609 Big MACs and Other Deal Point Trends in Private Company M&A

Wilson Chu
Partner
Haynes and Boone, LLP

Richard E. Climan
Partner
Cooley Godward LLP

Ho-il Kim
General Counsel
Cabot Corporation

Paul W. Lee
Partner
Goodwin Procter LLP

John S. Tsai
Vice President & Assistant General Counsel, Corporate & Securities
Waste Management, Inc.

Faculty Biographies

Wilson Chu

Wilson Chu is a partner in the business transactions section of Haynes and Boone, LLP and he chairs the firm's Asia Practice Group. His practice focuses on mergers and acquisitions, private equity investments, and emerging company advice, with an emphasis on transactions involving technology companies and Asian-based transactions.

Mr. Chu is a frequent author and speaker on mergers and acquisition issues. He is active in the ABA's Negotiated Acquisitions Committee, the National Asian Pacific American Bar Association, and the Inter-Pacific Bar Association. He is also a member of the Committee of 100 and past member of the Board of Trustees of the Dallas Museum of Art.

Mr. Chu received his BBA and his JD from Southern Methodist University in Dallas.

Richard E. Climan

Richard E. Climan is a partner in the business department at Cooley Godward LLP, a national law firm based in Northern California's Silicon Valley. Mr. Climan is the head of the firm's mergers and acquisitions group and has extensive experience in structuring, negotiating, and advising clients on a wide variety of acquisition transactions and related matters, including stock acquisitions, asset acquisitions, mergers, divestitures, auction transactions, tender offers, defensive strategies, leveraged buy-outs, and cross-border transactions.

Prior to joining Cooley Godward, Mr. Climan was a partner in the corporate department at Pettit & Martin in San Francisco.

Mr. Climan is the chair of the Committee on Negotiated Acquisitions, affiliated with the ABA's Section of Business Law. Mr. Climan is a frequent lecturer on M&A-related topics. He is a member of the Advisory Board of the *Mergers & Acquisitions Law Report*, a publication of The Bureau of National Affairs, and also serves on the Advisory Board of the annual *Securities Regulation Institute*, presented by the Corporate Counsel Center of Northwestern University School of Law. He is included in EuroMoney's *Guide to the World's Leading Mergers & Acquisition Lawyers*, and was named one of the “Top Ten Silicon Valley Lawyers” by *The Lawyer* magazine.

Mr. Climan received his AB from Harvard College and received his JD from Harvard Law School.

Ho-il Kim
General Counsel
Cabot Corporation

Paul W. Lee

Paul W. Lee is a partner in the corporate department of Goodwin Procter LLP. In his practice, he concentrates on corporate and securities law and the representation of companies in mergers, acquisitions, and public and private financings. He also works with private equity and venture capital funds in connection with their formation and their portfolio investments, as well as startup ventures in their organization, seed and venture capital financings, initial public offerings, and technological issues. Mr. Lee has served as chair of the firm's corporate department, and as a member of the associate compensation committee, legal personnel supervision committee, and various other committees of the firm.

Mr. Lee is currently a member of the board of governors of the ABA and is a past member of the ABA Commission on Opportunities for Minorities in the Profession. Mr. Lee served as the president of the National Asian Pacific American Bar Association, after previously serving as secretary and member of the board of governors. He is a founder and the first president of the Asian American Lawyers Association of Massachusetts.

Mr. Lee received a BS from Columbia University and JD cum laude from Cornell Law School, where he was an editor of the *Cornell International Law Journal*.

John S. Tsai
Vice President & Assistant General Counsel, Corporate & Securities
Waste Management, Inc.

Outline of Sample Walk Right-Related Provisions

1. Walk Right Provisions (Chu and Lee)
   a. Buyer's First Draft
   b. Seller's Markup to Select Provisions of Buyer's Draft (clean)*
   c. Seller's Markup to Select Provisions of Buyer's Draft (redline)*
2. Selected Closing Conditions (Climan)
   a. Excerpts From "Closing Conditions" Section of Buyer's Form of Stock Purchase Agreement
   b. Excerpts from Sample Response by Seller to Closing Conditions Proposed by Buyer (clean)
   c. Excerpts from Sample Response by Seller to Closing Conditions Proposed by Buyer (redline)

** Seller's counsel couldn't finish her comments before her regular Thursday afternoon tee time. For the purposes of this presentation, therefore, Seller's comments are limited select provisions that will form the basis of our discussion. One should assume, however, that after Seller's counsel is finished with her 18 holes, she'll turn her able (and refreshed) negotiation skills to the rest of Buyer's "Wish List!"*

WALK RIGHT PROVISIONS: BUYER'S FIRST DRAFT

ARTICLE VII

COVENANTS

7.1. ***Advice of Changes***. Between the date of this Agreement and the Closing, the Company shall promptly advise Parent orally and in writing of (i) any representation or warranty made by it contained in this Agreement, becoming untrue or inaccurate in any material respect (without giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" set forth therein), (ii) the failure by it to comply, in any material respect, with or satisfy, in any material respect, any covenant, condition or agreement to be complied with or satisfied by it under this Agreement, (iii) any change, event or inaction that would reasonably be expected to cause the representations and warranties of the Company to become untrue or inaccurate in any material respect (without giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" set forth therein) and (iv) any change, event or inaction having, or which could reasonably be expected to have, a Company Material Adverse Effect; *provided, however*, that no such notification shall affect the representations, warranties, covenants or agreements of the parties (or remedies with respect thereto) or the conditions to the obligations of the parties under this Agreement. Should any such fact or condition disclosed, or required to be disclosed pursuant to this ***Section 7.1***, require any change to the Company Disclosure Letter, the Company shall promptly deliver to Parent an amendment to the Company Disclosure Letter specifying such change.

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ARTICLE VIII

CONDITIONS TO MERGER

8.2. ***Additional Conditions to Obligations of Parent and Merger Sub***. The obligations of Parent and Merger Sub to effect the Merger and otherwise consummate the transactions contemplated by this Agreement and the Related Agreements are subject to the satisfaction or written waiver, at or prior to the Closing, of each of the following conditions:

(a) ***Accuracy of Representations and Warranties***. Each of the representations and warranties made by the Company in this Agreement and in each of the other agreements and instruments delivered to Parent in connection with the transactions contemplated by this Agreement shall have been accurate in all respects as of the date of this Agreement (without giving effect to any amendment to the Company Disclosure Letter delivered by the Company to Parent after the date hereof), and shall be accurate in all respects as of the Closing Date as if made on the Closing Date (without giving effect to any amendment to the Company Disclosure Letter delivered by the Company to Parent prior to the Closing), except for those representations and warranties which address matters only as of a particular date (which shall remain accurate as of such date).

(b) ***Performance of Covenants***. The Company shall have performed or complied in all material respects with all terms, covenants and agreements that the Company is required to perform or comply with under this Agreement prior to the Closing.

(c) ***No Material Adverse Change***. Since the date of this Agreement, there has not been

any material adverse change in (x) the business, financial condition, capitalization, assets, liabilities, operations, results of operations, or prospects of the Company or its Subsidiaries, (y) the ability of the Company to consummate the Merger or any of the other transactions contemplated by this Agreement, to perform any of its obligations under this Agreement, or to fulfill its conditions to closing under this Agreement, or (z) the ability of Parent to own and operate the business of the Company after the Closing as it is presently being operated, and no event has occurred or circumstance exists that may result in such a material adverse change.

(d) ***Due Diligence***. Parent and MergerSub shall have conducted (and be satisfied, in their sole discretion, with the results of) their business, financial, accounting, legal, and other due diligence of the Company and its Subsidiaries.

(e) ***Financing***. Parent shall have obtained on terms and conditions satisfactory to it all of the financing it needs in order to consummate the transactions contemplated hereby and to fund the working capital requirements of the Parent and its Subsidiaries after the Closing.

(f) ***Stockholder Approval***. This Agreement shall have been duly adopted and approved and the Merger shall have been duly approved by the affirmative vote of at least a majority of the shares of Company Common Stock outstanding on the date of such vote and entitled to vote on a proposal to approve the Merger and the transactions contemplated hereby.

(g) ***Consents***. All Consents required to be obtained in connection with the Merger and the other transactions contemplated by this Agreement (including the Consents identified in Part [___] of the Company Disclosure Letter) shall have been obtained and shall be in full force and effect. ["***Consent***" means any approval, consent, ratification, permission, waiver or authorization (including any Governmental Authorization); "***Governmental Authorization***" means any: (a) approval, permit, license, certificate, franchise, permission, clearance, registration, qualification or other authorization issued, granted, given or otherwise made available by or under the authority of any Governmental Body or pursuant to any Legal Requirement; or (b) right under any Contract with any Governmental Body]

(h) ***No Conflict***. Neither the consummation nor the performance of any of the Contemplated Transactions will, directly or indirectly (with or without notice or lapse of time), contravene or conflict with or result in a violation of or cause Parent or any Related Person of Parent to suffer any adverse consequence under (a) any applicable Legal Requirement or Order or (b) any Legal Requirement or Order that has been published, introduced or otherwise proposed by or before any Governmental Body.

(i) ***No Restraints***. No temporary restraining order, preliminary or permanent injunction or other Order preventing the consummation of the Merger shall have been issued by any Governmental Body, and there shall not be any Legal Requirement enacted or deemed applicable to the Merger that makes consummation of the Merger illegal or unduly burdensome to Parent.

(j) ***No Governmental Proceedings***. There shall not be pending or threatened any Legal Proceeding in which a Governmental Body is, or has threatened to become, a party or is otherwise involved, and neither Parent nor the Company shall have received any communication from any Governmental Body in which such Governmental Body indicates the possibility of commencing any Legal Proceeding or taking any other action: (a) challenging or seeking to restrain or prohibit the consummation of the Merger or any of the other transactions contemplated by this Agreement or the Related Agreements; (b) relating to the Merger and seeking to obtain from Parent or any of its Subsidiaries, or the Company or any of its Subsidiaries, any damages or

other relief that may be material to Parent; (c) seeking to prohibit or limit in any material respect Parent's ability to vote, receive dividends with respect to or otherwise exercise ownership rights with respect to the stock of the Company or any of its Subsidiaries; or (d) which would materially and adversely affect the right of Parent or the Company or any Subsidiary of Parent to own the assets or operate the business of the Company or any of its Subsidiaries.

(k) ***No Other Proceedings***. There shall not be pending any Legal Proceeding that: (a) challenges or seeks to restrain or prohibit the consummation of the Merger or any of the other transactions contemplated by this Agreement; (b) relates to the Merger and seeks to obtain from Parent or any of its Subsidiaries, or any of the Company or any of its Subsidiaries, any damages or other relief that may be material to Parent; (c) seeks to prohibit or limit in any material respect Parent's ability to vote, receive dividends with respect to or otherwise exercise ownership rights with respect to the stock of the Company or any of its Subsidiaries; or (d) would affect adversely the right of the Company, Parent or any Subsidiary of Parent to own the assets or operate the business of the Company or any of its Subsidiaries.

(l) ***Ancillary Agreements and Documents***. Parent shall have received the following agreements and documents, each of which shall be in full force and effect:

(i) a certificate signed on behalf of the Company by the Chief Executive Officer and the Chief Financial Officer of the Company representing and warranting after reasonable investigation that the conditions set forth in ***Section 8.2(a)*** (*Accuracy of Representations and Warranties*) and ***Section 8.2(b)*** (*Performance of Covenants*) have been duly satisfied (the ***"Company Compliance Certificate"***); and

(ii) any other document, certificate or instrument reasonably requested by Parent.

(m) ***Certificate of Merger***. The Company shall have executed and delivered to Parent and the Merger Sub the Certificate of Merger to be filed with the Secretary of State of the State of Delaware in connection with the Merger.

(n) ***Opinion of Counsel***. The Company shall have delivered to Parent an opinion, dated the Effective Time and addressed to Parent, of Dora, Boots & Tico, LLP in the form attached as ***Exhibit [___]***.

(o) ***Tax Opinion***. Stanley, Dennis & Bahamen, LLP, counsel to Parent, shall have delivered to Parent an opinion, dated as of the date on which the Effective Time occurs and addressed to Parent, of Stanley, Dennis & Bahamen, LLP, in form and substance reasonably satisfactory to Parent to the effect that, on the basis of facts, representations and assumptions set forth in such opinion which are consistent with the state of facts existing at the Effective Time, (i) the Merger will be treated for federal income tax purposes as a reorganization within the meaning of Section 368(a) of the Code, and (ii) each of Parent, the Company and the Merger Sub will be a party to a reorganization within the meaning of Section 368(b) of the Code. (In rendering the opinion described in this ***Section 8.2(o)***, Stanley, Dennis & Bahamen, LLP will rely on customary assumptions and on representations, assumptions and facts provided by Parent and the Company).

(p) ***Nasdaq Listing***. The shares of Parent Common Stock to be issued in the Merger shall have been approved for listing on the Nasdaq.

(q) ***FIRPTA***. The Company shall have certified to Parent (in a form reasonably satisfactory to Parent) that the Company is not, and has not been for the relevant period specified

in Section 897 of the Code, a United States real property holding corporation within the meaning of Section 897 of the Code.

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ARTICLE X

TERMINATION

10.1 ***Termination Events.*** This Agreement may be terminated prior to the Closing:

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

(b) by either Parent or the Company, if any Order by any Governmental Body of competent jurisdiction preventing or prohibiting consummation of the Merger shall have become final and nonappealable; *provided, however,* that the party seeking to terminate this Agreement pursuant to this ***Section 10.1(b)*** must have used all reasonable efforts to remove any such Order;

(c) by either Parent or the Company if (i) the Company Stockholders Meeting (including any adjournment or postponement thereof) shall have been duly held and completed and the Company stockholders shall have taken a final vote on a proposal to approve and adopt the Merger, this Agreement and the Escrow Agreement and (ii) the Merger, this Agreement and the Escrow Agreement shall not have been adopted and approved by the Required Company Stockholder Vote; *provided, however,* that the Company shall not be permitted to terminate this Agreement pursuant to this ***Section 10.1(c)*** if the failure of the Company stockholders to adopt and approve the Merger, this Agreement and the Escrow Agreement is attributable to a failure on the part of the Company to perform its obligations under this Agreement;

(c) by Parent if any of the Company's representations and warranties contained in this Agreement shall have been materially inaccurate as of the date of this Agreement (without giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" set forth therein) or shall have become materially inaccurate as of any subsequent date (as if made on such subsequent date and without giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" set forth therein), or if the Company breaches or fails to perform, in any material respect, any of its covenants contained in this Agreement, which inaccuracy, breach, or failure to perform (i) would give rise to the failure of a condition set forth in ***Sections 8.2(a)*** (*Accuracy of Representations and Warranties*) or ***8.2(b)*** (*Performance of Covenants*) and (ii) is incapable of being, or is not, cured by the Company within five business days of notice thereof;

(d) by the Company if any of Parent's representations and warranties contained in this Agreement shall have been materially inaccurate as of the date of this Agreement (without giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" set forth therein) or shall have become materially inaccurate as of any subsequent date (as if made on such subsequent date and without giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" set forth therein), or if Parent or MergerSub breaches or fails to perform, any material respect, any of their respective covenants contained in this Agreement; which inaccuracy, breach, or failure to perform (i) would give rise to the failure of a condition set forth in ***Sections 8.3(a)*** (*Accuracy of Representations and Warranties*) or ***8.3(b)*** (*Performance of Covenants*) and (ii) is incapable of being, or is not, cured by Parent or MergerSub within five business days of notice thereof; or

(e) by the Company or Parent if the Closing has not taken place on or before **[_____]**, 2002 (the ***"Drop-Dead Date"***) (other than as a result of any inaccuracy of any representation or warranty of the terminating party or any prior breach by the terminating party of any covenant, obligation or other provision of this Agreement).

10.2. ***Termination Procedures.*** If either party wishes to terminate this Agreement pursuant to ***Section 10.1***, it shall deliver to the other party a written notice stating that it is terminating this Agreement and setting forth a brief description of the basis on which it is terminating this Agreement.

10.3. ***Effect of Termination.*** If this Agreement is terminated pursuant to ***Section 10.1***, all further obligations of the parties under this Agreement shall terminate; *provided, however*, that: (a) neither the Company nor Parent shall be relieved of any obligation or liability arising from any inaccuracy of any representation or warranty of such party or from any prior breach by such party of any covenant, obligation or other provision of this Agreement; (b) the parties shall, in all events, remain bound by and continue to be subject to the provisions set forth in ***Section 12*** (*General*); (c) the Company shall, in all events, remain bound by and continue to be subject to [certain covenants]; and [(d) no party shall be liable for any consequential or punitive damages.]

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ARTICLE XI

INDEMNIFICATION

11.2. ***Indemnification by the Company and Principal Stockholders***. Parent and its affiliates (including the Company after the Closing), officers, directors, employees, agents, successors and assigns (each, a "***Parent Indemnified Party***") shall be indemnified and held harmless by the Company before the Effective Time and, jointly and severally by the Principal Stockholders, after the Effective Time for any and all Liabilities, Taxes, losses, damages, claims, costs and expenses, interest, awards, judgments and penalties (including, without limitation, attorneys' and consultants' fees and expenses actually suffered or incurred by them (including, without limitation, any Action brought or otherwise initiated by any of them) (hereinafter, a "***Loss***"), arising out of or resulting from:

(a) any inaccuracy in or breach or alleged breach of any representation or warranty made by the Company in (i) this Agreement (without giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" or any similar qualification contained or incorporated directly or indirectly in such representation or warranty, and without giving effect to any amendment to the Company Disclosure Letter), (ii) the Company Disclosure Letter, (iii) any amendments to the Company Disclosure Letter, (iv) the Company Compliance Certificate (for this purpose, such certificate will be deemed to have stated that the Company's representations and warranties in this Agreement fulfill the requirements of ***Section 8.2(a)*** *[Accuracy of Representations ad Warranties]*as of the Closing Date as if made on the Closing Date without giving effect to any amendment to the Company Disclosure Letter, unless the certificate expressly states that the matters disclosed in an amendment have caused a condition specified in ***Section 8.2(b)*** [*Performance of Covenants*] not to be satisfied), or (v) any other certificate, document, writing or instrument delivered by the Company pursuant to this Agreement;

(b) any breach or alleged breach of any covenant or obligation of the Company; …

WALK RIGHT PROVISIONS: SELLER'S MARKUP (CLEAN)

ARTICLE VII

COVENANTS

7.1. ***Advice of Changes***. Between the date of this Agreement and the Closing, the Company shall promptly advise Parent orally and in writing, to the extent the Company has Knowledge, of (i) any representation or warranty made by it contained in this Agreement, becoming untrue or inaccurate in any material respect (after giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" set forth therein), (ii) the failure by it to comply, in any material respect, with or satisfy, in any material respect, any covenant, condition or agreement to be complied with or satisfied by it in accordance with this Agreement, except for such failures to comply or satisfy that do not have and are not reasonably likely to have, individually or in the aggregate, a Company Material Adverse Effect; (iii) any change, event or inaction having, or which could reasonably be expected to have, a Company Material Adverse Effect; *provided, however*, that no such notification shall affect the representations, warranties, covenants or agreements of the parties (or remedies with respect thereto) or the conditions to the obligations of the parties under this Agreement. Should any such fact or condition disclosed, or required to be disclosed pursuant to this ***Section 7.1***, require any change to the Company Disclosure Letter, the Company shall promptly deliver to Parent an amendment to the Company Disclosure Letter specifying such change; *provided that*, the foregoing shall not limit the ability of the Company to provide amendments to the Company Disclosure Letter pursuant to ***Section 7.2*** below.

*["**Knowledge**" means the actual knowledge of the officers of the Company listed on **Schedule 7.1** hereto.]*

7.2. ***Subsequent Amendments of Company Disclosure Letter***. The Company shall have the right after the date hereof but not later than five (5) days prior to the Closing Date to deliver to Parent written amendments to the applicable Sections of the Company Disclosure Letter. To the extent that any such amendment does not disclose any event or condition that, individually or in the aggregate with all other events or conditions disclosed in such amendment, would be reasonably likely to have a Company Material Adverse Effect, such amendment shall be deemed accepted by Parent, and the relevant Section of such Disclosure Letter shall be deemed amended accordingly thereby. To the extent any such amendment discloses events or conditions that would be reasonably expected to have a Company Material Adverse Effect, Parent shall have the right to terminate this Agreement by giving the other written notice of such termination within five (5) days of its receipt of such amendment.

7.3. ***Consummation of Financing***. Parent will use its reasonable commercial efforts to obtain the financing required for the consummation of the Merger pursuant to the Financing Letters and to satisfy all conditions to funding as set forth in the Financing Letters. To the extent that any portion of the financing contemplated by the Financing Letters becomes unavailable, Parent will use its reasonable commercial efforts to arrange for alternative financing for the Merger.

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ARTICLE VIII

CONDITIONS TO MERGER

8.2. ***Additional Conditions to Obligations of Parent and Merger Sub***. The obligations of Parent and Merger Sub to effect the Merger and otherwise consummate the transactions contemplated by this Agreement and the Related Agreements are subject to the satisfaction or written waiver, at or prior to the Closing, of each of the following conditions:

(a) ***Accuracy of Representations and Warranties***. Each of the representations and warranties made by the Company in this Agreement and in each of Related Agreements delivered to Parent in connection with the transactions contemplated by this Agreement shall have been accurate in all material respects as of the Closing Date as if made on the Closing Date (after giving effect, pursuant to ***Section 7.2*** [*Subsequent Amendments of Company Disclosure Letter*], to any amendment to the Company Disclosure Letter delivered by the Company to Parent prior to the Closing), except (i) for those representations and warranties which address matters only as of a particular date (which shall remain accurate as of such date), (ii) as affected by the transactions contemplated hereby, and (iii) any inaccuracy that does not have a Company Material Adverse Effect.

(b) ***Performance of Covenants***. The Company shall have performed or complied in all material respects with all terms, covenants and agreements that the Company is required to perform or comply with under this Agreement prior to the Closing, except for such non-performance or non-compliance that does not have a Company Material Adverse Effect.

(c) ***No Material Adverse Effect***. Since the date of this Agreement, there shall not have occurred a Company Material Adverse Effect.

> *"**Company Material Adverse Effect**" means any event, change or occurrence (either individually or considered together with other events, changes or occurrences) that has a material adverse effect on (x) the business, financial condition, assets, or operations of the Company and its Subsidiaries, taken as a whole, or (y) the ability of the Company to consummate the Merger or any of the other transactions contemplated by this Agreement, to perform any of its obligations under this Agreement, or to fulfill its conditions to closing under this Agreement, provided, however, that no adverse change, effect, event, occurrence, state of facts or development to the extent it is a result of or attributable to any of the following shall be deemed in themselves, either alone or in combination, to constitute, and none of the following shall be taken into account in determining whether there has been, or will be, a "Company Material Adverse Effect":*
>
> *(a) any matter disclosed in the Company Disclosure Letter;*
>
> *(b) any effect to the extent attributable to any breach by the Parent or Merger Sub of any covenant or obligation set forth in this Agreement;*
>
> *(c) the announcement or pendency of the transactions contemplated hereby (including any cancellations of or delays in*

customer orders, any reduction in sales, any disruption in supplier, distributor, partner or similar relationships or any loss of employees);

(d) any conditions affecting the industries in which the Company participates, the U.S. economy (including its financial markets) as a whole, or foreign economies (including their applicable financial markets) in any locations where the Company or any of its subsidiaries has material operations or sales;

(e) any (i) out-of-pocket fees and expenses (including legal, accounting, investment banking and other fees and expenses) incurred in connection with the transactions contemplated hereby, or (ii) the payment of any amounts due to, or the provision of any other benefits (including benefits relating to acceleration of stock options) to, any officers or employees under employment contracts, non-competition agreements, employee benefit plans, severance arrangements or other arrangements in existence as of the date of this Agreement;

(f) compliance with the terms of, or the taking of any action required by, this Agreement;

(g) any change in accounting requirements or principles or any change in applicable legal requirements or the interpretation thereof;

(h) any actions required to be taken under applicable legal requirements; or

(i) any depletion of the Company's liquidity and capital resources through the incurrence of continued operating losses consistent with past experience.

(d) ***Due Diligence***. Parent and MergerSub shall not have discovered any matter in connection with their business, financial, accounting, legal, and other due diligence of the Company and its Subsidiaries that has, or would reasonably be expected to have, a Company Material Adverse Effect.

(e) ***Financing***. Parent shall have received the financing proceeds under the Financing Letters on the terms and conditions set forth therein or upon terms and conditions which are substantially equivalent or superior thereto, and to the extent any of the terms and conditions are not as so set forth or substantially equivalent or superior, on terms and conditions reasonably satisfactory to Parent; *provided,* that Parent shall have complied with the provisions of ***Section 7.3*** (*Consummation of Financing*).

*(Related Parent's Representation): "**Financing**. Parent has previously delivered to the Company the following: (a) a fully executed commitment letter (the "**Senior Debt Letter**") from FreeMoney, N.A. (the "**Bank**") and accepted by Parent providing the detailed terms and conditions upon which the Bank has committed to provide the entire senior debt and revolving credit portion of the financing required in connection with the Merger, and (b) the executed Equity Commitment Letter (together with the Senior Debt Letter, the "**Financing Letters**"). Each of the Financing Letters is in full force and effect on the date*

hereof and has not been amended or modified, and there is no breach or default existing (or which with notice or lapse of time or otherwise may exist) thereunder. The aggregate proceeds of the financing contemplated by the Financing Letters are sufficient to pay the cash portion of the Merger Consideration, to repay the existing indebtedness of the Company and its subsidiaries (excluding any indebtedness the parties agree shall not be repaid) and to pay all fees and expenses to be paid by Parent related to the transactions contemplated by this Agreement.

(f) ***Ancillary Agreements and Documents***. Parent shall have received the following agreements and documents, each of which shall be in full force and effect:

(i) a certificate signed on behalf of the Company by the Chief Executive Officer and the Chief Financial Officer of the Company representing and warranting after reasonable investigation that the conditions set forth in ***Section 8.2(a)*** (*Accuracy of Representations and Warranties*) and ***Section 8.2(b)*** (*Performance of Covenants*) have been duly satisfied (the ***"Company Compliance Certificate"***); *provided, however*, that in the event (x) the Company has complied with its obligations pursuant to ***Section 7.1*** (*Advice of Changes*) and is unable to deliver a certificate which satisfies the requirements of this ***Section 8.2(f)(i)*** solely as a result of the occurrence of events after the date of this Agreement ("***Material Subsequent Events***"), (y) the Company delivers a Company Compliance Certificate which otherwise satisfies the requirements of this ***Section 8.2(f)(i)*** and is otherwise qualified solely by the Material Subsequent Events, and (z) neither parent not Merger Sub are obligated to proceed to Closing as a result of the occurrence of the Material Subsequent Events but nevertheless elects to do so in their sole discretion, then (A) the Company shall nevertheless be deemed to have satisfied its obligations under this ***Section 8.2(f)(i),*** and (B) the Company's representations, warranties and covenants as of the Closing Date contained in this Agreement shall be deemed qualified by the Material Subsequent Events disclosed in the Company Certificate;

…

8.4 ***Frustration of Conditions***. Neither Parent or Merger Sub, on one hand, nor the Company, on the other, may rely on the failure of any condition set forth in this ***Article VIII*** to be satisfied if such failure was caused by such party's failure to comply with or perform any of its covenants set forth in this Agreement.

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ARTICLE X

TERMINATION

10.1 ***Termination Events.*** This Agreement may be terminated prior to the Closing:

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

(b) by either Parent or the Company, if any Order by any Governmental Body of competent jurisdiction preventing or prohibiting consummation of the Merger shall have become final and nonappealable; *provided, however,* that the party seeking to terminate this Agreement pursuant to this ***Section 10.1(b)*** shall have (x) used all reasonable efforts to remove any such Order, and (y) provided the other party (i) with prompt prior written notice of such Order, or the likelihood of such Order, and (ii) a meaningful opportunity to control, at the other party's expense, the removal of such Order;

(c) by either Parent or the Company if (i) the Company Stockholders Meeting (including any adjournment or postponement thereof) shall have been duly held and completed and the Company stockholders shall have taken a final vote on a proposal to approve and adopt the Merger, this Agreement and the Escrow Agreement and (ii) the Merger, this Agreement and the Escrow Agreement shall not have been adopted and approved by the Required Company Stockholder Vote; *provided, however,* that the Company shall not be permitted to terminate this Agreement pursuant to this ***Section 10.1(c)*** if the failure of the Company stockholders to adopt and approve the Merger, this Agreement and the Escrow Agreement is attributable to a failure on the part of the Company to perform its obligations under this Agreement, unless the failure results from the breach by Parent or Merger Sub of any their representations, warranties or covenants contained in this Agreement or Related Agreements;

(d) by Parent if, after giving effect to any amendments to the Company Disclosure Schedule pursuant to ***Section 7.2*** (*Subsequent Amendments of Company Disclosure Letter*), any of the Company's representations and warranties contained in this Agreement shall have been materially inaccurate as of the date of this Agreement (without giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" set forth therein) or shall have become materially inaccurate as of any subsequent date (as if made on such subsequent date and without giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" set forth therein), or if the Company breaches or fails to perform, in any material respect, any of its covenants contained in this Agreement, which inaccuracy, breach, or failure to perform (i) would give rise to the failure of a condition set forth in ***Sections 8.2(a)*** (*Accuracy of Representations and Warranties*) or ***8.2(b)*** (*Performance of Covenants*) and (ii) is incapable of being, or is not, cured by the Company within twenty business days of notice thereof;

(e) by the Company if any of Parent's representations and warranties contained in this Agreement shall have been materially inaccurate as of the date of this Agreement (without giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" set forth therein) or shall have become materially inaccurate as of any subsequent date (as if made on such subsequent date and without giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" set forth therein), or if Parent or MergerSub breaches or fails to perform, any material respect, any of their respective covenants contained in this Agreement; which inaccuracy, breach, or failure to perform (i) would give rise to the failure of a condition set forth in ***Sections 8.3(a)*** (*Accuracy of Representations and Warranties*) or ***8.3(b)***

(*Performance of Covenants*) and (ii) is incapable of being, or is not, cured by Parent or MergerSub within five business days of notice thereof;

(f) by Parent pursuant to ***Section 7.2*** (*Subsequent Amendments of Company Disclosure Letter*); or

(g) by the Company or Parent if the Closing has not taken place on or before **[_____]**, 2002 (the ***"Drop-Dead Date"***) (other than as a result of any inaccuracy of any representation or warranty of the terminating party or any prior breach by the terminating party of any covenant, obligation or other provision of this Agreement).

10.2. ***Termination Procedures.*** If either party wishes to terminate this Agreement pursuant to ***Section 10.1***, it shall deliver to the other party a written notice stating that it is terminating this Agreement and setting forth a brief description of the basis on which it is terminating this Agreement.

10.3. ***Effect of Termination.*** If this Agreement is terminated pursuant to ***Section 10.1***, all further obligations of the parties under this Agreement shall terminate; *provided, however*, that: (a) none of the Company, Parent, or Merger Sub shall be relieved of any obligation or liability arising from any inaccuracy of any representation or warranty of such party or from any prior breach by such party of any covenant, obligation or other provision of this Agreement; (b) the parties shall, in all events, remain bound by and continue to be subject to the provisions set forth in ***Section 12*** (*General*); (c) the Company shall, in all events, remain bound by and continue to be subject to [certain covenants]; and [(d) no party shall be liable for any consequential or punitive damages.]

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ARTICLE XI

INDEMNIFICATION

11.2. ***Indemnification by Principal Stockholders***. From and after the Closing, Parent and its affiliates (including the Company), officers, directors, employees, agents, successors and assigns (each, a "***Parent Indemnified Party***") shall be indemnified and held harmless by the Principal Stockholders, severally but not jointly, for any and all Liabilities, Taxes, losses, damages, claims, costs and expenses, interest, awards, judgments and penalties (including, without limitation, attorneys' and consultants' fees and expenses actually suffered or incurred by them (including, without limitation, any Action brought or otherwise initiated by any of them) (hereinafter, a "***Loss***"), arising out of or resulting from:

(a) any inaccuracy in or breach or alleged breach of any representation or warranty made by the Company in (i) this Agreement (after giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" or any similar qualification contained or incorporated directly or indirectly in such representation or warranty, and after giving effect to any amendment, made pursuant to ***Section 7.2***, to the Company Disclosure Letter), (ii) the Company Disclosure Letter, (iii) any amendments to the Company Disclosure Letter, (iv) the Company Compliance Certificate (for this purpose, such certificate will be deemed to have stated that the Company's representations and warranties in this Agreement fulfill the requirements of ***Section 8.2(a)*** *[Accuracy of Representations and Warranties]*as of the Closing Date as if made on

the Closing Date after giving effect to any amendment, made pursuant to ***Section 7.2***, to the Company Disclosure Letter, unless the certificate expressly states that the matters disclosed in an amendment have caused a condition specified in ***Section 8.2(b)*** [*Performance of Covenants*] not to be satisfied), or (v) any other certificate, document, writing or instrument delivered by the Company pursuant to this Agreement, except for any inaccuracy or breach under ***(i)-(v)*** above does not result in a Company Material Adverse Effect;

(b) any breach or alleged breach of any covenant or obligation of the Company, except for any breach or alleged breach that does not result in a Company Material Adverse Effect; …

WALK RIGHT PROVISIONS: SELLER'S MARKUP (REDLINE)

ARTICLE VII
COVENANTS

7.1. ***Advice of Changes***. Between the date of this Agreement and the Closing, the Company shall promptly advise Parent orally and in writing**, to the extent the Company has Knowledge,** of (i) any representation or warranty made by it contained in this Agreement, becoming untrue or inaccurate in any material respect ~~(without~~**(after** giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" set forth therein), (ii) the failure by it to comply, in any material respect, with or satisfy, in any material respect, any covenant, condition or agreement to be complied with or satisfied by it in accordance with this Agreement,**except for such failures to comply or satisfy that do not have and are not reasonably likely to have, individually or in the aggregate, a Company Material Adverse Effect;** (iii) any change, ~~event or inaction that would reasonably be expected to cause the representations and warranties of the Company to become untrue or inaccurate in any material respect (without giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" set forth therein) and (iv) any change,~~ event or inaction having, or which could reasonably be expected to have, a Company Material Adverse Effect; *provided, however*, that no such notification shall affect the representations, warranties, covenants or agreements of the parties (or remedies with respect thereto) or the conditions to the obligations of the parties under this Agreement. Should any such fact or condition disclosed, or required to be disclosed pursuant to this ***Section 7.1***, require any change to the Company Disclosure Letter, the Company shall promptly deliver to Parent an amendment to the Company Disclosure Letter specifying such change**; *provided that*, the foregoing shall not limit the ability of the Company to provide amendments to the Company Disclosure Letter pursuant to *Section 7.2* below.**

["Knowledge" means the actual knowledge of the officers of the Company listed on Schedule 7.1 hereto.]

7.2. *Subsequent Amendments of Company Disclosure Letter*. The Company shall have the right after the date hereof but not later than five (5) days prior to the Closing Date to deliver to Parent written amendments to the applicable Sections of the Company Disclosure Letter. To the extent that any such amendment does not disclose any event or condition that, individually or in the aggregate with all other events or conditions disclosed in such amendment, would be reasonably likely to have a Company Material Adverse Effect, such amendment shall be deemed accepted by Parent, and the relevant Section of such Disclosure Letter shall be deemed amended accordingly thereby. To the extent any such amendment discloses events or conditions that would be reasonably expected to have a Company Material Adverse Effect, Parent shall have the right to terminate this Agreement by giving the other written notice of such termination within five (5) days of its receipt of such amendment.

7.3. *Consummation of Financing*. Parent will use its reasonable commercial efforts to obtain the financing required for the consummation of the Merger pursuant to the Financing Letters and to satisfy all conditions to funding as set forth in the Financing Letters. To the extent that any portion of the financing contemplated by the Financing Letters becomes unavailable, Parent will use its reasonable commercial efforts to arrange for alternative financing for the Merger.

ARTICLE VIII

CONDITIONS TO MERGER

8.2. ***Additional Conditions to Obligations of Parent and Merger Sub***. The obligations of Parent and Merger Sub to effect the Merger and otherwise consummate the transactions contemplated by this Agreement and the Related Agreements are subject to the satisfaction or written waiver, at or prior to the Closing, of each of the following conditions:

(a) ***Accuracy of Representations and Warranties***. Each of the representations and warranties made by the Company in this Agreement and in each of ~~the other agreements and instruments~~ **Related Agreements** delivered to Parent in connection with the transactions contemplated by this Agreement shall have been accurate in all ~~respects as of the date of this Agreement (without giving effect~~ **material respects as of the Closing Date as if made on the Closing Date (after giving effect, pursuant to *Section 7.2* [*Subsequent Amendments of Company Disclosure Letter*],** to any amendment to the Company Disclosure Letter delivered by the Company to Parent ~~after the date hereof), and shall be accurate in all respects as of the Closing Date as if made on the Closing Date (without giving effect to any amendment to the Company Disclosure Letter delivered by the Company to Parent~~ prior to the Closing), except **(i)** for those representations and warranties which address matters only as of a particular date (which shall remain accurate as of such date)**, (ii) as affected by the transactions contemplated hereby, and (iii) any inaccuracy that does not have a Company Material Adverse Effect**.

(b) ***Performance of Covenants***. The Company shall have performed or complied in all material respects with all terms, covenants and agreements that the Company is required to perform or comply with under this Agreement prior to the Closing**, except for such non-performance or non-compliance that does not have a Company Material Adverse Effect**.

(c) ***No Material Adverse ~~Change~~ Effect***. Since the date of this Agreement, there ~~has not been any material adverse change in~~ **shall not have occurred a Company Material Adverse Effect.**

> ***"Company Material Adverse Effect" means any event, change or occurrence (either individually or considered together with other events, changes or occurrences) that has a material adverse effect on*** *(x) the business, financial condition, ~~capitalization,~~ assets, ~~liabilities,~~* ***or*** *operations ~~, results of operations, or prospects~~ of the Company ~~or~~* ***and*** *its Subsidiaries,* ***taken as a whole, or*** *(y) the ability of the Company to consummate the Merger or any of the other transactions contemplated by this Agreement, to perform any of its obligations under this Agreement, or to fulfill its conditions to closing under this Agreement, ~~or (z) the ability of Parent to own and operate the business of the Company after the Closing as it is presently being operated, and no event has occurred or circumstance exists that may result in such a material adverse change.~~* ***provided, however, that no adverse change, effect, event, occurrence, state of facts or development to the extent it is a result of or attributable to any of the following shall be deemed in themselves, either alone or in combination, to constitute, and none of the following shall be taken into account in determining whether there has been, or will be, a "Company Material Adverse Effect":***

(a) any matter disclosed in the Company Disclosure Letter;

(b) any effect to the extent attributable to any breach by the Parent or Merger Sub of any covenant or obligation set forth in this Agreement;

(c) the announcement or pendency of the transactions contemplated hereby (including any cancellations of or delays in customer orders, any reduction in sales, any disruption in supplier, distributor, partner or similar relationships or any loss of employees);

(d) any conditions affecting the industries in which the Company participates, the U.S. economy (including its financial markets) as a whole, or foreign economies (including their applicable financial markets) in any locations where the Company or any of its subsidiaries has material operations or sales;

(e) any (i) out-of-pocket fees and expenses (including legal, accounting, investment banking and other fees and expenses) incurred in connection with the transactions contemplated hereby, or (ii) the payment of any amounts due to, or the provision of any other benefits (including benefits relating to acceleration of stock options) to, any officers or employees under employment contracts, non-competition agreements, employee benefit plans, severance arrangements or other arrangements in existence as of the date of this Agreement;

(f) compliance with the terms of, or the taking of any action required by, this Agreement;

(g) any change in accounting requirements or principles or any change in applicable legal requirements or the interpretation thereof;

(h) any actions required to be taken under applicable legal requirements; or

(i) any depletion of the Company's liquidity and capital resources through the incurrence of continued operating losses consistent with past experience.

(d) ***Due Diligence***. Parent and MergerSub shall ~~have conducted (and be satisfied, in their sole discretion,~~ **not have discovered any matter in connection** with ~~the results of)~~ their business, financial, accounting, legal, and other due diligence of the Company and its Subsidiaries **that has, or would reasonably be expected to have, a Company Material Adverse Effect**.

(e) ***Financing***. Parent shall have ~~obtained on~~ **received the financing proceeds under the Financing Letters on the** terms and conditions ~~satisfactory to it all of the financing it needs in order to consummate~~ **set forth therein or upon terms and conditions which are substantially equivalent or superior thereto, and to the extent any of the terms and**

conditions are not as so set forth or substantially equivalent or superior, on terms and conditions reasonably satisfactory to Parent; *provided,* that Parent shall have complied with the provisions of *Section 7.3* (*Consummation of Financing*).

> ***(Related Parent's Representation): "Financing. Parent has previously delivered to the Company the following: (a) a fully executed commitment letter (the "Senior Debt Letter") from FreeMoney, N.A. (the "Bank") and accepted by Parent providing the detailed terms and conditions upon which the Bank has committed to provide the entire senior debt and revolving credit portion of the financing required in connection with the Merger, and (b) the executed Equity Commitment Letter (together with the Senior Debt Letter, the "Financing Letters"). Each of the Financing Letters is in full force and effect on the date hereof and has not been amended or modified, and there is no breach or default existing (or which with notice or lapse of time or otherwise may exist) thereunder. The aggregate proceeds of the financing contemplated by the Financing Letters are sufficient to pay the cash portion of the Merger Consideration, to repay the existing indebtedness of the Company and its subsidiaries (excluding any indebtedness the parties agree shall not be repaid) and to pay all fees and expenses to be paid by Parent related to*** *the transactions contemplated* ~~*hereby and to fund the working capital requirements of the Parent and its Subsidiaries after the Closing.*~~ ***by this Agreement.***

(f) ***Ancillary Agreements and Documents***. Parent shall have received the following agreements and documents, each of which shall be in full force and effect:

> (i) a certificate signed on behalf of the Company by the Chief Executive Officer and the Chief Financial Officer of the Company representing and warranting after reasonable investigation that the conditions set forth in ***Section 8.2(a)*** (*Accuracy of Representations and Warranties*) and ***Section 8.2(b)*** (*Performance of Covenants*) have been duly satisfied (the ***"Company Compliance Certificate"***); ***provided, however,* that in the event (x) the Company has complied with its obligations pursuant to *Section 7.1* (*Advice of Changes*) and is unable to deliver a certificate which satisfies the requirements of this *Section 8.2(f)(i)* solely as a result of the occurrence of events after the date of this Agreement ("*Material Subsequent Events*"), (y) the Company delivers a Company Compliance Certificate which otherwise satisfies the requirements of this *Section 8.2(f)(i)* and is otherwise qualified solely by the Material Subsequent Events, and (z) neither parent not Merger Sub are obligated to proceed to Closing as a result of the occurrence of the Material Subsequent Events but nevertheless elects to do so in their sole discretion, then (A) the Company shall nevertheless be deemed to have satisfied its obligations under this *Section 8.2(f)(i),* and (B) the Company's representations, warranties and covenants as of the Closing Date contained in this Agreement shall be deemed qualified by the Material Subsequent Events disclosed in the Company Certificate;**

...

8.4 ***Frustration of Conditions.*** **Neither Parent or Merger Sub, on one hand, nor the Company, on the other, may rely on the failure of any condition set forth in this *Article***

VIII **to be satisfied if such failure was caused by such party's failure to comply with or perform any of its covenants set forth in this Agreement.**

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ARTICLE X

TERMINATION

10.1 ~~.~~ ***Termination Events.*** This Agreement may be terminated prior to the Closing:

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

(b) by either Parent or the Company, if any Order by any Governmental Body of competent jurisdiction preventing or prohibiting consummation of the Merger shall have become final and nonappealable; *provided, however,* that the party seeking to terminate this Agreement pursuant to this ***Section 10.1(b)*** ~~must~~ **shall** have **(x)** used all reasonable efforts to remove any such Order**, and (y) provided the other party (i) with prompt prior written notice of such Order, or the likelihood of such Order, and (ii) a meaningful opportunity to control, at the other party's expense, the removal of such Order**;

(c) by either Parent or the Company if (i) the Company Stockholders Meeting (including any adjournment or postponement thereof) shall have been duly held and completed and the Company stockholders shall have taken a final vote on a proposal to approve and adopt the Merger, this Agreement and the Escrow Agreement and (ii) the Merger, this Agreement and the Escrow Agreement shall not have been adopted and approved by the Required Company Stockholder Vote; *provided, however,* that the Company shall not be permitted to terminate this Agreement pursuant to this ***Section 10.1(c)*** if the failure of the Company stockholders to adopt and approve the Merger, this Agreement and the Escrow Agreement is attributable to a failure on the part of the Company to perform its obligations under this Agreement**, unless the failure results from the breach by Parent or Merger Sub of any their representations, warranties or covenants contained in this Agreement or Related Agreements;**~~;~~

~~**(d) by Parent if**~~ **(d) by Parent if, after giving effect to any amendments to the Company Disclosure Schedule pursuant to *Section 7.2* (*Subsequent Amendments of Company Disclosure Letter*),** any of the Company's representations and warranties contained in this Agreement shall have been materially inaccurate as of the date of this Agreement (without giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" set forth therein) or shall have become materially inaccurate as of any subsequent date (as if made on such subsequent date and without giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" set forth therein), or if the Company breaches or fails to perform, in any material respect, any of its covenants contained in this Agreement, which inaccuracy, breach, or failure to perform (i) would give rise to the failure of a condition set forth in ***Sections 8.2(a)*** (*Accuracy of Representations and Warranties*) or ***8.2(b)*** (*Performance of Covenants*) and (ii) is incapable of being, or is not, cured by the Company within ~~five~~ **twenty** business days of notice thereof;

(e) by the Company if any of Parent's representations and warranties contained in this Agreement shall have been materially inaccurate as of the date of this Agreement (without

giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" set forth therein) or shall have become materially inaccurate as of any subsequent date (as if made on such subsequent date and without giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" set forth therein), or if Parent or MergerSub breaches or fails to perform, any material respect, any of their respective covenants contained in this Agreement; which inaccuracy, breach, or failure to perform (i) would give rise to the failure of a condition set forth in ***Sections 8.3(a)*** (*Accuracy of Representations and Warranties*) or ***8.3(b)*** (*Performance of Covenants*) and (ii) is incapable of being, or is not, cured by Parent or MergerSub within five business days of notice thereof;

~~or~~

(f) by Parent pursuant to *Section 7.2* (*Subsequent Amendments of Company Disclosure Letter*); or

~~(f)~~

(g) by the Company or Parent if the Closing has not taken place on or before **[_____]**, 2002 (the ***"Drop-Dead Date"***) (other than as a result of any inaccuracy of any representation or warranty of the terminating party or any prior breach by the terminating party of any covenant, obligation or other provision of this Agreement).

10.2. ***Termination Procedures.*** If either party wishes to terminate this Agreement pursuant to ***Section 10.1***, it shall deliver to the other party a written notice stating that it is terminating this Agreement and setting forth a brief description of the basis on which it is terminating this Agreement.

10.3. ***Effect of Termination.*** If this Agreement is terminated pursuant to ***Section 10.1***, all further obligations of the parties under this Agreement shall terminate; *provided, however*, that: (a) ~~neither~~ **none of** the Company ~~nor~~**,** Parent**, or Merger Sub** shall be relieved of any obligation or liability arising from any inaccuracy of any representation or warranty of such party or from any prior breach by such party of any covenant, obligation or other provision of this Agreement; (b) the parties shall, in all events, remain bound by and continue to be subject to the provisions set forth in ***Section 12*** (*General*); (c) the Company shall, in all events, remain bound by and continue to be subject to [certain covenants]; and [(d) no party shall be liable for any consequential or punitive damages.]

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ARTICLE XI

INDEMNIFICATION

11.2. ***Indemnification by ~~the Company and~~ Principal Stockholders***. **From and after the Closing,** Parent and its affiliates (including the Company ~~after the Closing)~~**)**, officers, directors, employees, agents, successors and assigns (each, a "***Parent Indemnified Party***") shall be indemnified and held harmless by the ~~Company before the Effective Time and, jointly and severally by the~~ Principal Stockholders, ~~after the Effective Time~~ **severally but not jointly,** for any and all Liabilities, Taxes, losses, damages, claims, costs and expenses, interest, awards, judgments and penalties (including, without limitation, attorneys' and consultants' fees and

expenses actually suffered or incurred by them (including, without limitation, any Action brought or otherwise initiated by any of them) (hereinafter, a "***Loss***"), arising out of or resulting from:

(a) any inaccuracy in or breach or alleged breach of any representation or warranty made by the Company in (i) this Agreement ~~(without~~**(after** giving effect to any qualification or limitation as to "materiality" or "Company Material Adverse Effect" or any similar qualification contained or incorporated directly or indirectly in such representation or warranty, and ~~without~~ **after** giving effect to any amendment**, made pursuant to *Section 7.2*,** to the Company Disclosure Letter), (ii) the Company Disclosure Letter, (iii) any amendments to the Company Disclosure Letter, (iv) the Company Compliance Certificate (for this purpose, such certificate will be deemed to have stated that the Company's representations and warranties in this Agreement fulfill the requirements of ***Section 8.2(a)*** *[Accuracy of Representations and Warranties]*as of the Closing Date as if made on the Closing Date ~~without~~ **after** giving effect to any amendment**, made pursuant to *Section 7.2*,** to the Company Disclosure Letter, unless the certificate expressly states that the matters disclosed in an amendment have caused a condition specified in ***Section 8.2(b)*** [*Performance of Covenants*] not to be satisfied), or (v) any other certificate, document, writing or instrument delivered by the Company pursuant to this Agreement**, except for any inaccuracy or breach under *(i)-(v)* above does not result in a Company Material Adverse Effect**;

(b) any breach or alleged breach of any covenant or obligation of the Company**, except for any breach or alleged breach that does not result in a Company Material Adverse Effect**; …

SELECTED CLOSING CONDITIONS: EXCERPTS FROM "CLOSING CONDITIONS" SECTION OF BUYER'S FORM OF STOCK PURCHASE AGREEMENT

EXCERPTS FROM "CLOSING CONDITIONS" SECTION OF BUYER'S FORM OF STOCK PURCHASE AGREEMENT

CONDITIONS TO BUYER'S OBLIGATION TO PURCHASE SHARES. Buyer's obligation to purchase the Shares is subject to the satisfaction, at or prior to the Closing, of each of the following conditions:

(a) ***Accuracy of Representations***. Each of the representations and warranties made by Seller in this Agreement shall have been accurate in all material respects as of the date of this Agreement and shall be accurate in all material respects as of the Closing Date as if made on the Closing Date.

* * *

(e) ***No Material Adverse Change***. There shall have been no material adverse change in the business, condition (financial or otherwise), capitalization, assets (tangible or intangible), liabilities (fixed, contingent or otherwise), operations, revenues, net income, financial performance or prospects of Target or any of its subsidiaries, and no event shall have occurred or circumstance shall exist that could reasonably be expected to result in such a material adverse change.

(f) ***No Litigation***. There shall not be pending, and there shall not have been threatened, any suit, action, proceeding, investigation or inquiry: (i) challenging or seeking to restrain or prohibit the sale or purchase of the Shares or the consummation of any of the other transactions contemplated by this Agreement; (ii) relating to any of the transactions contemplated by this Agreement and seeking to obtain from Buyer or any of its subsidiaries any damages that are material to Buyer or any of its subsidiaries; (iii) seeking to prohibit or limit in any material respect Buyer's ability to vote, receive dividends with respect to or otherwise exercise ownership rights with respect to any of the Shares; or (iv) which, if adversely determined, could reasonably be expected to have a material adverse effect on the business, condition (financial or otherwise), capitalization, assets (tangible or intangible), liabilities (fixed, contingent or otherwise), operations, revenues, net income, financial performance or prospects of Buyer, any of Buyer's subsidiaries, Target or any of Target's subsidiaries.

SELECTED CLOSING CONDITIONS: EXCERPTS FROM SAMPLE RESPONSE BY SELLER TO CLOSING CONDITIONS PROPOSED BY BUYER (CLEAN)

EXCERPTS FROM SAMPLE RESPONSE BY SELLER TO CLOSING CONDITIONS PROPOSED BY BUYER

CONDITIONS TO BUYER'S OBLIGATION TO PURCHASE SHARES. Buyer's obligation to purchase the Shares is subject to the satisfaction, at or prior to the Closing, of each of the following conditions:

(a) ***Accuracy of Representations.*** The representations and warranties made by Seller in this Agreement that speak as of the date of this Agreement or as of any other specified date shall have been accurate as of such date, disregarding any inaccuracies that have not resulted in a Target Material Adverse Change; and the other representations and warranties made by Seller in the Agreement shall be accurate as of the Closing Date as if made on the Closing Date, disregarding any inaccuracies that have not resulted in a Target Material Adverse Change.

* * *

(e) ***No Material Adverse Change***. Since the date of this Agreement, there shall not have occurred any event that has resulted in a Target Material Adverse Change.

(f) ***No Governmental Litigation***. There shall not be pending against Buyer, before any U.S. federal or state court of competent jurisdiction, any suit, action or proceeding commenced by any U.S. federal or state Governmental Body that challenges Buyer's purchase of the Shares and in which there is a reasonable likelihood of a judgment against Buyer providing for an award of damages or other relief that would have a material adverse effect on Buyer's business.

* * *

For purposes of this Agreement, "Target Material Adverse Change" means a material adverse change in the business, financial condition or results of operations of Target and its subsidiaries taken as a whole; *provided, however*, that none of the following shall be deemed (either alone or in combination) to constitute, and none of the following shall be taken into account in determining whether there has been, such a material adverse change:

(i) any failure on the part of Target or any of its subsidiaries to meet internal, published or other estimates, predictions, projections or forecasts of revenue, net income or any other measure of financial performance;

(ii) any adverse change (including any litigation, loss of employees, cancellation of or delay in customer orders, reduction in revenue or net income or disruption of business relationships) arising from or attributable or relating to (A) the announcement or pendency of any of the transactions contemplated by this Agreement, (B) conditions affecting the industry or industry sector in which the Target or any of its subsidiaries operates or participates, the United States economy or financial markets or any foreign economy or financial markets in any location where Target or any of its

subsidiaries has material operations or sales, (C) any act or threat of terrorism or war anywhere in the world, any armed hostilities or terrorist activities anywhere in the world, any threat or escalation of armed hostilities or terrorist activities anywhere in the world or any governmental or other response or reaction to any of the foregoing; (D) legal, accounting, investment banking or other fees or expenses incurred in connection with the transactions contemplated by this Agreement, (E) the payment of any amounts due to, or the provision of any other benefits to, any officers or other employees under employment contracts, non-competition agreements, employee benefit plans, severance arrangements or other arrangements in existence as of the date of this Agreement, (F) compliance with the terms of, or the taking of any action required or otherwise contemplated by, this Agreement, (G) the taking of any action by Buyer or any action approved or consented to by Buyer, (H) any breach of this Agreement by Buyer, (I) any change in accounting requirements or principles or any change in applicable laws, rules or regulations or the interpretation thereof, or (J) any action required to be taken under applicable laws, rules, regulations or agreements; or

(iii) any adverse change that is temporary in nature.

SELECTED CLOSING CONDITIONS: EXCERPTS FROM SAMPLE RESPONSE BY SELLER TO CLOSING CONDITIONS PROPOSED BY BUYER (REDLINE)

EXCERPTS FROM ~~"CLOSING CONDITIONS"~~SAMPLE RESPONSE BY
~~SECTION OF BUYER'S FORM OF STOCK~~
SELLER TO CLOSING CONDITIONS PROPOSED
~~PURCHASE AGREEMENT~~
BY BUYER

CONDITIONS TO BUYER'S OBLIGATION TO PURCHASE SHARES. Buyer's obligation to purchase the Shares is subject to the satisfaction, at or prior to the Closing, of each of the following conditions:

(a) ***Accuracy of Representations.*** ~~Each of the~~ **The** representations and warranties made by Seller in this Agreement ~~shall have been accurate in all material respects~~ **that speak** as of the date of this Agreement ~~and~~ **or as of any other specified date shall have been accurate as of such date, disregarding any inaccuracies that have not resulted in a Target Material Adverse Change; and the other representations and warranties made by Seller in the Agreement** shall be accurate ~~in all material respects~~ as of the Closing Date as if made on the Closing Date**, disregarding any inaccuracies that have not resulted in a Target Material Adverse Change**.

* * *

(e) ***No Material Adverse Change***. ~~There shall have been no material adverse change in the business, condition (financial or otherwise), capitalization, assets (tangible or intangible), liabilities (fixed, contingent or otherwise), operations, revenues, net income, financial performance or prospects of Target or any of its subsidiaries, and no event shall have occurred or circumstance shall exist that could reasonably be expected to result in such a material adverse change.~~ **Since the date of this Agreement, there shall not have occurred any event that has resulted in a Target Material Adverse Change.**

~~(f) No~~

(f) ***No Governmental Litigation***. There shall not be pending ~~, and there shall not have been threatened, any suit, action, proceeding, investigation or inquiry: (i) challenging or seeking to restrain or prohibit the sale or~~ **against Buyer, before any U.S. federal or state court of competent jurisdiction, any suit, action or proceeding commenced by any U.S. federal or state Governmental Body that challenges Buyer's** purchase of the Shares ~~or the consummation of any of the other transactions contemplated by this Agreement; (ii) relating to any of the transactions contemplated by this Agreement and seeking to obtain from Buyer or any of its subsidiaries any damages that are material to Buyer or any of its subsidiaries; (iii) seeking to prohibit or limit in any material respect Buyer's ability to vote, receive dividends with respect to or otherwise exercise ownership rights with respect to any of the Shares; or (iv) which, if adversely determined, could reasonably be expected to~~ **and in which there is a reasonable likelihood of a judgment against Buyer providing for an award of damages or other relief that would** have a material adverse effect on ~~the business, condition (financial or otherwise), capitalization, assets (tangible or intangible), liabilities (fixed, contingent or otherwise), operations, revenues, net income, financial performance or prospects of~~

~~Buyer, any of Buyer's subsidiaries, Target or any of Target's subsidiaries.~~ **Buyer's business.**

*** * ***

For purposes of this Agreement, "Target Material Adverse Change" means a material adverse change in the business, financial condition or results of operations of Target and its subsidiaries taken as a whole; *provided, however*, that none of the following shall be deemed (either alone or in combination) to constitute, and none of the following shall be taken into account in determining whether there has been, such a material adverse change:

(i) **any failure on the part of Target or any of its subsidiaries to meet internal, published or other estimates, predictions, projections or forecasts of revenue, net income or any other measure of financial performance;**

(ii) **any adverse change (including any litigation, loss of employees, cancellation of or delay in customer orders, reduction in revenue or net income or disruption of business relationships) arising from or attributable or relating to (A) the announcement or pendency of any of the transactions contemplated by this Agreement, (B) conditions affecting the industry or industry sector in which the Target or any of its subsidiaries operates or participates, the United States economy or financial markets or any foreign economy or financial markets in any location where Target or any of its subsidiaries has material operations or sales, (C) any act or threat of terrorism or war anywhere in the world, any armed hostilities or terrorist activities anywhere in the world, any threat or escalation of armed hostilities or terrorist activities anywhere in the world or any governmental or other response or reaction to any of the foregoing; (D) legal, accounting, investment banking or other fees or expenses incurred in connection with the transactions contemplated by this Agreement, (E) the payment of any amounts due to, or the provision of any other benefits to, any officers or other employees under employment contracts, non-competition agreements, employee benefit plans, severance arrangements or other arrangements in existence as of the date of this Agreement, (F) compliance with the terms of, or the taking of any action required or otherwise contemplated by, this Agreement, (G) the taking of any action by Buyer or any action approved or consented to by Buyer, (H) any breach of this Agreement by Buyer, (I) any change in accounting requirements or principles or any change in applicable laws, rules or regulations or the interpretation thereof, or (J) any action required to be taken under applicable laws, rules, regulations or agreements; or**

(iii) **any adverse change that is temporary in nature.**

TECHNOLOGY M&A

THEN AND NOW

THEN (1999) . . .

1 **Deals put together very quickly; minimal time for due diligence**

2 **Buyer's stock used as acquisition "currency"**

3 **Basic deal structure: single-step, tax-free, stock-for-stock merger**

4 **Basic pricing formulation: fixed exchange ratio, no collar**

5 **"Pooling of interests" accounting**

THEN (1999) . . .

6 **Low pre-merger antitrust (HSR) notification thresholds**

7 **"Tight" deals with significant limitations on buyer's walk rights**

8 **Significant limitations on buyer's post-closing indemnification remedies**

9 **Deal protection: "lock-up" stock option**

10 **Significant limitations on buyer's ability to "tell the story" to the Street**

NOW (2002)

1 **More thorough due diligence; more deals called off before announcement**

2 **Cash deals and mixed consideration deals more common**

3 **Two-step deals, asset acquisitions on the rise**

4 **Collars more common; earn-outs growing in popularity**

5 **Purchase accounting, but no automatic amortization of goodwill**

NOW (2002)

6 **HSR notification thresholds higher, but U.S. and foreign antitrust authorities scrutinizing smaller deals more closely**

7 **Buyers negotiating broader walk rights**

8 **Buyers negotiating broader indemnification rights**

9 **"Lock-up" options declining in popularity**

10 **New SEC communication rules facilitate M&A "road shows"**

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