hereof," "herein," "hereto," "hereunder" and the like mean and refer to this Agreement as a whole and not merely to the specific Section, paragraph or clause in which the word appears; words importing any gender include the other gender; the term "including" shall mean "including but not by way of limitation" and the term "ordinary course of business" shall mean "ordinary course of business, consistent with past practice."

---

<sup>1</sup> The name of the Buyer and certain confidential terms of this Agreement have been withheld or redacted from this Motion and this Agreement to protect the confidential nature of the information and business sensitivities. The full un-redacted version of this Agreement shall be provided: (i) to the Court, the Official Committees and the FCRs upon request of the Debtors; and (ii) to other parties in interest, upon request and agreement of the Debtors and the Buyer and execution of a confidentiality agreement.



1.02 Defined Terms. For purposes of this Agreement, the following defined terms have the meanings set forth in this Section.

“Acquired Business” has the meaning given such term in Section 16.04.

“Affiliate” of any Person means any other Person which, directly or indirectly, controls or is controlled by or is under common control with such Person. A Person shall be deemed to “control,” be “controlled by” or be “under common control with” any other Person if such other Person possesses, directly or indirectly, power to direct or cause the direction of the management or policies of such Person whether through the ownership of voting securities or other ownership interests, by contract or otherwise.

“Agreement” has the meaning given such term in the Preamble.

“Ancillary Agreements” means the agreements described in Section 3.03.

“Approved Indemnification Claim” has the meaning given such term in Section 14.04.

“Arbitrator” has the meaning given such term in Section 4.06.

“Bankruptcy Code” means Chapter 11 of Title 11, U.S.C. §§101 *et seq.*, as amended.

“Bankruptcy Court” means the United States Bankruptcy Court for the District of Delaware.

“Bankruptcy Proceeding” means *In re: W. R. Grace & Co. et al., Debtors*, Chapter 11, Case Nos. 01-1139 et al. (JKF) (Jointly Administered) in the Bankruptcy Court.

“Basket Amount” has the meaning given such term in Section 14.02.

“Business Day” means a day that is not a Saturday or Sunday, nor a day on which banks are required or authorized to be closed in New York City.

“Buyer” has the meaning given such term in the Preamble.

“Buyer Claim” has the meaning given such term in Section 14.02.

“Buyer Entity” means any of Buyer, its Subsidiaries, and any Person of which Buyer is a Subsidiary.

“Buyer Group” means, collectively, Buyer and its Subsidiaries, and any Person of which Buyer is a Subsidiary.

“Buyer Indemnified Parties” has the meaning given such term in Section 14.02.

“Buyer Parent” has the meaning given such term in the Preamble.

"Buyer's Severance Plan" has the meaning given such term in Section 12.02.

"Claim" has the meaning given such term in Section 14.03.

"Closing" means the actions to be taken by Seller and Buyer described in Section 3.03.

"Closing Current Assets" has the meaning given such term in Section 4.02.

"Closing Current Liabilities" has the meaning given such term in Section 4.02.

"Closing Date" means the date on which the Closing takes place.

"Closing Permitted Exceptions" means (a) Liens for Taxes, assessments, levies and other charges of Governmental Authorities not yet due and payable or being contested in good faith by appropriate proceedings, and (b) with respect to the Subject Business Real Property (i) matters disclosed by the Survey, the existence of which, individually or in the aggregate, would not materially and adversely diminish the value or marketability of or interfere with the present use, operation or occupancy of the Subject Business Real Property, (ii) easements, encroachments, restrictions, rights of way and any other non-monetary Liens of public record disclosed by the Title Commitment, the existence of which, individually or in the aggregate, would not materially and adversely diminish the value or marketability of or interfere with the present use, operation or occupancy of the Subject Business Real Property, (iii) zoning and building restrictions and (iv) Liens of Seller's secured credit facility, all of which shall be released at or prior to the Closing; provided, however, that in no event shall any monetary Liens encumbering or otherwise affecting the Subject Business Real Property (other than as described in subsection (a) or (b)(iv) above) be deemed to be Closing Permitted Exceptions.

"Closing Statement" has the meaning given such term in Section 4.04.

"Closing Working Capital Amount" has the meaning given such term in Section 4.02.

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

"Confidential Information" has the meaning given such term in Section 16.09.

"Confidentiality Agreement" means the confidentiality agreement dated April 2, 2009, between Seller and Buyer.

"Continued Employees" has the meaning given such term in Section 12.01.

"Contract" means any lease, license, contract, agreement or other binding commitment, whether oral or written and whether express or implied.

"Cure Costs" means all payments under section 365 of the Bankruptcy Code which are required to assume and assign the Transferred Contracts.

"Damages" means any and all losses, assessments, damages (including damages related to any awards for equitable relief or any obligations, prohibitions or Liens imposed on the Transferred Assets or Subject Business), penalties, fines, amounts paid in settlement, defense costs, Taxes, Liens, costs or expenses (including interest), of any nature whatsoever, including, (a) in connection with the defense of a Third Party Claim, reasonable attorneys' fees and other out-of-pocket expenses, and (b) in connection with any Claim other than a Third Party Claim, reasonable attorneys' fees and other out-of-pocket expenses solely of the prevailing party. For purposes of this definition, "prevailing party" shall mean a defendant that is fully exonerated or cleared in connection with the defense of the applicable Proceeding, or a plaintiff that is awarded all or any portion of the relief claimed thereby in the applicable Proceeding.

"Disclosure Schedules" means, collectively, the various schedules referred to in this Agreement.

"Dispute Notice" has the meaning given such term in Section 14.04.

"Dispute Period" has the meaning given such term in Section 14.04.

"Division Presidents" has the meaning given such term in Section 14.04.

"EH&S Law" means any Law, or any Hazardous Material standard issued pursuant to any Law, whenever in effect (except to the extent any specific reference to EH&S Law herein may be qualified by a particular date), which relates to or otherwise imposes liability, obligations or standards relating to the protection of human health and safety and the Environment, including the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9601 *et seq.*), the Hazardous Materials Transportation Act (49 U.S.C. App. § 1801 *et seq.*), the Resource Conservation and Recovery Act (42 U.S.C. § 6901 *et seq.*), the Clean Water Act (33 U.S.C. § 1251 *et seq.*), the Clean Air Act (42 U.S.C. § 7401 *et seq.*), the Toxic Substance Control Act (15 U.S.C. § 2601 *et seq.*), the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 136 *et seq.*), the Occupational Safety and Health Act (29 U.S.C. § 651 *et seq.*), the Registration, Evaluation, Authorization and Restriction of Chemicals (Reg. (EC) No. 1907/2006 of the European Parliament), Restriction of Hazardous Substances (Dir. 2002/95/EC of the European Parliament) and any Law having similar effect in any other jurisdiction.

"Employee Closing Date" has the meaning set forth in Section 12.05.

"Environment" means soil, surface and sub-surface land, surface waters (including navigable, non-navigable, ephemeral and maritime waters), groundwater, stream sediments, ambient air (including indoor air), plant life, animal life and natural resources.

"Excluded Assets" has the meaning given such term in Section 2.02.

"Excluded Liabilities" has the meaning given such term in Section 2.03.

“Executive” has the meaning given such term in Section 12.01.

“Final Closing Working Capital Amount” has the meaning given such term in Section 4.06.

“Final Order” means any order of the Bankruptcy Court after all opportunities for rehearing, reargument, petition for certiorari and appeal are exhausted or expired and any requests for rehearing have been denied; and that has not been revised, stayed, enjoined, set aside, annulled, reversed, remanded, modified or suspended, with respect to which any required waiting period has expired, and to which all conditions to effectiveness prescribed therein or otherwise by Law or Order have been satisfied; provided, however, that no order shall fail to be a Final Order solely because of the possibility that a motion pursuant to Rule 60 of the Federal Rules of Civil Procedure or Rule 9024 of the Federal Rules of Bankruptcy Procedure may be filed with respect to such order.

“Governmental Authority” means any federal, state, municipal or foreign government or other political subdivision thereof, and any entity exercising executive, legislative, judicial, regulatory or administration functions of or pertaining to government, including any governmental authority, agency, department, board, commission or instrumentality of the United States, any foreign government, any State of the United States or any political subdivision of any of the foregoing, and any court or tribunal of competent jurisdiction.

“Hazardous Materials” means any wastes, pollutants, contaminants, hazardous or toxic substances or organisms (including Legionella species, Stachybotrys species, petroleum, polychlorinated biphenyls, asbestos and asbestos-containing materials) that is listed, defined, designated, classified or regulated under any applicable EH&S Law.

“Income Statements” has the meaning given such term in Section 5.15.

“Indemnified Party” has the meaning given such term in Section 14.04.

“Indemnifying Party” has the meaning given such term in Section 14.04.

“Indemnity Cap” has the meaning given such term in Section 14.02.

“Initial Purchase Price” has the meaning given such term in Section 2.04.

“Insurance Policies” means insurance policies or other insurance coverage.

“Intellectual Property” or “IP” means any and all of the following:

- (a) United States and foreign patents, patent applications, and patent disclosures, including all reissues, divisions, continuations, continuations-in part, substitutions, or extensions of any of the foregoing;
- (b) (i) trademarks, service marks, trade names, brand names, trade dress, logos, and designs, assumed names and other indications of origin, whether

- registered or unregistered, and any applications or renewals therefor, and (ii) all goodwill symbolized thereby or associated with (i);
- (c) United States and foreign copyrights, whether registered or unregistered, and any applications therefor or renewals thereof; and
  - (d) inventions, formulae, processes, designs, ideas, know-how, show-how, manufacturing know-how, trade secrets, computer software and technical manuals and documentation which are not embodied within subparagraphs (a), (b) and (c).

“Inventory” has the meaning given such term in Section 2.02.

“IP Assignment” has the meaning given such term in Section 3.03.

“IP Lease” means that certain lease by Seller of Intellectual Property set forth on Schedule 1.02.

“Knowledge of Seller” or “Seller’s Knowledge” means the knowledge that any of the individuals listed on Exhibit 1.02A has on the date of this Agreement or on the Closing Date, as applicable.

“Law” means any federal, state, local, municipal, foreign or other law, statute, constitution, principle of common law, ordinance, code, decree, rule or regulation of any Governmental Authority.

“Lien” means any mortgage, pledge, security interest, easement, covenant, charge, right-of-way or other lien or encumbrance.

“Maryland Assets” means certain assets used in the Subject Business that are located at Seller’s facilities in Columbia, Maryland, or Curtis Bay (Baltimore), Maryland, which are listed in Exhibit 1.02B.

“Material Adverse Effect” means any change, effect, occurrence or development that, individually or in the aggregate, has or would reasonably be expected to have a material adverse effect upon the Transferred Assets or Transferred Liabilities, or on the business, condition (financial or otherwise), operations or results of operations of the Subject Business, taken as a whole, but excluding (a) economic effects or changes that are generally applicable to the industries and markets in which the Subject Business operates, (b) general changes in the United States or world financial markets or general economic conditions, (c) general changes in applicable Laws (except, in the case of clauses (a), (b) and (c), to the extent such effect or change disproportionately affects the Subject Business), or (d) the failure, in and of itself, to win any particular bid or proposal made to a customer (or any cancellation or revocation of any request for proposal from any customer) or meet any projections, but not the facts underlying such failure.

“Material Contracts” has the meaning given such term in Section 5.10.

“Minimum Claim Amount” has the meaning given such term in Section 14.02.

“Natural Gas Subject Business” means the operation of the Subject Business as conducted within one year before the Closing with respect to manufacture and sale of natural gas membranes, membrane modules and membrane systems for use in natural gas separations.

“Natural Gas Subject Business Intellectual Property” means Seller’s interest in Intellectual Property that is used or held for use exclusively in the Natural Gas Subject Business or that has been developed for, or is under development for use exclusively in the Natural Gas Subject Business.

“Net Assets Statements” has the meaning given such term in Section 5.15.

“Nonassignable Items” has the meaning given such term in Section 16.06.

“Objection Notice” has the meaning given such term in Section 4.05.

“Order” means any judgment, order or similar act issued, made or rendered by any Governmental Authority.

“Parties” means Seller, Buyer and Buyer Parent, collectively, and “Party” means Seller, Buyer or Buyer Parent, individually.

“Permit” means any approval, authorization, consent, franchise, license, permit or certificate issued or required by any Governmental Authority.

“Permitted Exceptions” means (a) Liens for Taxes, assessments, levies and other charges of Governmental Authorities not yet due and payable or being contested in good faith by appropriate proceedings, and (b) with respect to the Subject Business Real Property (i) matters disclosed by the Survey, (ii) easements, encroachments, restrictions, rights of way and any other non-monetary Liens of public record disclosed by the Title Commitment, (iii) zoning and building restrictions and (iv) Liens of Seller’s secured credit facility, all of which shall be released at or prior to the Closing; provided, however, that in no event shall any monetary Liens encumbering or otherwise affecting the Subject Business Real Property (other than as described in subsection (a) or (b)(iv) above) be deemed to be Permitted Exceptions.

“Person” means any individual, partnership, firm, trust, association, company, limited liability company, corporation, joint venture, unincorporated organization, other business entity or Governmental Authority.

“Pre-Closing EH&S Liabilities” means any liability of the Subject Business, or any liability that may attach to an entity purchasing the Subject Business, for Damages arising under applicable EH&S Laws and relating to circumstances existing prior to the Closing, including liabilities under applicable EH&S Laws arising from (a) personal injuries or property damage from exposures to

Hazardous Materials sold, distributed or otherwise placed into the Environment prior to the Closing; (b) ownership or operation of the Subject Business Real Property, or from any condition existing thereon or emanating therefrom (including the release or migration or threatened release or migration of Hazardous Materials into or through the Environment), prior to the Closing; (c) noncompliance with applicable EH&S Laws on or prior to the Closing; (d) manufacturing or sales of products, or other activities or operations of the Subject Business, in each case prior to the Closing; (e) circumstances prior to the Closing relating to the Excluded Assets or any other real property or businesses owned or operated at any time by any Seller Entity or their current or former Affiliates; (f) transportation, storage, disposal, treatment or recycling of Hazardous Materials by the Subject Business, any Seller Entity or their Affiliates prior to Closing; and (g) obligations pursuant to section 1.21 (Environmental Compliance and Indemnity) of the Vesting Deed relating to circumstances existing prior to the Closing.

“Proceeding” means any action, suit, litigation, arbitration or proceeding, commenced, brought, conducted or heard by or before, any court or other Governmental Authority or any arbitrator or arbitration panel, other than the Bankruptcy Proceeding.

“Purchase Price” has the meaning given such term in Section 4.07.

“Research Employee” has the meaning given such term in Section 12.01.

“Restricted IP” has the meaning given in Section 16.06.

“Sale Motion” means a motion which Seller shall file with the Bankruptcy Court seeking approval for the Transactions, which shall be in form and substance reasonably satisfactory to Buyer.

“Sale Order” means an order to be submitted to the Bankruptcy Court substantially in the form attached hereto as Exhibit 1.02C that, with such changes that are reasonably acceptable to Buyer and as may be approved by the Bankruptcy Court, is entered by the Bankruptcy Court approving the consummation of the Transactions.

“Scheduled Closing Date” has the meaning given such term in Section 3.01.

“Seller” has the meaning given such term in the Preamble.

“Seller Benefit Plan” has the meaning given such term in Section 5.12.

“Seller Claims” has the meaning given such term in Section 14.03

“Seller Entity” means any of WRG, Seller, any Subsidiary of WRG or Seller, and any other Affiliate of any of the foregoing.

“Seller Group” means, collectively, WRG, Seller, their Subsidiaries and the other Affiliates of any of the foregoing.

“Seller Indemnified Parties” has the meaning given such term in Section 14.03.

“Senior Executive” has the meaning given such term in Section 14.04.

“Senior Managers” has the meaning given such term in Section 14.04.

“Subject Business” means the development, manufacture and sale, primarily at and from Seller’s facilities in Littleton, Colorado (including related activities at and from Seller’s facilities in Columbia, Maryland and Curtis Bay (Baltimore), Maryland prior to Closing), of polymer based membranes, membrane modules and membrane systems, each for purification of natural gas or other hydrocarbons.

“Subject Business Employees” has the meaning given such term in Section 12.01.

“Subject Business Intellectual Property” means Seller’s interest in Intellectual Property that is used or held for use exclusively in the Subject Business or has been developed for, or is under development for use exclusively in the Subject Business.

“Subject Business Real Property” means the real property owned by Seller and located at 8101 Midway Drive, Littleton, Douglas County, Colorado, together with any and all buildings, structures, fixtures and improvements located thereon and appurtenances thereto.

“Subsidiary” of a Person means any other Person in which the first Person directly or through one or more intermediaries owns securities or other equity interests representing more than 50% of the voting power of all such securities or other equity interests.

“Survey” means a current plat of survey of the Subject Business Real Property (a) prepared in accordance with the Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys (as jointly established and adopted in 2005 by the American Land Title Association and the National Society of Professional Surveyors, (b) performed by a surveyor registered in the State of Colorado, (c) certified to Buyer and the Title Insurer, and (d) containing the Table A Items listed on **Exhibit 1.2D**, and (e) otherwise in form and substance reasonably acceptable to Buyer.

“Tax” means any federal, state, local or foreign governmental tax or assessment, including income tax, any payroll or other similar employment tax, any sales, use, excise, gross receipts or value added tax, or any tax on real or personal property, including interest and penalties with respect thereto.

“Third Party Claims” means any and all Claims by any Person, other than Seller Entities or Buyer Entities or any of their Affiliates, which could give rise to a right of indemnification under this Article.

“Title Commitment” means a current preliminary title report or title commitment for the Subject Business Real Property issued by the Title Insurer showing fee simple title in Seller,



proposing to insure Buyer, and committing to insure the Subject Business Real Property in the amount of the Purchase Price allocated to the Subject Business Real Property.

“Title Insurer” means First American Title Insurance Company or such other title insurance company selected by Buyer.

“Title Policy” means an ALTA Form B (2006) Owner’s Policy of Title Insurance (or the most recent form available in the State of Colorado) issued by the Title Insurer in the full amount of the Purchase Price allocated to the Subject Business Real Property and insuring fee simple title to the Subject Business Real Property in a Buyer Entity or any of their Affiliates, and which (a) is subject only to the Closing Permitted Exceptions, (b) contains the endorsements listed on Exhibit 1.02E, (c) contains no exception for the gap between Closing and recording of the deed, and (d) is otherwise reasonably acceptable to the Buyer Group in all respects.

“Transaction Documents” means this Agreement, the Ancillary Agreements and any other agreements, instruments and documents executed and delivered pursuant to this Agreement.

“Transactions” means the transactions contemplated by this Agreement.

“Transferred Assets” has the meaning given such term in Section 2.02.

“Transferred Contracts” means the Contracts listed on Exhibit 1.02F.

“Transferred Liabilities” has the meaning given such term in Section 2.03.

“Transferee” has the meaning given such term in Section 19.06.

“Transition Date” has the meaning given such term in Section 14.03.

“Transition Services Agreement” has the meaning given such term in Section 3.03.

“Valuation Time” means 11:59 p.m. Eastern time on the date immediately prior to the Closing Date.

“Vesting Deed” means that certain Special Warranty Deed from Mission Viejo Business Properties, Inc., as grantor, and Seller, as grantee, dated December 9, 1988 and recorded in Book 831, Page 157 of the Douglas County, Colorado Recorder’s Office.

“WRG” means W. R. Grace & Co., a Delaware corporation, of which Seller is a direct wholly-owned Subsidiary.

## ARTICLE 2

### Purchase and Sale of Transferred Assets; Purchase Price

2.01 Purchase and Sale of Transferred Assets; Assumption of Transferred Liabilities. On the terms and subject to the conditions of this Agreement, at the Closing, subject to Section 16.06, Seller shall sell, assign, transfer, convey and deliver to Buyer (or cause to be sold, assigned, transferred, conveyed and delivered to Buyer), free and clear of all Liens (other than Permitted Exceptions) to the maximum extent permissible under section 363 of the Bankruptcy Code, and Buyer shall purchase, acquire and accept the Transferred Assets and assume from Seller the Transferred Liabilities.

2.02 Transferred and Excluded Assets.

(a) The "Transferred Assets" shall consist of all of the right, title and interest that Seller possesses to or in, to and under any and all of the assets, properties, rights, Contracts and claims of any kind and nature, whether tangible or intangible, real, personal or mixed, and wherever located, that are owned, leased, licensed, used or held for use by Seller exclusively in connection with the Subject Business, including the following (but in every case, excluding the Excluded Assets) (collectively, the "Transferred Assets"):

(i) the Subject Business Real Property;

(ii) the Maryland Assets;

(iii) all machinery and equipment (including any Intellectual Property owned by or licensed to Seller that is embodied in the mechanical features and physical design of such machinery or equipment), test skids, furniture, hardware, fixtures, automobiles, trucks, tractors, trailers, tools, tooling and other tangible personal property of every kind and description: (A) located at the Subject Business Real Property; or (B) wherever located, including, in each case, the items set forth on Schedule 2.02(a);

(iv) all inventories and supplies of raw materials, works-in-process, finished goods, spare parts, supplies, storeroom contents, packaging inventories and other inventories (collectively, "Inventory");

(v) all trade accounts, notes receivable, accounts receivable and other receivables;

(vi) all prepayments and deposits;

(vii) all books and records (other than Tax returns and related work papers), files, customer lists, accounting records, papers, tapes, disks, manuals, keys, reports, plans, catalogs, sales and marketing and promotional materials and all other printed and written materials, and general intangibles;

(viii) all rights under or pursuant to all warranties, representations and guarantees, whether express or implied, made by suppliers, manufacturers, contractors and other third parties with respect to any of the Transferred Assets, other than any of the foregoing to the extent that it relates to any

**Excluded Asset or Excluded Liability;**

(ix) all the Permits listed or required to be listed on Schedule 5.20 (to the extent transferable);

(x) all claims, causes of action, choses in action, rights of recovery, rights of set off, and rights of recoupment listed on Schedule 2.02(a)(x);

(xi) the Subject Business Intellectual Property;

(xii) all rights in, to and under the Transferred Contracts; and

(xiii) all of the respective forms, office supplies and warehouse and other supplies, including pallets, strapping and other packaging, production and manufacturing supplies and maintenance supplies.

(b) Notwithstanding anything to the contrary contained in this Agreement, the Transferred Assets shall not include, and Seller or another Seller Entity shall retain all right, title and interest that it possesses to or in, each of the following assets, properties, rights, Contracts and claims (collectively, the "Excluded Assets"):

(i) cash and cash items, other than petty cash deposits with third parties;

(ii) refunds of Taxes arising out of the Subject Business for all Tax periods (or portions thereof) ending at or prior to the Closing Date;

(iii) amounts receivable from any unit of Seller other than the Subject Business or from any other Seller Entity;

(iv) Insurance Policies, claims with respect to Insurance Policies, and refunds of amounts previously paid or prepaid on account of Insurance Policies;

(v) employee benefit plans and funds maintained by, or in conjunction with, any Seller Entity, and refunds of amounts previously paid or prepaid amounts on account of such employee benefit plans and funds;

(vi) records to the extent relating exclusively to any of the Excluded Liabilities;

(vii) the names "Grace" and "Davison", whether alone or in combination with each other or with other words, including in any trade name or trade or service mark; and

(viii) the other assets listed on Schedule 2.02(b);

**2.03 Transferred and Excluded Liabilities.**

(a) At the Closing, Buyer shall assume only the following obligations and liabilities of Seller as and to the extent relating exclusively to the Subject Business (collectively, the "Transferred Liabilities"):

(i) all obligations under the Transferred Contracts (other than fifty percent (50%) of all Cure Costs) to the extent arising at or after the Closing, solely with respect to periods beginning on and after the Closing Date;

(ii) all ordinary course payables of Seller specifically related to the operation of the Subject Business (excluding intercompany payables) accruing prior to the Closing Date to the extent and in the amounts set forth on the Closing Statement;

(iii) all ordinary course vacation benefit plan accruals for the current calendar year to the extent and in the amounts set forth on the Closing Statement; and

(iv) all payment and performance obligations under Permits included in the Transferred Assets to the extent arising on or after the Closing Date, solely with respect to periods beginning on and after the Closing Date.

(b) It is expressly understood and agreed that, except for Transferred Liabilities, neither Buyer, any Buyer Entity nor any Affiliate of Buyer or any Buyer Entity is assuming, nor shall they be or become liable for, any other liability or obligation of Seller or any other Seller Entity, whether occurring or accruing before, at or after the Closing, or of the Subject Business, whether occurring or accruing before or at the Closing. In furtherance and not in limitation of the foregoing, with the exception of the Transferred Liabilities, neither Buyer nor any of its Affiliates shall assume, or be deemed to have assumed, any of the following liabilities or obligations of Seller or any other Seller Entity, whether occurring or accruing before, at or after the Closing, or of the Subject Business, whether occurring or accruing before or at the Closing, whether or not disclosed on any Schedule hereto ("Excluded Liabilities"):

(i) any breach or default under any Transferred Contract to the extent occurring, accruing during or arising out of the period prior to the Closing;

(ii) any ordinary course or non-ordinary course payable to the extent not set forth, or in excess of the amount set forth, on the Closing Statement;

(iii) any liabilities arising out of Seller Benefit Plans;

(iv) all employment liabilities to the extent occurring or accruing prior to the Closing Date;

(v) any liability or obligation arising out of or relating to any (A) former employee, officer, director or consultant of any Seller Entity or (B) Subject Business Employee who does not become a Continued Employee;

- (vi) all liabilities to the extent relating in any way to Excluded Assets;
- (vii) any liability of any Seller Entity for any indebtedness (including fifty percent (50%) of all Cure Costs relating to Transferred Contracts);
- (viii) Taxes of any Seller Entity, including Taxes arising out of the Subject Business for all Tax periods (or portions thereof) ending at or prior to the Closing Date;
- (ix) amounts payable to any unit of Seller other than the Subject Business, or to any other Seller Entity and any liabilities arising out of any transaction between Seller and any other Seller Entity in connection with the Subject Business;
- (x) premiums or any other charges under any Insurance Policy;
- (xi) (A) any liability in any way related to asbestos, (B) [REDACTED] environmental remediation activities required by EH&S Laws or as necessary to meet cleanup standards under EH&S Laws (regardless of whether such activities may be voluntary measures) or (C) [REDACTED] all Pre-Closing EH&S Liabilities;
- (xii) all liabilities and obligations, including any liability arising from claims for injury to persons or property, arising out of the Transferred Assets or the Subject Business prior to the Closing Date;
- (xiii) any obligation for Seller's or any other Seller Entity's legal, accounting or other professional fees or expenses related to or in connection with the preparation of this Agreement or the consummation of the Transactions;
- (xiv) any fines by Governmental Authorities existing or arising prior to the Closing Date;
- (xv) any matters disclosed or required to be disclosed on Schedules 5.08(a) or (b); and
- (xvi) to the extent not otherwise specified hereunder or in any of the other Transaction Documents, any liability to the extent arising from or connected with the operation of the Subject Business prior to the Closing Date.

2.04 Purchase Price. "Initial Purchase Price" means twenty-two million U.S. dollars (US\$22,000,000). The Initial Purchase Price shall be subject to adjustment as set forth in Article 4. The Initial Purchase Price, as so adjusted, shall be the "Purchase Price". The Purchase Price shall be allocated among the Transferred Assets as provided in Section 2.05.

2.05 Purchase Price Allocation.

- (a) Each Party agrees to prepare and timely file U.S. Internal Revenue Service Form 8594 (Asset Acquisition Statement) in accordance with Section 1060 of the Code with respect to the Transferred Assets and to cooperate in every reasonable way with the other Parties in the preparation

of such form.

(b) The Parties agree that the portion of the Initial Purchase Price to be allocated to the Subject Business Real Property shall be \$[REDACTED].

(c) The Parties agree that the portion of the Initial Purchase Price to be allocated to the intangible assets shall be \$[REDACTED].

(d) The Parties agree that the remaining portion of the Purchase Price shall be allocated to net current assets and fixed assets (not including the Subject Business Real Property).

### ARTICLE 3

#### Closing

3.01 Scheduled Closing Date. The "Scheduled Closing Date" shall be the fifth (5th) Business Day after the date on which the conditions to Closing set forth in Articles 10 and 11 (other than Sections 10.04 and 11.05 and any other items that, by their nature are required to be satisfied at Closing) shall have been fulfilled or waived, or such other day as Seller and Buyer may agree to in an amendment to this Agreement executed and delivered in accordance with Section 19.07.

3.02 Time and Place of Closing, Simultaneity. The Closing shall take place at 10:00 a.m. Eastern time on the Scheduled Closing Date at the offices of Seller, 7500 Grace Drive, Columbia, Maryland. All of the actions to be taken and documents to be executed and delivered at the Closing shall be deemed to be taken, executed and delivered simultaneously, and no such action, execution or delivery shall be effective until all actions to be taken and executions and deliveries to be effected at the Closing are complete. The Closing shall, for all purposes hereunder, be deemed effective at 12:01 a.m. Eastern time, on the Closing Date.

3.03 Transfers at the Closing; Ancillary Agreements; Payments. At the Closing:

(a) Seller shall execute and deliver to Buyer a special warranty deed for the Subject Business Real Property in the form attached hereto as Exhibit 3.03(a), subject only to the Closing Permitted Exceptions;

(b) Seller and Buyer shall execute and deliver to each other a Bill of Sale and Assignment and Assumption Agreement in substantially the form attached hereto as Exhibit 3.03(b);

(c) Seller and Buyer shall execute and deliver to each other an Intellectual Property Assignment Agreement in substantially the form attached hereto as Exhibit 3.03(c) (an "IP Assignment") covering: (i) all the patents and patent applications set forth or required to be set forth in Schedule 5.14(a), Part 1, (ii) all trademarks, trademark applications and domain names set forth or required to be set forth in Schedule 5.14(a), Part 5 and (iii) any other patents and patent applications that are not then Restricted IP; provided, that if there are patents or patent applications that are

Restricted IP as of the Closing, then promptly after such patent or patent applications cease to be Restricted IP, the Seller and Buyer shall execute and deliver to each other an IP Assignment covering such patents and patent applications;

(d) Seller and Buyer shall execute and deliver to each other a Transition Services Agreement in substantially the form attached hereto as **Exhibit 3.03(d)** (the "Transition Services Agreement");

(e) Seller shall deliver the certificates required pursuant to Section 10.04 hereof and Buyer shall deliver the certificates required pursuant to Section 11.05 hereof;

(f) Seller shall deliver to Buyer a list identifying all customers of the Subject Business along with the letter code assigned to each such customer on the Schedules and in other due diligence or other related materials delivered or made available to Buyer prior to the Closing; and

(g) Buyer shall pay the Initial Purchase Price to Seller. Such payment shall be made by means of a wire transfer to Seller's account as follows:

Bank: JPMorgan Chase Bank, NA  
Bank ABA #: 021000021  
Bank SWIFT code CHASUS33  
Bank account name: W. R. Grace & Co.-Conn.  
Bank account number: 016001257  
Text message: Funds from [REDACTED] re: Membranes.

In addition, each of Buyer and Seller shall execute and deliver such other agreements, instruments and other documents to effect, confirm or evidence the transactions contemplated by this Agreement as the other Parties shall reasonably request. Each such document shall be reasonably satisfactory in form and substance to the Party to whom such document is delivered, but shall contain no representations, warranties, covenants or agreements other than those specifically contained in this Agreement.

3.04 Further Assurances. At any time and from time to time after the Closing, at the request and expense of any Party, the other Parties shall execute and deliver, or cause to be executed and delivered, all such deeds, assignments, and other documents, and take or cause to be taken all such other actions, as the requested Party reasonably deems necessary or advisable in order to complete, perfect or evidence any of the Transactions. Any out-of-pocket expenses related to any such request shall be paid by the requesting Party.

## ARTICLE 4

### Purchase Price, Post-Closing Adjustments

4.01 Closing of Books. Seller shall close the books and related accounting records, on a

going concern basis, of Seller (but only to the extent that they relate to the Subject Business) as of the Valuation Time, and take a physical count of the Subject Business Inventory at or within two weeks prior to such time. Such Inventory count shall be taken in accordance with the inventory-taking procedures described in Schedule 4.01. Representatives of Buyer may observe the taking of such inventory.

#### 4.02 Definitions.

(a) "Closing Current Assets" means the aggregate amount, as of the Valuation Time, of all the accounts receivable and Inventory of the Subject Business included in the Transferred Assets, computed in accordance with Section 4.03.

(b) "Closing Current Liabilities" means the aggregate amount, as of the Valuation Time, of (i) all ordinary course payables of Seller specifically related to the operation of the Subject Business (excluding intercompany payables) accruing prior to the Closing Date, (ii) employee payroll and vacation benefit plan accruals of the Subject Business and (iii) deferred revenue, in each case, computed in accordance with Section 4.03.

(c) "Closing Working Capital Amount" means the amount of the Closing Current Assets less the amount of the Closing Current Liabilities.

4.03 Computation of Closing Current Assets and Liabilities. The Closing Current Assets and the Closing Current Liabilities shall be determined in U.S. dollars on a going concern basis, in accordance with the accounting policies set forth in Schedule 4.03(a), consistently applied, and in accordance with the sample Closing Working Capital Amount set forth on Schedule 4.03(b).

#### 4.04 Closing Statement.

(a) As soon as reasonably practicable but in no event more than ninety (90) days after the Closing, Seller shall deliver to Buyer a report setting forth Seller's determination of the Closing Working Capital Amount (the "Closing Statement"), along with supporting documentation.

(b) Seller agrees to provide Buyer and its accountants supporting documentation and access to the books and records of the Subject Business to the extent reasonably requested by Buyer for purposes of reviewing the contents of the Closing Statement, and any related supporting schedules prepared by Seller in connection with the preparation of such statement, and will cause appropriate personnel of Seller to provide reasonable assistance to Seller and its representatives in connection with such review. Each Party shall pay the costs, if any, of its own accountants and advisors in connection with the preparation and review of the Closing Statement contemplated by this Section 4.04.

4.05 Acceptance. If Buyer does not object to the Closing Working Capital Amount shown on the Closing Statement delivered by Seller, by written notice of objection (the "Objection Notice") delivered to Seller within thirty (30) calendar days after Buyer's receipt of such statement, describing



in reasonable detail each of its proposed adjustments to Seller's determination thereof, then the Closing Working Capital Amount shown on the Closing Statement shall be final and binding on the Parties.

4.06 Non-Acceptance, Resolution of Disputes.

(a) If Buyer timely delivers an Objection Notice, then Buyer and Seller shall promptly endeavor to agree upon the proper amount of the items in dispute. If a written agreement settling any disputed items has not been reached within thirty (30) days after the date of Buyer's receipt of the Objection Notice, then either Seller or Buyer may, by notice to the other, submit for determination by arbitration in accordance with this Section the question of what adjustments, if any, must be made to Buyer's determination of such amount in order for it to be determined in accordance with the provisions of this Agreement.

(b) Any such determination by arbitration shall be made by Ernst & Young LLP, or such other nationally recognized accounting firm that the Parties may agree upon (the "Arbitrator") and shall be final and binding on the Parties. The Arbitrator shall be directed to render a written report as promptly as practicable on the unresolved disputed items and to resolve only those issues of dispute set forth in the Objection Notice and to make such modifications, if any, to the Closing Statement as shall reflect such determination. Not later than thirty (30) days after the engagement of the Arbitrator (as evidenced by its written acceptance by facsimile or otherwise to the Parties), the Parties shall submit simultaneous briefs to the Arbitrator (with a copy to the other Parties) setting forth their respective positions regarding the issues in dispute and their respective calculations of the Closing Statement. Rebuttal briefs shall be submitted simultaneously by the Parties within fifteen (15) days after the submission of the initial briefs. The Arbitrator shall be instructed to use the accounting policies set forth in Schedules 4.03(a) and (b) in connection with its determination hereunder and shall render its decision resolving the dispute within thirty (30) days after submission of the rebuttal briefs. If additional or other information is required by the Arbitrator, the Arbitrator shall give notice thereof to the Parties as soon as practicable before the expiration of such thirty (30)-day period, and the Parties shall promptly respond; provided, however, that, without the written consent of Seller and Buyer, no request for additional or other information shall act as an extension of the thirty (30)-day period in which the Arbitrator must render its decision.

(c) The fees and expenses of the Arbitrator for any such determination by arbitration shall be shared as follows: Seller shall bear that portion thereof equal to the total amount of such fees and expenses multiplied by a fraction, the denominator of which shall be the difference between the Closing Working Capital Amount as finally proposed by Buyer before the arbitration began and the Closing Working Capital Amount as finally proposed by Seller before the arbitration began, and the numerator of which shall be the difference between the Closing Working Capital Amount as determined by the Arbitrator and the Closing Working Capital Amount as finally proposed by Seller before the arbitration began. Buyer shall bear the remainder of such fees and expenses.

(d) Nothing herein shall be construed to authorize or permit the Arbitrator to determine  
(i) any question or matter whatsoever under or in connection with this Agreement or any other

Transaction Document except the determination of what adjustments, if any, must be made in one or more of the items reflected in the Closing Working Capital Amount as shown on the Closing Statement delivered by Buyer in order for the Closing Working Capital Amount to be determined in accordance with the provisions of this Agreement and (ii) a Final Closing Working Capital Amount that is not in the range between and including the final proposals of Seller and Buyer. Nothing herein shall be construed to require the Arbitrator to follow any rules or procedures of any arbitration association.

(e) The Closing Working Capital Amount as finally determined pursuant to this Section shall constitute the "Final Closing Working Capital Amount."

#### 4.07 Payment of Adjustments.

(a) In the event that the Final Net Working Capital Amount is less than \$[REDACTED], Seller shall pay to Buyer the amount of such difference in accordance with Section 4.07(c) and Section 14.06.

(b) In the event that the Final Net Working Capital Amount is more than \$[REDACTED], Buyer shall pay to Seller the amount of such difference in accordance with Section 4.07(c).

(c) Any payment pursuant to this Section 4.07 will be made within five (5) Business Days following the final determination of the amount thereof in accordance with this Section. Any payment pursuant to this Section 4.07 will be paid by wire transfer of immediately available funds to the account designated in writing by the Party receiving the payment. Any payment pursuant to this Section will be treated by the Parties as an adjustment to the Initial Purchase Price, and the Initial Purchase Price, as so adjusted, shall be the "Purchase Price". Interest shall be paid on the amount of the net adjusting payment, from and including the Closing Date to but not including the date of payment, at a floating rate per annum equal to the U.S. prime rate, as reported by *The Wall Street Journal*, in effect from time to time during the period from the Closing Date until the date of payment.

## ARTICLE 5

### **Seller's Representations and Warranties**

Seller represents and warrants to Buyer as of the date hereof and as of the Closing Date as follows:

5.01 Corporate Organization and Existence. Seller is a corporation duly organized and validly existing under the Connecticut Business Corporation Act and has the full power and authority to carry on the Subject Business and to own and use the assets and properties owned and used by it in connection therewith, including the Transferred Assets. Seller is duly authorized to conduct business and is in good standing as a foreign corporation in Colorado.

5.02 Corporate Power. Subject to entry of the Sale Order and its becoming a Final Order, Seller has full corporate power to enter into this Agreement and the other Transaction Documents to which it is or will be a party and perform its obligations hereunder and thereunder.

5.03 Authorization. Subject to entry of the Sale Order and its becoming a Final Order, the execution and delivery by Seller of this Agreement and the other Transaction Documents to which it is or will be a party and its performance of its obligations hereunder and thereunder have been duly authorized by all required corporate action.

5.04 Execution and Delivery. Subject to entry of the Sale Order and its becoming a Final Order, Seller has duly and validly executed and delivered this Agreement and at Closing, will have duly and validly executed and delivered the other Transaction Documents to which it is a party and which are being executed and delivered simultaneously with this Agreement. The remaining Transaction Documents to which Seller will be a party, when executed and delivered at the Closing, will be duly and validly executed and delivered by Seller. Subject to entry of the Sale Order and its becoming a Final Order, this Agreement and each Transaction Document to which it is a party which is being executed simultaneously with this Agreement constitutes, and each Transaction Document to which it is a party upon its execution and delivery at the Closing will constitute (assuming as to each such Transaction Document to which Buyer is a party, its due authorization, execution and delivery by Buyer and entry of the Sale Order and its becoming a Final Order) a legal, valid and binding obligation of Seller, enforceable against Seller in accordance with its terms, subject (other than with respect to the Bankruptcy Proceeding) to bankruptcy, insolvency, reorganization, moratorium, fraudulent transfer and similar Laws of general applicability relating to or affecting creditors' rights and to general equity principles (whether in equity or at law).

5.05 No Conflict. Except as specified in Schedule 5.05, and subject to entry of the Sale Order and its becoming a Final Order, the execution and delivery by Seller of this Agreement and the other Transaction Documents to which it is or will be a party, and its performance of its obligations hereunder and thereunder, do not (a) conflict with its certificate of incorporation or by-laws; (b) result in any violation or breach of any of the provisions of, or constitute a default under, any Law or Order to which Seller or any other Seller Entity is a party or by which it is bound, which violation, breach or default would materially adversely affect Seller's ability to execute and deliver this Agreement or any other Transaction Document to which it is or will be a party or perform its obligations hereunder or thereunder; or (c) result in any breach of any of the provisions of, or constitute a default under, any Contract to which Seller or any other Seller Entity is a party or by which it is bound, which such breach or default of which would materially adversely affect its ability to execute and deliver this Agreement or any other Transaction Document to which it is or will be a party or perform its obligations hereunder or thereunder.

5.06 Real Property.

(a) Schedule 5.06(a) sets forth a true and complete legal description and street address of the Subject Business Real Property. The Subject Business Real Property constitutes all of the real property used in the direct manufacturing operations of the Subject Business. To Seller's

Knowledge, Seller has good and marketable title in fee simple to the Subject Business Real Property, free and clear of all Liens other than the Permitted Exceptions. Neither the Subject Business Real Property nor any portion thereof is subject to any lease, sublease, license or other agreement granting to any Person other than Seller any right to use or occupy the Subject Business Real Property. No third party has any option, right of first offer or right of first refusal to acquire, lease or license the Subject Business Real Property or any portion thereof or interest therein. There are no Persons in possession of the Subject Business Real Property other than Seller. Seller is not a party to any real property leases, subleases, license or other occupancy agreements pursuant to which Seller is the lessee, sublessee, licensee or occupant of any real property in connection with the Subject Business.

(b) To the Knowledge of Seller, there are no proposed or pending changes to any zoning regulation or official plan affecting the Subject Business Real Property.

(c) Neither Seller nor the Seller Group has received any written notice of any pending, threatened or contemplated condemnation or eminent domain Proceedings that affect the Subject Business Real Property. To Seller's Knowledge, Seller has not received any oral notice of the intention of any Governmental Authority to take or use all or any part of the Subject Business Real Property, and to Seller's Knowledge, there are no pending or threatened or contemplated condemnation or eminent domain Proceedings or hearings that affect the Subject Business Real Property.

(d) The Subject Business Real Property is in good operating condition and, in all material respects, in a state of good maintenance and repair. There are no material defects in any of the structural components of the buildings and other improvements located in, on or about the Subject Business Real Property, and the electrical, plumbing (including water treatment capabilities for the operation of the Subject Business) and utility systems are in good working order and condition in all material respects, ordinary wear and tear excepted.

(e) Neither Seller nor any other Seller Entity has received from any third party any written, or to Seller's Knowledge, any other, notice of any violation, breach or default of the Restrictions (as defined and contained in the Vesting Deed), including any such notice alleging nuisance, noxious or offensive activity related to the Subject Business Real Property.

(f) To the Knowledge of Seller, there is no Law, Lien or Order that prevents the facilities located at the Subject Business Real Property from being operated twenty-four (24) hours per day, seven (7) days per week.

5.07 Title to and Sufficiency of Assets. Subject to the representations and warranties made in Section 5.14 with respect to Restricted IP, Seller has good and (except with respect to Nonassignable Items and Restricted IP) transferable title to all of the Transferred Assets and Seller has good leasehold title to those Transferred Assets which Seller purports to lease, in each case, free and clear of all Liens other than Permitted Exceptions. Except for Excluded Assets and Seller's assets used in the performance of Seller's obligations under the Transition Services Agreement, all of the material tangible and intangible assets used or held for use in connection with the Subject

Business are included in the Transferred Assets, and except as set forth in Schedule 5.07, the Transferred Assets include all assets reflected on the May 31, 2009 Net Assets Statement, other than those disposed of in compliance with Section 5.19 or in accordance with Section 9.01 (including with the prior written consent of Buyer). The Transferred Assets, together with the services performed under the Transition Services Agreement, include all tangible and intangible assets and rights necessary to conduct the Subject Business in substantially the same manner as presently conducted.

5.08 Litigation; Investigations.

(a) Except as set forth in Schedule 5.08(a), (i) there are no material Proceedings (other than the Bankruptcy Proceeding) pending or, to the Knowledge of Seller, threatened against Seller in respect of the Subject Business or against the Subject Business, and (ii) to the Knowledge of Seller, there are no other hearings, inquiries or audits pending or threatened against Seller by or before any court or other Governmental Authority (other than the Bankruptcy Proceeding) or any arbitrator or arbitration panel in respect of the Subject Business or against the Subject Business.

(b) Except as set forth in Schedule 5.08(b), there are no pending or, to the Knowledge of Seller, threatened governmental investigations relating in any way to the Subject Business.

5.09 Insurance. Schedule 5.09 describes the Insurance Policies maintained by Seller exclusively with respect to the Subject Business.

5.10 Material Contracts.

(a) Other than as set forth on Schedule 5.10(a) and except for Contracts that are not being assumed and assigned hereunder, neither Seller nor any other Seller Entity is a party to or otherwise bound by the following (whether written or oral) exclusively in connection with the Subject Business (each, a "Material Contract"):

(i) any agreement relating to (A) the license to Seller of any material Intellectual Property owned or controlled by any other Person (other than unmodified, commercially available, off-the-shelf computer software that has an aggregate cost of \$150,000 or less), (B) license of any material Intellectual Property (including any Natural Gas Subject Business Intellectual Property) owned or controlled by Seller to any other Person, (C) receipt and/or disclosure and use of any material proprietary Intellectual Property (including any Natural Gas Subject Business Intellectual Property), or (D) the development of any material Intellectual Property (including any Natural Gas Subject Business Intellectual Property) in cooperation with any other Person;

(ii) any distributor, manufacturer's representative, sales agent, broker or consultant Contract, or any Contract containing a most-favored nation provision or granting exclusive selling rights to any manufacturer's representative, sales agent, broker or distributor;

(iii) any bailment or consignment or other similar Contract relating to Inventory,

equipment or other assets of any customer, supplier or third party;

(iv) any Contract for the purchase of materials, components, supplies, equipment or services (A) pursuant to which Seller has agreed to purchase all of its requirements for the goods and/or services in question or which contain minimum volume or dollar guarantees or commitments requiring the payment to Seller by any other Person of more than \$50,000 or having a term of twelve (12) months or longer, or (B) requiring the payment by Seller to any other Person of more than \$50,000 or having a term of twelve (12) months or longer;

(v) any Contract involving the lease of personal property in excess of \$50,000 individually or \$150,000 in the aggregate;

(vi) any (A) trust indenture, mortgage, promissory note, loan agreement or other Contract for the borrowing of money, or any Contract or agreement of guarantee, surety, support, indemnification, assumption or endorsement of, or any similar commitment by the Subject Business to become liable for the obligations or other liabilities of any other Person, (B) offset, countertrade or barter agreement or any Contract limiting the freedom of the Subject Business or any employees thereof to engage in any line of business or activity or to compete or otherwise conduct business anywhere in the world, solicit any employees or disclose any information otherwise permitted to be disclosed under applicable Law, or (C) letter of credit or bond (excluding endorsements of instruments for collection of accounts receivable in the ordinary course of business);

(vii) any power of attorney that could have an effect on the Transferred Assets after Closing;

(viii) any Contract providing for severance payments, divestiture incentives or other additional rights or benefits in the event of the sale of the Transferred Assets or the Subject Business, excluding any of the foregoing that will not be the obligation of Buyer after the Closing;

(ix) any partnership or joint venture agreement;

(x) any Contract between Seller or any other Seller Entity, on the one hand, and any other Seller Entity or any other division of Seller, on the other hand, in exclusive connection with the Subject Business;

(xi) other than for sales and purchases in the ordinary course of business, any Contract or option for the acquisition or sale by the Subject Business of any material asset or group of assets of the Subject Business; or

(xii) any settlement agreement with any Governmental Authority or third party within the preceding twelve (12) months or under which there are no outstanding obligations of Seller.

(b) With respect to each such Material Contract (other than a Material Contract which is listed on Schedule 5.14(f) (which Contracts are covered by the representations and warranties

contained in Section 5.14(f) or which is an Excluded Asset): (i) the Material Contract is legal, valid, binding and enforceable in accordance with its terms by Seller and, to the Knowledge of Seller, by the other contracting party thereto, and is in full force and effect, subject (other than with respect to the Bankruptcy Proceeding) to bankruptcy, insolvency, reorganization, moratorium, fraudulent transfer and similar Laws of general applicability relating to or affecting creditors' rights and to general equity principles (whether in equity or at law), (ii) neither Seller nor, to the Knowledge of Seller, any other party is in breach or default, and, to the Knowledge of Seller, (A) no event has occurred which with notice or lapse of time or both would constitute a breach or default, or permit termination, modification, or acceleration of and (B) no party has notified Seller or any other Seller Entity of any intention to terminate, modify or accelerate such Material Contract, (iii) Seller has not received written notice, or to the Knowledge of Seller, no party has otherwise repudiated in writing or in a manner reasonably communicated to the management of Seller or any other Seller Entity, any provision of such Material Contract and (iv) neither Seller nor any Seller Entity has waived any material rights under any Material Contract.

(c) Seller has heretofore delivered or made available to Buyer complete copies, including all amendments and modifications thereto, of all Material Contracts that are binding on the Subject Business.

(d) To Seller's Knowledge as of the date of this Agreement, none of the four Persons with a bid, proposal or purchase order listed on Schedule 5.10(d) has notified Seller of any intent to materially change any such bid, proposal or purchase order or notified Seller of any circumstances that would preclude or prevent any such bids or proposals from becoming purchase orders or materially delay any bids or proposals from becoming purchase orders.

#### 5.11 Labor and Employment.

(a) Schedule 5.11(a) lists each Subject Business Employee, his/her work location, title, service commencement date, current base pay and any bonus or other compensation incentive plans in which the Subject Business Employee is eligible to participate. Each written employment Contract covering any such Subject Business Employee has been made available to Buyer.

(b) Seller is not a party to nor does it have any liability with respect to any collective bargaining agreement or other similar Contract with a labor union or similar organization covering any Subject Business Employee and, to the Knowledge of Seller, there have not, in the previous 18 months, been any organizing campaigns or organizing activities by a union to organize any Subject Business Employee to form or join a union. All employment or labor related litigation claims, including charges filed with the Equal Employment Opportunity Commission or its state counterparts, since January 1, 2004 by any Subject Business Employee are listed on Schedule 5.11(b).

5.12 Employee Benefit Plans. Each employee benefit plan (as defined in Section 3(3) of the Employee Retirement Income Security Act), excluding governmental plans, which as of the date hereof covers any Subject Employee (each a "Seller Benefit Plan") is set forth on Schedule 5.12.

### 5.13 Environmental Compliance.

(a) Except as set forth on Schedule 5.13, Seller in connection with the Subject Business is in compliance in all material respects with all applicable EH&S Laws as of the date hereof or the Closing Date.

(b) Except as set forth on Schedule 5.13, (i) Seller in connection with the Subject Business has in force all Permits required by applicable EH&S Laws as of the date hereof or the Closing Date for the operation of the Subject Business and the Transferred Assets, and no event has occurred that would allow, either upon the giving of notice or lapse of time or otherwise, revocation or early termination of any such Permit.

(c) Except as set forth on Schedule 5.13, (i) since January 1, 2007, no notices or claims relating to potential liability or legal action under any applicable EH&S Laws in effect during the periods between January 1, 2007 and the date hereof or January 1, 2007 and the Closing Date have been received by Seller in connection with the Subject Business or the Transferred Assets; and (ii) to the Knowledge of Seller, there are no Proceedings, or other hearings, inquiries or audits, pending or threatened, by or before any court or other Governmental Authority or any arbitrator or arbitration panel (other than the Bankruptcy Proceeding) under applicable EH&S Laws with respect to any Seller Entity or their current or former Affiliates with respect to the Subject Business, or the Transferred Assets.

(d) Except as set forth on Schedule 5.13, to Seller's Knowledge, there are no Hazardous Materials present in the Environment that require investigation or remediation pursuant to any applicable EH&S Law as of the date hereof or the Closing Date, or that exceed any remediation or other standard contained in or issued pursuant to any applicable EH&S Law as of the date hereof or the Closing Date, either (i) at the Subject Business Real Property, or (ii) arising from or relating to the Subject Business, and for which any Seller Entity or their current or former Affiliates may be liable.

### 5.14 Intellectual Property.

(a) Schedule 5.14(a) sets forth a list of all patents, patent applications, registered trademarks and service marks, trademark and service mark applications, domain names, and trade names used or held for use in the Subject Business. Operation of the Subject Business will not infringe, misappropriate or otherwise use unlawfully any Intellectual Property (other than that listed in Schedule 5.14(a)) owned by any Seller Entity immediately after the Closing. The Subject Business Intellectual Property includes all of the Intellectual Property set forth on Schedule 5.14(a).

(b) Seller's operation of the Natural Gas Subject Business, except as set forth in Schedule 5.14(b), and manufacture and lease of the membrane modules pursuant to the IP Lease, do not infringe, misappropriate or otherwise make any unlawful or unauthorized use of any third party Intellectual Property, in the United States of America, and to the Knowledge of Seller, outside of the United States of America. To the Knowledge of Seller, Seller's operation of the Subject Business



(other than the Natural Gas Subject Business and manufacture and lease of the membrane modules pursuant to the IP Lease which are addressed above) does not infringe, misappropriate or otherwise make any unlawful or unauthorized use of any third party Intellectual Property. To the Knowledge of Seller, no third party is infringing, misappropriating or otherwise making any unlawful or unauthorized use of any Subject Business Intellectual Property, or any Intellectual Property licensed to Seller for which Seller has the right to enforce. There is no pending, or to the Knowledge of Seller, threatened, Proceeding alleging that Seller's operation of the Subject Business infringes, misappropriates or otherwise makes any unlawful or unauthorized use of any third party Intellectual Property (including any such Proceeding seeking that Seller license, or refrain from using, any third party Intellectual Property).

(c) (i) Seller exclusively owns the Intellectual Property listed in Schedule 5.14(a), Parts 1, 2 and 5, and jointly owns with a third party the Intellectual Property listed in Schedule 5.14(a), Part 3. Seller makes no representation or warranty with respect to whether the ownership of Intellectual Property listed in Schedule 5.14(a), Part 3, including joint ownership, is correctly recorded, or that Schedule 5.14(a), Part 3 contains and/or accurately sets forth all patents and/or applications corresponding to the priority patent application filed for each of the two patent families set forth therein. Seller's ownership of Intellectual Property listed in Schedule 5.14(a), Parts 2 and 3 is, to the Knowledge of Seller, subject to terms and conditions of related development agreements with the third party joint owner, which development agreements are listed in Schedule 5.10(a). To the Knowledge of Seller, Seller is joint holder of record, of the Intellectual Property listed in Schedule 5.14(a), Part 4, of which Seller makes no other representation or warranty as to ownership.

(ii) Seller has the right to transfer or assign all right, title, and interest to the Natural Gas Subject Business Intellectual Property at the Closing. To the Knowledge of Seller, Seller has the right to transfer or assign all right, title, and interest to Subject Business Intellectual Property, other than (A) the Natural Gas Subject Business Intellectual Property and (B) the Intellectual Property listed on Schedule 5.14(a), at the Closing.

(iii) Seller has the right to transfer or assign all of its right, title and interest in and to the Subject Business Intellectual Property listed on Schedule 5.14(a), except for the Intellectual Property listed in Schedule 5.14(a), Part 4, free and clear of all Liens (other than Permitted Exceptions), subject to terms and conditions contained in the agreements set forth in Schedule 5.14(c)(iii). To the Knowledge of Seller, no other contractual terms and obligations, other than those of agreements set forth in Schedule 5.14(c)(iii) exist to limit or otherwise condition the assignment or transfer of such foregoing Subject Business Intellectual Property listed on Schedule 5.14(a) (other than the items listed in Schedule 5.14(a), Part 4) from Seller to Buyer.

(d) Seller, in connection with the Subject Business, has not entered into a stand alone agreement whose primary operation at Law is to indemnify any other Person for or against any infringement, misappropriation, or other unlawful or unauthorized use of Intellectual Property. For the avoidance of doubt, such a stand alone agreement does not include legal obligations or agreements (i) as provided pursuant to the design, manufacture, or sale of products to which the

terms and conditions as set forth in Schedule 5.21(a) apply, or (ii) under the terms and conditions of the agreements set forth in Schedule 5.10(a).

(e) Other than as set forth in Schedule 5.14(e), Seller, in connection with the Subject Business, (i) does not license any third party software (other than unmodified commercial-off-the-shelf software), (ii) does not use any open source software, and (iii) has developed, using solely internal resources, all non-commercial software used or held for use by it.

(f) Schedule 5.14(f) lists the agreements between Seller and all of the Subject Business Employees providing for confidentiality obligations with respect to Intellectual Property and assignment of Intellectual Property developed in connection with the Subject Business. Copies of such agreements have been made available to Buyer. Seller has not received written notice and the other party has not otherwise repudiated in a manner reasonably communicated to the management of Seller or any other Seller Entity, any provision in any agreement listed in Schedule 5.14(f), and neither Seller nor any Seller Entity has waived any material rights under any such agreement. To Seller's Knowledge, (i) each such agreement is legal, valid, binding and enforceable against the other party in accordance with its terms, and is in full force and effect, subject (other than with respect to the Bankruptcy Proceeding) to bankruptcy, insolvency, reorganization, moratorium, fraudulent transfer and similar Laws of general applicability relating to or affecting creditors' rights and to general equity principles (whether in equity or at law), and (ii) neither Seller nor the other party is in breach or default, and (A) no event has occurred which with notice or lapse of time or both would constitute a breach or default, or permit termination, modification, or acceleration thereof and (B) the other party has not notified Seller or any other Seller Entity of any intention to terminate, modify or accelerate such agreement.

(g) Seller has used commercially reasonable efforts to maintain the confidentiality of any legally protectable Natural Gas Subject Business Intellectual Property. To the Knowledge of Seller, Seller has used commercially reasonable efforts to maintain the confidentiality of any legally protectable Subject Business Intellectual Property other than the Natural Gas Subject Business Intellectual Property.

(h) No loss or expiration of any of the Intellectual Property listed in Schedule 5.14(a), Parts 1, 2 and 5, is pending, or to the Knowledge of Seller, is threatened, except for Intellectual Property expiring at the end of its statutory term (and not as a result of any act or omission by Seller, including a failure to pay any required maintenance fees except in the ordinary course of business).

#### 5.15 Financial Statements.

(a) Schedule 5.15(a) contains an unaudited statement of net assets of the Subject Business as of December 31, 2008, and May 31, 2009 (the "Net Assets Statements"). The Net Assets Statements reflect all amounts necessary for a fair presentation of the current assets, fixed assets and current liabilities of the Subject Business as of such dates, in accordance with the accounting principles set forth in Schedule 4.03(a).

(b) Schedule 5.15(b) sets forth the unaudited statements of income of the Subject Business for the years ended December 31, 2008 and December 31, 2007 and for the five (5) month period ended May 31, 2009 (collectively, the "Income Statements"). The Income Statements present fairly, in all material respects, the results of operations of the Subject Business for the periods to which they relate, in accordance with Seller's accounting principles set forth on Schedule 4.03(a), consistently applied.

#### 5.16 Taxes.

(a) Seller has (i) duly filed with the appropriate taxing authority (or there has been filed on its behalf) all Tax returns required to be filed by it (taking into account all applicable extensions) with respect to the Subject Business and (ii) paid all Taxes shown as due on such Tax returns when payable. All such Tax returns are true and correct in all material respects.

(b) There are no Liens for Taxes upon any Transferred Assets, except for Liens for Taxes not yet due and payable.

(c) There is no audit, examination, deficiency, refund litigation or proposed adjustment pending or in progress or threatened with respect to any Taxes relating to the Subject Business.

(d) There are no outstanding written requests, agreements, consents or waivers to extend the statutory period of limitations applicable to the assessment of any Taxes relating to the Subject Business.

(e) Seller, with respect to the Subject Business, is in material compliance with all applicable information reporting and Tax withholding requirements under U.S. federal, state and local, and non-U.S. Tax Laws.

5.17 Compliance with Laws. Since January 1, 2007, Seller (or its past or present Affiliates) has complied in all material respects with all applicable Laws in connection with the Subject Business, and no Proceeding has been commenced, and to Seller's Knowledge, no Proceeding has been filed, and no hearing, audit or inquiry has been commenced, against Seller alleging any failure to so comply by or before any court or other Governmental Authority or any arbitrator or arbitration panel (other than the Bankruptcy Proceeding).

5.18 Transactions with Affiliates. Except as set forth on Schedule 5.18, no Seller Entity other than Seller or any other division of Seller, and none of the directors or officers, and to the Knowledge of Seller, none of the consultants, employees or managers of Seller or any other Seller Entity (or to the Knowledge of Seller, any of the respective Affiliates of any such entities or individuals) have been involved in any business arrangement or relationship with the Subject Business, are entitled to any payment or transfer of any assets from the Subject Business, have any interest in any material property or asset owned, leased, licensed or used by the Subject Business, or have a material interest in any customer or supplier of the Subject Business or any provider of products or services to the Subject Business.

5.19 Conduct of the Business. Since May 31, 2009, except as specifically disclosed in Schedule 5.19, the Subject Business has not:

- (a) suffered any theft, damage, destruction or casualty loss in excess of \$100,000 in the aggregate to its assets (including the Transferred Assets), whether or not covered by insurance;
- (b) entered into any settlement regarding the breach or infringement of, any Subject Business Intellectual Property;
- (c) subjected any of the Transferred Assets to any Lien (other than Permitted Exceptions and Liens that will be released at or prior to the Closing);
- (d) sold, leased, subleased, licensed, assigned, transferred or otherwise disposed of any of its material tangible or intangible assets (including the Subject Business Intellectual Property) (except for sales of Inventory and non-exclusive licenses granted in the ordinary course of business) or, to the Knowledge of Seller, disclosed any confidential information (other than pursuant to agreements requiring the Person to whom the disclosure was made to maintain the confidentiality of such confidential information);
- (e) waived, canceled, compromised or released any material rights or material claims of material value, other than in the ordinary course of business;
- (f) except (i) as required pursuant to the terms of any Seller Benefit Plan or (ii) for increases in annual salary or hourly wages or cash bonuses in the ordinary course of business (which do not individually exceed 5% of base salary), (A) granted to any Subject Business Employee any increase in compensation or benefits, (B) granted to any Subject Business Employee any increase in severance or termination pay, (C) entered into or amended any employment, indemnification, severance, or termination agreement with any employee (except where required by Law), or (D) taken any action to accelerate any payments, rights or benefits, or made any material determinations not in the ordinary course of business, under any Seller Benefit Plan;
- (g) made any material change in its accounting principles, methods or practices, or made or changed any Tax election, or settled any material Tax controversy;
- (h) other than pursuant to its capital budget, authorized, committed to or made any capital expenditures that aggregate in excess of \$84,000;
- (i) made any loans or advances to, or guarantees for the benefit of, any Person (other than advances to employees of the Subject Business for travel and business expenses incurred in the ordinary course of business);
- (j) instituted, compromised or settled any Proceeding;
- (k) acquired any other business or Person (or any significant portion or division thereof), whether by merger, consolidation or reorganization or by purchase of its assets or stock or acquired

any other material assets;

(m) entered into any Contracts with, any Affiliate of Seller;

(n) induced, or attempted to induce, any employee of the Subject Business, whether directly or indirectly, to terminate his or her employment with the Subject Business as of or following the Closing;

(o) dismissed any member of the Subject Business' senior management team (except for cause) or employed or engaged (or offered to employ or engage) any other Person with total compensation of \$75,000 per year or higher; or

(p) committed or agreed, in writing or other legally binding manner, to any of the foregoing, except as expressly contemplated by this Agreement.

5.20 Permits. Schedule 5.20 sets forth a complete and correct list of all material Permits obtained or necessary in connection with the operation of the Transferred Assets and the Subject Business. To the Knowledge of Seller, all of the Permits set forth or required to be set forth on Schedule 5.20 are valid and in full force and effect. Seller has not received any written notice, and to the Knowledge of Seller, Seller has not received any other notice, from any Governmental Authority stating an intention to terminate or modify any material Permit.

5.21 Product Warranty/Product Liability.

(a) Schedule 5.21(a) sets forth the standard terms and conditions with respect to products designed, manufactured or sold by the Subject Business and services rendered by the Subject Business and lists all material deviations from the warranties and guaranties contained therein that Seller has offered or agreed to give in the six months prior to the date hereof.

(b) Except as set forth on Schedule 5.21(b), there is currently no pending, and since January 1, 2008, there has been no pending or, to the Knowledge of Seller, threatened Proceeding and the Subject Business has no material liability with respect to (i) any product alleged to have a defect in manufacture or design, (ii) any other product liability or any similar claim with respect to any product sold by the Subject Business, or (iii) any claim for the breach of any express or implied product warranty or any similar claim with respect to any such product other than standard warranty obligations made by the Subject Business in the ordinary course of business to purchasers of its products. To Seller's Knowledge, since January 1, 2008, there has not been any accident, happening or event caused or allegedly caused by any hazard, defect, alleged hazard or alleged defect in manufacture, design, materials or workmanship relating to any product sold by the Subject Business. There is currently no pending, and since January 1, 2008, there has been no pending, nor to the Knowledge of Seller, threatened, voluntary or compulsory recall, market withdrawal, safety alert, investigation or any other similar notice or action relating to any alleged defect or violation, or lack of safety or efficacy of any product.

5.22 No Premerger Obligations. The Transactions do not give rise to any premerger notification or, subject to entry of the Sale Order and its becoming a Final Order, any other approval obligations on the part of Seller or any other Seller Entity under the Law of any jurisdiction.

5.23 Additional Representation. Seller further represents and warrants the answers set forth in Schedule 5.23; provided, however, that such representation and warranty is given only as of the date hereof.

## ARTICLE 6

### Buyer Representations and Warranties

Each of Buyer and Buyer Parent represents and warrants to Seller as of the date hereof and as of the Closing as follows:

6.01 Corporate Organization and Existence. Buyer is a limited liability company duly organized, validly existing and in good standing under the Laws of Delaware. Buyer Parent is a corporation duly organized, validly existing and in good standing under the Laws of Delaware. Each of Buyer and Buyer Parent has full power to enter into this Agreement and the other Transaction Documents to which it is or will be a party and, subject to entry of the Sale Order and it becoming a Final Order, perform its obligations hereunder and thereunder. The execution and delivery by each of Buyer and Buyer Parent of this Agreement and the other Transaction Documents to which it is or will be a party, and its performance of its obligations hereunder and thereunder, have been duly authorized by all required action on the part of Buyer and Buyer Parent. Buyer is duly authorized to conduct business and is in good standing under the Laws of each jurisdiction where such qualification is required, except in such jurisdictions where the failure to be so qualified or licensed would not reasonably be expected to have a material adverse effect on Buyer's ability to consummate the Transactions.

6.02 Authorization. Each of Buyer and Buyer Parent has duly and validly executed and delivered this Agreement and the other Transaction Documents to which it is a party which are being executed and delivered simultaneously with this Agreement. The remaining Transaction Documents to which Buyer will be a party, when executed and delivered at the Closing, will be duly and validly executed and delivered by Buyer. This Agreement and each Transaction Document to which Buyer or Buyer Parent is a party which is being executed simultaneously with this Agreement constitutes, and each Transaction Document to which it is a party upon its execution and delivery at the Closing will constitute (assuming as to this Agreement and each other Transaction Document to which Seller is a party, its due authorization, execution and delivery by Seller and entry of the Sale Order and its becoming a Final Order) a legal, valid and binding obligation of Buyer or Buyer Parent, as applicable, enforceable against Buyer or Buyer Parent, as applicable, in accordance with its terms, subject to bankruptcy, insolvency, reorganization, moratorium, fraudulent transfer and similar Laws of general applicability relating to or affecting creditors' rights and to general equity principles (whether in equity or at law).

6.03 No Conflict. The execution and delivery by each of Buyer and Buyer Parent of this Agreement and the other Transaction Documents to which it is or will be a party, and the performance by each of Buyer and Buyer Parent of its obligations hereunder and thereunder, do not (a) conflict with its organizational documents, or (b) subject to entry of the Sale Order and its becoming a Final Order, result in any violation or breach of any of the provisions of, or constitute a default under, any Law, Order or Contract to which it is a party or by which it is bound, which violation, breach or default would materially adversely affect its ability to execute and deliver this Agreement or any other Transaction Document to which it is or will be a party or perform its obligations hereunder or thereunder.

6.04 Sufficient Funds. Buyer will have on the Scheduled Closing Date sufficient funds to consummate the Transactions.

6.05 No Premerger Obligations. The Transactions do not give rise to any premerger notification or, subject to entry of the Sale Order and its becoming a Final Order, any other approval obligations on the part of Buyer or Buyer Parent under the Law of any jurisdiction.

## ARTICLE 7

### Buyer's Investigation

Buyer hereby acknowledges the following:

7.01 Investigation. Buyer has conducted its own investigation and has made its own evaluation of the Subject Business, the Transferred Assets and the Transferred Liabilities; provided that except as provided by applicable Law, no knowledge of, or investigation by or on behalf of, any Buyer will constitute a waiver of Buyer's right to enforce any covenant, representation or warranty, contained herein or affect any right Buyer may have to indemnification.

7.02 No Additional Representations. Except for the specific representations and warranties in this Agreement, neither Seller nor any other Seller Entity is making any representation or warranty, express or implied, of any nature whatsoever with respect to the Subject Business, the Transferred Assets or the Transferred Liabilities.

## ARTICLE 8

### Covenants of Seller and Buyer

8.01 Bankruptcy Court Approval.

(a) Seller shall use commercially reasonable efforts to have the Bankruptcy Court approve the Sale Order at its hearing on August 24, 2009, or, if after such use of commercially reasonable efforts, Seller is unable to obtain such approval at such hearing, as soon as practicable thereafter, and not vacate, stay, amend, reverse, supplement, or modify the Sale Order. Upon entry of the Sale Order, Seller shall (i) use commercially reasonable efforts to cause the Sale Order to

become a Final Order as soon as possible after its entry and to obtain any other approvals or consents from the Bankruptcy Court that may be reasonable necessary to consummate the Transactions and (ii) not seek to revoke, modify, or supplement the Sale Order without the prior written consent of Buyer.

(b) Buyer shall use commercially reasonable efforts (including providing testimony as required at any hearing before the Bankruptcy Court) to assist Seller in obtaining approval of the Sale Order at its hearing on August 24, 2009, or, if after such use of commercially reasonable efforts, Seller is unable to obtain approval at such hearing, as soon as practicable thereafter.

(c) Seller shall promptly provide Buyer with drafts of all documents, motions, orders, filings or pleadings that Seller or any Affiliate thereof proposes to file with the Bankruptcy Court or any other court or tribunal which relate in any manner, directly or indirectly, to (i) this Agreement, the Ancillary Agreements or the Transactions; (ii) the Sale Motion; (iii) entry of the Sale Order; or (iv) the Subject Business, and will provide Buyer with a reasonable opportunity to review such documents in advance of their service and filing.

(d) Seller shall comply with all requirements of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure in connection with obtaining approval of the sale of the Transferred Assets (including the assumption and assignment to Buyer of any Transferred Contracts) to Buyer pursuant to this Agreement. Notice of the hearing on the request for entry of the Sale Order pursuant to the Sale Motion, notice of any hearings at which objections to proposed Cure Costs or other issues regarding the proposed assumption and assignment of the Transferred Contracts pursuant to the Sale Motion, and notice of the deadline for all objections to entry of the Sale Order or any other order related thereto or to the Sale Motion shall be properly served by Seller in accordance with all applicable Federal Rules of Bankruptcy Procedure and all applicable local rules and standing orders of the Bankruptcy Court on all parties required to receive such notices, including all parties who have asserted Liens in the Transferred Assets, all parties to Transferred Contracts, counsel to any statutory committee appointed in the Bankruptcy Proceeding, the Office of the United States Trustee for the District of Delaware, all financial institutions that have currently outstanding loans to Seller, all parties filing notices of appearance or requests for papers in the Bankruptcy Proceeding, the Internal Revenue Service, the U.S. Environmental Protection Agency and any applicable state environmental agency, the Pension Benefit Guaranty Corporation, and, to the extent required, each of Seller's other creditors. In addition, notice of the Sale Motion and the hearing on the request for entry of the Sale Order and the objection deadline for such hearing shall be given by Seller, in a form reasonably satisfactory to Buyer, by publication of a notice in *The Wall Street Journal* National Edition and *The Denver Post* at a time reasonably in advance of such objection deadline and hearing.

8.02 Access and Inquiry. Between the date of this Agreement and the Closing, Seller shall give Buyer reasonable access to the books and records, files, customer lists, accounting records and the facilities of the Subject Business and Buyer upon request will be permitted to contact and make reasonable inquiry of employees of Seller regarding the Subject Business. Buyer acknowledges that the terms of the Confidentiality Agreement shall apply to information obtained by Buyer and its



representatives pursuant to this Section.

8.03 Licenses and Permits; Consents.

(a) Buyer and Seller will cooperate after the date hereof to prepare and file or cause to be prepared and filed, at Buyer's cost, with the appropriate Governmental Authorities applications for the issuance or transfer to Buyer of all Permits required for Buyer to operate the Subject Business after the Closing, to be effective upon the Closing. Buyer and Seller shall use their commercially reasonable efforts to secure such Permits. Prior to Closing, neither Buyer nor Seller shall communicate with any Governmental Authorities in connection with such Permit transfer or issuance without first consulting with the other Party or Parties and providing the other Party or Parties with an opportunity to participate in such communications.

(b) As soon as practicable after the date hereof, Seller will give all required notices to third parties and Buyer and Seller will use their commercially reasonable efforts to obtain all consents as may be required or appropriate in connection with the consummation of the Transactions and to preserve all rights and benefits of the Subject Business [REDACTED].

8.04 Notices to Third Parties. Buyer and Seller shall cooperate to make all other filings and to give notice to all third parties that may reasonably be required to consummate the transactions contemplated by this Agreement.

8.05 Commercially Reasonable Efforts. In making commercially reasonable efforts as required under this Article 8 or elsewhere in this Agreement, no Party shall be required to make any payment (other than for reasonable legal fees and payment of any applicable Cure Costs) that it is not presently contractually required to make, divest or hold separate or license any assets of Buyer, any member of the Buyer Group or any of its Affiliates (including assets of the Subject Business), make any change in the conduct of its business or that of the Subject Business other than to perform under the terms of this Agreement, accept any limitation on the future conduct of its business or that of the Subject Business, accept any significant modification in any existing agreement or arrangement, or agree to any of the foregoing.

8.06 Title Insurance and Survey. Buyer shall order the Title Commitment and the Survey and deliver copies of the same to Seller. Seller shall provide all reasonable cooperation to Buyer in Buyer's efforts to obtain for the benefit of Buyer the Survey and the Title Policy, including executing and delivering such affidavits, documents and other agreements as are required by the Title Insurer to issue the Title Policy. The cost of obtaining the Title Commitment, the Survey and the Title Policy shall be borne by Buyer.

8.07 Termination of Intercompany Agreements. Any Contracts or other arrangements between Seller or any other Seller Entity in connection with the Subject Business, on the one hand, and any other Seller Entity or any other division of Seller, on the other hand, shall be terminated by Seller as of or prior to the Closing; and in any event, Buyer shall have no rights or obligations thereunder or with respect thereto.

8.08 Delivery of Monthly Financials. Until the Closing Date, Seller shall, as promptly as practicable but in no event later than 15 days after the end of each calendar month, prepare and deliver to Buyer an income statement and statement of net assets of the Subject Business for such calendar month. Such unaudited statements shall be prepared in accordance with the accounting policies set forth in Schedule 4.03(a), consistently applied.

8.09 Assumption and Assignment of Transferred Contracts; Cure Costs. In the event that any Cure Cost obligation exists with respect to any Transferred Contract, at the Closing, Seller shall assign to Buyer and Buyer will assume all of the Transferred Contracts. Seller and Buyer shall each be responsible for one-half of such Cure Costs. Notwithstanding the foregoing, Buyer may request and Seller shall file with the Bankruptcy Court a request by Buyer to modify Exhibit 1.02F to add additional Contracts related to the Subject Business as Transferred Contracts and have Buyer and Seller pay the corresponding Cure Costs, if any, in the manner provided in this Section 8.09; provided, however, that any such request to modify Exhibit 1.02F is made in writing by Buyer within sixty (60) days following the Closing Date, and provided, further, that Seller shall not be required to modify Exhibit 1.02F with respect to any Contract that it has previously rejected in the Bankruptcy Proceeding.

8.10 Temporary Employees. In connection with the hiring of any temporary employees prior to Closing, Seller shall consult with Buyer prior to such hiring, except to the extent prohibited by Law.

## ARTICLE 9

### Conduct of Business Prior to the Closing

9.01 Operation in Ordinary Course. From the date hereof through the Closing or the earlier termination of this Agreement, except as set forth on Schedule 9.01 or as specifically required by this Agreement, Seller, in connection with the Subject Business, shall comply in all material respects with applicable Laws and conduct the Subject Business in the ordinary course of business (including repairing or replacing casualty losses and making previously budgeted capital expenditures in the ordinary course of business) and shall use its commercially reasonable efforts to preserve intact the Subject Business and relationships with third parties (including customers and suppliers) and to keep available the services of its current officers and employees; provided, however, that the occurrence of any event (or failure to occur of any necessary event), which occurrence (or failure to occur) is beyond the reasonable control of Seller, shall not constitute a violation or breach of this Section 9.01.

Without limiting the generality of the foregoing, from the date hereof until the Closing, unless Buyer has previously consented in writing thereto, Seller, in connection with the Subject Business, will not, and will cause the other Seller Entities not to:

- (a) enter into any settlement regarding the breach or infringement of, any Subject Business Intellectual Property;
- (b) subject any of the Transferred Assets to any Lien (other than Permitted Exceptions

and Liens that will be released at or prior to the Closing);

(c) sell, lease, sublease, license, assign, transfer or otherwise dispose of any of its tangible or intangible assets (including the Subject Business Intellectual Property) (except for sales of Inventory and non-exclusive licenses granted in the ordinary course of business);

(d) waive, cancel, compromise or release any rights or claims of material value, other than in the ordinary course of business or disclose any confidential information (other than pursuant to agreements requiring the Person to whom the disclosure is made to maintain the confidentiality of such confidential information);

(e) enter into, amend, waive or terminate any material provision of any Material Contract or the Subject Business' material rights thereunder or enter into any other material transaction (other than sales or Contracts for sales of Inventory) or materially change any material business practice;

(f) except (i) as required pursuant to the terms of any Seller Benefit Plan or (ii) for increases in annual salary or hourly wages or cash bonuses in the ordinary course of business (which do not individually exceed 5% of base salary), (A) grant to any employee any increase in compensation or benefits, (B) grant to any employee any increase in severance or termination pay, (C) enter into or amend any employment, consulting, indemnification, severance, collective bargaining or termination agreement with any employee (except where required by Law), (D) establish, adopt, enter into or amend in any material respect any Seller Benefit Plan, (E) take any action to accelerate any payments, rights or benefits, or make any material determinations not in the ordinary course of business, under any Seller Benefit Plan or (F) loan or advance money or other property to any employee, other than ordinary course employee expense advances;

(g) make any material change to its accounting methods, principles or practices;

(h) authorize, commit to or make any capital expenditures not previously budgeted that aggregate in excess of \$84,000;

(i) make any loans or advances to, or financial guarantees for the benefit of, any Persons other than the Subject Business (other than advances to employees of the Subject Business for travel and business expenses incurred in the ordinary course of business);

(j) institute, compromise or settle any material Proceeding;

(k) grant any warranties or similar performance guarantee to its customers other than in the ordinary course of business;

(l) acquire any other business or Person (or any significant portion or division thereof), whether by merger, consolidation or reorganization or by purchase of its assets or stock or acquired any other material assets;

(m) except in the ordinary course of business, (i) acquire or dispose of any property or

assets or (ii) cancel any debts or waive any claims or rights of substantial value;

(n) enter into any Contracts with, any Affiliate of Seller, except to the extent required by Law;

(o) except as provided in Schedule 9.01(o), induce, or attempt to induce, any Subject Business Employee, whether directly or indirectly, to terminate his or her employment with the Subject Business as of or following the Closing;

(p) dismiss any member of the Subject Business' senior management team (except for cause) or employ or engage (or offer to employ or engage) any other Person with total compensation of \$75,000 per year or higher;

(q) make any material change in its general pricing practices or policies or any material change in its credit or allowance practices or policies; or

(r) commit or agree, in writing or other legally binding manner, to any of the foregoing, except as expressly contemplated by this Agreement.

## ARTICLE 10

### Conditions Precedent to Buyer's Obligations

All obligations of Buyer under this Agreement are subject, at Buyer's option, to the fulfillment prior to or at the Closing, of each of the following conditions:

10.01 Performance of Covenants and Agreements. Seller shall have performed in all material respects all of the covenants and agreements required to be performed by Seller at or prior to the Closing pursuant to this Agreement.

10.02 Permits, Consents, etc. Each environmental Permit set forth on Schedule 5.20 either (a) has been obtained effective as of the Closing or (b) would reasonably be expected to be obtained after the Closing without penalty or other material adverse consequences to Buyer. There shall be no other material Permit, consent, approval or authorization of, or declaration to or filing with, any Governmental Authority required in connection with the Transactions that has not been accomplished or obtained and which could not reasonably be expected to be accomplished or obtained after the Closing without penalty or other material adverse consequences to Buyer.

10.03 Litigation. No Proceeding by any third Person (including any Governmental Authority) shall have been instituted (and remain pending on the Closing Date) against any Seller Entity or Buyer Entity (or any Affiliate of any Seller Entity or Buyer Entity), and no Order shall have been issued (and remain outstanding on the Closing Date), that questions, or reasonably could be expected to lead to subsequent questioning of, the validity or legality of this Agreement or the Transactions which in the case of a Proceeding, if successful, would materially adversely affect the right of Buyer to consummate the Transactions or to continue the Subject Business after the Closing

substantially as currently operated.

10.04 Certificates of Seller.

(a) Seller shall have delivered to Buyer a certificate of Seller, dated the Closing Date, signed by the President or any Vice President of Seller to the effect that the conditions set forth in Sections 10.01 and 10.05 have been satisfied, subject, with respect to the condition set forth in Section 10.05, for any matters listed on such certificate. The listing of such matters shall not (i) be or be deemed an admission that such matters, individually or collectively, constitute a Material Adverse Effect or (ii) constitute a waiver by Buyer of any of its rights contained in Article 14 or any of the conditions precedent to the Closing hereunder or cure any breach of any representation, warranty or covenant contained herein.

(b) Seller shall have delivered to Buyer a certificate of Seller, dated the Closing Date, signed by the Secretary or an Assistant Secretary of Seller, (i) certifying that the execution, delivery and performance of the Transaction Documents to which Seller is a party have been duly authorized by the Board of Directors or its duly authorized delegee, and that such authorization has not been amended but remains in full force and effect on the Closing Date, and (ii) certifying the incumbency as officers or authorized signatories of Seller, and the authenticity of specimen signatures, of all Persons signing any Transaction Documents on behalf of Seller.

10.05 No Material Adverse Effect. There will not have occurred, from the date hereof through and including the Closing, any Material Adverse Effect.

10.06 Closing Deliveries. Seller shall have delivered to Buyer those items set forth in Section 3.03.

10.07 Bankruptcy Court Approval. The Sale Order shall have been entered and shall have become a Final Order.

10.08 Title and Survey. Buyer shall have received the Title Policy and the Survey.

## ARTICLE 11

### Conditions Precedent to Seller's Obligations

All obligations of Seller under this Agreement are subject, at Seller's option, to the fulfillment prior to or at the Closing, of each of the following conditions:

11.01 Accuracy of Representations and Warranties. The representations and warranties of Buyer contained in this Agreement shall be true and correct (without regard to any materiality or material adverse effect qualifications or exceptions contained therein) in all respects at and as of the Closing Date, except for such breaches or failures to be true and correct that would not reasonably be expected, individually or in the aggregate, to have a material adverse effect upon the ability of Buyer to consummate the Transactions or on the ability of Buyer Parent to perform its obligations under

this Agreement.

11.02 Performance of Covenants and Agreements. Buyer shall have performed in all material respects at or prior to the Closing all of the covenants and agreements required to be performed by Buyer at or prior to the Closing pursuant to this Agreement.

11.03 Permits, Consents, etc. Each environmental Permit set forth on Schedule 5.20 either (a) has been obtained effective as of the Closing or (b) would reasonably be expected to be obtained after the Closing without penalty or other material adverse consequences to Buyer. There shall be no other material Permit, consent, approval or authorization of, or declaration to or filing with, any Governmental Authority required in connection with the Transactions which has not been accomplished or obtained and which could not reasonably be expected to be accomplished or obtained after the Closing without penalty or other material adverse consequences to the Seller Group.

11.04 Litigation. No Proceeding by any third Person (including any Governmental Authority) shall have been instituted (and remain pending on the Closing Date) and against any Seller Entity or Buyer Entity (or any Affiliate of any Seller Entity or Buyer Entity), and no Order shall have been issued (and remain outstanding on the Closing Date), that questions, or reasonably could be expected to lead to subsequent questioning of, the validity or legality of this Agreement or the Transactions which in the case of a Proceeding, if successful, would materially and adversely affect the right of Buyer to consummate the Transactions or to continue the Subject Business after the Closing substantially as currently operated might involve material liability on the part of any Seller Entity.

11.05 Certificates of Buyer.

(a) Buyer shall have delivered to Seller a certificate of Buyer, dated the Closing Date, signed by an authorized representative of Buyer to the effect that the conditions set forth in Sections 11.01 and 11.02 have been satisfied.

(b) Buyer shall have delivered to Seller a certificate of Buyer, dated the Closing Date, signed by an authorized representative of Buyer, (i) certifying that resolutions of the Board of Managers of Buyer authorizing the Transactions and the execution, delivery and performance of the Transaction Documents to which Buyer is a party have been duly adopted and have not been amended but remain in full force and effect as of the Closing Date, and (ii) certifying the incumbency as officers or authorized signatories of Buyer, and the authenticity of specimen signatures, of all Persons signing any Transaction Documents on behalf of Buyer. Buyer Parent shall have delivered to Seller a certificate of Buyer Parent, dated the Closing Date, signed by an authorized representative of Buyer Parent, (y) certifying the due authorization of Buyer Parent's execution, delivery and performance of this Agreement and that such authorization has not been amended but remains in full force and effect as of the Closing Date, and (z) certifying the incumbency as officers or authorized signatories of Buyer Parent, and the authenticity of specimen signatures, of all Persons signing any Transaction Documents on behalf of Buyer Parent.

11.06 Bankruptcy Court Approval. The Sale Order shall have been entered and shall have become a Final Order.

## ARTICLE 12

### Employee Matters

#### 12.01 Employment.

(a) Except as set forth on Schedule 12.01, effective on the day after the Closing Date, (i) each Seller employee who is employed exclusively in the Subject Business and (ii) any other Seller Entity employee who performs substantial services for the Subject Business and is designated by Seller as an employee who is being transferred with the Subject Business (collectively, the "Subject Business Employees") shall cease to be an employee of Seller. All employees described in clauses (i) and (ii) above as of the date of this Agreement are listed on Schedule 12.01. If the executive employee set forth on Schedule 12.01 (the "Executive") exercises his right to re-employment with Seller, Seller shall make the services of the Executive available to Buyer for a period of three (3) months after the Closing Date (or for so long as he remains employed with Seller if he ceases to be employed less than three months following the Closing Date) on a full time basis at the fully burdened cost of his services (which shall not be materially increased between the Closing and the termination of such three month period) or upon such other terms as Buyer and Seller may agree. In the event the Executive does not become a Continued Employee, Buyer and Seller shall request that the Executive enter into a noncompetition and confidentiality agreement with Buyer. If the Executive does not enter into a noncompetition and confidentiality agreement with Buyer, upon Buyer's request, if permissible under applicable Law, Seller shall enforce the terms of the Executive's existing noncompetition and confidentiality agreement for the benefit of Buyer; and Buyer will reimburse Seller for any and all costs and expenses it incurs in connection with such enforcement and shall hold harmless Seller from and against any Damages arising from such enforcement. If the research employee set forth on Schedule 12.01 (the "Research Employee") does not become a Continued Employee, Buyer and Seller shall request that the Research Employee enter into a confidentiality agreement with Buyer. If the Research Employee does not enter into a confidentiality agreement with Buyer, upon Buyer's request, if permissible under applicable Law, Seller shall enforce the terms of the Research Employee's existing confidentiality agreement for the benefit of Buyer; and Buyer will reimburse Seller for any and all costs and expenses it incurs in connection with such enforcement and shall hold harmless Seller from and against any Damages arising from such enforcement.

(b) Each Subject Business Employee who accepts an offer of employment from Buyer in accordance with Section 12.02 shall become an employee of Buyer effective on the day after the Closing Date; and all such employees are referred to as "Continued Employees". Seller is making no representation or warranty as to which, if any, Subject Business Employees will accept offers of employment from Buyer.

12.02 Positions Offered to Subject Business Employees. Buyer shall offer each Subject

Business Employee employment to commence on the day after the Closing Date. With respect to each Subject Business Employee, the position offered by Buyer (i) shall be for a job that is comparable to the Subject Business Employee's job with the Subject Business as of the Closing, (ii) shall be at no reduction in base salary or base hourly rate effective immediately prior to the Closing, (iii) shall initially be within fifty (50) miles of the current location of the Subject Business and (iv) shall provide employee benefit plan coverage as follows:

(A) Vacation.

(1) Effective as of the day after the Closing Date, Buyer shall assume all liability and obligations of Seller to each Continued Employee with respect to vacation from the Closing.

(2) Each Continued Employee shall be given credit by the Buyer Group for the employee's prior service with the Seller Group for purposes of the Buyer Group's vacation policies, to the extent such service is recognized under Seller's vacation policies.

(B) Severance.

(1) Effective as of the day after the Closing Date, the Continued Employees shall be covered by Buyer's severance program or policy ("Buyer's Severance Plan").

(2) Under Buyer's Severance Plan, for purposes of determining severance benefits payable for terminations eligible for severance in accordance with Buyer's Severance Plan within 12 months after the Closing Date, each Continued Employee shall be given credit by the Buyer Group for service with the Seller Group through the Closing Date (and service with the Buyer Group after the Closing Date).

(C) Other Plans. Except as otherwise provided in this Section with respect to vacation and severance benefits, effective as of the day after the Closing Date, Buyer shall make available to each Continued Employee the 401(k) plans, medical plans, dental plans, disability plans, group insurance plans and all other benefits under the Buyer's plans, policies and arrangements, which are made available by the Buyer Group to its similarly situated employees. With respect to any such plan, policy or arrangement that requires an employee to attain any specific length of service with Buyer in order to participate in, or be eligible for, or to be vested in, any benefits provided thereunder, each Continued Employee shall be given credit for purposes of determining such participation, eligibility and vesting (but not for purposes of the accrual of any benefits under any such plan, policy or arrangement) for the Employee's length of service with the Seller Group through the Closing Date.

12.03 Inactive Subject Business Employees. This Agreement shall not obligate Buyer to employ any Subject Business Employee who is classified by Seller as being on long-term disability leave as of the Closing. Any Subject Business Employees who are regarded by Seller as being on short-term disability, worker's compensation, or other leave of absence (whether paid or unpaid) as of the Closing shall continue such status with Buyer after the Closing and shall be offered



employment with the Buyer, in accordance with the provisions set forth above in Section 12.02, provided that such Subject Business Employees return to active employment within six months of the Closing Date and provided that the commencement date of such leave is included in Schedule 5.11(a).

**12.04 Terms of Employment.** As to terms and conditions of employment not specified in this Article, from and after the Closing the Continued Employees (i) shall be treated in a similar manner as the other employees of the Buyer Group who are similarly situated, (ii) shall be entitled to participate on the same basis as such other employees in all job training, career development and educational programs of the Buyer Group, and (iii) shall be entitled to fair and equitable consideration together with such other employees in connection with any management or executive job opportunities or any other promotional opportunities with the Buyer Group; provided, however, that Continued Employees will be employed at will, which means their employment may be terminated at any time or for any reason, just as a Continued Employee may terminate employment at any time and for any reason, and nothing in this Section 12.04 or this Agreement generally shall modify their employment at will status.

**12.05 Employment Related Indemnities.** Seller shall indemnify Buyer from and against all Damages resulting from claims from the Subject Business Employees (including Continued Employees) where such Claims are based on facts alleged to have occurred prior to the day after the Closing Date (the "Employee Closing Date") or on or after the Closing Date as provided in subsection (b) below, including a Claim by any Subject Business Employee who declines to accept employment with Buyer. Buyer shall indemnify the Seller Group from and against all Damages resulting from Claims based on facts arising after the Employee Closing Date, including: (a) the employment, or termination of employment, of any Continued Employee, (b) any Claim made by any Subject Business Employee for any severance pay, excluding any claim for entitlement to severance based on an alleged obligation by Seller created before the Employee Closing Date or based on termination by Seller after refusal of an offer to become an employee of Buyer and (c) any Claim made by any Continued Employee that results from the actual or alleged non-continuance, reduction or change of the terms and conditions of employment (including any reduction or change of the employment-related benefits provided to such employee), which occurs on or after the Employee Closing Date. Buyer shall also indemnify the Seller Group from and against all Damages resulting from Claims based on Buyer's hiring practices and decisions with respect to the Subject Business.

## ARTICLE 13

### Termination

#### 13.01 Rights to Terminate.

(a) This Agreement may be terminated at any time prior to the Closing by written agreement of Seller and Buyer.

(b) This Agreement may be terminated at the written election of Buyer or Seller, if the

Closing has not occurred within one hundred-eighty (180) days after the date of this Agreement by reason of the failure to be satisfied of any of the conditions set forth in Article 10 or Article 11 hereof, respectively (provided that no Party may terminate this Agreement pursuant to this clause if the failure to consummate the transactions contemplated by this Agreement is the result of a breach of this Agreement by the Party seeking to terminate this Agreement).

(c) This Agreement may be terminated by Buyer at any time prior to Closing if (i) Seller's case is converted to a case under chapter 7 of the Bankruptcy Code, (ii) a plan of reorganization is filed by Seller which is incompatible with the performance of Seller's obligations under this Agreement or (iii) a chapter 11 trustee is appointed for Seller.

(d) This Agreement may be terminated by Buyer if the Bankruptcy Court approves an order authorizing the sale of the Transferred Assets to another Person.

### 13.02 Consequences of Termination.

(a) In the event that (i) this Agreement is terminated pursuant to Section 13.01 (other than pursuant to Section 13.01(a) or as a result of Buyer's material breach of this Agreement) or (ii) prior to the twelve (12) month anniversary of the date of this Agreement, Seller receives Bankruptcy Court approval to sell all or substantially all of the Transferred Assets to a third party and such sale to the third party pursuant to such Bankruptcy Court approval closes at any time thereafter, then Seller shall pay Buyer a fee equal to 2.5% of the Initial Purchase Price within thirty (30) days of the closing of such sale. Any fee payable pursuant to this Section shall be subject to Section 14.06.

(b) The obligations of the Parties under this Section 13.02, Section 14.06 and Article 17 shall survive any termination of this Agreement.

## ARTICLE 14

### Indemnification

14.01 Survival. All of the representations and warranties contained in this Agreement or in any certificate delivered by Buyer or Seller pursuant to this Agreement will survive the Closing and continue in full force and effect until the eighteen (18) month anniversary of the Closing Date, except that (a) the representations and warranties contained in Sections 5.01 (Corporate Organization and Existence), 5.02 (Corporate Power), 5.03 (Authorization), 5.04 (Execution and Delivery), 5.05 (No Conflict), 5.07 (Title to Assets), 5.18 (Transactions with Affiliates), 6.01 (Corporate Organization and Existence), 6.02 (Authorization) and 6.03 (No Conflict) hereof will survive the Closing indefinitely, and (b) the representations and warranties contained in Sections 5.13 (Environmental Compliance) and 5.14 (Intellectual Property) hereof will survive the Closing until the second anniversary of the Closing Date. All covenants or agreements contained in this Agreement or any other Transaction Document which by their terms have any remaining obligation to be performed or observed following the Closing will survive until fully performed or observed in accordance with their terms. Subject to Section 14.08, notwithstanding anything herein to the contrary, each

representation or warranty which is the subject of one or more claims asserted in writing prior to the expiration of the applicable period set forth above will survive with respect to the related claim or claims until the final resolution thereof. Each of the representations and warranties in Articles 5 and 6 is a separate and independent warranty and will be applied and interpreted separately and independently from all other representations and warranties contained herein and from all covenants contained herein.

#### 14.02 Seller's Indemnification.

(a) Subject to the terms and conditions of this Article 14, Seller agrees to reimburse, defend, indemnify and hold harmless Buyer and its present and future Affiliates and their respective managers, directors, officers, employees and representatives (collectively, the "Buyer Indemnified Parties") for, from, against and in respect of any and all Damages resulting from, caused by or that exist or arise due to, any of the following (collectively, "Buyer Claims"):

(i) prior to their expiration in accordance with Section 14.01 hereof, any inaccuracy of any representation or breach of any warranty made or given by Seller in this Agreement or any certificate delivered by Seller pursuant to this Agreement;

(ii) any breach of or failure by Seller to perform or comply with any covenant or agreement contained in this Agreement or any other Transaction Document to which Seller is a party (other than the Transition Services Agreement);

(iii) any Excluded Asset or Excluded Liability; and

(iv) reasonable attorneys' fees and other out-of-pocket expenses of a Buyer Indemnified Party in its defense of any Third Party Claim resulting from, caused by or that exists or arises due to any of the foregoing, if the defense of such Claim is not assumed by Seller, and the Buyer Indemnified Party is fully exonerated or cleared with respect to such Claim in the applicable Proceeding.

(b) Notwithstanding Section 14.02(a) hereof, other than with respect to Sections 5.01 (Corporate Organization and Existence), 5.02 (Corporate Power), 5.03 (Authorization), 5.04 (Execution and Delivery), 5.05 (No Conflict), 5.07 (Title to Assets) and 5.18 (Transactions with Affiliates), which shall not be subject to limitation, the obligations of Seller pursuant to Section 14.02(a)(i) hereof: (i) will not apply with respect to any individual Claim for indemnifiable Damages of less than \$25,000 (the "Minimum Claim Amount"), after which, subject to Section 14.02(b)(ii) below, the Buyer Indemnified Parties shall be entitled to recover all such Damages, including the Minimum Claim Amount; and (ii) until the aggregate of all Damages claimed by all Buyer Indemnified Parties, or any of them under Section 14.02 exceeds \$100,000 (the "Basket Amount"), after which the Buyer Indemnified Parties shall be entitled to recover all such Damages in excess of the Basket Amount; and (iii) will be limited to, and will not exceed, \$4,400,000 (the "Indemnity Cap"). The dollar thresholds set forth in this Section have been negotiated for the special purpose of the provision to which they relate, and are not to be taken as evidence of the level of "materiality" for

purposes of any statutory or common law which may be applicable to the Transactions under which a level of materiality might be an issue.

(c) All amounts owing pursuant to this Section 14.02 will be paid promptly, and in any event, not more than five (5) Business Days following notice of the final adjudication or determination thereof, by wire transfer from Seller of immediately available funds to the account designated in writing by any Buyer Indemnified Party entitled to such payment. All amounts payable pursuant to this Section shall be subject to Section 14.06 hereof.

#### 14.03 Buyer's Indemnification.

(a) Subject to the terms and conditions of this Article 14, from and after the Closing Date, Buyer agrees to reimburse, defend, indemnify and hold harmless Seller and its present and future Affiliates and their respective managers, officers, employees and representatives (collectively, the "Seller Indemnified Parties") for, from, against and in respect of any and all Damages resulting from, caused by or that exist or arise due to, any of the following (collectively, "Seller Claims", and together with Buyer Claims, the "Claims"):

(i) prior to their expiration in accordance with Section 14.01 hereof, any inaccuracy of any representation or breach of any warranty made or given by Buyer in this Agreement or any certificate delivered by Buyer pursuant to this Agreement;

(ii) any breach of or failure by Buyer to perform or comply with any covenant or agreement contained in this Agreement or any other Transaction Document to which Buyer is a party (other than the Transition Services Agreement);

(iii) any Transferred Asset or Transferred Liability; and

(iv) reasonable attorneys' fees and other out-of-pocket expenses of a Seller Indemnified Party in its defense of any Third Party Claim resulting from, caused by or that exists or arises due to any of the foregoing, if the defense of such Claim is not assumed by Buyer, and the Seller Indemnified Party is fully exonerated or cleared with respect to such Claim in the applicable Proceeding.

(b) Notwithstanding Section 14.03(a) hereof, other than with respect to Sections 6.01 (Corporate Organization and Existence), 6.02 (Authorization) and 6.03 (No Conflict) which shall not be subject to limitation, the obligations of Buyer pursuant to Section 14.03(a)(i) hereof: (i) will not apply with respect to any individual Claim for indemnifiable Damages of less than the Minimum Claim Amount, after which, subject to Section 14.03(b)(ii) below, the Seller Indemnified Parties shall be entitled to recover all such Damages, including the Minimum Claim Amount; and (ii) until the aggregate of all Damages claimed by all Seller Indemnified Parties, or any of them under Section 14.03 exceeds the Basket Amount, after which the Seller Indemnified Parties shall be entitled to recover all such Damages in excess of the Basket Amount; and (iii) will be limited to, and will not exceed, the Indemnity Cap. The dollar thresholds set forth in this Section have been negotiated for

the special purpose of the provision to which they relate, and are not to be taken as evidence of the level of "materiality" for purposes of any statutory or common law which may be applicable to the Transactions under which a level of materiality might be an issue.

(c) All amounts owing pursuant to this Section 14.03 will be paid promptly, and in any event not more than five (5) Business Days following notice of the final adjudication or determination thereof, by wire transfer by Buyer of immediately available funds to the account designated in writing by any Seller Indemnified Party entitled to such payment.

(d) [REDACTED]

#### 14.04 Procedures for Indemnification.

(a) No Party hereto shall be liable for any Claim for indemnification under this Article 14 unless written notice of a Claim for indemnification is delivered by the Party seeking indemnification (the "Indemnified Party") to the Party from whom indemnification is sought (the "Indemnifying Party") prior to the expiration of any applicable survival period set forth in Section 14.02(b) or prior to the Transition Date in the case of Claims relating to the subject matter of Section 14.03(d) (in which event the Claim shall survive until resolved). If any third party notifies the Indemnified Party with respect to any Third Party Claim against the Indemnifying Party under this Article 14, then the Indemnified Party shall notify the Indemnifying Party promptly thereof in writing; provided that no delay on the part of the Indemnified Party in notifying the Indemnifying Party shall relieve the Indemnifying Party from any obligation hereunder unless, and then only to the extent that, the Indemnifying Party is actually prejudiced thereby. All notices given pursuant to this Section shall describe with reasonable specificity the nature of the Claim, the amount of the Claim (to the extent then known) and the basis of the Indemnified Party's Claim for indemnification.

(b) Following receipt of notice of a Claim in accordance with Section 14.04(a) (other than a Third Party Claim which shall be governed by Section 14.04(c) below), the Indemnifying Party shall have sixty (60) days from the date it receives notice of such Claim (the "Dispute Period") to make such investigation of the Claim as the Indemnifying Party deems necessary or desirable. For purposes of such investigation, the Indemnified Party shall make available to the Indemnifying Party all the material information related to such Claim relied upon by, or in possession or control of, the Indemnified Party to substantiate such Claim. If the Indemnifying Party disagrees with the validity or amount of all or a portion of such Claim made by the Indemnified Party, the Indemnifying Party shall deliver to the Indemnified Party written notice thereof (the "Dispute Notice") prior to the expiration of the Dispute Period. If no Dispute Notice is received by the Indemnified Party within the Dispute Period with respect to all or any portion of such Claim or the Indemnifying Party provides notice that it does not have a dispute with respect to all or any portion of such Claim, such Claim (or undisputed portion thereof) shall be deemed approved and consented to by the Indemnifying Party (such Claim being referred to herein as an "Approved Indemnification Claim"). The Indemnifying Party shall pay the Indemnified Party any such Approved Indemnification Claim within five (5) Business Days after such Claim is determined to be an Approved Indemnification Claim. If a Dispute Notice is received by the Indemnified Party within the Dispute Period and the

Indemnified Party and the Indemnifying Party do not agree to the validity and/or amount of such disputed Claim (or portion thereof), no payment shall be made on account of the disputed portion of such Claim until such disputed Claim is resolved, whether by adjudication of such matter, agreement between Buyer and Seller or otherwise (and upon any such resolution, such Claim (or portion thereof) shall be deemed to be an Approved Indemnification Claim). All amounts payable by Seller pursuant to this Section shall be subject to Section 14.06.

(c) After the Indemnified Party has given notice of a Third Party Claim to the Indemnifying Party pursuant to Section 14.04(a), the Indemnifying Party shall be entitled upon written notice to the Indemnified Party (i) to participate in the defense of such Claim and (ii) to the extent desired (and if the Indemnifying Party agrees in writing not to challenge the facts underlying any judgment associated with such indemnification Claim in any subsequent Proceeding between the Indemnified Party and the Indemnifying Party regarding the Indemnifying Party's obligation to indemnify the Indemnified Party for the Damages associated with such indemnification Claim), to assume the defense thereof with qualified counsel of its own choice reasonably acceptable to the Indemnified Party, in each case, at the Indemnifying Party's sole cost and expense; provided, however, that the Indemnified Party may participate in such defense. Unless and until the Indemnifying Party assumes the defense of a Third Party Claim, the Indemnified Party shall have the right to undertake the defense of such Third Party Claim, by qualified counsel or other representatives of its own choosing reasonably acceptable to the Indemnifying Party, subject to the right of the Indemnifying Party to assume the defense of such Third Party Claim at any reasonable time prior to settlement, compromise or final determination thereof, upon which such assumption, the Indemnifying Party shall promptly reimburse the Indemnified Party for all costs and expenses incurred by the Indemnified Party at any time in connection with the defense of such Third Party Claim prior to the Indemnifying Party's assumption thereof. The Party controlling the defense of a Third Party Claim shall consider in good faith any recommendations made by any other Party with respect to the defense of such Third Party Claim. Subject to Section 14.08, any other provision of this Agreement to the contrary notwithstanding, the Party voluntarily participating in, but not controlling, the defense of a Third Party Claim shall bear its own costs of such participation, including its attorney's fees.

(d) Subject to Section 14.08, notwithstanding any provision of this Agreement to the contrary with respect to control of the defense:

(i) For any Claim whose resolution may require environmental remediation, installation or modification of equipment, Permit modification or operational changes at the Subject Business Real Property, the Party controlling the defense pursuant to this Section 14.04 shall work cooperatively with the other Party and act by consensus when developing, modifying and implementing a strategy to resolve the Claim, and both Parties shall be entitled to participate in all communications with any Governmental Authority relevant to the resolution of the Claim on commercially reasonable terms.

(ii) For any Claim (A) that seeks injunctive relief by or against the Indemnified Party with

respect to Intellectual Property, (B) that includes a Claim against a customer or supplier of the Indemnified Party, or (C) as to which the Indemnified Party reasonably believes that an adverse determination would have a material adverse effect on the Indemnified Party's reputation or future business prospects, the Indemnified Party shall have the right to undertake the defense of such Third Party Claim, by qualified counsel or other representatives of its own choosing reasonably acceptable to the Indemnifying Party.

(e) The Indemnified Party shall not agree or consent to the entry of any judgment or enter into any settlement of any Third Party Claim that might give rise to liability of the Indemnifying Party under this Article 14 without the Indemnifying Party's prior written approval, which approval shall not be unreasonably withheld, conditioned or delayed. The Indemnifying Party shall not agree or consent to any settlement without the prior written approval of the Indemnified Party unless such settlement imposes only monetary damages that are less than the then-remaining Indemnity Cap and the Indemnified Party receives a full release.

(f) Any disputes regarding (i) the reasonableness of the implementation of Section 14.04(d)(i) or (ii) the reasonableness of withholding, conditioning or delaying any approval required by Section 14.04(e) shall be resolved pursuant to the following procedures:

(i) If the representatives of the Parties having primary responsibility for handling the Claim are unable to resolve the dispute, they shall immediately elevate the issue to the President of the Davison division of Seller and the President of Buyer (collectively, the "Division Presidents"). The Division Presidents will confer and make an effort to resolve the dispute reasonably and promptly, but in any event within 72 hours or such other time frame as they may agree upon in writing.

(ii) If the Division Presidents are unable to resolve the dispute within such time frame, they shall elevate the issue to the Chief Executive Officer of Seller and the President of the division within which Buyer operates (collectively, the "Senior Managers"). The Senior Managers will confer and make an effort to resolve the dispute reasonably and promptly, but in any event within 72 hours or such other time frame as they may agree upon in writing.

(iii) If the Senior Managers are unable to resolve the dispute within such time frame, they shall elevate the issue to the Chief Executive Officer of Seller and the Chief Executive Officer of Buyer Parent (collectively, the "Senior Executives"). The Senior Executives will confer and make an effort to resolve the dispute reasonably and promptly, but in any event within one (1) week or such other time frame as they may agree upon in writing. Delegations from a Party's Senior Executive shall require the agreement of the other Party's Senior Executive.

(iv) Resolution of the dispute, whether in accordance with subsection (i), (ii) or (iii) above or otherwise, shall be reflected in a written agreement.

(v) (A) If the Senior Executives are unable to resolve the dispute within such time

frame, either Party may initiate an arbitration to resolve such dispute by delivering notice to the other Party. The Party initiating the arbitration shall provide a list of at least three arbitrators with its initial arbitration notice, and the Parties thereafter shall have seven (7) calendar days to agree upon an arbitrator from such list. Unless otherwise agreed to in writing by the Parties, the arbitrator shall be a recognized expert in the relevant field of specialization who has been practicing in such field for at least ten (10) years. If the Parties are unable to agree upon an arbitrator in this period, at the request of either Party the arbitrator shall be selected by the American Arbitration Association in accordance with its Commercial Arbitration Rules.

(B) The arbitration shall take place at the Subject Business Real Property, or such other place as the Parties may agree in writing.

(C) The arbitration decision shall be made within a time period of forty-five (45) calendar days after the appointment of the arbitrator, or such other time period agreed upon by the Parties which shall take into account any deadlines that may apply to the underlying dispute. The arbitrator shall, in consultation with the Parties, establish a schedule for submissions consistent with this time period.

(D) The arbitrator shall render its decision based on the commercial reasonableness of each Party's position from the perspective of both Parties taking into account the involvement of any Governmental Authorities in the underlying dispute; provided, that in no event shall the arbitrator award punitive damages to any Party. To the extent relevant, the arbitrator's interpretation of and remedies under this Agreement shall be governed by the laws of Colorado.

(E) The Party losing the arbitration shall pay the arbitration costs, and each Party shall bear the costs of their own experts and counsel advising them.

(F) The determination of the arbitrator(s) shall be final, binding and conclusive upon all Parties. Any arbitration decision may be entered in and enforced by any court having jurisdiction thereof.

14.05 No Consequential Damages. No Party shall seek or be entitled to recover its own special, incidental, indirect, consequential or punitive damages in any claim for indemnification under this Article unless any such damages were awarded to a third party pursuant to a Third Party Claim for which the Indemnified Party was entitled to indemnification pursuant to this Article 14.

14.06 Priority of Payments. Subject to entry of the Sale Order, any amounts that become payable by Seller pursuant to this Agreement or any of the Ancillary Agreements shall constitute administrative expenses of Seller's estate and will not be discharged, modified, or otherwise affected by any plan of reorganization or liquidation for Seller.

14.07 Treatment of Indemnity Payments. All indemnification payments made pursuant to this Agreement will be treated by the Parties as adjustments to the Purchase Price.



14.08 Indemnification Limitations. Notwithstanding anything to the contrary contained in this Agreement, in the event of any fraud in the inducement with respect to this Agreement committed by or on behalf of any Party or any Affiliate of any Party prior to the Closing Date, no limitation set forth in this Article 14 or otherwise in this Agreement shall be applicable to any rights or obligations of the Parties.

14.09 Additional Limitations. [REDACTED]

## ARTICLE 15

### Cooperation in Various Matters

15.01 Mutual Cooperation.

(a) After the Closing, each Party shall cooperate with the other Parties as reasonably requested by such other Party in connection with the prosecution or defense of any claims or other matters relating to the Subject Business, other than claims between the Parties under this Agreement. Such cooperation shall include the furnishing of testimony and other evidence, permitting access to employees and providing information regarding the whereabouts of former employees.

(b) Seller shall use commercially reasonable efforts to, and Buyer shall use commercially reasonable efforts to assist Seller to obtain any certificate or other document from any Governmental Authority or other Person as may be necessary to mitigate, reduce or eliminate any Tax that could be imposed (including, but not limited to, any Tax with respect to the transactions contemplated hereby).

15.02 Buyer's Files and Records. On reasonable notice and regulations during normal business hours, Buyer shall allow Seller access to any files and records in Buyer's possession relating to the Subject Business prior to the Closing that Seller requires in order to properly prepare documents required to be filed with any Governmental Authority, and the right to copy and make extracts therefrom. If at any time Buyer intends to dispose of such any files and records, it shall give Seller notice of such disposal, and at Seller's request given within sixty days after such notice, deliver to Seller, at Seller's expense, any of such items that Seller requests.

## ARTICLE 16

### Post-Closing Matters

16.01 Reports. Buyer shall provide such information as Seller may reasonably request in connection with Seller's preparation of financial, Tax and other reports and statements relating to the Subject Business for periods prior to the Closing. Seller shall provide such assistance as Buyer may reasonably request at Buyer's expense for Buyer's preparation of financial, Tax and other reports and statements relating to the Subject Business for periods after the Closing.

16.02 Names. After the Closing, Buyer shall have no right to use the "Grace" and/or

“Davison” names, and Buyer shall not, nor permit any other Buyer Entity to, refer (other than in response to unsolicited inquiries or in announcements of the occurrence of the Closing, including public disclosure it reasonably believes is required to be made under applicable Law or any listing or trading agreement concerning its or any of its Affiliates' publicly-traded securities) to their respective businesses as formerly being owned by or associated with Seller, except that for a period of 90 days after the Closing, Buyer shall have the right to use any all signs, labels, stationery, business cards, packaging materials, catalogues, sales and promotional or advertising materials and printed forms that use such names and are included in the Transferred Assets as of the Closing, or have been ordered prior to the Closing for use in the Subject Business. Buyer shall use commercially reasonable efforts to minimize such usage and to discontinue it as soon as reasonably practicable after the Closing.

16.03 Publicity. Except as may be required or desirable to comply with the requirements of any applicable Law or the rules and regulations of the U.S. Securities and Exchange Commission or of any stock exchange or national market system upon which the securities of Buyer, Seller or any of their respective Affiliates are listed, no Party will issue any press release or other internal announcement or external public announcement relating to the subject matter of this Agreement or the Transactions without the prior approval (which approval will not be unreasonably withheld, conditioned or delayed) of Buyer and Seller. The disclosing Party shall use commercially reasonable efforts to give each other Party such advance notice as is reasonably practical before issuing any press release or making any other public announcement otherwise authorized in this Section 16.03.

16.04 Seller's Covenant Not to Compete.

For a period of five (5) years after the Closing Date, Seller will not, and will cause each other Seller Entity not to directly or indirectly, anywhere in the world engage in the development, manufacture and sale of polymer based membranes, membrane modules and membrane systems, each for purification of natural gas or other hydrocarbons; provided that the foregoing shall not apply with respect to a business acquired by a Seller Entity after the Closing Date if, in the twelve (12) month period prior to such acquisition, the net sales of products of the acquired business that compete with those developed, manufactured or sold (or proposed to be developed, manufactured or sold) by the Subject Business were less than (a) \$1,500,000 or (b) 10% of the net sales of the entire acquired business during such period and Seller uses commercially reasonable efforts to divest such competing portion of such acquired business (the “Acquired Business”) within twelve (12) months following such acquisition. If the Seller Entity shall not have effected such divestment within one year after its acquisition despite its commercially reasonable efforts, Buyer shall grant the Seller Entity reasonable extension of the divestment period not to exceed six months during which the Seller Entity must either divest or idle the Acquired Business. When the Seller Entity proposes to sell the Acquired Business, it shall notify Buyer and give Buyer the opportunity to participate in the bidding or other process for the sale of the Acquired Business on a basis substantially equal to the other interested bidders.

16.05 Non Solicitation of Subject Business Employees. For a period of three (3) years after

the Closing Date, Seller shall not and shall cause the other Seller Entities not to, directly or indirectly, solicit for employment or hire, any Continued Employee who is, or within the thirty (30) days prior to such solicitation or hiring has been, employed by a Buyer Entity or any Affiliate of a Buyer Entity or by a Seller Entity in the case of a solicitation or hiring within the thirty (30) days following the Closing; provided, however, that a general public advertisement by any Seller Entity for employees in the ordinary course of business and not specifically directed at any employee of the Subject Business, shall not constitute a breach of the foregoing representation with respect to solicitation.

#### 16.06 Nonassignable Items.

(a) Nothing in this Agreement or the other Transaction Documents nor the consummation of the Transactions shall be construed as an attempt or agreement to assign any Transferred Asset, including any Transferred Contract, Permit, certificate, approval, authorization or other right, which by its terms or applicable Law, as modified by the Bankruptcy Code, is nonassignable without the consent of a third party or a Governmental Authority or the Bankruptcy Court or is cancelable by a third party in the event of assignment ("Nonassignable Items") unless and until such consent has been obtained. Buyer and Seller shall use commercially reasonable efforts to obtain and satisfy all consents and to resolve all impracticalities of sale, conveyance, assignment, sublease or transfer necessary to convey to Buyer all Nonassignable Items. If any such consents are not obtained and satisfied or if an attempted sale, conveyance, assignment, sublease or transfer would be ineffective, then, to the maximum extent permitted by Law and the Transferred Asset, the Parties agree to cooperate with one another in any reasonable alternative arrangement (including, subcontracting and delegation of performance), that will give Buyer the full benefits of such Transferred Asset. The cost to establish any such reasonable alternative arrangement shall be borne by Seller. To the extent that Buyer is provided the benefits of any Transferred Asset, Buyer shall perform for the benefit of the Seller Entities and any third party the obligations of a Seller Entity pursuant to such Nonassignable Item and shall indemnify and hold harmless the Seller Entities from and against any and all obligations and liabilities of such Seller Entities after the Closing under such Nonassignable Item. If Buyer requests that a Seller Entity enforce rights under any such Nonassignable Item and such enforcement requires the filing by a Seller Entity of a Proceeding, Buyer will reimburse such Seller Entity for any and all costs and expenses it incurs as a result of Buyer's request and shall hold harmless each Seller Entity from and against any liability arising from the action requested by Buyer. Notwithstanding any of the foregoing, the treatment of nonassignable Subject Business Intellectual Property shall be governed exclusively by Section 16.06(b).

(b) [REDACTED]

16.07 Accounts Receivable and Other Payments Received After Closing. In the event that Seller or any other Seller Entity receives any payment relating to any account receivable (including any amounts received under a letter of credit by Seller or any other Seller Entity in respect of a product delivery by or on behalf of Buyer) of the Subject Business outstanding or any other payment related to the Transferred Assets on or after the Closing Date, Seller or its Affiliate will deliver such

funds to Buyer promptly upon identification of the payment as owed to Buyer.

16.08 Removal of Maryland Assets. As soon as practicable (but in any event, within ninety (90) days) after the termination of the Transition Services Agreement, Buyer shall remove from Seller's facilities in Columbia, Maryland and Curtis Bay (Baltimore), Maryland, all Maryland Assets not already moved or in transit other than the test skid, which shall be removed within one hundred-twenty (120) days after the Closing Date. From and after the Closing Date, Seller shall allow Buyer and its employees, agents, representatives and contractors to store and remove the Maryland Assets until the Maryland Assets are fully removed. Buyer shall comply with all reasonable regulations of the Seller Entities in connection with such storage and removal.

16.09 Confidentiality. Seller agrees that, (a) at all times from and after the Closing Date with respect to know-how and trade secrets and (b) for five years from and after the Closing Date with respect to all other confidential information, except as otherwise required by applicable Law or the rules of any stock exchange on which Seller's or WRG's securities may be listed, it will, and will cause each of the other Seller Entities and its and their directors, officers and employees to, keep secret and retain in the same confidential manner as Seller maintains its similarly situated confidential information, and will not use for the benefit of themselves or others, any confidential information with respect to the Subject Business that it or any other Seller Entities, or any of its or their directors, officers, employees, agents, representatives or consultants possesses as of or prior to the Closing Date, including know-how, trade secrets, customer lists, details of any Contracts, pricing policies, operational methods, marketing plans or strategies, product development techniques, plans or processes, other than any of the foregoing which (y) are in or become part of the public domain other than by reason of a breach by Seller of this Section 16.09, or (z) as of the date of the disclosure by a Seller Entity had been independently developed by or otherwise was in the possession of the recipient other than by reason of a breach by a Seller of this Section 16.09 (collectively, the "Confidential Information"). In the event Seller or any other Seller Entity is requested or required (by oral request or written request for information or documents in any Proceeding, interrogatory, subpoena, civil investigative demand or similar process) to disclose any Confidential Information, then Seller, on its own behalf or on behalf of such other Seller Entity, will notify Buyer promptly in writing of the request or requirement, unless such notice may cause it to be in violation of applicable Law or the terms of such request so that Buyer may seek an appropriate protective Order (at Buyer's expense) or waive compliance with this Section 16.09, and shall otherwise cooperate at Buyer's expense with obtaining such Order or other assurance that confidential treatment will be accorded to such Confidential Information. The Confidentiality Agreement shall be deemed to automatically terminate upon the Closing.

16.10 Release of Restrictions. [REDACTED]

## ARTICLE 17

### Expenses

17.01 Buyer's Expenses. Buyer shall pay, and indemnify all Seller Entities against all

Damages arising from, expenses incurred by or on behalf of the Buyer Group in connection with the preparation, authorization, execution and performance of this Agreement and the Transactions, including, but not limited to, all fees and expenses of brokers, finders, agents, representatives, consultants, counsel and accountants.

17.02 Seller's Expenses. Seller shall pay, and indemnify the Buyer Entities and their Affiliates against all Damages arising from, expenses incurred by or on behalf of Seller in connection with the preparation, authorization, execution and performance of this Agreement and the Transactions, including, but not limited to, all fees and expenses of brokers, finders, agents, representatives, consultants, counsel and accountants. Any amounts payable pursuant to this Section 17.02 shall be subject to Section 14.06.

17.03 Transfer Taxes. Buyer and Seller shall each pay 50% of any stamp duty, sales, transfer, value added, gross receipts, excise, recording, registration or similar Tax applicable to this Agreement, the transfer to Buyer of the Transferred Assets pursuant to this Agreement, the other Transaction Documents or the Transactions.

17.04 Real Estate Prorations. The following prorations relating to the Subject Business Real Property shall be made at Closing:

(a) All real and personal property Taxes and assessments, whether general or special, and all ad valorem and other Taxes levied with respect to the Subject Business Real Property or any other tangible asset included in the Transferred Assets for any taxable period that includes any period before the Closing Date and ends after the Closing Date shall be prorated on a taxable period basis, with Seller being liable for such Taxes attributable to the days in the taxable period prior to the Closing Date and Buyer being liable for such Taxes attributable to days in the taxable period on or after the Closing Date.

(b) All charges for water, wastewater treatment, sewer charges, electricity, fuel, gas, telephone, garbage and other utilities and operating expenses relating to the Subject Business Real Property shall be prorated as of the Closing Date, with Seller being liable to the extent such items relate to any time period prior to the Closing Date, and Buyer being liable to the extent such items relate to any time period on or after the Closing Date.

(c) If any of the foregoing proration amounts cannot be determined as of the Closing Date due to final invoices not being issued as of the Closing Date, Seller and Buyer shall prorate such items as and when the actual invoices are issued to the appropriate Party. The Party owing amounts to the other by means of such prorations shall pay the same within thirty (30) days after delivery of a written request by the paying Party. Any amounts payable pursuant to this Section 17.04 shall be subject to Section 14.06.

**ARTICLE 18****Notices**

18.01 Notices. All notices and other communications hereunder shall be in writing and shall be deemed duly delivered (i) upon receipt after being sent by registered or certified mail, return receipt requested, postage prepaid, (ii) upon receipt after being sent for next Business Day delivery, fees prepaid, via a reputable nationwide overnight courier service, or (iii) on the date of receipt (or, the first Business Day following such receipt if the date of such receipt is not a Business Day) of transmission by facsimile, in each case to the intended recipient as set forth below:

**If to Seller:**

W. R. Grace & Co.-Conn.  
7500 Grace Drive  
Columbia, Maryland 21044  
Attention: Corporate Secretary  
Facsimile: (410) 531-4545  
Confirmation: (410) 531-4362

**If to Buyer or Buyer Parent:**

[REDACTED]

with a copy in the case of a notice to Buyer to:

[REDACTED]

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

Jenner & Block LLP  
330 N. Wabash Avenue  
Chicago, Illinois 60611  
Attention: John F. Cox  
Facsimile: (312) 840-7396

No Party shall refuse delivery of any notice hereunder. Each Party may change the address to which such communications are to be directed to it by giving written notice to the other Parties in the manner provided above.

**ARTICLE 19****General**

19.01 Entire Agreement. This Agreement (including the Disclosure Schedules, Exhibits and Ancillary Agreements) sets forth the entire agreement and understanding of the Parties and related Persons with respect to the subject matter hereof and supersedes all prior agreements, arrangements and understandings relating thereto.

19.02 Governing Law. The construction, interpretation and other matters arising out of or in connection with this Agreement (whether arising in contract, tort, equity or otherwise) shall in all respects be governed by and construed (a) to the extent applicable, in accordance with the Bankruptcy Code, and (b) to the extent the Bankruptcy Code is not applicable, in accordance with the Laws of the State of Delaware, without giving effect to rules governing the conflict of laws.

19.03 Venue and Retention of Jurisdiction. Each Party irrevocably and unconditionally submits to the exclusive jurisdiction of the Bankruptcy Court for any litigation arising out of or in connection with this Agreement and the Transactions (and agrees not to commence any litigation relating thereto except in the Bankruptcy Court, other than actions in any court of competent jurisdiction to enforce any judgment, decree or award rendered by any such court as described herein); provided, however, that this Section 19.03 shall not be applicable in the event the Bankruptcy Proceeding has closed, in which case the Parties irrevocably and unconditionally submit to the exclusive jurisdiction of the federal courts in the District of Delaware and state courts of the State of Delaware for any litigation arising out of or in connection with this Agreement and the Transactions.

19.04 Waiver of Jury Trial. EACH PARTY WAIVES THE RIGHT TO A TRIAL BY JURY IN ANY DISPUTE IN CONNECTION WITH OR RELATING TO THIS AGREEMENT OR ANY MATTERS DESCRIBED OR CONTEMPLATED HEREIN, AND AGREES TO TAKE ANY AND ALL ACTION NECESSARY OR APPROPRIATE TO EFFECT SUCH WAIVER.

19.05 Equitable Remedies. The Parties agree that irreparable damage would occur in the event that any provision of this Agreement was not performed in accordance with the terms hereof and that the Parties shall be entitled to specific performance of the terms hereof, in addition to any other remedy at law or equity without the necessity of demonstrating the inadequacy of monetary damages or the posting of a bond.

19.06 Assignment; Successors. This Agreement shall be assignable by Buyer and Buyer Parent only with the prior written consent of Seller, and shall be assignable by Seller only with the written prior consent of Buyer, which consents shall not be unreasonably withheld or delayed; provided, however, that Buyer may assign any and all rights and/or obligations hereunder, in whole or in part, to any one or more of its Subsidiaries or Affiliates or to a buyer of all or substantially all of the Transferred Assets (or a business containing all or substantially all of the Transferred Assets) (each, a "Transferee") upon notice to the non-assigning Party. Any assignment not in accordance with this Section 19.06 shall be void and of no effect. Any assignment in accordance with this Section 19.06 shall not relieve the assigning Party of any of its obligations hereunder. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns.

19.07 Amendments and Waivers. This Agreement may be amended, superseded or terminated, only by a written instrument specifically referring to this Agreement and specifically stating that it amends, supersedes or terminates this Agreement, executed by Seller, Buyer and Buyer Parent. At any time prior to the Closing, the Parties may extend the time for performance of, or waive compliance with, any of the covenants, agreements or conditions of each other Party to this Agreement and may waive any breach of the representations or warranties of each other Party. No agreement extending or waiving any provision of this Agreement will be valid or binding unless it is in writing and is executed and delivered by or on behalf of the Party against which it is sought to be enforced. Unless otherwise agreed to by the Parties, 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 conditions of this Agreement will not be construed as a subsequent waiver of any other terms, covenants, conditions, rights or privileges, but the same will continue and remain in full force and effect as if no such forbearance or waiver had occurred.

19.08 Counterparts. This Agreement may be executed in two or more counterparts, each of which counterparts may be signed by one or all Parties. Each such counterpart shall be an original, but all such counterparts shall constitute one and only one agreement.

19.09 Captions. The captions used in this Agreement are for convenience of reference only and shall not be considered in the interpretation of the provisions hereof.

19.10 Severability. In the event that any provision of this Agreement or the application thereof, becomes or is declared by a court of competent jurisdiction to be illegal, void or unenforceable, the remainder of this Agreement shall continue in full force and effect and the application of such provision to other Persons or circumstances shall be interpreted so as reasonably to effect the intent of the Parties. The Parties further agree to replace such void or unenforceable provision of this Agreement with a valid and enforceable provision that shall achieve, to the extent possible, the economic, business and other purposes of such void or unenforceable provision.

19.11 No Third Party Beneficiaries. The terms and provisions of this Agreement shall not confer third party beneficiary rights or remedies upon any Person other than the Parties and their respective successors and permitted assigns.

19.12 No Successor or Transferee Liability. Except where expressly prohibited under applicable Law or otherwise expressly ordered by the Bankruptcy Court, upon the Closing, neither Buyer, any other Buyer Entity, nor any of its or their stockholders shall be deemed to (a) be the successor of Seller; (b) have, de facto, or otherwise, merged with or into Seller; (c) be a mere continuation or substantial continuation of Seller or the enterprise(s) of Seller; or (d) other than as set forth in this Agreement, be liable for any acts or omissions of Seller in the conduct of Seller's business or arising under or related to the Transferred Assets. Without limiting the generality of the foregoing, and except as otherwise provided in this Agreement, neither Buyer, any other Buyer Entity, nor any of its or their stockholders shall be liable for any Claims against Seller, any other Seller Entity or any of its or their predecessors, and neither Buyer, any other Buyer Entity, nor any of



its or their stockholders shall have any successor, transferee or vicarious liability of any kind or character whether known or unknown as of the Closing, whether now existing or hereafter arising, or whether fixed or contingent, with respect to Seller's business or any obligations of Seller or any other Seller Entity arising prior to the Closing, except as provided in this Agreement, including liabilities on account of any Taxes arising, accruing, or payable under, out of, in connection with, or in any way relating to the operation of Seller's business prior to the Closing.

19.13 Guaranty by Buyer Parent. Buyer Parent hereby guarantees the payment and performance of Buyer's (or any Transferee's) obligations under this Agreement and the other Transaction Documents. Buyer Parent acknowledges and agrees that no release or extinguishments of Buyer's (or any Transferee's) obligations or liabilities (other than in accordance with the terms of this Agreement or any other Transaction Document), whether by decree in any bankruptcy proceeding or otherwise, shall affect the continuing validity and enforceability of this guarantee; provided, however, that Buyer Parent will be entitled to assert in its own name any and all of the rights, defenses, counterclaims, exculpations, set-offs, indemnities and limitations on liability to which Buyer (or any Transferee) may be entitled to assert under this Agreement or any other Transaction Document.

*[Remainder of page intentionally left blank]*

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first above written.

W. R. GRACE & CO.-CONN.

[REDACTED]

By: \_\_\_\_\_  
Name: Gregory E. Poling  
Title: Vice President, W.R. Grace & Co.-Conn.  
President, Grace Davison

By: \_\_\_\_\_  
Name: [REDACTED]  
Title: [REDACTED]

[REDACTED]  
(with respect solely to Sections 6.01, 6.02,  
6.03, 6.05 and 19.13)

By: \_\_\_\_\_  
Name: [REDACTED]  
Title: [REDACTED]

Signature Page to the Membranes Asset Sale Agreement

SCHEDULE 5.10(a)  
CONTRACTS

Contract ID	Counter Party	Name of the Contract	Date of the Contract	Service / Type of Contract	Address
06-5397	PetroLink International, LLC	Non-Exclusive Agency Agreement	1/1/2006	Agency agreement	330 Rayford Road, #212 Spring, Texas 77386
02-3663	Membrane Extraction Technology, Ltd.	Distribution Agreement	12/13/2002	Distribution agreement	437 Sherfield Building London, United Kingdom SW7 2AZ
02-3669	Kvaerner Process Systems	Exclusive Supply Agreement	8/7/2002	Supply agreement	7909 Parkwood Circle, 6 <sup>th</sup> Floor Houston, Texas 77036
06-5110	ProSep Technologies, Inc.	Supply Agreement	12/1/2005	Supply agreement	908 Town & Country Boulevard., Suite 120 Houston, Texas 77024
06-5378	Intelligent Energy, Inc.	Letter Agreement	6/30/2006	Supply agreement	2955 Redondo Avenue Long Beach, California 90806
09-6515	Sheikh Sons	Non-Exclusive Commercial Agency Agreement – Pakistan	1/1/2008	Agency agreement	31-34 Bank Square Market Model Town Lahore, Pakistan 54700
09-6446	Air Liquide	Bulk Product Agreement	4/1/2007	Supply agreement	432 N. 44 Street Ste 290 Phoenix, Arizona 85008
N/A	Monument EHS, LLC	Independent Contractor Agreement	3/3/2008	Consulting agreement	P.O. Box 514 19685 Aries Drive Monument, Colorado 80132

SCHEDULE 5.10(a)  
CONTRACTS

Contract ID	Counter Party	Name of the Contract	Date of the Contract	Service / Type of Contract	Address
N/A	Mobile Mini, LLC	Off-Site Rental Agreement	6/16/2004	Rental agreement	5300 Eudora Street Commerce City, Colorado 80022
N/A	CBeyond	Services Agreement	6/4/2007	Services agreement	320 Interstate North Parkw S.E., Atlanta, Georgia 30339
N/A	Fenwal Protection Systems	Services Contract	11/4/2008	Services agreement	400 Main Street Ashland, Massachusetts 01752
N/A	Keesen Enterprises, Inc.	Landscape Maintenance Agreement	3/6/2009	Services agreement	3355 S. Umatilla Street Englewood, Colorado 80110
N/A	PureWater Dynamics, Inc.	Rental/Lease Agreement – Personal Property	4/15/2004	Rental agreement	30 Kalameth Street Denver, Colorado 80223
N/A	Qqest Software Systems	12 Month Extended Service Agreement	5/13/2009	Invoice	9350 South 150 East, Suite 300 Sandy, Utah 84070
N/A	Mills, Derek F.	Agreement	12/22/2005	Employee Agreement	8101 W. Midway Drive, Littleton Colorado, 80125
N/A	Nolen, Cody C.	Agreement	8/30/2006	Employee Agreement	8101 W. Midway Drive, Littleton Colorado, 80125
N/A	Paulaha, Craig G.	Agreement	10/24/1990	Employee Agreement	8101 W. Midway Drive, Littleton Colorado, 80125
N/A	White, L. Steve	Agreement	12/14/1989	Employee Agreement	7500 Grace Drive Columbia, MD 21044

SCHEDULE 5.10(a)  
CONTRACTS

Contract ID	Counter Party	Name of the Contract	Date of the Contract	Service / Type of Contract	Address
N/A	Stouffer, Samantha K.	Agreement	10/31/2006	Employee Agreement	8101 W. Midway Drive, Littleton Colorado, 80125
N/A	Barnett, Jerry T.	Agreement	11/7/1991	Employee Agreement	8101 W. Midway Drive, Littleton Colorado, 80125
N/A	Beeman, Lisa	Agreement	8/26/1996	Employee Agreement	8101 W. Midway Drive, Littleton Colorado, 80125
N/A	Boyarko, Brian P.	Employment Agreement	8/8/1991	Employee Agreement	8101 W. Midway Drive, Littleton Colorado, 80125
N/A	Demps, Enrique	Agreement	8/30/2006	Employee Agreement	8101 W. Midway Drive, Littleton Colorado, 80125
N/A	Estevan, Faye	Agreement	10/6/2006	Employee Agreement	8101 W. Midway Drive, Littleton Colorado, 80125
N/A	Koch, Roy W.	Agreement	4/4/2007	Employee Agreement	8101 W. Midway Drive, Littleton Colorado, 80125
N/A	LaRiviere, John P.	Agreement	3/22/2007	Employee Agreement	8101 W. Midway Drive, Littleton Colorado, 80125
N/A	Martinez, Tina A.	Agreement	10/23/2006	Employee Agreement	8101 W. Midway Drive, Littleton Colorado, 80125
N/A	Stone, Eric A.	Agreement	11/9/1998	Employee Agreement	8101 W. Midway Drive, Littleton Colorado, 80125
N/A	Parker, Linda L.	Agreement	6/4/2009	Employee Agreement	8101 W. Midway Drive, Littleton Colorado, 80125

SCHEDULE 5.10(a)  
CONTRACTS

**Licenses to Seller**

Contract ID	Counter Party	Original Date of the Contract	Address
02-3768	<i>Confidentiality obligations require that the counter party's name be withheld</i>	11/11/2002	
04-4428	<i>Confidentiality obligations require that the counter party's name be withheld</i>	8/12/2004	

**Licenses by Seller**

Contract ID	Counter Party	Original Date	Address
31-1625	Kvaerner Process Systems Corporation	8/11/1994	#200, 1209 – 59 <sup>th</sup> Avenue S.E. Box 19 Calgary, Alberta Canada T2H 2P6
09-6469	<i>Confidentiality obligations require that the counter party's name be withheld</i>	12/31/1996	

**Proprietary Information Agreements**

Contract ID	Counter Party	Original Date	Address
02-3782	<i>Confidentiality obligations require that the counter party's name be withheld</i>	11/21/2002	
04-4419	<i>Confidentiality obligations require that the counter party's name be withheld</i>	5/17/2004	
05-5002	<i>Confidentiality obligations require that the counter party's name be withheld</i>	9/6/2005	
06-5261	<i>Confidentiality obligations require that the counter party's name be withheld</i>	5/15/2006	

SCHEDULE 5.10(a)  
CONTRACTS

<b>Proprietary Information Agreements</b>			
<b>Contract ID</b>	<b>Counter Party</b>	<b>Original Date</b>	<b>Address</b>
06-5419	Center for Membrane Applied Science and Technology	10/20/2006	MAST Center University of Colorado at Boulder Boulder, CO 80309-0424
06-5419	Regents of the University of Colorado	10/20/2006	The University of Colorado at Boulder 401 Discovery Drive, Suite 390, 589 UCB Boulder, CO 80309-0589
07-5729	Membrane Extraction Technology Limited	4/16/2007	Sherfield Building London SW7 2AZ United Kingdom
07-5729	<i>Confidentiality obligations require that the counter party's name be withheld</i>	4/16/2007	
08-6165	<i>Confidentiality obligations require that the counter party's name be withheld</i>	7/25/2008	
09-6367	<i>Confidentiality obligations require that the counter party's name be withheld</i>	1/15/2009	
01-3008	<i>Confidentiality obligations require that the counter party's name be withheld</i>	2/5/2001	
01-3008	<i>Confidentiality obligations require that the counter party's name be withheld</i>	2/5/2001	
01-3151	Imperial College of Science, Technology and Medicine	3/27/2001	South Kensington London SW7 2AZ
02-3498	<i>Confidentiality obligations require that the counter party's name be withheld</i>	3/14/2002	
02-3503	<i>Confidentiality obligations require that the counter party's name be withheld</i>	3/6/2002	
02-3610	<i>Confidentiality obligations require that the counter party's name be withheld</i>	6/7/2002	

SCHEDULE 5.10(a)  
CONTRACTS

<b>Proprietary Information Agreements</b>			
<b>Contract ID</b>	<b>Counter Party</b>	<b>Original Date</b>	<b>Address</b>
02-3622	<i>Confidentiality obligations require that the counter party's name be withheld</i>	6/27/2002	
02-3622	<i>Confidentiality obligations require that the counter party's name be withheld</i>	6/27/2002	
02-3765	<i>Confidentiality obligations require that the counter party's name be withheld</i>	10/24/2002	
03-3940	Howe-Baker Engineers, Ltd	4/3/2003	3102 E 5th St. Tyler, TX 75701-5103
03-3981	<i>Confidentiality obligations require that the counter party's name be withheld</i>	5/4/2003	
03-4086	<i>Confidentiality obligations require that the counter party's name be withheld</i>	9/21/2003	
03-4079	<i>Confidentiality obligations require that the counter party's name be withheld</i>	9/26/2003	
03-4087	<i>Confidentiality obligations require that the counter party's name be withheld</i>	9/26/2003	
03-4116	<i>Confidentiality obligations require that the counter party's name be withheld</i>	11/12/2003	
04-4635	<i>Confidentiality obligations require that the counter party's name be withheld</i>	11/19/2004	
04-4564	<i>Confidentiality obligations require that the counter party's name be withheld</i>	6/10/2004	
04-4510	PARATECH Resources, Inc.	9/21/2004	992 Agnes Road El Dorado, AR 71730
04-4411	<i>Confidentiality obligations require that the counter party's name be withheld</i>	8/15/2004	
05-4691	<i>Confidentiality obligations require that the counter party's name be withheld</i>	1/19/2005	



SCHEDULE 5.10(a)  
CONTRACTS

<b>Proprietary Information Agreements</b>			
<b>Contract ID</b>	<b>Counter Party</b>	<b>Original Date</b>	<b>Address</b>
05-4936	<i>Confidentiality obligations require that the counter party's name be withheld</i>	2/1/2005	
05-4711	<i>Confidentiality obligations require that the counter party's name be withheld</i>	2/17/2005	
05-4844	<i>Confidentiality obligations require that the counter party's name be withheld</i>	4/4/2005	
05-5062	<i>Confidentiality obligations require that the counter party's name be withheld</i>	10/26/2005	
06-5124	<i>Confidentiality obligations require that the counter party's name be withheld</i>	11/15/2005	
06-5124	<i>Confidentiality obligations require that the counter party's name be withheld</i>	11/15/2005	
06-5390	<i>Confidentiality obligations require that the counter party's name be withheld</i>	3/22/2005	
08-6087	<i>Confidentiality obligations require that the counter party's name be withheld</i>	5/30/2008	
03-4095	Mustang Engineers and Constructors L.P.	10/20/2003	16001 Park Ten Place Houston, TX 77084
03-4118	<i>Confidentiality obligations require that the counter party's name be withheld</i>	11/17/2003	
04-4258	Steeltek Inc.	3/10/2004	4141 South Jackson Tulsa, OK 74107
99-2375	Imperial College of Science Technology and Medicine	9/2/1999	Department of Chemical Engineering Prince Consort Road London SW7 2BY England
09-6367	Membrane Technology & Research Inc.	1/9/2009	1360 Willow Road Menlo Park, CA 94025

SCHEDULE 5.10(a)  
CONTRACTS

<b>Proprietary Information Agreements</b>			
<b>Contract ID</b>	<b>Counter Party</b>	<b>Original Date</b>	<b>Address</b>
04-4336	<i>Confidentiality obligations require that the counter party's name be withheld</i>	6/10/2004	
03-4118	<i>Confidentiality obligations require that the counter party's name be withheld</i>	11/17/2003	
02-3631	<i>Confidentiality obligations require that the counter party's name be withheld</i>	6/7/2002	
08-6165	ConocoPhillips	7/25/2008	344-PL Bartlesville Technology Center Bartlesville, OK 74004
05-4865	<i>Confidentiality obligations require that the counter party's name be withheld</i>	4/19/2005	
05-4681	<i>Confidentiality obligations require that the counter party's name be withheld</i>	1/3/2005	
01-3377	Phillips Petroleum Company	2/2/2001	14A Phillips Building Bartlesville, OK 74004

SCHEDULE 5.10(a)  
CONTRACTS

**Development Agreements**

Contract ID	Counter Party	Original Date	Address
31-1508B	ExxonMobil Research and Engineering Company	3/1/1993	3225 Gallows Road Fairfax, Virginia 22037
00-2561	ExxonMobil Research and Engineering Company	1/1/1999	3225 Gallows Road Fairfax, Virginia 22037
00-2562	<i>Confidentiality obligations require that the counter party's name be withheld</i>	1/1/1999	
06-5202	<i>Confidentiality obligations require that the counter party's name be withheld</i>	11/12/2003	
31-1829	ExxonMobil Research and Engineering Company	5/9/1996	3225 Gallows Road Fairfax, Virginia 22037
31-1859	ExxonMobil Research and Engineering Company	8/1/1996	3225 Gallows Road Fairfax, Virginia 22037
05-4997	<i>Confidentiality obligations require that the counter party's name be withheld</i>	8/10/2005	
07-5595	Membrane Technology Limited	11/1/06	Sherfield Building London SW7 2AZ United Kingdom
07-5494	<i>Confidentiality obligations require that the counter party's name be withheld</i>	12/5/06	

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re: ) Chapter 11  
)  
W.R. GRACE & CO., et al.,<sup>1</sup> ) Case No. 01-1139 (JKF)  
) Jointly Administered  
Debtors. )

Objection Deadline: August 7, 2009 at 4:00 p.m.  
Hearing Date: August 24, 2009 at 10:30 a.m.

**NOTICE OF MOTION FOR AN ORDER (A) APPROVING THE AGREEMENTS BY AND BETWEEN W. R. GRACE & CO.-CONN. AND BUYER; (B) AUTHORIZING THE SALE OF CERTAIN ASSETS OF W. R. GRACE & CO.-CONN.'S MEMBRANES BUSINESS TO BUYER FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS; (C) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT TO BUYER OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (D) GRANTING CERTAIN RELATED RELIEF**

TO: Parties required to receive notice pursuant to Del. Bankr. LR 2002-1.

<sup>1</sup> The Debtors consist of the following 62 entities: W. R. Grace & Co. (f/k/a Grace Specialty Chemicals, Inc.), W. R. Grace & Co.-Conn., A-1 Bit & Tool Co., Inc., Alewife Boston Ltd., Alewife Land Corporation, Amicon, Inc., CB Biomedical, Inc. (f/k/a Circe Biomedical, Inc.), CCHP, Inc., Coalgrace, Inc., Coalgrace II, Inc., Creative Food 'N Fun Company, Darex Puerto Rico, Inc., Del Taco Restaurants, Inc., Dewey and Almy, LLC (f/k/a Dewey and Almy Company), Ecarg, Inc., Five Alewife Boston Ltd., G C Limited Partners I, Inc. (f/k/a Grace Cocoa Limited Partners I, Inc.), G C Management, Inc. (f/k/a Grace Cocoa Management, Inc.), GEC Management Corporation, GN Holdings, Inc., GPC Thomasville Corp., Gloucester New Communities Company, Inc., Grace A-B Inc., Grace A-B II Inc., Grace Chemical Company of Cuba, Grace Culinary Systems, Inc., Grace Drilling Company, Grace Energy Corporation, Grace Environmental, Inc., Grace Europe, Inc., Grace H-G Inc., Grace H-G II Inc., Grace Hotel Services Corporation, Grace International Holdings, Inc. (f/k/a Dearborn International Holdings, Inc.), Grace Offshore Company, Grace PAR Corporation, Grace Petroleum Libya Incorporated, Grace Tarpon Investors, Inc., Grace Ventures Corp., Grace Washington, Inc., W. R. Grace Capital Corporation, W. R. Grace Land Corporation, Gracoal, Inc., Gracoal II, Inc., Guanica-Caribe Land Development Corporation, Hanover Square Corporation, Homco International, Inc., Kootenai Development Company, L B Realty, Inc., Litigation Management, Inc. (f/k/a GHSC Holding, Inc., Grace JVH, Inc., Asbestos Management, Inc.), Monolith Enterprises, Incorporated, Monroe Street, Inc., MRA Holdings Corp. (f/k/a Nestor-BNA Holdings Corporation), MRA Intermedco, Inc. (f/k/a Nestor-BNA, Inc.), MRA Staffing Systems, Inc. (f/k/a British Nursing Association, Inc.), Remedium Group, Inc. (f/k/a Environmental Liability Management, Inc., E&C Liquidating Corp., Emerson & Cuming, Inc.), Southern Oil, Resin & Fiberglass, Inc., Water Street Corporation, Axial Basin Ranch Company, CC Partners (f/k/a Cross Country Staffing), Hayden-Gulch West Coal Company, H-G Coal Company.

RECEIVED  
JUL 21 2009

The above-captioned debtors and debtors-in-possession (collectively, the “Debtors”) filed the attached *Motion For An Order (A) Approving The Agreements By And Between W. R. Grace & Co.-Conn. And Buyer; (B) Authorizing The Sale Of Certain Assets Of W. R. Grace & Co.-Conn. 'S Membranes Business To Buyer Free And Clear Of Liens, Claims, Encumbrances And Other Interests; (C) Authorizing The Assumption And Assignment To Buyer Of Certain Executory Contracts And Unexpired Leases; And (D) Granting Certain Related Relief* (the “Motion”) with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, Wilmington, Delaware 19801 (the “Bankruptcy Court”). A true and correct copy of the Motion is attached hereto.

Responses to the relief requested in the Motion, if any, must be in writing and be filed with the Bankruptcy Court no later than 4:00 p.m. (prevailing Eastern time) on **August 7, 2009**. At the same time, you must also serve a copy of the objections or responses, if any, upon the following: (i) co-counsel for the Debtors, Theodore L. Freedman, Kirkland & Ellis LLP, Citigroup Center, 601 Lexington Avenue, New York, NY 10022-4611 (fax number 212-446-4800), Janet S. Baer, The Law Offices of Janet S. Baer, P.C., 70 West Madison Street, Suite 2100, Chicago, IL 60602 (Fax number 312-641-2165); and James E. O'Neill, Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, 17<sup>th</sup> Floor, PO. Box 8705, Wilmington, DE 19899-8705 (Courier 19801) (fax number 302-652-4400); (ii) counsel to the Official Committee of Unsecured Creditors, Lewis Kruger, Stroock & Stroock & Lavan, 180 Maiden Lane, New York, NY 10038-4982 (fax 212-806-6006), and Michael R. Lastowski, Duane, Morris & Heckscher, LLP, 1100 N. Market Street, Suite 1200, Wilmington, DE 19801-1246 (fax 302-657-4901); (iii) counsel to the Official Committee of Property Damage Claimants, Scott L.

Baena, Bilzin, Sumberg, Dunn, Baena, Price & Axelrod, First Union Financial Center, 200 South Biscayne Boulevard, Suite 2500, Miami, FL 33131 (fax 305-374-7593), and Michael B. Joseph, Ferry & Joseph, P.A., 824 Market Street, Suite 904, P.O. Box 1351, Wilmington, DE 19899 (fax 302-575-1714); (iv) counsel to the Official Committee of Personal Injury Claimants, Elihu Inselbuch, Caplin & Drysdale, Chartered, 375 Park Avenue, 35<sup>th</sup> Floor, New York, NY 10152-3500 (fax 212-644-6755), and Marla Eskin, Campbell & Levine, LLC, 800 N. King Street, Suite 300, Wilmington, DE 19801 (fax 302-426-9947); (v) counsel to the Official Committee of Equity Holders, Thomas M. Mayer, Kramer Levin Naftalis & Frankel LLP, 919 Third Avenue, New York, NY 10022 (fax 212-715-8000), and Teresa K.D. Currier, Saul Ewing LLP, 222 Delaware Avenue P.O. Box 1266, Wilmington, DE 19899-1397 (fax 302-421-6813); (vi) counsel to the Future Claimants' Representative, Richard H. Wyron, Swidler Berlin Shereff Friedman, LLP, 3000 K Street, NW, Suite 300, Washington, DC 20007 (fax 202-424-7643), and John C. Phillips, Jr., Phillips, Goldman & Spence, P.A., 1200 North Broom Street, Wilmington, DE 19806 (fax 302-655-4210); (vii) the Office of the United States Trustee, Attn: David Klauder, 844 N. King Street, Wilmington, DE 19801 (fax 302-573-6497); and (viii) counsel to the Property Damage Future Claimants' Representative, Karl Hill, Seitz, Van Ogtrop & Green, P.A., 222 Delaware Avenue, Suite 1500, P.O. Box 68, Wilmington, DE 19899 (fax 302-888-0606) and Alan B. Rich, Law Office of Alan B. Rich, Esq., 1201 Main Street, Suite 1910, LB 201, Dallas, TX 75202 (fax 214-749-0325).

IF NO OBJECTIONS ARE TIMELY FILED AND SERVED IN ACCORDANCE WITH THIS NOTICE, THE BANKRUPTCY COURT MAY GRANT THE RELIEF REQUESTED BY THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

IN THE EVENT THAT ANY OBJECTION OR RESPONSE IS FILED AND SERVED IN ACCORDANCE WITH THIS NOTICE, A HEARING ON THE MOTION WILL BE HELD BEFORE THE HONORABLE JUDITH K. FITZGERALD ON AUGUST 24, 2009 AT 10:30 A.M., EASTERN TIME AT THE UNITED STATES BANKRUPTCY COURT, 824 MARKET STREET, WILMINGTON, DELAWARE 19801.

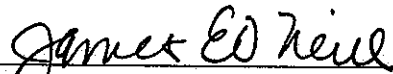
Dated: July 20, 2009

Respectfully submitted,

KIRKLAND & ELLIS LLP  
Theodore L. Freedman  
Deanna D. Boll  
601 Lexington Ave.  
New York, NY 10022  
Telephone: (212) 446-4800  
Facsimile: (212) 446-4900

THE LAW OFFICES OF JANET S. BAER, P.C.  
Janet S. Baer, P.C.  
70 W. Madison Street  
Suite 2100  
Chicago, IL 60602  
Telephone: (312) 641-2162

and

  
PACHULSKI, STANG, ZIEHL & JONES LLP  
James E. O'Neill (Bar No. 4042)  
919 North Market Street, 16th Floor  
P.O. Box 8705  
Wilmington, Delaware 19899-8705  
(Courier 19801)  
Telephone: (302) 652-4100  
Facsimile: (302) 652-4400

*Counsel for the Debtors and Debtors in Possession*

THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: ) Chapter 11
)
W. R. GRACE & CO., et al.<sup>1</sup> ) Case No. 01-01139 (JKF)
) (Jointly Administered)
Debtors. )
) Hearing Date: August 24, 2009 at 10:30 a.m.
) Objection Deadline: August 7, 2009 at 4:00 p.m.

MOTION FOR AN ORDER (A) APPROVING THE AGREEMENTS BY AND BETWEEN W. R. GRACE & CO.-CONN. AND BUYER; (B) AUTHORIZING THE SALE OF CERTAIN ASSETS OF W. R. GRACE & CO.-CONN.'S MEMBRANES BUSINESS TO BUYER FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS; (C) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT TO BUYER OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (D) GRANTING CERTAIN RELATED RELIEF

W. R. Grace & Co.-Conn. (the "Selling Debtor," and together with the other above-captioned debtors, the "Debtors"), hereby files this motion (the "Motion") requesting entry of an

1 The Debtors consist of the following 62 entities: W. R. Grace & Co. (f/k/a Grace Specialty Chemicals, Inc.), W. R. Grace & Co.-Conn., A-1 Bit & Tool Co., Inc., Alewife Boston Ltd., Alewife Land Corporation, Amicon, Inc., CB Biomedical, Inc. (f/k/a Circe Biomedical, Inc.), CCHP, Inc., Coalgrace, Inc., Coalgrace II, Inc., Creative Food & Fun Company, Darex Puerto Rico, Inc., Del Taco Restaurants, Inc., Dewey and Almy, LLC (f/k/a Dewey and Almy Company), Ecarg, Inc., Five Alewife Boston Ltd., G C Limited Partners I, Inc. (f/k/a Grace Cocoa Limited Partners I, Inc.), G C Management, Inc. (f/k/a Grace Cocoa Management, Inc.), GEC Management Corporation, GN Holdings, Inc., GPC Thomasville Corp., Gloucester New Communities Company, Inc., Grace A-B Inc., Grace A-B II Inc., Grace Chemical Company of Cuba, Grace Culinary Systems, Inc., Grace Drilling Company, Grace Energy Corporation, Grace Environmental, Inc., Grace Europe, Inc., Grace H-G Inc., Grace H-G II Inc., Grace Hotel Services Corporation, Grace International Holdings, Inc. (f/k/a Dearborn International Holdings, Inc.), Grace Offshore Company, Grace PAR Corporation, Grace Petroleum Libya Incorporated, Grace Tarpon Investors, Inc., Grace Ventures Corp., Grace Washington, Inc., W. R. Grace Capital Corporation, W. R. Grace Land Corporation, Gracoal, Inc., Gracoal II, Inc., Guanica-Caribe Land Development Corporation, Hanover Square Corporation, Homco International, Inc., Kootenai Development Company, L B Realty, Inc., Litigation Management, Inc. (f/k/a GHSC Holding, Inc., Grace JVH, Inc., Asbestos Management, Inc.), Monolith Enterprises, Incorporated, Monroe Street, Inc., MRA Holdings Corp. (f/k/a Nestor-BNA Holdings Corporation), MRA Intermedco, Inc. (f/k/a Nestor-BNA, Inc.), MRA Staffing Systems, Inc. (f/k/a British Nursing Association, Inc.), Remedium Group, Inc. (f/k/a Environmental Liability Management, Inc., E&C Liquidating Corp., Emerson & Cuming, Inc.), Southern Oil, Resin & Fiberglass, Inc., Water Street Corporation, Axial Basin Ranch Company, CC Partners (f/k/a Cross Country Staffing), Hayden-Gulch West Coal Company, H-G Coal Company.



order, in substantially the form attached hereto as Exhibit A (the "Sale Order"), authorizing the sale of the assets of its Membrane Business and related relief to Buyer.<sup>2</sup>

The Selling Debtor's Grace Davison Membranes business (the "Membranes Business"), based in Littleton, Colorado, is a developer and producer of cellulose acetate polymer, spiral-wound membrane modules used to separate carbon dioxide (CO<sub>2</sub>) and hydrogen sulfide (H<sub>2</sub>S) from natural gas streams. These membranes are used in the separation systems of natural gas producers, including private and public companies and state-owned enterprises. The Membranes Business maintains a portfolio of intellectual property that includes patents, trade secrets, and manufacturing know-how related to separation membranes for applications ranging from natural gas treatment, to pharmaceutical and semiconductor lithography applications, to "green" technologies such as CO<sub>2</sub> capture and bio-separations. The Membranes Business uses predominantly external sales channels in the distribution of its products.

In the first quarter of 2009, the Selling Debtor began considering strategic alternatives for the Membranes Business. Ultimately, the Debtors determined that a sale of the business would be in the best interests of their estates. This decision was based on a number of factors, of which the major factors were that the Membranes Business: (i) is not complementary to the Debtor's other businesses; (ii) is small (less than 1% of the Debtors' sales) but requires significant management attention; (iii) sells into the natural gas industry, an end market in which the Debtors have no other presence and very little leverage; (iv) has significant potential, but would require significant capital expenditure to achieve that potential; (v) would be attractive to a buyer

---

<sup>2</sup> The name of the Buyer and certain confidential terms of the Sale Agreement have been withheld or redacted from this Motion and the Agreement to protect the confidential nature of the information and business sensitivities. The full un-redacted version of the Agreement shall be provided: (i) to the Court, the Official Committees and the FCRs upon request of the Debtors; and (ii) to other parties in interest, upon request and agreement of the Debtors and the Buyer and execution of a confidentiality agreement.

to whose businesses the Membranes Business would be complementary and for whom the necessary capital expenditures would involve synergies not available to the Debtors. The Debtors believe the sale of the Membranes Business will generate value to the Selling Debtor's estate while enabling senior management to focus on higher-return, core activities.

The Selling Debtor and its financial advisor began marketing and soliciting potential buyers for the Membranes Business in the spring of 2009 and have since contacted numerous strategic and financial buyers. These marketing efforts, which are described more fully below, culminated in the Agreements for which the Selling Debtor seeks approval from this Court. The Buyer has agreed to purchase the Membranes Business pursuant to Bankruptcy Code sections 103, 363 and 365 through a private sale process for \$22 million subject to certain post-closing adjustments. The Buyer has expressed and demonstrated its strong desire to close the Sale expeditiously. Because of the extensive marketing efforts, the attractiveness of the transaction by comparison with the proposals from other contenders for the business, and the inherent instability created by the marketing of the Membranes Business, the Selling Debtor has determined to move forward with a private sale. Alternatively, the Debtors would have to continue marketing the Membranes Business and repeat an auction sale process, that in effect has already occurred, which would subject the estate to significant market risk with a low probability of identifying a higher and better offer, thereby risking the erosion of the business's potential value. Accordingly, the Selling Debtor believes that the Sale is in the best interests of its estate and creditors, and will serve to maximize the value realized for the Membranes Business.

As a result, the Debtors seek entry of the Sale Order:

- (1) approving the Membranes Asset Sale Agreement, dated July 15, 2009 (the "Sale Agreement," a redacted copy of which is attached hereto as **Exhibit B**),

- between the Selling Debtor and Buyer and its parent as Guarantor of Buyer's obligations, and such other agreements to be entered into and among the parties as contemplated therein (the "Ancillary Agreements" and together with the Sale Agreement, the "Agreements");
- (2) authorizing the sale (the "Sale") of certain assets (the "Transferred Assets") to the Buyer free and clear of all liens, claims, encumbrances, and other interests (collectively, the "Liens") except Closing Permitted Exceptions (as such term is defined in the Sale Agreement) in accordance with the terms and conditions set forth in the Agreements;
  - (3) authorizing the assumption by the Selling Debtor and the assignment to the Buyer of certain related executory contracts and unexpired leases (the "Transferred Contracts") in connection therewith;
  - (4) taking effect immediately by virtue of this Court's waiving the 10-day stay under Bankruptcy Rules 6004(h) and 6006(d); and
  - (5) granting certain related relief.

### JURISDICTION

1. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b). Venue of this proceeding and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.
2. The statutory predicates for the relief requested herein are sections 105(a), 363(b), (f), (m) and (n), and 365 of the Bankruptcy Code, sections 2002(a)(2), 6004(a), (b), (c), (e), (f)

and (h), 6006(a), (c) and (d), 9006 and 9014 of the Bankruptcy Rules, and Rules 2002-1(b) and 9006-1 of the District of Delaware Local Rules.

### **BACKGROUND**

#### **A. The Debtors' Chapter 11 Cases and the Membranes Business**

3. The Debtors are engaged in specialty chemicals and specialty materials businesses on a worldwide basis through two operating segments: Grace Davison, which includes silica- and alumina-based catalysts and materials used in a wide range of industrial applications as well as materials used for rigid food and beverage packaging; and Grace Construction Products, which includes specialty chemicals and materials used in commercial and residential construction. Both divisions have global operations with sales throughout North America, Europe, the Asia-Pacific region, and Latin America.

4. Grace Davison accounted for \$2.2 billion of sales in 2008, constituting 67% of the Debtors' consolidated revenue. Grace Construction Products had \$1.1 billion in sales accounting for 33% of the Debtors' consolidated revenue. The Membranes Business is a business unit of Grace Davison and had sales of approximately \$6.0 million in 2008. Thus, the Membranes Business represents less than 1% of the Debtors' consolidated 2008 revenue.

5. The Membranes Business, based in Littleton, Colorado, is a developer and producer of cellulose acetate polymer, spiral-wound membrane modules used to separate carbon dioxide (CO<sub>2</sub>) and hydrogen sulfide (H<sub>2</sub>S) from natural gas streams. These membranes are used in the separation systems of natural gas producers, including private and public companies and state-owned enterprises. The Membranes Business maintains a portfolio of intellectual property that includes patents, trade secrets, and manufacturing know-how related to separation membranes for applications ranging from natural gas treatment, to pharmaceutical and

semiconductor lithography applications, to "green" technologies such as CO<sub>2</sub> capture and bio-separations.

6. The Membranes Business uses predominantly external sales channels in the distribution of its products. Its principal distributor represents approximately 90% of Membrane Business sales.

7. The major competitive advantage of the Membranes Business is its technological competency including certain trade secrets and other intellectual property.

8. The Membranes Business has sixteen employees. Fifteen are located at its production facility in Littleton, Colorado, and its senior principal scientist is based in Columbia, Maryland.

**B. The Selling Debtor's Extensive Marketing and Sales Efforts**

9. In April 2008, the Debtors, in consultation with Seale & Associates, Inc., its financial advisor ("Seale"), started pursuing the sale of the Membranes Business. Seale and the Debtors reviewed information on 1300 companies and Seale contacted more than 100 potential strategic buyers and 70 potential financial buyers. Generally, strategic buyers were more interested than financial buyers because they are looking to add the Membranes Business to the package of goods and services that they already offer to natural gas producers.

10. A brief summary of the investment opportunity was provided to more than 115 potential buyers (both strategic and financial). Of these, 32 potential buyers eventually entered into confidentiality agreements, received a detailed information memorandum, and 12 submitted a preliminary indication of interest containing a preliminary purchase price. Based on the preliminary purchase prices in the indications of interest, four potential buyers were invited to and participated in a tour of the Littleton, Colorado manufacturing facility, and presentations by the management of the business, followed by substantial due diligence through access to an

electronic data room and follow-up questions that were answered by the Selling Debtor's management through Seale.

11. Each of the four potential buyers then submitted a revised firm bid, subject to negotiation of a definitive agreement for the transaction. In evaluating each bid, the Selling Debtor considered primarily the dollar amount of the bid, Seller Debtor's confidence that the bid would hold up, the bid's required closing conditions, and relative ease of transition of the Membranes Business to the potential buyer's organization. The Buyer's bid was the second highest; but taking into account all the evaluation criteria, its bid was the most attractive. The Buyer has a business that is similar to the Membranes Business and therefore was able to quickly understand and evaluate many aspects of the Membranes Business. The Buyer had received pre-approval of the transaction by its senior executives, and was prepared to move on an accelerated timeline. By contrast, the highest bidder was unfamiliar with the business, and required an extra two weeks of due diligence before it was prepared to move forward. The highest bid was therefore basically a further indication of interest, and the Seller Debtor had no certainty whether a bona fide final offer would be forthcoming, much less whether the price would hold up. By contrast, the Buyer had provided a firm bid and was ready to begin negotiations immediately. Based on these factors and circumstances, the Selling Debtor determined, in its business judgment, that the offer from the Buyer was materially better than the three other bids submitted and, as such, constituted the highest and best offer for the Membranes Business.

12. Moreover, the Buyer has the capability and operating expertise to close the transaction and integrate the Membranes Business into its own operations with only limited transitional assistance from the Debtors.

13. Thus, after examining all of the alternatives, the Selling Debtor concluded that the prompt consummation of a transaction with the Buyer is in the best interests of the Selling Debtor and its affiliates, their creditors, and their estates, and will maximize the value received for the assets of the Membranes Business.

14. Therefore, the Selling Debtor negotiated and entered into the Agreements with the Buyer, contingent upon Court approval, for which it now seeks approval from this Court.

**C. Terms and Conditions of the Sale Agreement with the Buyer**

15. On July 15, 2009, after two weeks of intensive arms-length negotiations, the Selling Debtor and the Buyer and the Guarantor executed the Sale Agreement, which is subject to this Court's approval. As more fully described in the Sale Agreement, the Selling Debtor proposes to sell the Membranes Business to the Buyer on the following terms and conditions:<sup>3</sup>

<b>Selling Debtor</b>	W. R. Grace & Co.-Conn.
<b>Buyer</b>	[Redacted]
<b>Guarantor</b>	[Redacted]
<b>Purchase Price (Section 2.04)</b>	\$22,000,000
<b>Transferred Assets (Section 2.02(b))</b>	All of the Selling Debtor's right, title, and interest in assets used exclusively in the Membranes Business including, but not limited to: (i) real property; (ii) leases; (iii) machinery and equipment; (iv) inventory; (v) accounts receivable; (vi) books and records; (vii) rights under the Transferred Contracts; (viii) Permits, to the extent transferable; (ix) office supplies; and (x) intellectual property (including software), but excluding the Excluded Assets.

<sup>3</sup> Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to such terms in the Sale Agreement, a redacted copy of which is attached hereto as **Exhibit B**. To the extent of any inconsistency between the summary set forth herein and the Sale Agreement, the terms and conditions of the Sale Agreement shall govern.

<b>Excluded Assets (Section 2.02(b))</b>	All assets of the Seller and its Affiliates not used exclusively in the Membranes Business, and also (i) cash and cash items; (ii) tax refunds; (iii) intercompany receivables; (iv) insurance policies and policy refunds; (v) employee benefit plans and related funds and refunds; (vi) records relating to any of the Excluded Liabilities; and (vii) the names "Grace" and "Davison."
<b>Transferred Contracts (Exhibit 1.02F)</b>	The Contracts identified in Exhibit 1.02F. Buyer may add additional Contracts to Exhibit 1.02F up to sixty (60) days following the Closing Date, in which case the Selling Debtor will file and notice the affected counterparties by motion.
<b>Cure Costs (Section 8.09)</b>	To be split 50%-50% between Seller and Buyer.
<b>Transferred Liabilities (Section 2.03(a))</b>	Buyer shall assume and be liable for only the following obligations and liabilities of Seller and its Affiliates: (i) obligations under the Transferred Contracts (other than fifty percent (50%) of Cure Costs) to the extent arising at or after the Closing, solely with respect to periods beginning on and after the Closing Date; (ii) all ordinary course payables of Seller specifically related to the operation of the Subject Business (excluding intercompany payables) accruing prior to the Closing Date to the extent and in the amounts set forth on the Closing Statement; (iii) all ordinary course vacation benefit plan accruals for the current calendar year to the extent and in the amounts set forth on the Closing Statement; and (iv) all payment and performance obligations under Permits included in the Transferred Assets to the extent arising on or after the Closing Date, solely with respect to periods beginning on and after the Closing Date.
<b>Excluded Liabilities (Section 2.03(b))</b>	Buyer is not assuming any liabilities of Seller or any Seller Entity other than the Transferred Liabilities. The Excluded Liabilities include among other things environmental, health and safety liabilities arising with respect to relating to circumstances existing prior to the Closing; liability under any Seller Benefit Plans; any liability or obligation related to any other business of any Seller Entity other than the Membranes Business; and all liabilities and obligations arising out of the Transferred Assets or the Membranes Business prior to the Closing Date.
<b>Employee Matters (Article 12)</b>	<ul style="list-style-type: none"> <li>• Buyer shall offer each Subject Business Employee a job that is comparable to the employee's job with the Membranes Business as of the Closing, at no reduction in base salary or base hourly rate as in effect immediately prior to the Closing,</li> <li>• Buyer shall not assume any Seller Benefit Plans. Buyer shall make available to each Continued Employee all benefits which are made available to its similarly situated employees.</li> </ul>



<b>Closing Date (Section 3.01)</b>	The fifth Business Day after conditions to Closing (other than conditions that are required to be fulfilled at the Closing) have been fulfilled or waived, or as the Parties shall otherwise agree in writing.
<b>Closing Conditions (Articles 10, 11)</b>	The Sale Order has become a Final Order; all covenants and agreements required to be performed before the Closing have been performed; no Material Adverse Effect has occurred.
<b>Termination of the Sale Agreement (Article 13)</b>	The Sale Agreement may be terminated: at any time prior to the Closing by written agreement of Seller and Buyer; at the written election of Buyer or Seller, if the Closing has not occurred within one hundred-eighty (180) days after the date of the Sale Agreement by reason of the failure to be satisfied of any of the conditions to Closing (provided that no Party may terminate if the failure to close is the result of a breach of the Sale Agreement by that Party); at any time prior to Closing if (i) Seller's case is converted to a case under chapter 7 of the Bankruptcy Code, (ii) a plan of reorganization is filed by Seller which is incompatible with the performance of Seller's obligations under the Sale Agreement or (iii) a chapter 11 trustee is appointed for Seller; by Buyer if the Bankruptcy Court approves an order authorizing the sale of the Transferred Assets to another Person.
<b>Break-Up Fee (Section 13.02(a))</b>	2.5% of the Purchase Price, or \$550,00, payable within 30 days of closing of an alternative transaction.
<b>Indemnification (Article 14)</b>	<ul style="list-style-type: none"> <li>• With customary exceptions (validity of agreement, title to assets, etc.) most representations and warranties expire 18 months after the Closing (24 months for environmental and intellectual property).</li> <li>• Each of Seller's and Buyer's indemnification obligations for breach of representations and warranties are subject to a deductible per occurrence of \$25,000 with a \$100,000 aggregate deductible and will be limited to and not exceed \$4,400,000, provided that certain fundamental representations and warranties are not subject to the foregoing limitations.</li> </ul>
<b>Release of Restrictions (Section 16.10)</b>	[Redacted]

**RELIEF REQUESTED**

16. By this Motion, pursuant to sections 105(a), 363(b), (f) and (m), and 365 of the Bankruptcy Code, the Selling Debtor: (a) seeks entry of an order by this Court approving the Agreements with the Buyer and authorizing the sale of the Membranes Business to the Buyer

free and clear of all Liens (except the Closing Permitted Exceptions), upon the terms set forth in the Agreements and Sale Order, (b) seeks authority for the Selling Debtor to assume and assign to the Buyer the Transferred Contracts, (c) requests authority to pay a Break-Up Fee to the Buyer, if applicable, (d) requests that the Sale Order be effective immediately by waiving the 10-day stay under Bankruptcy Rule 6004(h) and 6006(d), and (e) requests such other and further relief as is just and proper.

### **BASIS FOR RELIEF**

17. In accordance with Bankruptcy Rule 6004, sales of property rights outside the ordinary course of business may be conducted by private sale or public auction. The Selling Debtor has determined that the Sale of the Membranes Business by private sale to the Buyer will produce the highest and best offer for this business (thereby maximizing the value of to its estate) and is in the best interests of the Selling Debtor and its affiliates, their estates, and their creditors.

18. The Agreements represent the culmination of a comprehensive, arms-length negotiation for the Sale of the Membranes Business in exchange for the highest and best consideration available for such business. In the Selling Debtor's business judgment, the Selling Debtor believes that the Sale will provide a larger recovery for the Selling Debtor's estate than would be provided by any other viable alternative. The bases for the relief requested in this Motion are founded in a number of provisions of the Bankruptcy Code and Bankruptcy Rules. These bases are discussed in detail below.

A. **Bankruptcy Code Section 363 Permits The Sale Of The Membranes Business Outside The Ordinary Course Of Business.**

19. Section 363 of the Bankruptcy Code provides that a debtor, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Although section 363 of the Bankruptcy Code does not specify a

standard for determining when it is appropriate for a court to authorize the use, sale or lease of property of the estate, the bankruptcy courts routinely authorize sales of a debtor's assets if such sale is based upon the sound business judgment of the debtor. See, e.g., Meyers v. Martin (In re Martin), 91 F.3d 389, 395 (3d Cir. 1996); The Official Committee of Unsecured Creditors v. The LTV Corp. (In re Chateaugay Corp.), 973 F.2d 141, 143 (2d Cir. 1992); Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1070-71 (2d Cir. 1983); In re Delaware & Hudson Railway Co., 124 B.R. 169, 176 (D. Del. 1991). Indeed, the Delaware & Hudson Railway court rejected the pre-Code "emergency" or "compelling circumstances" standard, finding the "sound business purpose" standard applicable and, discussing the requirements of that test under Lionel, observing:

A non-exhaustive list of factors to consider in determining if there is a sound business purpose for the sale include: the proportionate value of the asset to the estate as a whole; the amount of elapsed time since the filing; the likelihood that a plan of reorganization will be proposed and confirmed in the near future; the effect of the proposed disposition of the future plan of reorganization; the amount of proceeds to be obtained from the sale versus appraised values of the property; and whether the asset is decreasing or increasing in value.

124 B.R. at 176. The Delaware & Hudson Railway court further held that:

[o]nce a court is satisfied that there is a sound business reason or an emergency justifying the pre-confirmation sale, the court must also determine that the trustee has provided the interested parties with adequate and reasonable notice, that the sale price is fair and reasonable and that the proposed purchaser is proceeding in good faith.

Id.

20. Furthermore, once "the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct." Committee of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.), 60 B.R. 612, 616 (Bankr.

S.D.N.Y. 1986). There is a presumption that “in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.” The Official Comm. of Subordinated Bondholders v. Integrated Resources, Inc. (In re Integrated Resources, Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)). Thus, if a debtor’s actions satisfy the business judgment rule, then the transaction in question should be approved under section 363(b)(1).

21. The Selling Debtor has proposed the Sale of the Membranes Business after thorough consideration of all viable alternatives, and has concluded that the Sale is supported by a number of sound business reasons. As previously discussed, the Membranes Business: (i) represents less than 1% of the Debtors’ revenues, (ii) is the Debtors’ sole business unit that sells into the natural gas industry, and (iii) is a non-core operation. Thus, the Selling Debtor seeks to sell the Membranes Business at this time to generate value to the estate while enabling the Debtors’ senior management to focus on higher-return, core activities.

22. The Selling Debtor also believes that the amount of the consideration received for the Membranes Business is fair and reasonable. The fairness and reasonableness of the consideration to be paid by the Buyer ultimately has been demonstrated by adequate “market exposure” and a fair marketing process – the best means for establishing whether a fair and reasonable price is being paid.

23. Thus, the extensive marketing efforts have demonstrated that there is a limited market for the Membranes Business and that the offer made by the Buyer is the best offer that the Debtor has received for such assets. The timing contemplated by this Motion – an expected closing date in September 2009 -- will eliminate any potential uncertainty surrounding the

Membranes Business and mitigate the risk that its financial performance and hence the value of the Membranes Business might suffer from this uncertainty. Accordingly, the Selling Debtor, in its business judgment, believes that the Agreements are in the best interests of the estate and its creditors. The Selling Debtor requests that this Court make a finding at the hearing on this Motion that the proposed Sale is a proper exercise of the Selling Debtor's business judgment and is duly authorized.

**B. The Sale Of The Membranes Business Free And Clear Of Liens And Other Interests Is Authorized By Section 363(f).**

24. The Selling Debtor further submits that it is appropriate to sell the Membranes Business free and clear of Liens (except the Closing Permitted Exceptions) pursuant to section 363(f) of the Bankruptcy Code, with any such Liens attaching to the net sale proceeds of the Membranes Business to the extent applicable. Section 363(f) of the Bankruptcy Code authorizes a debtor to sell assets free and clear of any interest in such property of an entity other than the estate if:


- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

25. This provision is supplemented by section 105(a) of the Bankruptcy Code, which provides that “[t]he Court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a).

26. Because Bankruptcy Code section 363(f) is drafted in the disjunctive, satisfaction of any one of its five requirements will suffice to permit the sale of the Membranes Business “free and clear” of liens and interests. In re Dundee Equity Corp., 1992 Bankr. LEXIS 436, at \*12 (Bankr. S.D.N.Y. Mar. 6, 1992) (“[s]ection 363(f) is in the disjunctive, such that the sale free of the interest concerned may occur if any one of the conditions of § 363(f) have been met.”); In re Elliott, 94 B.R. 343, 345 (E.D. Pa. 1988) (same).

27. The Selling Debtor believes that one or more of the tests of section 363(f) are satisfied with respect to the transfer of the Membranes Business pursuant to the Sale Agreement. In particular, the Selling Debtor believes that at least section 363(f)(2) will be met in connection with the transactions proposed under the Sale Agreement because each of the parties holding liens on the Membranes Business will consent, or absent any objection to this Motion, will be deemed to have consented to, the Sale. Any lienholder also will be adequately protected by having its Liens, if any, in each instance against the Selling Debtor or its estate, attach to the cash proceeds of the Sale ultimately attributable to the Membranes Business in which such creditor alleges an interest, in the same order of priority, with the same validity, force and effect that such creditor’s liens had prior to the Sale, subject to any claims and defenses the Selling Debtor and its estate may possess with respect thereto. Accordingly, section 363(f) authorizes the transfer and conveyance of the Membranes Business free and clear of any Liens (other than the Permitted Exceptions).

C. **The Transferred Assets And Transferred Contracts Should Be Sold Free And Clear Of Successor Liability.** 

28. Under the terms of the Sale Agreement, the Buyer is not liable for any of the Selling Debtor’s liabilities as a successor to the Selling Debtor’s business or otherwise (the “Excluded Liabilities”), unless expressly assumed. Extensive case law exists providing that

claims against a buyer are directed to the proceeds of a free and clear sale of property and may not subsequently be asserted against a buyer.

29. Although section 363(f) of the Bankruptcy Code provides for the sale of assets “free and clear of any interests,” the term “any interest” is not defined anywhere in the Bankruptcy Code. Folger Adam Security v. DeMatteis/MacGregor JV, 209 F.3d 252, 257 (3d Cir. 2000). In the case of In re Trans World Airlines, Inc., 322 F.3d 283, 288-89 (3d Cir. 2003), the Third Circuit specifically addressed the scope of the term “any interest.” The Third Circuit observed that while some courts have “narrowly interpreted that phrase to mean only in rem interests in property,” the trend in modern cases is towards “a more expansive reading of ‘interests in property’ which ‘encompasses other obligations that may flow from ownership of the property.’”, Id. at 289 (citing 3 Collier on Bankruptcy 363.06[1]). As determined by the Fourth Circuit in In re Leckie Smokeless Coal Co., 99 F.3d 573, 581-582 (4th Cir. 1996), a case cited approvingly and extensively by the Third Circuit in Folger, the scope of section 363(f) is not limited to in rem interests. Thus, the Third Circuit in Folger stated that Leckie held that the debtors “could sell their assets under § 363(f) free and clear of successor liability that otherwise would have arisen under federal statute.” Folger, 209 F.3d at 258.

30. Courts have consistently held that a buyer of a debtor’s assets pursuant to a section 363 sale takes free from successor liability resulting from pre-existing claims. See The Ninth Avenue Remedial Group v. Allis-Chalmers Corp., 195 B.R. 716, 732 (Bankr. N.D. Ind. 1996) (stating that a bankruptcy court has the power to sell assets free and clear of any interest that could be brought against the bankruptcy estate during the bankruptcy); MacArthur Company v. Johns-Manville Corp. (In re Johns-Manville Corp.), 837 F.2d 89, 93-94 (2d Cir. 1988) (channeling of claims to proceeds consistent with intent of sale free and clear under section

363(f) of the Bankruptcy Code); In re New England Fish Co., 19 B.R. 323, 329 (Bankr. W.D. Wash. 1982) (transfer of property in free and clear sale included free and clear of Title VII employment discrimination and civil rights claims of debtor's employees); In re Hoffman, 53 B.R. 874, 876 (Bankr. D.R.I. 1985) (transfer of liquor license free and clear of any interest permissible even though the estate had unpaid taxes); American Living Systems v. Bonapfel (In re All Am. Of Ashburn, Inc.), 56 B.R. 186, 190 (Bankr. N.D. Ga. 1986) (product liability claims precluded on successor doctrine in a sale of assets free and clear); WBO Partnership v. Virginia Dept. of Medical Assistance Services (In re WBO Partnership), 189 B.R. 97, 104-05 (Bankr. E.D. Va. 1995) (Commonwealth of Virginia's right to recapture depreciation is an "interest" as used in section 363(f)).

31. Here, the Debtors' chapter 11 cases were filed in good faith. The Buyer has engaged in arm's-length negotiations with the Selling Debtor and has not exerted control or undue influence over the Selling Debtor. The Buyer is completely and wholly unrelated to the Selling Debtor. The Buyer does not, and will not, share any common incorporators, officers, directors, or controlling stockholders with the Selling Debtor, and the Buyer is not an insider of the Selling Debtor. See 11 U.S.C. § 101(31).

32. In addition, no other person or entity (or persons or entities) has offered to enter into an agreement or series of agreements as favorable to the Selling Debtor as the Sale Agreement. If the Sale Agreement is not approved, then management will be forced to evaluate options that are not as attractive as the current offer. For obvious reasons, the very purpose of an order purporting to authorize the transfer of assets free and clear of all "interests" would be frustrated if claimants could thereafter use the transfer as a basis to assert claims against a purchaser arising from a seller's pre-sale conduct.



33. Furthermore, the Selling Debtor is providing notice of the proposed sale to all known parties in interest that may assert claims or interests relating to the Transferred Assets against the Selling Debtor, including, but not limited to, trade creditors, contract counterparties, lenders and other parties known to the Selling Debtor to be asserting claims of any kind relating to the Transferred Assets. Under section 363(f) of the Bankruptcy Code, the Buyer is entitled to know that the Transferred Assets are not infected with latent claims that will be asserted against the Buyer after the proposed transaction is completed. Accordingly, consistent with the above-cited case law, the order approving the Sale should state that the Buyer is not liable as a successor under any theory of successor liability, for claims that encumber or relate to the Transferred Assets.

**D. The Buyer Is A Good Faith Buyer And Is Entitled To The Full Protection Of Section 363(m) Of The Bankruptcy Code, And The Transfer Of The Membranes Business Does Not Violate Section 363(n).**

34. Section 363(m) of the Bankruptcy Code provides:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). While the Bankruptcy Code does not define “good faith,” the Third Circuit

in In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143 (3d Cir. 1986) held that:

[t]he requirement that a buyer act in good faith . . . speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a buyer’s good faith status at a judicial sale involves fraud, collusion between the Proposed Buyer and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.

788 F.2d at 147 (citations omitted).

35. In the present case, the Sale is an intensively-negotiated transaction in which the Buyer has, at all times, acted in good faith under the Abbotts Dairy standards. In addition to a fair and reasonable value offered by the Buyer, the proposed sale also is the product of arms-length, good faith negotiations, in which the Selling Debtor bargained for the maximum possible purchase price for the Membranes Business. Extensive negotiations were held between the parties involving substantial time and energy by the parties and their professionals, and the Agreements reflect give-and-take and compromises by both sides.

36. In addition, the Buyer is not an "insider" of any of the Debtors, as that term is defined in section 101(31) of the Bankruptcy Code. There is absolutely no indication of fraud or improper insider dealing of any kind. The Sale Agreement does not constitute an avoidable transaction pursuant to section 363(n) and the Buyer should receive the protections afforded good faith purchasers by section 363(m). Accordingly, the Selling Debtor requests that the Court make a finding at the hearing that the Buyer is entitled to the full protections of Bankruptcy Code section 363(m).

**E. Assumption And Assignment Of The Transferred Contracts Is Authorized By Section 365 Of The Bankruptcy Code.**

37. The Sale contemplates the assumption and assignment of certain executory contracts and unexpired leases of the Membranes Business to the Buyer, which are necessary to the Buyer for the continuation of the Membranes Business and, at the same time, will enhance the value of the Sale to the Selling Debtor's estate by curtailing further administrative liability to the estate and eliminating certain rejection claims. Specifically, the Debtors propose to assume and assign to Buyer those Transferred Contracts set forth on Exhibit B to the proposed Sale Order (the "List of Transferred Contracts"). The List of Transferred Contracts also sets forth next to each Transferred Contract the proposed Cure Amount that the Selling Debtor proposes to

pay to each counterparty. The Debtors believe that most of the Transferred Contracts were entered into post-petition and in any event, the Debtors believe they are current on all outstanding obligations under the Transferred Contracts and that no cure amounts are owing. In an abundance of caution and to the extent applicable, the Selling Debtor requests approval to assume and assign the Transferred Contracts to the Buyer pursuant to section 365(f) of the Bankruptcy Code, notwithstanding any provisions in the Transferred Contracts, including those described in sections 365(b)(2) and (f)(1) and (3) of the Bankruptcy Code, that prohibit such assignment.

38. Section 365(f) of the Bankruptcy Code provides, in pertinent part, that:

The trustee may assign an executory contract or unexpired lease of the debtor only if –

- (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
- (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2). Under section 365(a), a debtor “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a).

Section 365(b)(1), in turn, codifies the requirements for assuming an unexpired lease or executory contract of a debtor, providing that:

(b) (1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee –

- (A) cures, or provides adequate assurance that the trustee will promptly cure, such default ....;
- (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

- (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

39. The standard applied by a court in determining whether the assumption or rejection of an executory contract or unexpired lease pursuant to section 365(a) should be approved is the “business judgment” test, which requires a debtor to determine that the requested assumption or rejection would be beneficial to its estate. See, e.g., In re Group of Institutional Investors, Inc. v. Chicago, Milwaukee, St. Paul and Pac. R.R. Co., 318 U.S. 523, 550 (1943) (“the question [of assumption] is one of business judgment”); Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095, 1098-99 (2d Cir. 1993) (to decide a motion to assume the court must put itself in the position of the trustee and determine whether such assumption would be a good decision or a bad one).

40. Courts generally will not second-guess a debtor’s business judgment concerning the assumption of an executory contract. See In re Paolo Gucci, 193 B.R. 411, 414 (S.D.N.Y. 1996); see also Sharon Steel Corp. v. National Gas Fuel Distrib. Corp. (In re Sharon Steel Corp.), 872 F.2d 36, 40 (3d Cir. 1989); In re III Enter., Inc., 163 B.R. 453, 469 (Bankr. E.D. Pa. 1994) (“Generally, a court will give great deference to a debtor’s decision to assume or reject an executory contract. A debtor need only show that its decision to assume or reject the contract is an exercise of sound business judgment—a standard which we have concluded many times is not difficult to meet.”).

41. In the present case, the Selling Debtor’s assumption and assignment of the Transferred Contracts to the Buyer meets the business judgment standard and satisfies the requirements of section 365 of the Bankruptcy Code. As discussed above, the transactions contemplated by the Agreements will provide significant benefits to the Selling Debtor’s estate.

Because the Selling Debtor cannot obtain the benefits of the Sale Agreement without the assumption of the Transferred Contracts referenced above, the assumption of these Transferred Contracts is undoubtedly a sound exercise of the Selling Debtor's business judgment.

42. Further, a debtor in possession may assign an executory contract or an unexpired lease of the debtor if it assumes the agreement in accordance with section 365(a), and provides adequate assurance of future performance by the assignee, whether or not there has been a default under the agreement. See 11 U.S.C. § 365(f)(2). Significantly, among other things, adequate assurance may be provided by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. See, e.g., In re Bygaph, Inc., 56 B.R. at 605-06 (stating that adequate assurance of future performance is present when the prospective assignee of a lease from the debtor has financial resources and has expressed willingness to devote sufficient funding to the business in order to give it a strong likelihood of succeeding).

43. The meaning of "adequate assurance of future performance" depends on the facts and circumstances of each case, but should be given "practical, pragmatic construction." EBG Midtown South Corp. v. McLaren/Hart Env'tl. Engineering Corp. (In re Sanshoe Worldwide Corp.), 139 B.R. 585, 592 (S.D.N.Y. 1992) (citations omitted), aff'd, 993 F.2d 300 (2d Cir. 1993); Carlisle Homes, Inc. v. Arrari (In re Carlisle Homes, Inc.), 103 B.R. 524, 538 (Bankr. D.N.J. 1989).

44. Here, the Buyer has agreed to pay half of the Cure Amounts in connection with the Transferred Contracts, although the Selling Debtor estimates that the cure payments associated with all of the Transferred Contracts is \$0.00. Furthermore, the assignee, i.e., the Buyer, has sufficient assets to continue performance under the Transferred Contracts from and

after the Closing Date. To the extent necessary, the Buyer is able and willing, at the Sale Hearing or earlier to a party upon request, to demonstrate to the satisfaction of this Court that adequate assurance of future performance is present. The Sale Hearing will therefore provide the Court and other interested parties with the opportunity to evaluate and, if necessary, challenge the ability of the Buyer or other successful bidder to provide adequate assurance of future performance under the Transferred Contracts. Accordingly, the Selling Debtor submits that the assumption and assignment of the Transferred Contracts as set forth herein should be approved.

45. To assist in the assumption, assignment and sale of the Transferred Contracts, the Selling Debtor also requests that the Court enter an order providing that anti-assignment provisions in the Transferred Contracts shall not restrict, limit or prohibit the assumption, assignment and sale of the Transferred Contracts and are deemed and found to be unenforceable anti-assignment provisions within the meaning of section 365(f) of the Bankruptcy Code.

46. Section 365(f)(1) of the Bankruptcy Code permits a debtor to assign unexpired leases and contracts free from such anti-assignment restrictions:

[N]otwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

11 U.S.C. § 365(f)(1).


47. Section 365(f)(1), by operation of law, invalidates provisions that prohibit, restrict, or condition assignment of an executory contract or unexpired lease. See, e.g., Coleman Oil Co., Inc. v. The Circle K Corp. (In re The Circle K Corp.), 127 F. 3d 904, 910-11 (9th Cir. 1997) (“no principle of bankruptcy or contract law precludes us from permitting the Debtors here to extend their leases in a manner contrary to the leases’ terms, when to do so will effectuate the purposes of section 365”). Section 365(f)(3) goes beyond the scope of section 365(f)(1) by prohibiting

enforcement of any clause creating a right to modify or terminate the contract or lease upon a proposed assumption or assignment thereof. See, e.g., In re Jamesway Corp., 201 B.R. 73 (Bankr. S.D.N.Y. 1996) (section 365(f)(3) prohibits enforcement of any lease clause creating right to terminate lease because it is being assumed or assigned, thereby indirectly barring assignment by debtor; all lease provisions, not merely those entitled anti-assignment clauses, are subject to court's scrutiny regarding anti-assignment effect).

48. Other courts have recognized that provisions that have the effect of restricting assignments cannot be enforced. See In re Rickel Home Centers, Inc., 240 B.R. 826, 831 (D. Del. 1998) ("In interpreting Section 365(f), courts and commentators alike have construed the terms to not only render unenforceable lease provisions which prohibit assignment outright, but also lease provisions that are so restrictive that they constitute de facto anti-assignment provisions."). Similarly, in In re Mr. Grocer, Inc., the court noted that:

[the] case law interpreting § 365(f)(1) of the Bankruptcy Code establishes that the court does retain some discretion in determining that lease provisions, which are not themselves ipso facto anti-assignment clauses, may still be refused enforcement in a bankruptcy context in which there is no substantial economic detriment to the landlord shown, and in which enforcement would preclude the bankruptcy estate from realizing the intrinsic value of its assets.

77 B.R. 349, 354 (Bankr. D.N.H. 1987). Thus, the Selling Debtor requests that any anti-assignment provisions be deemed not to restrict, limit or prohibit the assumption, assignment and sale of the Transferred Contracts and be deemed and found to be unenforceable anti-assignment provisions within the meaning of section 365(f) of the Bankruptcy Code.

**F. A Private Sale Of The Membranes Business Is Authorized Under Bankruptcy Rule 6004.** 

49. Bankruptcy Rule 6004(f)(1) provides that "[a]ll sales not in the ordinary course of business may be by private sale or by public auction." Fed. R. Bankr. P. 6004(f)(1). Courts often allow chapter 11 debtors to sell assets outside the ordinary course of business by private

sale when the debtors demonstrate that the sale is permissible pursuant to section 363(b) of the Bankruptcy Code. See, e.g., Palermo v. Pritam Realty, Inc. (In re Pritam Realty, Inc.), 233 B.R. 619 (D.P.R. 1999) (upholding the bankruptcy court's approval of a private sale conducted by a chapter 11 debtor); In re Condere Corp., 228 B.R. 615 (Bankr. S.D. Miss. 1998) (approving a private sale of a chapter 11 debtor's assets where the standards of § 363(b) were met); In re Embrace Systems Corp., 178 B.R. 112, 123 (Bankr. W.D. Mich. 1995) ("A large measure of discretion is available to a bankruptcy court in determining whether a private sale should be approved. The court should exercise its discretion based upon the facts and circumstances of the proposed sale."); In re Wieboldt Stores, Inc., 92 B.R. 309 (N.D. Ill. 1988) (affirming right of chapter 11 debtor to transfer assets by private sale).

50. Here, the Selling Debtor proposes to proceed with the sale of the Membranes Business by way of a private sale without incurring the cost and delay associated with conducting a public auction. An auction is not required under section 363(b) of the Bankruptcy Code. In re Trans World Airlines, Inc., 2001 WL 18202326, at \*4 (Bankr. D. De. 2001) (noting that "a 363(b) sale transaction does not require an auction procedure. The auction procedure has developed over the years as an effective means for producing arm's length fair value transaction."). As discussed above, the Selling Debtor extensively marketed the Membranes Business and conducted multiple bidding rounds to obtain the highest and best offer therefor. As a result, the Selling Debtor submits that the Buyer's offer is the highest and best that the Selling Debtor has received, and constitutes fair market value, given the limited market for the Membranes Business.

51. The alternative to the proposed Sale is to continue to market the Membranes Business and conduct another auction sale process, which would subject the estate to significant



market risk with a low probability of identifying a higher and better offer. The Selling Debtor believes that further delays in completing the Sale could lead to deteriorating financial performance of the Membranes Business and eroded potential value. Moreover, employees and customers of the Membranes Business would continue to face uncertainty regarding the future of the Membranes Business. This uncertainty could potentially lead to loss of employees, weakened financial performance, and the erosion of value.

52. Because a private sale is specifically authorized under Bankruptcy Rule 6004 and the Selling Debtor believes that the Buyer's offer is the highest and best offer for the Membranes Business, the Selling Debtor requests that this Court approve the proposed private sale of the Membranes Business to the Buyer in accordance with the Agreements.

**G. Notice Of The Proposed Sale Satisfies Bankruptcy Rule 2002.**

53. A copy of this Motion and the Notice of Motion will be served on: (i) the U.S. Trustee; (ii) counsel to the Committees and the FCRs; (iii) counsel to the administrative agents for the Debtors' prepetition secured lenders; (iv) counsel to the Debtors' postpetition lenders; (v) all parties that have requested special notice pursuant to Bankruptcy Rule 2002; (vi) the Buyer and its counsel; (vii) all persons or entities known or reasonably believed to have asserted a Lien in any of the assets of the Membranes Business; (viii) federal, state and local taxing authorities who have a reasonably known interest in the relief requested by this Motion; (ix) the counterparty to each of the Transferred Contracts; (x) all persons or entities known or reasonably believed to have expressed a serious interest in acquiring the Membranes Business; and (xi) the United States Attorneys for the Districts of Delaware, Colorado and Maryland (collectively, the "Notice Parties"). In addition, the Debtors will be publishing the Notice of the Sale Motion and the hearing on the request for entry of the Sale Order and the objection deadline for such hearing

in *The Wall Street Journal* National Edition and *The Denver Post* at a time reasonably in advance of such objection deadline and hearing.

54. Several sections of the Bankruptcy Code dictate the sufficiency of notice and adequacy of service. As discussed below, the content and manner of service of this Motion and the related notice satisfies all such requirements:

55. Section 363 Notice: Section 363 of the Bankruptcy Code provides that a trustee may sell property "after notice and hearing." Under section 102(1) of the Bankruptcy Code, the phrase "after notice and hearing" means "notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances." 11 U.S.C. § 102(1)(A). As set forth above, by service and publication of this Motion, all interested parties have been provided notice of the salient details regarding this Motion and the Sale Hearing. Accordingly, notice is sufficient under section 363 of the Bankruptcy Code.

56. Bankruptcy Rule 2002: Bankruptcy Rule 2002 requires twenty days notice of proposed sales of property other than in the ordinary course of business. In addition, Bankruptcy Rule 2002 provides that, as to sales, notice of a sale shall "include the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections." Fed. R. Bankr. P. 2002. Local Rule 2002-1(b) specifies the parties on whom a Motion for a sale other than in the ordinary course of business must be served in cases pending in this jurisdiction. The Debtor believes that this Motion and Sale Notice contains the requisite information to reasonably notify parties in interest in satisfaction of the foregoing rules and requirements, and as discussed in detail herein, exigent circumstances necessitate the Selling Debtor to be able to have the Motion approved as expeditiously as possible, but by no later than August 24, 2009, in order for the Debtor to be in a position to close the Sale on or before September 15, 2009).

Indeed, by filing on July 20 for a August 24 hearing, the Selling Debtor is providing 35 days notice of the Sale.

57. Bankruptcy Rules 6004 and 6006: Bankruptcy Rule 6004 requires that notices of sales of property out of the ordinary course of business comply with Bankruptcy Rule 2002. As set forth above, the Debtor has complied with Bankruptcy Rule 2002. Bankruptcy Rule 6006 requires notice of a motion to assume or assign an executory contract or unexpired lease to be served on the counterparty to such contract or lease, as well as on other parties in interest as this Court may direct. The list of Transferred Contracts, including cure amount, and notice of the Motion will be served on counterparties to the Transferred Contracts, and thus this requirement will be satisfied.

58. Procedural Due Process: The notice of this Motion that is being provided is “reasonably calculated” to apprise interested parties of the pendency of the matter and to afford them an opportunity to object. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Parties in interest have been or will be and should be found to have been afforded adequate notice of this Motion and the Sale Hearing.

59. The Debtor submits that the notice that they have provided of this Motion and the Sale Hearing is reasonable and appropriate and should be approved by this Court as adequate and sufficient notice.

**H. Relief Under Bankruptcy Rule 6004(h) is Appropriate.**

60. Bankruptcy Rule 6004(h) provides that an “order authorizing the use, sale, or lease of property . . . is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise.” The Selling Debtor requests that any order approving the Agreements be effective immediately by providing that the 10-day stay under Bankruptcy Rule 6004(h) is waived.

61. The purpose of Bankruptcy Rule 6004(h) is to provide sufficient time for an objecting party to appeal before an order can be implemented. See Advisory Committee Notes to Fed. R. Bankr. P. 6004(h) and 6006(d). Although Bankruptcy Rule 6004(h) and the Advisory Committee Notes are silent as to when a court should “order otherwise” and eliminate or reduce the 10-day stay period, Collier suggests that the 10-day stay period should be eliminated to allow a sale or other transaction to close immediately “where there has been no objection to the procedure.” 10 Collier on Bankruptcy 15th Ed. Rev., ¶ 6064.09 (L. King, 15th rev. ed. 1988). Furthermore, Collier provides that if an objection is filed and overruled, and the objecting party informs the court of its intent to appeal, the stay may be reduced to the amount of time actually necessary to file such appeal. Id.

62. To preserve the value of the Membranes Business by bringing certainty to the sale process, and because both the Selling Debtor and Buyer desire to close the Sale on or before September 15, 2009, the Selling Debtor seeks to close the Sale as soon as possible after all closing conditions have been met or waived. Accordingly, the Selling Debtor hereby requests that the Court waive the 10-day stay period under Bankruptcy Rule 6004(h) and 6006(d) or, in the alternative, if an objection to the Sale is filed, reduce the stay period to the minimum amount of time needed by the objecting party to file its appeal to allow the Sale to close.

**No Prior Request**

63. No prior Motion for the relief requested herein has been made to this or any other court.

WHEREFORE, the Selling Debtor requests that the Court grant it the relief requested herein and such other and further relief as is just and proper.

Dated: July 20, 2009

Respectfully submitted,

KIRKLAND & ELLIS LLP  
Theodore L. Freedman  
Deanna D. Boll  
601 Lexington Ave.  
New York, NY 10022  
Telephone: (212) 446-4800  
Facsimile: (212) 446-4900

THE LAW OFFICES OF JANET S. BAER, P.C.  
Janet S. Baer, P.C.  
70 W. Madison Street  
Suite 2100  
Chicago, IL 60602  
Telephone: (312) 641-2162

and

  
PACHULSKI, STANG, ZIEHL & JONES LLP  
James E. O'Neill (Bar No. 4042)  
919 North Market Street, 16th Floor  
P.O. Box 8705  
Wilmington, Delaware 19899-8705  
(Courier 19801)  
Telephone: (302) 652-4100  
Facsimile: (302) 652-4400

*Counsel for the Debtors and Debtors in Possession*

# Exhibit A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: ) Chapter 11
)
W, R, GRACE & CO., et al.,<sup>1</sup> ) Case No. 01-01139 (JKF)
) (Jointly Administered)
Debtors. )
) Re: Docket No. \_\_\_\_\_
) \_\_\_\_\_ Agenda Item No. \_\_\_\_

ORDER (A) APPROVING THE AGREEMENT BY AND BETWEEN
W. R. GRACE & CO.-CONN., [REDACTED] AND [REDACTED]; (B) AUTHORIZING
THE SALE OF CERTAIN ASSETS OF W. R. GRACE & CO.-CONN.'S MEMBRANES
BUSINESS TO [REDACTED], FREE AND CLEAR OF ALL LIENS, CLAIMS,
ENCUMBRANCES AND OTHER INTERESTS;
(C) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT TO
[REDACTED] OF CERTAIN EXECUTORY CONTRACTS
AND UNEXPIRED LEASES; AND (D) GRANTING CERTAIN RELATED RELIEF

This matter coming on to be heard on the motion<sup>2</sup> dated July 20, 2009 [Docket No. \_\_\_\_]
(the "Sale Motion") of W. R. Grace & Co.-Conn., as debtor and debtor in possession (the
"Selling Debtor" and together with the other above-captioned debtors, the "Debtors") for entry of
an order (i) approving the Membranes Asset Sale Agreement, dated July 15, 2009 between the
Selling Debtor, [REDACTED] (the "Buyer") and [REDACTED] (the "Buyer Parent") appended

1 The Debtors consist of the following 62 entities: W. R. Grace & Co. (f/k/a Grace Specialty Chemicals, Inc.), W. R. Grace &
Co.-Conn, A-1 Bit & Tool Co., Inc., Alewife Boston Ltd., Alewife Land Corporation, Amicon, Inc., CB Biomedical, Inc.
(f/k/a Circe Biomedical, Inc.), CCHP, Inc., Coalgrace, Inc., Coalgrace II, Inc., Creative Food 'N Fun Company, Darex
Puerto Rico, Inc., Del Taco Restaurants, Inc., Dewey and Almy, LLC (f/k/a Dewey and Almy Company), Ecarg, Inc., Five
Alewife Boston Ltd., GC Limited Partners I, Inc., (f/k/a Grace Cocoa Limited Partners I, Inc.), GC Management, Inc. (f/k/a
Grace Cocoa Management, Inc.), GEC Management Corporation, GN Holdings, Inc. GPC Thomasville Corp., Gloucester
New Communities Company, Inc., Grace A-B Inc., Grace A-B II Inc., Grace Chemical Company of Cuba, Grace Culinary
Systems, Inc., Grace Drilling Company, Grace Energy Corporation, Grace Environmental, Inc., Grace Europe, Inc., Grace
H-G Inc., Grace H-G II Inc., Grace Hotel Services Corporation, Grace International Holdings, Inc. (f/k/a Dearborn
International Holdings, inc.), Grace Offshore Company, Grace PAR Corporation, Grace Petroleum Libya Incorporated,
Grace Tarpon Investors, Inc., Grace Ventures Corp., Grace Washington, Inc., W. R. Grace Capital Corporation., W. R.
Grace Land Corporation, Gracoal, Inc., Gracoal II, Inc, Guanica-Caribe Land Development Corporation, Hanover Square
Corporation, Homco International, Inc., Kootenai Development Company, L B Realty, Inc., Litigation Management, Inc.
(f/k/a GHSC Holding, Inc., Grace JVH, Inc., Asbestos Management, Inc.), Monolith Enterprises, Incorporated, Monroe
Street, Inc., MRA Holdings Corp. (f/k/a Nestor-BNA Holdings Corporation), MRA Intermedco, Inc. (f/k/a Nestor-BNA,
Inc.), MRA Staffing Systems, Inc. (f/k/a British Nursing Association, Inc.), Remedium Group, Inc. (f/k/a Environmental
Liability Management, Inc., E&C Liquidating Corp, Emerson & Curning, Inc.), Southern Oil, Resin & Fiberglass, Inc.,
Water Street Corporation, Axial Basin Ranch Company, CC Partners (f/k/a Cross Country Staffing), Hayden-Gulch West
Coal Company, H-G Coal Company.

2 Capitalized terms used, but not otherwise defined herein, shall have the meanings ascribed to them in the Agreement (as
defined below) and the Sale Motion, and to the extent of any inconsistency, the Agreement shall govern.

hereto as Exhibit A (the "Agreement" and, together with all related exhibits, attachments and ancillary agreements, the "Sale Documents";<sup>3</sup> (ii) authorizing the sale of certain assets (the "Acquired Assets") to the Buyer free and clear of all Liens, claims, and other interests in accordance with the terms and conditions set forth in the Agreement; (iii) authorizing the assumption by the Selling Debtor and the assignment to the Buyer of certain related executory contracts and unexpired leases (the "Transferred Contracts"); (iv) taking effect immediately by virtue of this Court waiving the 10-day stay under Bankruptcy Rules 6004(h) and 6006(d); and (v) granting certain related relief (collectively, the "Sale Order"); the Selling Debtor having executed the Agreement; a hearing on the Sale Motion having been held on August 24, 2009 (the "Sale Hearing"); all interested parties having been afforded an opportunity to be heard with respect to the Sale Motion and all relief related thereto; and it appearing that the Court has jurisdiction over this matter; the Court having reviewed and considered (i) the Sale Motion, (ii) the objections thereto, if any, and (iii) the arguments of counsel made, and the evidence proffered or adduced, at the Sale Hearing; it appearing that the relief requested in the Sale Motion and approval of the Sale to Buyer of the Acquired Assets, including the Selling Debtor's assumption and assignment to Buyer of the Transferred Contracts, is in the best interests of the Selling Debtor, its affiliates, their estates, creditors and other parties in interest; and based on the Sale Motion, the statements of counsel, the record of the Sale Hearing and the record in these cases; and after due deliberation thereon; and good cause appearing therefore, it is hereby

---

<sup>3</sup> Due to their voluminous and/or confidential and proprietary nature, the exhibits and schedules to the Agreement are intentionally omitted from Exhibit A



FOUND AND DETERMINED THAT:<sup>4</sup>**Jurisdiction, Final Order and Statutory Predicates**

A. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(h)(2) and this Court has jurisdiction under 28 U.S.C. §§ 157 and 1334 over the Sale Motion and each of the transactions contemplated by the Sale Documents (collectively, the "Sale"). Venue of this proceeding and the Sale Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

B. This Sale Order constitutes a final and appealable order within the meaning of 28 U.S.C. § 158(a). Notwithstanding Bankruptcy Rules 6004(h) and 6006(d), and to any extent necessary under Bankruptcy Rule 9014 and Rule 54(b) of the Federal Rules of Civil Procedure, as made applicable by Bankruptcy Rule 7054, the Court expressly finds that there is no just reason for delay in the implementation of this Sale Order, and expressly directs entry of judgment as set forth herein.

C. The statutory predicates for the relief requested in the Sale Motion are sections 105(a), 363(b), (f), (m) and (n), and 365 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 et seq. as amended (the "Bankruptcy Code"), Rules 2002(a)(2), 6004(a), (b), (c), (e), (f) and (h), 6006(a), (c) and (d), 9006 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Rules 2002-1(b) and 9006-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware.

---

<sup>4</sup> The findings and conclusions set forth herein constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. All findings of fact and conclusions of law announced by the Court at the Sale Hearing in relation to the Sale Motion are hereby incorporated herein to the extent not inconsistent herewith. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

**Notice of the Sale and Cure Amounts**

D. Actual written notice of the Sale Hearing, the Sale Motion, the Sale and the assumption and assignment of the Transferred Contracts, and a reasonable opportunity to object or to be heard with respect to the Sale Motion and the relief requested therein has been afforded to all interested parties and entities, including, but not limited to; (i) the U.S. Trustee; (ii) counsel to the Committees and the FCRs; (iii) counsel to the administrative agents for the Debtors' prepetition lenders; (iv) counsel to the Debtors' postpetition lenders; (v) all parties that have requested special notice pursuant to Bankruptcy Rule 2002; (vi) the Buyer and its counsel; (vii) all persons or entities known or reasonably believed to have asserted a Lien on any of the Acquired Assets; (viii) federal, state and local taxing authorities who have a reasonably known interest in the relief requested by this Motion, including the Internal Revenue Service; (ix) the U.S. Environmental Protection Agency and the Pension Benefit Guaranty Corporation; (x) the counterparty to each of the Transferred Contracts; (xi) all persons or entities known or reasonably believed to have expressed an interest in acquiring assets of the Selling Debtor that are used in its membranes business unit (the "Membranes Business"); and (xii) the United States Attorneys for the Districts of Delaware, Colorado and Maryland.

E. As evidenced by the affidavits of service and publication previously filed with the Court, and based on the representations of counsel at the Sale Hearing, (i) proper, timely, adequate and sufficient notice of the Sale Motion, the Sale Hearing, and the Sale, including, without limitation, the assumption and assignment of the Transferred Contracts, has been provided in accordance with sections 102(1), 105(a), 363 and 365 of the Bankruptcy Code and Rules 2002, 6004, 6006 and 9014 of the Bankruptcy Rules, (ii) such notice was good and sufficient, and appropriate under the particular circumstances, and (iii) no other or further notice

of the Sale Motion, the Sale Hearing or the Sale, including, without limitation, the assumption and assignment of the Transferred Contracts and the proposed cure amounts, is or shall be required.

F. The Selling Debtor published notice of the Sale Motion, the Sale, and the time and place of the Sale Hearing in the National Edition of The Wall Street Journal and The Denver Post on \_\_\_\_\_, 2009.

G. As part of the Sale Motion, the Selling Debtor has served notice of the Cure Amounts (as such term is defined below), if any, upon each non-debtor counterparty to the Transferred Contracts that the Selling Debtor seeks to assume and assign to the Buyer on the Closing Date. The service of such notice was good, sufficient and appropriate under the circumstances and no further notice need be given in respect of establishing a Cure Amount for the respective Transferred Contracts. Non-debtor counterparties to the Transferred Contracts have had an opportunity to object to the Cure Amount, if any, set forth in the notice.

H. The disclosures made by the Selling Debtor concerning the Sale Documents, the Sale, and the Sale Hearing were good, complete and adequate.

#### **Good Faith of Buyer and Buyer Parent**

I. Neither the Buyer nor the Buyer Parent is an "insider" of the Debtors, as that term is defined in section 101(31) of the Bankruptcy Code.

J. The Agreement and each of the other Sale Documents were negotiated, proposed and entered into by the Selling Debtor, on the one hand, and the Buyer and the Buyer Parent, on the other hand, without collusion, in good faith, and from arm's length bargaining

positions. Neither the Selling Debtor, the Buyer nor the Buyer Parent has engaged in any conduct that would cause or permit all or any part of the Sale or any obligation of the Selling Debtor under the Sale Documents to be avoided under section 363(n) of the Bankruptcy Code.

K. The Buyer and the Buyer Parent are good faith buyers within the meaning of section 363(m) of the Bankruptcy Code and, as such, are entitled to all of the protections afforded thereby, and otherwise have proceeded in good faith in all respects in connection with this proceeding in that: (a) the Buyer and the Buyer Parent recognized that the Selling Debtor was free to deal with the other potential party interested in acquiring the Acquired Assets; (b) all payments to be made by the Buyer and the Buyer Parent and other agreements or arrangements entered into by the Buyer and the Buyer Parent in connection with the Sale have been disclosed; (c) neither the Buyer nor the Buyer Parent has violated section 363(n) of the Bankruptcy Code by any action or inaction; (d) no common identity of directors or controlling stockholders exists between the Buyer, the Buyer Parent, on the one hand, and the Selling Debtor, on the other hand; and (e) the negotiation and execution of the Agreement and other Sale Documents related thereto was at arm's-length and in good faith. The Buyer and the Buyer Parent will be acting in good faith within the meaning of section 363(m) of the Bankruptcy Code in closing the Sale.

#### **Highest and Best Offer**

L. The Selling Debtor has thoroughly and effectively marketed the Membranes Business for sale in an appropriate manner that was designed to maximize the value received by the Selling Debtor for its Membranes Business.

M. The consideration provided by the Buyer and the Buyer Parent pursuant to the terms of the Sale Documents: (i) is fair and reasonable, (ii) is the highest and otherwise best

offer for the Acquired Assets, and (iii) will provide a greater recovery for the Selling Debtor's estate than would be provided by any other available alternative.

N. The Selling Debtor's determination that the Sale Documents constitute the highest and best offer for the Acquired Assets, including the Transferred Contracts, constitutes a valid and sound exercise of the Selling Debtor's business judgment pursuant to section 363(b) of the Bankruptcy Code.

O. Approval of the Sale Motion and the Sale Documents and the consummation of the Sale contemplated thereby at this time are in the best interests of the Selling Debtor, its affiliates, their creditors, their estates and other parties in interest.

P. The Selling Debtor has demonstrated compelling circumstances and a good, sufficient and sound business purpose and justification for the Sale prior to, and outside of, a plan of reorganization.

Q. No consents or approvals, other than those expressly provided for in the Agreement, are required for the Selling Debtor to consummate such Sale.

#### **No Fraudulent Transfer**

R. The Purchase Price constitutes reasonably equivalent value and fair consideration under the Bankruptcy Code and under the laws of the United States, any state territory, possession or the District of Columbia.

#### **Validity of Transfer**

S. The Sale has been duly and validly authorized by all necessary corporate action of the Selling Debtor, who has full corporate power and authority to execute and deliver

the Agreement and each of the other Sale Documents. Except as expressly set forth therein, no further consents or approvals are required for the Selling Debtor to consummate the Sale contemplated by the Sale Documents.

T. On the date of closing of the Agreement (the "Closing Date"), the Selling Debtor's transfer of the Acquired Assets, including its assumption and assignment to the Buyer of the Transferred Contracts, will be a legal, valid and effective transfer that, except for the Transferred Liabilities and any Permitted Exceptions, will vest the Buyer with all of the Selling Debtor's rights, title, and interests free and clear of all Liens, claims, obligations, liabilities, demands, guaranties, options, rights, contractual or other commitments, restrictions, interests and matters of any kind and nature, whether known or unknown, contingent or otherwise, whether arising prior to or subsequent to the commencement of these bankruptcy cases, and whether imposed by agreement, understanding, law, equity or otherwise (collectively, the "Interests"), including but not limited to those (i) arising under doctrines of successor liability, (ii) that purport to give to any party a right or option to effect any forfeiture, modification, right of first refusal or termination of the Selling Debtor's or the Buyer's interest in such assets or contracts, or any similar rights and/or (iii) that relate to taxes arising under or out of, in connection with, or in any way relating to the operation of the Membranes Business prior to the Closing Date (including, without limitation, any and all liens which may arise under any state and federal law statute by reason of the Debtors' failure to comply with any other applicable statute relating to bulk or bulk sales law).

U. The Buyer and the Buyer Parent would not have entered into the Agreement and would not consummate the Sale contemplated thereby, thus adversely affecting the Debtors, their estates, and their creditors, if the transfer of the Acquired Assets were not,

except for the Transferred Liabilities and any Permitted Exceptions, free and clear of all Interests of any kind or nature whatsoever, or if the Buyer or the Buyer Parent would, or in the future could, be liable for any of the Interests.

**Section 363(f) is Satisfied**

V. The Selling Debtor may sell the Acquired Assets free and clear of all Interests (other than Permitted Exceptions and Transferred Liabilities) because, in each case, one or more of the standards set forth in section 363(f)(1)-(5) of the Bankruptcy Code has been satisfied. Those nondebtor parties with Interests in the Acquired Assets who did not object, or who withdrew their objections, to the Agreement, the Sale or the Sale Motion are deemed to have consented pursuant to sections 363(f)(2) and 365 of the Bankruptcy Code. Those nondebtor parties with Interests in the Acquired Assets who did object fall within one or more of the other subsections of sections 363(f) and 365 of the Bankruptcy Code and are not entitled to adequate protection or are adequately protected by having their Interests, if any, attach to the cash proceeds of the Sale ultimately attributable to the property against or in which they claim an interest.

W. Except as expressly set forth in the Agreement, the transfer of the Acquired Assets to the Buyer shall in no way impose any liability or obligation upon the Buyer or the Buyer Parent for Interests related to the Selling Debtor's operation of the Membranes Business or use of the Acquired Assets. Neither the Buyer nor the Buyer Parent shall be deemed, as a result of any action taken in connection with the purchase of the Acquired Assets or the assignment of the Transferred Contracts, to: (i) be a successor (or other such similarly situated party) to any of the Debtors (other than with respect to the Transferred Liabilities and any obligations arising under the Transferred Contracts from and after the Closing Date as expressly

stated in the Agreement); or (ii) have, *de facto* or otherwise, merged with or into any of the Debtors. Neither the Buyer nor the Buyer Parent is acquiring or assuming any liability, warranty or other obligation of the Debtors, except as expressly set forth in the Agreement with respect to the Transferred Liabilities.

X. Except for the Transferred Liabilities, the transfer of the Acquired Assets to the Buyer, including the Selling Debtor's assumption and assignment to the Buyer of the Transferred Contracts will not subject the Buyer or the Buyer Parent to any liability whatsoever with respect to the operation of the Membranes Business prior to the Closing Date or by reason of such transfer under the laws of the United States, any state, territory or possession thereof, or the District of Columbia, based, in whole or in part, directly or indirectly, in any theory of law or equity, including, without limitation, any theory of antitrust, successor or transferee liability.

**Assumption and Assignment of the Transferred Contracts**

Y. The Selling Debtor has demonstrated that it is an exercise of its sound business judgment to assume and assign the Transferred Contracts in connection with the consummation of the Sale, and the Selling Debtor's assumption and assignment to the Buyer of the Transferred Contracts is in the best interests of the Selling Debtor, its affiliates, their estates and their creditors, The Transferred Contracts being assigned to the Buyer are an integral part of the Membranes Business purchased by the Buyer and, accordingly, the assumption and assignment of the Transferred Contracts is reasonable, enhances the value of the Selling Debtor's estate and does not constitute unfair discrimination.

Z. Pursuant to and in accordance with the Agreement, the Selling Debtor and/or the Buyer have (i) cured any default existing prior to the date hereof under each of the



Transferred Contracts, within the meaning of section 365(b)(1)(A) of the Bankruptcy Code; (ii) provided compensation or adequate assurance of compensation to any party for any actual pecuniary loss to such party resulting from a default prior to the date hereof under any of the Transferred Contracts, within the meaning of section 365(b)(1)(B) of the Bankruptcy Code; and (iii) provided adequate assurance of its future performance of and under the Transferred Contracts, within the meaning of sections 365(b)(1)(C) and 365(f)(2)(B) of the Bankruptcy Code.

**Compelling Circumstances for an Immediate Sale**

AA. To maximize the value of the assets of the Membranes Business and preserve the viability of the Membranes Businesses as a going concern, it is essential that the Sale occur within the time constraints set forth in the Agreement. Time is of the essence in consummating the Sale.

**Other**

BB. The Sale does not constitute a de facto plan of reorganization or liquidation or an element of such a plan for any of the Debtors, as it does not and does not propose to: (i) impair or restructure existing debt of, or equity interests in, the Debtors; (ii) impair or circumvent voting rights with respect to any future plan proposed by the Debtors; (iii) circumvent chapter 11 plan safeguards, such as those set forth in sections 1125 and 1129 of the Bankruptcy Code; or (iv) classify claims or equity interests, compromise controversies or extend debt maturities.

**NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED**

**THAT:**

### General Provisions

1. The relief requested in the Sale Motion is granted and approved, and the Sale contemplated thereby is approved as set forth in this Sale Order.

2. All objections to the entry of this Sale Order or the relief provided herein that have not been withdrawn, waived, or settled, and all reservations of rights included therein, are hereby denied and overruled on the merits, or the interests of such objections have been otherwise satisfied or adequately provided for.

### Approval of the Sale Documents

3. The Sale Documents, and all of the terms and conditions thereof, are hereby approved; provided, however, that the fee specified in Section 13.02(a) of the Agreement shall not be paid pending a further determination by the Court that the amount of such fee bears a reasonable relationship to the costs and expenses of the Buyer.

4. Pursuant to sections 363(b) and (f) of the Bankruptcy Code, the Selling Debtor is authorized and directed to consummate the Sale in accordance with the terms and conditions of the Sale Documents.

5. The Selling Debtor is authorized and directed to execute and deliver, and empowered to perform under, consummate and implement the Sale Documents, including all instruments and documents that may be reasonably necessary or desirable to implement the Sale as contemplated by the Agreement, and to take all further actions as may be reasonably requested by the Buyer for the purpose of assigning, transferring, granting, conveying and conferring to the Buyer or reducing to possession, the Acquired Assets, including the Transferred Contracts, or as may be necessary or appropriate to the performance of the obligations as contemplated by the

Agreement. Any amounts that become payable by the Selling Debtor pursuant to the Sale Documents shall (a) constitute administrative expenses of the Selling Debtor's estates; (b) be paid by the Selling Debtor without further order of this Court and in the time and manner provided for in the Sale Documents; and (c) not be discharged, modified, or otherwise affected by any plan of reorganization or liquidation for the Debtors.

6. The terms and provisions of this Sale Order shall be binding in all respects upon the Selling Debtor, its affiliates, their estates, all known or unknown creditors of, and all known or unknown holders of equity interests in, the Selling Debtor or Debtors, any holders of Interests against, in or on all or any portion of the Acquired Assets, all non-Debtor parties to the Transferred Contracts, the Buyer and all successors and assigns of the Buyer, the Buyer Parent and all successors and assigns of the Buyer Parent, and any trustees, if any, subsequently appointed in any of the Debtors' chapter 11 cases or upon a conversion to chapter 7 under the Bankruptcy Code of any of the Debtors' cases. This Sale Order and the Sale Documents shall inure to the benefit of the Selling Debtor, its affiliates, their estates, their creditors, the Buyer, the Buyer Parent, all interested parties and their respective successors and assigns. The Sale Documents shall not be subject to rejection.

#### **Transfer of the Acquired Assets**

7. Pursuant to sections 105(a), 363(f) and 365 of the Bankruptcy Code, the Selling Debtor is authorized to transfer the Acquired Assets on the Closing Date (the "Closing"). Such assets shall be transferred to the Buyer and shall constitute a legal, valid, binding and effective transfer of such assets of the Membranes Business and, upon the Selling Debtor's receipt of the Purchase Price, shall be, free and clear of all Interests (other than Permitted Exceptions and Transferred Liabilities), with all such Interests of any kind or nature whatsoever

to attach to the net proceeds of the Sale ultimately attributable to the property against or in which such Interests are held with the same validity, priority, force and effect that they now have, subject to any claims and defenses the Selling Debtor may possess with respect thereto.

8. Except as expressly permitted or otherwise specifically provided by the Agreement or this Sale Order, all persons and entities holding Interests in the Acquired Assets (other than Permitted Exceptions and Transferred Liabilities), arising under or out of, in connection with, or in any way relating to, the Selling Debtor, the assets of the Membranes Business, the Transferred Contracts, the operation of the Membranes Business prior to the Closing Date, or the transfer of the Membranes Business or the Transferred Contracts to the Buyer, hereby are forever barred, estopped and permanently enjoined from asserting against the Buyer, the Buyer Parent, their respective successors or assigns, property or assets, such persons' or entities' Interests. On the Closing Date, each creditor is authorized to execute such documents and take all other actions as may be necessary to release Interests (other than Permitted Exceptions and Transferred Liabilities) on the Acquired Assets, if any, as provided for herein.

9. The transfer of the Acquired Assets, including the Transferred Contracts, to the Buyer pursuant to the Agreement constitute a legal, valid and effective transfer of such assets and contracts, and shall vest the Buyer with all right, title and interest of the Selling Debtor in and to such assets and contracts free and clear of all Interests of any kind or nature whatsoever.

**Assumption by Selling Debtor and Assignment to the Buyer of the  
Transferred Contracts**

10. Pursuant to sections 105(a) and 365 of the Bankruptcy Code, and subject to and conditioned upon the Closing, the Selling Debtor's assumption and assignment to the

Buyer of the Transferred Contracts, is hereby approved, and the requirements of section 365(b)(1) of the Bankruptcy Code with respect thereto are hereby deemed satisfied.

11. The Selling Debtor is hereby authorized and directed in accordance with sections 105(a) and 365 of the Bankruptcy Code to (a) assume and assign to the Buyer, effective upon the Closing, the Transferred Contracts free and clear of all Interests of any kind or nature whatsoever, and (b) execute and deliver to the Buyer such documents or other instruments as may be necessary to assign and transfer the Transferred Contracts to the Buyer.

12. The Transferred Contracts shall be transferred to, and remain in full force and effect for the benefit of, the Buyer in accordance with their respective terms, notwithstanding any provision in any such Transferred Contract that prohibits, restricts or conditions such assignment or transfer and, pursuant to section 365(k) of the Bankruptcy Code, the Selling Debtor shall be relieved from any further liability with respect to the Transferred Contracts after such assignment to and assumption by the Buyer.

13. The Selling Debtor may assume and assign each of the Transferred Contracts in accordance with, sections 363 and 365 of the Bankruptcy Code and any provisions in any of the Transferred Contracts that prohibits, restricts or conditions the assignment of such Transferred Contract, or allow the party to such Transferred Contract to terminate, recapture, impose any penalty, condition renewal or extension, or modify any term or condition upon the assumption or assignment of such Transferred Contract constitute unenforceable anti-assignment provisions which are void and of no force and effect.

14. All other requirements and conditions under section 363 and 365 of the Bankruptcy Code for the assumption and assignment to the Buyer of each of the Transferred

Contracts have been satisfied. Upon Closing, in accordance with sections 363 and 365, the Buyer shall be fully and irrevocably vested in all right, title and interest of each of the Transferred Contracts.

15. As of the Closing Date, each of the Transferred Contracts will be in full force and effect and not subject to termination or cancellation by the non-Debtor party thereto based upon any act, omission or failure that may have occurred or arisen prior to the Closing.

16. All defaults or other obligations of the Selling Debtor under any Transferred Contract arising or accruing prior to the date of this Sale Order (without giving effect to any acceleration clauses or any default provisions of the kind specified in section 365(b)(2) of the Bankruptcy Code) shall be deemed cured by the Selling Debtor upon payment by the Selling Debtor and the Buyer, in accordance with Section 8.09 of the Agreement, at the Closing of the Sale or as soon thereafter as practicable of the cure amount set forth on Exhibit B hereto with respect to those Transferred Contracts set forth on Exhibit B (the "Cure Amounts"). After the payment of the relevant Cure Amounts, neither the Selling Debtor nor the Buyer shall have any further liabilities to the non-Debtor parties to the Transferred Contracts other than the Buyer's obligations under the Transferred Contracts that become due and payable on or after the Closing Date. There shall be no rent accelerations, assignment fees, increases (including advertising rates) or any other fees charged to Buyer or the Selling Debtor as a result of the assumption and assignment of the Transferred Contracts.

17. Except for the obligation of the Selling Debtor and/or Buyer to pay the Cure Amounts, each nondebtor party to a Transferred Contract hereby is forever barred, estopped and permanently enjoined from asserting against the Selling Debtor or the Buyer, or the property

of any of them, any default existing as of the date of the Sale Hearing; or, against the Buyer, any counterclaim, defense, setoff or any other claim asserted or assertable against the Selling Debtor. Pursuant to sections 105(a), 363, and 365 of the Bankruptcy Code, all parties to the Transferred Contracts are forever barred and permanently enjoined from raising or asserting against the Selling Debtor or the Buyer any assignment fee, default, breach or claim or pecuniary loss or condition to assignment, arising under or related to the Transferred Contracts existing as of the Closing Date or arising by reason of the Closing.

#### **Additional Sale Provisions**

18. On the Closing Date of the Sale, each of the Selling Debtor's creditors is authorized and directed to execute such documents and take all other actions as may be necessary to release its Interests, if any, in the Acquired Assets, including the Transferred Contracts, as such Interests may have been recorded or may otherwise exist.

19. This Sale Order (a) shall, be effective as a determination that, on the Closing Date, all Interests of any kind or nature whatsoever existing with respect to the Selling Debtor, the Acquired Assets or the Transferred Contracts prior to the Closing have been unconditionally released, discharged and terminated, and that the conveyances described herein have been effected, and (b) shall be binding upon and shall govern the acts of all entities including, without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, secretaries of state, federal, state and local officials and all other persons and entities who may be required by operation of law, the duties of their office or contract, to accept, file, register or otherwise record or release any documents or instruments, or

who may be required to report or insure any title or state of title in or to any of such assets or contracts.

20. No bulk sales law or any similar law of any state or other jurisdiction shall apply in any way to the transactions authorized herein.

21. Each and every federal, state and local governmental agency or department is hereby directed to accept any and all documents and instruments necessary and appropriate to consummate the transactions contemplated by the Agreement.

22. If any person or entity, that has filed financing statements, mortgages, mechanic's liens, *lis pendens* or other documents or agreements evidencing Liens with respect to the Selling Debtor, the Acquired Assets or the Transferred Contracts shall not have delivered to the Selling Debtor and the Buyer prior to the Closing Date, in proper form for filing and executed by the appropriate parties, termination statements, instruments of satisfaction, releases of all Liens which the person or entity has with respect to the Selling Debtor, the Acquired Assets, the Transferred Contracts, or otherwise, then (a) the Selling Debtor is hereby authorized and directed to execute and file such statements, instruments, releases and other documents on behalf of the person or entity with respect to such assets and contracts, and (b) the Buyer is hereby authorized to file, register or otherwise record a certified copy of this Sale Order, which, once filed, registered or otherwise recorded, shall constitute conclusive evidence of the release of all Liens in the Acquired Assets and Transferred Contracts of any kind or nature whatsoever.

23. All entities who are presently, or on the Closing Date may be, in possession of some or all of the Acquired Assets are hereby directed to surrender possession of the Acquired Assets to the Buyer on the Closing Date.



24. Except for the Transferred Liabilities, the Buyer and the Buyer Parent shall have no liability or responsibility for any liability or other obligation of the Selling Debtor arising under or related to the Membranes Business or the Transferred Contracts. Without limiting the generality of the foregoing, and except as otherwise specifically provided herein and in the Agreement, the Buyer shall not be liable for any claims against the Selling Debtor or any of its predecessors or affiliates, and the Buyer and the Buyer Parent shall have no successor or vicarious liabilities of any kind or character whether known or unknown as of the Closing Date, now existing or hereafter arising, whether fixed or contingent, with respect to the Selling Debtor or any obligations of the Selling Debtor arising prior to the Closing Date, including, but not limited to, (1) liabilities on account of any taxes arising, accruing or payable under, out of, in connection with or in any way relating to the operation of the Business prior to the Closing Date and (2) liabilities based on any theory of antitrust, environmental, successor or transferee liability, labor law, de facto merger or substantial continuity.

25. Under no circumstances shall the Buyer or the Buyer Parent be deemed a successor of or to the Debtors for any Interest against or in the Selling Debtor or the Membranes Business or Transferred Contracts of any kind or nature whatsoever. Except for the Transferred Liabilities, the sale, transfer, assignment and delivery of the Acquired Assets, including the Transferred Contracts, shall not be subject to any Interests, and Interests of any kind or nature whatsoever shall remain with, and continue to be obligations of, the Selling Debtor. Except for persons holding Transferred Liabilities, all persons holding Interests against or in the Selling Debtor or the Acquired Assets or Transferred Contracts of any kind or nature whatsoever (including, but not limited to, the Selling Debtor and/or its successors (including any trustee)), creditors, employees, unions, former employees and shareholders, administrative agencies,

governmental units, secretaries of state, federal, state and local officials, including those maintaining any authority relating to any environmental, health and safety laws, and the successors and assigns of each of the foregoing) shall be, and hereby are, forever barred, estopped and permanently enjoined from asserting, prosecuting, or otherwise pursuing such Interests of any kind or nature whatsoever against the Buyer, the Buyer Parent, their property, their successors and assigns or the Acquired Assets or Transferred Contracts, as an alleged successor or otherwise, with respect to any Interest of any kind or nature whatsoever such person or entity had, has or may have against or in the Selling Debtor, its estate, officers, directors, shareholders or the Acquired Assets or Transferred Contracts. Following the Closing Date, no holder of an Interest in the Selling Debtor shall interfere with the Buyer's title to or use and enjoyment of the Membranes Business or the Transferred Contracts based on or related to such Interest, or any actions that the Selling Debtor may take in its chapter 11 case.

#### Additional Provisions

26. This Court retains exclusive jurisdiction over any matter or dispute arising from or relating to the implementation of this Sale Order as well as to enforce and implement the terms and provisions of the Sale Documents, all amendments thereto, any waivers and consents thereunder, and each of the agreements executed in connection therewith in all respects, including, but not limited to, retaining jurisdiction to (a) compel delivery of the Acquired Assets to the Buyer, (b) resolve any disputes arising under or related to the Sale Documents, except as otherwise provided therein, (c) interpret, implement, and enforce the provisions of this Sale Order and (d) protect the Buyer and the Buyer Parent against any Interest in the Selling Debtor, the Acquired Assets or the Transferred Contracts, of any kind or nature whatsoever, attaching to the proceeds of the Sale.

27. Nothing contained in any plan confirmed in these cases or any order of this court confirming such plan shall conflict with or deviate from the provisions of the Agreement or the terms of this Sale Order.

28. The transactions contemplated by the Agreement are undertaken by the Buyer in good faith, as that term is used in section 363(m) of the Bankruptcy Code. Accordingly, the reversal or modification on appeal of the authorization provided herein to consummate the Sale shall not affect the validity of the Sale as to the Buyer and the Buyer Parent, except to the extent such authorization is duly stayed pending such appeal prior to such consummation. The Buyer and the Buyer Parent are buyers in good faith of the Acquired Assets, including the Transferred Contracts, and are entitled to all of the protections afforded by section 363(m) of the Bankruptcy Code.

29. The consideration provided by the Buyer and the Buyer Parent for the assets of the Membranes Business under the Agreement (a) constitutes, and shall be deemed to constitute, reasonably equivalent value and fair consideration, and (b) is fair and reasonable and may not be avoided under section 363(n) or any other provision of the Bankruptcy Code, or otherwise.

30. The terms and provisions of the Sale Documents and this Sale Order shall be binding in all respects upon, and shall inure to the benefit of, the Selling Debtor, its affiliates, their estates and their creditors, the Buyer, the Buyer Parent and their affiliates, successors and assigns, and shall be binding in all respects upon any affected third parties including, but not limited to, all persons asserting Interests in such assets and contracts to be sold or assigned to the Buyer pursuant to the Sale Documents, notwithstanding any subsequent appointment of any

trustee(s) or similar party under any chapter of the Bankruptcy Code, as to which trustee(s) or similar party such terms and provisions likewise shall be binding.

31. The failure specifically to include any particular provision of a Sale Document in this Sale Order shall not diminish or impair the effectiveness of such provision, it being the intent of the Court that the Agreement and each of the Sale Documents he authorized and approved in their entirety. Likewise, all of the provisions of this Sale Order are nonseverable and mutually dependent.

32. The Agreement and any other Sale Document may be modified, amended or supplemented by the parties thereto, in a writing signed by all parties, and in accordance with the terms thereof, without further order of the Court, provided that any such modification, amendment or supplement does not have a material adverse effect on the Debtors' estates. In the event that a motion is filed to add additional contracts (the "Additional Contracts") to the list of Transferred Contracts pursuant to Section 8.09 of the Agreement, upon entry of an order approving the assumption and assignment of the Additional Contracts and payment of the related cure amounts by the Seller and/or Buyer in accordance with Section 8.09 of the Agreement, such Additional Contracts shall be considered Transferred Contracts for all purposes under this Order.

33. Notwithstanding Bankruptcy Rules 7062, 9014, 6004(h) and 6006(d), this Sale Order shall not be stayed for 10 days after the entry of the Sale Order and shall be effective and enforceable immediately upon entry.

34. Nothing in this Order or the Agreement releases, nullifies, or enjoins the enforcement of any liability to a governmental unit under any environmental statutes or regulations that any entity would be subject to as the owner or operator of property after the date

of entry of this Order. Notwithstanding the foregoing sentence, nothing in this Order shall be interpreted to deem Buyer as the successor to the Debtors under any state or federal successor liability doctrine. Any action by a governmental unit to enforce a liability of the kind described in the first sentence of this paragraph may be asserted in any forum outside the Bankruptcy Court which has jurisdiction under applicable nonbankruptcy law. Nothing in this Order or the Asset Purchase Agreement authorizes the transfer or assignment to Buyer of any license, permit, registration, authorization, or approval of or with respect to a governmental unit without Buyer's complying with all applicable legal requirements under nonbankruptcy law governing such transfers or assignments.

Dated: \_\_\_\_\_, 2009

\_\_\_\_\_  
Judith K. Fitzgerald  
United States Bankruptcy Judge

# EXHIBIT B

## ACC Extras

Supplemental resources available on [www.acc.com](http://www.acc.com)

609 New Bankruptcy Code for Non-bankruptcy Lawyers  
Program Material. February 2007

<http://www.acc.com/legalresources/resource.cfm?show=20096>

Loan Purchase Transactions: An Innovative Approach to Acquiring Real  
Estate Assets in a Downturn Market

Article. June 2008

<http://www.acc.com/legalresources/resource.cfm?show=15882>

Top Ten Key Questions (and Answers) for Dealing with Financially  
Distressed Suppliers.

Quick Reference. June 2008

<http://www.acc.com/legalresources/resource.cfm?show=116654>

Please note, these additional resources are provided by the Association of Corporate  
Counsel and not by the faculty of this session.