**STOCK PURCHASE AGREEMENT**

**AMONG**

**\_\_\_\_\_\_\_\_\_\_**

**AND**

**\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_,**

**AND\_\_\_\_\_\_\_\_\_\_,**

**\_\_\_\_\_\_\_\_\_\_ \_\_, \_\_\_\_\_\_\_\_\_\_**

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**[EXHIBITS, ANNEXES, AND SCHEDULES HAVE BEEN OMITTED FROM THIS SAMPLE FORM 2203]**

STOCK PURCHASE AGREEMENT[[1]](#footnote-1),[[2]](#footnote-2),[[3]](#footnote-3)

This Stock Purchase Agreement (this ‘‘Agreement’’) is entered into on [as of] \_\_\_\_\_\_\_ \_\_\_, \_\_\_\_, by and among \_\_\_\_\_\_\_\_\_\_, a \_\_\_\_\_\_\_\_\_\_ corporation (‘‘*Buyer*’’), and \_\_\_\_\_\_\_\_\_\_, and \_\_\_\_\_\_\_\_\_\_ (each a Seller and collectively, ‘‘*Sellers*’’). Buyer and Sellers are referred to collectively herein as the ‘‘*Parties*.’’[[4]](#footnote-4)

Sellers in the aggregate own all of the outstanding capital stock of \_\_\_\_\_\_\_\_\_\_, a \_\_\_\_\_\_\_\_\_\_ corporation (‘‘*Target*’’).

This Agreement contemplates a transaction in which Buyer will purchase from Sellers, and Sellers will sell to Buyer, all of the outstanding capital stock of Target in return for cash and the Buyer Notes.[[5]](#footnote-5)

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.

§1. Definitions.

‘‘*Accredited Investor*’’ has the meaning set forth in Regulation D promulgated under the Securities Act.

‘‘*Adverse Consequences*’’ means, subject to the limitations set forth in §8(f), all actions, suits, proceedings, hearings, investigations, charges, complaints, claims, demands, injunctions, judgments, orders, decrees, rulings, damages, dues, penalties, fines, costs, [reasonable amounts paid in settlement], liabilities, obligations, taxes, liens, losses, expenses, and fees, including court costs and [reasonable] attorneys’ fees and expenses.

‘‘*Affiliate*’’ has the meaning set forth in Rule 12b-2 of the regulations promulgated under the Securities Exchange Act.

‘‘*Affiliated Group*’’ means any affiliated group within the meaning of Code §1504(a) or any similar group defined under a similar provision of state, local, or non-U.S. law.

‘‘*Applicable Rate*’’ means the corporate base rate of interest publicly announced from time to time by [Financial Institution] [plus/minus \_\_\_\_\_\_\_\_\_\_% per annum].

‘‘*Basis*’’ means any past or present fact, situation, circumstance, status, condition, activity, practice, plan, occurrence, event, incident, action, failure to act, or transaction that forms or could form the basis for any specified consequence.

‘‘*Buyer*’’ has the meaning set forth in the preface above.

‘‘*Buyer Notes*’’ has the meaning set forth in §2(b) below.

‘‘*Closing*’’ has the meaning set forth in §2(c) below.

‘‘*Closing Date*’’ has the meaning set forth in §2(c) below.

‘‘*Closing Purchase Price*’’ has the meaning set forth in §2(b) below.

‘‘*COBRA*’’ means the requirements of Part 6 of Subtitle B of Title I of ERISA and Code §4980B and of any similar state law.

‘‘*Code*’’ means the Internal Revenue Code of 1986, as amended.

‘‘*Confidential Information*’’ means any information concerning the business and affairs of Target and its Subsidiaries that is not already generally available to the public.

‘‘*Controlled Group*’’ has the meaning set forth in Code §1563.

‘‘*Data Laws*’’ means laws, regulations, guidelines, and rules in any jurisdiction (federal, state, local, and non-U.S.) applicable to data privacy, data security, and/or personal information[, as well as industry standards applicable to Target and its Subsidiaries].

‘‘*Disclosure Schedule*’’ has the meaning set forth in §4 below.

‘‘*Employee Benefit Plan*’’ means any ‘‘employee benefit plan’’ (as such term is defined in ERISA §3(3)) and any other material employee benefit plan, program or arrangement of any kind.

‘‘*Employee Pension Benefit Plan*’’ has the meaning set forth in ERISA §3(2).

‘‘*Employee Welfare Benefit Plan*’’ has the meaning set forth in ERISA §3(1).

‘‘*Environmental, Health, and Safety Requirements*’’[[6]](#footnote-6) means all federal, state, local, and non-U.S. statutes, regulations, ordinances, and similar provisions having the force or effect of law, all judicial and administrative orders and determinations, and all common law concerning public or worker health and safety (with respect to exposure to hazardous substances), pollution, or protection of the environment, including all those relating to the presence, use, production, generation, handling, transportation, treatment, storage, disposal, distribution, labeling, testing, processing, discharge, release, threatened release, control, exposure to, or cleanup of any hazardous materials, substances, or wastes, chemical substances or mixtures, pesticides, pollutants, contaminants, toxic chemicals, petroleum products or byproducts, asbestos, polychlorinated biphenyls, noise, odor, mold, or radiation.

‘‘*ERISA*’’ means the Employee Retirement Income Security Act of 1974, as amended.

‘‘*ERISA Affiliate*’’ means each entity that is treated as a single employer with Target for purposes of Code §414.

‘‘*Escrow Agent*’’ has the meaning set forth in §2(b) below.

‘‘*Escrow Agreement*’’ means the Escrow Agreement entered into concurrently herewith and attached hereto as Exhibit F.

‘‘*Escrow Amount*’’ means $\_\_\_\_\_\_\_\_\_\_.

‘‘*Estoppel Certificates*’’ has the meaning set forth in §7(a) below.

‘‘*Fiduciary*’’ has the meaning set forth in ERISA §3(21).

‘‘*Financial Statement*’’ has the meaning set forth in §4(g) below.

‘‘*FIRPTA Affidavit*’’ has the meaning set forth in §7(a) below.

‘‘*Fraud*’’ means common law fraud, the elements of which are set forth in *ABRY Partners V, L.P. v. F&W Acquisition LLC* (Del. Ch. 2006).

‘‘*GAAP*’’ means United States generally accepted accounting principles as in effect from time to time, consistently applied.

‘‘*Hart-Scott-Rodino Act*’’ means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

‘‘*Improvements*’’ has the meaning set forth in §4(l) below.

‘‘*Income Tax*’’ means any federal, state, local, or non-U.S. income tax, including any interest, penalty, or addition thereto, whether disputed or not.

‘‘*Income Tax Return*’’ means any return, declaration, report, claim for refund, or information return or statement relating to Income Taxes, including any schedule or attachment thereto, and including any amendment thereof.

‘‘*Indemnified Party*’’ has the meaning set forth in §8(d) below.

‘‘*Indemnifying Party*’’ has the meaning set forth in §8(d) below.

‘‘*Intellectual Property*’’[[7]](#footnote-7) means all of the following in any jurisdiction throughout the world: (a) all inventions (whether patentable or unpatentable and whether or not reduced to practice), all improvements thereto, and all patents, patent applications, and patent disclosures, together with all reissuances, continuations, divisions, continuations-in-part, revisions, extensions, and reexaminations thereof, (b) all trademarks, service marks, trade dress, logos, slogans, trade names, corporate names, Internet domain names, other source identifiers, and rights in telephone numbers and social media assets, together with all translations, adaptations, derivations, and combinations thereof and including all goodwill associated therewith, and all applications, registrations, and renewals in connection therewith, (c) all rights of publicity, privacy, and endorsement (including rights to the use of names, voices, likenesses, images, appearances, signatures, and biographical information of real persons), (d) rights in databases and collections of data, and all copyrightable works, all copyrights, and all applications, registrations, and renewals in connection therewith, (e) all mask works and all applications, registrations, and renewals in connection therewith, (f) all trade secrets and Confidential Information (including ideas, research and development, know-how, formulas, compositions, manufacturing and production processes and techniques, technical data, designs, drawings, specifications, customer and supplier lists, pricing and cost information, and business and marketing plans and proposals), (g) all computer software (including source code, object code, and related documentation), (h) all material advertising and promotional materials, (i) all other proprietary rights, and (j) all copies and tangible embodiments thereof (in whatever form or medium).[[8]](#footnote-8)

“*IT Systems*” has the meaning set forth in §4(aa) below.

‘‘*Knowledge*’’ means actual knowledge after reasonable investigation.[[9]](#footnote-9)

‘‘*Lease Consents*’’ has the meaning set forth in §7(a) below.

‘‘*Leased Real Property*’’ means all leasehold or subleasehold estates and other rights to use or occupy any land, buildings, structures, improvements, fixtures, or other interest in real property held by Target or any of its Subsidiaries.[[10]](#footnote-10)

‘‘*Leases*’’ means all leases, subleases, licenses, concessions and other agreements (written or oral), including all amendments, extensions, renewals, guaranties, and other agreements with respect thereto, pursuant to which Target or any of its Subsidiaries holds any Leased Real Property, including the right to all security deposits and other amounts and instruments held by or on behalf of Target or any of its Subsidiaries thereunder.

‘‘*Lien*’’ means any mortgage, pledge, lien, encumbrance, charge, or other security interest[, other than (a) liens for taxes not yet due and payable [or for taxes that the taxpayer is contesting in good faith through appropriate proceedings], (b) purchase money liens and liens securing rental payments under capital lease arrangements, and (c) other liens arising in the Ordinary Course of Business and not incurred in connection with Intellectual Property or the borrowing of money].

‘‘*Material Adverse Effect*’’ or ‘‘*Material Adverse Change*’’ means any effect or change that would be materially adverse to the business, assets, condition (financial or otherwise), operating results, operations, or business prospects of Target and its Subsidiaries, taken as a whole, or to the ability of any Party to consummate timely the transactions contemplated hereby.[[11]](#footnote-11)

‘‘*Material Leased Real Property*’’ has the meaning set forth in §7(a) below.

‘‘*Most Recent Balance Sheet*’’ means the balance sheet contained within the Most Recent Financial Statements.

‘‘*Most Recent Financial Statements*’’ has the meaning set forth in §4(g) below.

‘‘*Most Recent Fiscal Month End*’’ has the meaning set forth in §4(g) below.

‘‘*Most Recent Fiscal Year End*’’ has the meaning set forth in §4(g) below.

‘‘*Multiemployer Plan*’’ has the meaning set forth in ERISA §3(37).

‘‘*Ordinary Course of Business*’’ means an action taken, or omitted to be taken, by any Person in the ordinary course of such Person’s business consistent with past custom and practice (including with respect to quantity and frequency); provided, that any action taken, or omitted to be taken, that relates to, or arises out of, any pandemic, epidemic, or disease outbreak to the extent reasonably consistent with policies, procedures, and protocols recommended by the Centers for Disease Control and Prevention, the World Health Organization, and other governmental authorities shall be deemed to be in the Ordinary Course of Business.[[12]](#footnote-12)

‘‘*Owned Real Property*’’ means all land, together with all buildings, structures, improvements, and fixtures located thereon, and all easements and other rights and interests appurtenant thereto, owned by Target and its Subsidiaries.[[13]](#footnote-13)

‘‘*Party*’’ has the meaning set forth in the preface above.

‘‘*PBGC*’’ means the Pension Benefit Guaranty Corporation.

‘‘*Permitted Encumbrances*’’ means with respect to each parcel of Real Property: (a) real estate taxes, assessments and other governmental levies, fees, or charges imposed with respect to such Real Property that are (i) not due and payable as of the Closing Date or (ii) being contested in good faith and for which appropriate reserves have been established in accordance with GAAP; (b) mechanics’ liens and similar liens for labor, materials, or supplies provided with respect to such Real Property incurred in the Ordinary Course of Business for amounts that are (i) not due and payable as of the Closing Date or (ii) being contested in good faith that would not, individually or in the aggregate, materially impair the use or occupancy of the Real Property or the operation of the business of Target and its Subsidiaries as currently conducted on such Real Property; (c) zoning, building codes, and other land use laws regulating the use or occupancy of such Real Property or the activities conducted thereon that are imposed by any governmental authority having jurisdiction over such Real Property and are not violated by the current use or occupancy of such Real Property or the operation of the business of Target and its Subsidiaries as currently conducted thereon; and (d) easements, covenants, conditions, restrictions, and other similar matters of record affecting title to such Real Property that do not or would not materially impair the use or occupancy of such Real Property in the operation of the business of Target and its Subsidiaries as currently conducted thereon.[[14]](#footnote-14)

‘‘*Person*’’ 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, any other business entity, or a governmental entity (or any department, agency, or political subdivision thereof).

‘‘*Prohibited Transaction*’’ has the meaning set forth in ERISA §406 and Code §4975.

‘‘*Purchase Price*’’ has the meaning set forth in §2(b) below.

‘‘*Real Property*’’ has the meaning set forth in §4(l) below.

‘‘*Real Property Laws*’’ has the meaning set forth in §4(l) below.

‘‘*Reportable Event*’’ has the meaning set forth in ERISA §4043.

‘‘*Requisite Sellers*’’ means Sellers holding [a majority] in interest of Target Shares as set forth in §4(b) of the Disclosure Schedule.[[15]](#footnote-15)

‘‘*Securities Act*’’ means the Securities Act of 1933, as amended.

‘‘*Securities Exchange Act*’’ means the Securities Exchange Act of 1934, as amended.

‘‘*Seller*’’ has the meaning set forth in the preface above.

‘‘*Subsidiary*’’ means, with respect to any Person, any corporation, limited liability company, partnership, association, or other business entity of which (i) if a corporation, a majority of the total voting power of shares of stock entitled (without regard to the occurrence of any contingency) to vote in the election of directors, managers, or trustees thereof is at the time owned or controlled, directly or indirectly, by that Person or 1 or more of the other Subsidiaries of that Person or a combination thereof or (ii) if a limited liability company, partnership, association, or other business entity (other than a corporation), a majority of the partnership or other similar ownership interests thereof is at the time owned or controlled, directly or indirectly, by that Person or 1 or more Subsidiaries of that Person or a combination thereof and for this purpose, a Person or Persons own a majority ownership interest in such a business entity (other than a corporation) if such Person or Persons shall be allocated a majority of such business entity’s gains or losses or shall be or control any managing director or general partner of such business entity (other than a corporation). The term ‘‘Subsidiary’’ shall include all Subsidiaries of such Subsidiary.

‘‘*Surveys*’’ has the meaning set forth in §7(a) below.

‘‘*Target*’’ has the meaning set forth in the preface above.

‘‘*Target Share*’’ means any share of the common stock, par value $\_\_\_\_\_\_\_\_\_\_ per share, of Target.[[16]](#footnote-16)

‘‘*Tax*’’ or ‘‘*Taxes*’’ means any federal, state, local, or non-U.S. income, gross receipts, license, payroll, employment, excise, severance, stamp, occupation, premium, windfall profits, environmental, customs duties, capital stock, franchise, profits, withholding, social security (or similar), unemployment, disability, real property, personal property, sales, use, transfer, registration, value added, alternative or add-on minimum, estimated, or other tax of any kind whatsoever, including any interest, penalty, or addition thereto, whether disputed or not.

‘‘*Tax Benefits*’’ has the meaning set forth in §8(e) below.

‘‘*Tax Return*’’ means any return, declaration, report, claim for refund, or information return or statement relating to Taxes, including any schedule or attachment thereto, and including any amendment thereof.

‘‘*Third-Party Claim*’’ has the meaning set forth in §8(d) below.

‘‘*Title Commitments*’’ has the meaning set forth in §7(a) below.

‘‘*Title Company*’’ has the meaning set forth in §7(a) below.

‘‘*Title Policies*’’ has the meaning set forth in §7(a) below.

‘‘*WARN Act*’’ has the meaning set forth in §4(h) below.

§2. Purchase and Sale of Target Shares.[[17]](#footnote-17)

(a) Basic Transaction. On and subject to the terms and conditions of this Agreement, Buyer agrees to purchase from each Seller, and each Seller agrees to sell to Buyer, all of his, her, or its Target Shares for the consideration specified below in this §2.

(b) *Purchase Price*.[[18]](#footnote-18) Buyer agrees to pay to Sellers at the Closing $\_\_\_\_\_\_\_\_\_\_ (the ‘‘*Purchase Price*’’) less the Escrow Amount (such difference, the ‘‘*Closing Purchase Price*’’) by delivery of (i) its promissory notes (the ‘‘*Buyer Notes*’’) in the form of Exhibit A attached hereto in the aggregate principal amount of $\_\_\_\_\_\_\_\_\_\_ and (ii) cash for the balance of the Closing Purchase Price payable by wire transfer or delivery of other immediately available funds. The Purchase Price shall be allocated among Sellers in proportion to their respective holdings of Target Shares as set forth in §4(b) of the Disclosure Schedule.[[19]](#footnote-19) Buyer agrees to pay to \_\_\_\_\_\_\_\_\_\_, as escrow agent (the ‘‘*Escrow Agent*’’), at the Closing the Escrow Amount in cash payable by wire transfer or delivery of other immediately available funds for deposit into the escrow account. The Escrow Amount plus any interest accrued thereon will be available to satisfy any amounts owed by Target to Buyer under this Agreement in accordance with the terms of the Escrow Agreement attached hereto as Exhibit F.[[20]](#footnote-20)

(c) *Closing.* The closing of the transactions contemplated by this Agreement (the ‘‘*Closing*’’) shall take place either (i) at the offices of \_\_\_\_\_\_\_\_\_\_ in \_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_, or (ii) remotely by exchange of documents and signatures (or their electronic counterparts), in each case, commencing at 9:00 a.m. local time on the [second] business day following the satisfaction or waiver of all conditions to the obligations of the Parties to consummate the transactions contemplated hereby (other than conditions with respect to actions the respective Parties will take at the Closing itself) or such other date, place, or time as Buyer and Requisite Sellers may mutually determine (the ‘‘*Closing Date*’’); provided, however, that the Closing Date shall be no earlier than \_\_\_\_\_\_\_ \_\_\_, \_\_\_\_.[[21]](#footnote-21)

(d) *Deliveries at Closing.* At the Closing, (i) Sellers will deliver to Buyer the various certificates, instruments, and documents referred to in §7(a) below, (ii) Buyer will deliver to Sellers the various certificates, instruments, and documents referred to in §7(b) below, (iii) each Seller will deliver to Buyer stock certificates representing all of his, her, or its Target Shares, endorsed in blank or accompanied by duly executed assignment documents, and (iv) Buyer will deliver to each Seller and the Escrow Agent the consideration specified in §2(b) above.

§3. Representations and Warranties Concerning Transaction.

(a) *Sellers’ Representations and Warranties.* Each Seller represents and warrants to Buyer that the statements contained in this §3(a) are correct and complete as of the date of this Agreement and will be correct and complete as of the Closing Date (as though made then and as though the Closing Date were substituted for the date of this Agreement throughout this §3(a)) with respect to himself, herself, or itself, except as set forth in Annex I attached hereto.

(i) *Organization of Certain Sellers.* Seller (if a corporation or other entity) is duly organized, validly existing, and in good standing under the laws of the jurisdiction of its incorporation (or other formation).

(ii) *Authorization of Transaction.* Seller has full power and authority (including full corporate or other entity power and authority) to execute and deliver this Agreement and to perform his, her, or its obligations hereunder. This Agreement constitutes the valid and legally binding obligation of Seller, enforceable in accordance with its terms and conditions. Seller need not give any notice to, make any filing with, or obtain any authorization, consent, or approval of any government or governmental agency in order to consummate the transactions contemplated by this Agreement. The execution, delivery and performance of this Agreement and all other agreements contemplated hereby have been duly authorized by Seller.

(iii) *Non-contravention.* Neither the execution and delivery of this Agreement, nor the consummation of the transactions contemplated hereby, will (A) violate any constitution, statute, regulation, rule, injunction, judgment, order, decree, ruling, charge, or other restriction of any government, governmental agency, or court to which Seller is subject or, if Seller is an entity, any provision of its charter, bylaws or other governing documents, (B) conflict with, result in a breach of, constitute a default under, result in the acceleration of, create in any party the right to accelerate, terminate, modify, or cancel, or require any notice under any agreement, contract, lease, license, instrument, or other arrangement to which Seller is a party or by which he, she, or it is bound or to which any of his, her, or its assets are subject, or (C) result in the imposition or creation of a Lien upon or with respect to Target Shares.

(iv) *Brokers’ Fees.* Seller has no liability or obligation to pay any fees or commissions to any broker, finder, or agent with respect to the transactions contemplated by this Agreement.

(v) *Investment.* Seller (A) understands that the Buyer Notes have not been, and will not be, registered under the Securities Act, or under any state securities laws, and are being offered and sold in reliance upon federal and state exemptions for transactions not involving any public offering, (B) is acquiring the Buyer Notes solely for his, her, or its own account for investment purposes, and not with a view to the distribution thereof, (C) is a sophisticated investor with knowledge and experience in business and financial matters, (D) has received certain information concerning Buyer and has had the opportunity to obtain additional information as desired in order to evaluate the merits and the risks inherent in holding the Buyer Notes, (E) is able to bear the economic risk and lack of liquidity inherent in holding the Buyer Notes, and (F) is an Accredited Investor for the reasons set forth on Annex I.[[22]](#footnote-22)

(vi) *Target Shares.* Seller holds of record and owns beneficially the number of Target Shares set forth next to his, her, or its name in §4(b) of the Disclosure Schedule, free and clear of any restrictions on transfer (other than any restrictions under the Securities Act and state securities laws), taxes, Liens, options, warrants, purchase rights, contracts, commitments, equities, claims, and demands. Seller is not a party to any option, warrant, purchase right, or other contract or commitment (other than this Agreement) that could require Seller to sell, transfer, or otherwise dispose of any capital stock of Target. Seller is not a party to any voting trust, proxy, or other agreement or understanding with respect to the voting of any capital stock of Target.

(b) *Buyer’s Representations and Warranties.*[[23]](#footnote-23) Buyer represents and warrants to Sellers that the statements contained in this §3(b) are correct and complete as of the date of this Agreement and will be correct and complete as of the Closing Date (as though made then and as though the Closing Date were substituted for the date of this Agreement throughout this §3(b)), except as set forth in Annex II attached hereto.

(i) *Organization of Buyer.* Buyer is a corporation (or other entity) duly organized, validly existing, and in good standing under the laws of the jurisdiction of its incorporation (or other formation).

(ii) *Authorization of Transaction.* Buyer has full power and authority (including full corporate or other entity power and authority) to execute and deliver this Agreement and to perform its obligations hereunder. This Agreement constitutes the valid and legally binding obligation of Buyer, enforceable in accordance with its terms and conditions. Buyer need not give any notice to, make any filing with, or obtain any authorization, consent, or approval of any government or governmental agency in order to consummate the transactions contemplated by this Agreement. The execution, delivery and performance of this Agreement and all other agreements contemplated hereby have been duly authorized by Buyer.

(iii) *Non-contravention.* Neither the execution and delivery of this Agreement, nor the consummation of the transactions contemplated hereby, will (A) violate any constitution, statute, regulation, rule, injunction, judgment, order, decree, ruling, charge, or other restriction of any government, governmental agency, or court to which Buyer is subject or any provision of its charter, bylaws, or other governing documents or (B) conflict with, result in a breach of, constitute a default under, result in the acceleration of, create in any party the right to accelerate, terminate, modify, or cancel, or require any notice under any agreement, contract, lease, license, instrument, or other arrangement to which Buyer is a party or by which it is bound or to which any of its assets are subject.

(iv) *Brokers’ Fees.* Buyer has no liability or obligation to pay any fees or commissions to any broker, finder, or agent with respect to the transactions contemplated by this Agreement.

(v) *Investment.* Buyer is not acquiring the Target Shares with a view to or for sale in connection with any distribution thereof within the meaning of the Securities Act.

(vi) Buyer has no plan or intention to take any action with respect to the Target subsequent to the Closing that would cause the transactions contemplated hereby to constitute part of a transaction that is the same as, or substantially similar to, the ‘‘Intermediary Transaction Tax Shelter’’ described in Internal Revenue Service Notices 2001-16 and 2008-111.[[24]](#footnote-24)

§4. *Representations and Warranties Concerning Target and Its Subsidiaries.*[[25]](#footnote-25) Sellers represent and warrant to Buyer that the statements contained in this §4 are correct and complete as of the date of this Agreement and will be correct and complete as of the Closing Date (as though made then and as though the Closing Date were substituted for the date of this Agreement throughout this §4), except as set forth in the disclosure schedule delivered by Sellers to Buyer on the date hereof and initialed by the Parties (the ‘‘*Disclosure Schedule*’’).[[26]](#footnote-26) The Disclosure Schedule will be arranged in paragraphs corresponding to the lettered and numbered paragraphs contained in this §4.[[27]](#footnote-27)

(a) *Organization, Qualification, and Corporate Power.* Each of Target and its Subsidiaries are corporations duly organized, validly existing, and in good standing under the laws of the jurisdiction of their incorporation. Each of Target and its Subsidiaries are duly authorized to conduct business and are in good standing under the laws of each jurisdiction where such qualification is required, except where the lack of such qualification would not have a Material Adverse Effect. Each of Target and its Subsidiaries have full corporate power and authority to carry on the business in which they are engaged and to own and use the properties owned and used by them. §4(a) of the Disclosure Schedule lists the directors and officers of Target and each of its Subsidiaries.

(b) *Capitalization.* The entire authorized capital stock of Target consists of \_\_\_\_\_\_\_\_\_\_ Target Shares, of which \_\_\_\_\_\_\_\_\_\_ Target Shares are issued and outstanding and \_\_\_\_\_\_\_\_\_\_ Target Shares are held in treasury.[[28]](#footnote-28) All of the issued and outstanding Target Shares have been duly authorized, are validly issued, fully paid, and non-assessable, and are held of record by the respective Sellers as set forth in §4(b) of the Disclosure Schedule. There are no outstanding or authorized options, warrants, purchase rights, subscription rights, conversion rights, exchange rights, or other contracts or commitments that could require Target to issue, sell, or otherwise cause to become outstanding any of its capital stock. There are no outstanding or authorized stock appreciation, phantom stock, profit participation, or similar rights with respect to Target. There are no voting trusts, proxies, or other agreements or understandings with respect to the voting of the capital stock of Target.

(c) *Non-contravention.* Neither the execution and the delivery of this Agreement, nor the consummation of the transactions contemplated hereby, will (i) violate any constitution, statute, regulation, rule, injunction, judgment, order, decree, ruling, charge, or other restriction of any government, governmental agency, or court to which Target or any of its Subsidiaries is subject or any provision of the charter or bylaws of Target or any of its Subsidiaries or (ii) conflict with, result in a breach of, constitute a default under, result in the acceleration of, create in any party the right to accelerate, terminate, modify, or cancel, or require any notice under any agreement, contract, lease, license, instrument, or other arrangement to which Target or any of its Subsidiaries is a party or by which it is bound or to which any of its assets is subject (or result in the imposition of any Lien upon any of its assets), except where the violation, conflict, breach, default, acceleration, termination, modification, cancellation, failure to give notice, or Lien would not have a Material Adverse Effect. Neither Target nor any of its Subsidiaries needs to give any notice to, make any filing with, or obtain any authorization, consent, or approval of any government or governmental agency in order for the Parties to consummate the transactions contemplated by this Agreement, except where the failure to give notice, to file, or to obtain any authorization, consent, or approval would not have a Material Adverse Effect.

(d) *Brokers’ Fees.* Neither Target nor any of its Subsidiaries has any liability or obligation to pay any fees or commissions to any broker, finder, or agent with respect to the transactions contemplated by this Agreement.

(e) *Title to Assets.* Target and its Subsidiaries have good and marketable title to, or a valid leasehold interest in, the properties and assets used by them, located on their premises, or shown on the Most Recent Balance Sheet or acquired after the date thereof, free and clear of all Liens, except for properties and assets disposed of in the Ordinary Course of Business since the date of the Most Recent Balance Sheet.

(f) *Subsidiaries.* §4(f) of the Disclosure Schedule sets forth for each Subsidiary of Target (i) its name and jurisdiction of incorporation, (ii) the number of authorized shares for each class of its capital stock, (iii) the number of issued and outstanding shares of each class of its capital stock, the names of the holders thereof, and the number of shares held by each such holder, and (iv) the number of shares of its capital stock held in treasury. All of the issued and outstanding shares of capital stock of each Subsidiary of Target have been duly authorized and are validly issued, fully paid, and non-assessable. Target and/or 1 or more of its Subsidiaries hold of record and own beneficially all of the outstanding shares of each Subsidiary of Target, free and clear of any restrictions on transfer (other than restrictions under the Securities Act and state securities laws), taxes, Liens, options, warrants, purchase rights, contracts, commitments, equities, claims, and demands. There are no outstanding or authorized options, warrants, purchase rights, subscription rights, conversion rights, exchange rights, or other contracts or commitments that could require Target or any of its Subsidiaries to sell, transfer, or otherwise dispose of any capital stock of any of its Subsidiaries or that could require any Subsidiary of Target to issue, sell, or otherwise cause to become outstanding any of its own capital stock. There are no outstanding stock appreciation, phantom stock, profit participation, or similar rights with respect to any Subsidiary of Target. There are no voting trusts, proxies, or other agreements or understandings with respect to the voting of any capital stock of any Subsidiary of Target. Neither Target nor any of its Subsidiaries controls directly or indirectly or has any direct or indirect equity participation in any corporation, partnership, trust, or other business association that is not a Subsidiary of Target. Except for the Subsidiaries set forth in §4(f) of the Disclosure Schedule, neither Target nor any of its Subsidiaries owns or has any right to acquire, directly or indirectly, any outstanding capital stock of, or other equity interests in, any Person.

(g) *Financial Statements.* Attached hereto as Exhibit B are the following financial statements (collectively the ‘‘*Financial Statements*’’): (i) audited consolidated balance sheets and statements of income, changes in stockholders’ equity, and cash flow as of and for the fiscal years ended \_\_\_\_\_\_\_ \_\_\_, \_\_\_\_, \_\_\_\_\_\_\_ \_\_\_, \_\_\_\_, \_\_\_\_\_\_\_ \_\_\_, \_\_\_\_, \_\_\_\_\_\_\_ \_\_\_, \_\_\_\_, and \_\_\_\_\_\_\_ \_\_\_, \_\_\_\_, (the ‘‘*Most Recent Fiscal Year End*’’) for Target and its Subsidiaries; and (ii) unaudited consolidated balance sheets and statements of income, changes in stockholders’ equity, and cash flow (the ‘‘*Most Recent Financial Statements*’’) as of and for the months ended \_\_\_\_\_\_\_ \_\_\_, \_\_\_\_ (the ‘‘*Most Recent Fiscal Month End*’’) for Target and its Subsidiaries. The Financial Statements (including the notes thereto) have been prepared in accordance with GAAP throughout the periods covered thereby and present fairly the financial condition of Target and its Subsidiaries as of such dates and the results of operations of Target and its Subsidiaries for such periods;[[29]](#footnote-29) provided, however, that the Most Recent Financial Statements are subject to normal year-end adjustments (which will not be material individually or in the aggregate) and lack footnotes and other presentation items.

(h) *Events Subsequent to Most Recent Fiscal Year End.* Since the Most Recent Fiscal Year End, there has not been any Material Adverse Change. Without limiting the generality of the foregoing, since that date:

(i) neither Target nor any of its Subsidiaries has sold, leased, transferred, or assigned any material assets, tangible or intangible, outside the Ordinary Course of Business;

(ii) neither Target nor any of its Subsidiaries has entered into any material agreement, contract, lease, or license outside the Ordinary Course of Business;

(iii) no party (including Target or any of its Subsidiaries) has accelerated, terminated, made material modifications to, or canceled any material agreement, contract, lease, or license to which Target or any of its Subsidiaries is a party or by which any of them is bound;

(iv) neither Target nor any of its Subsidiaries has imposed any Lien upon any of its assets, tangible or intangible;

(v) neither Target nor any of its Subsidiaries has made any material capital expenditures outside the Ordinary Course of Business;

(vi) neither Target nor any of its Subsidiaries has made any material capital investment in, or any material loan to, any other Person outside the Ordinary Course of Business;

(vii) Target and its Subsidiaries have not created, incurred, assumed, or guaranteed more than $\_\_\_\_\_\_\_\_\_\_ in aggregate indebtedness for borrowed money and capitalized lease obligations;

(viii) neither Target nor any of its Subsidiaries has transferred, assigned, or granted any license, sublicense, agreement, covenant not to sue, or permission with respect to any material Intellectual Property;

(ix) there has been no change made or authorized in the charter or bylaws of Target or any of its Subsidiaries;

(x) neither Target nor any of its Subsidiaries has issued, sold, or otherwise disposed of any of its capital stock, or granted any options, warrants, or other rights to purchase or obtain (including upon conversion, exchange, or exercise) any of its capital stock;

(xi) neither Target nor any of its Subsidiaries has declared, set aside, or paid any dividend or made any distribution with respect to its capital stock (whether in cash or in kind) or redeemed, purchased, or otherwise acquired any of its capital stock;

(xii) neither Target nor any of its Subsidiaries has experienced any material damage, destruction, or loss (whether or not covered by insurance) to its property;

(xiii) neither Target nor any of its Subsidiaries has made any loan to, or entered into any other transaction with, any of its directors, officers, and employees outside the Ordinary Course of Business;

(xiv) neither Target nor any of its Subsidiaries has entered into or terminated any employment contract providing for annual compensation in excess of $[ ][[30]](#footnote-30) or collective bargaining agreement, written or oral, or modified the terms of any existing such contract or agreement, or become bound by any collective bargaining relationship;

(xv) neither Target nor any of its Subsidiaries has granted any increase in the base compensation of any of its directors, officers, and employees outside the Ordinary Course of Business;

(xvi) neither Target nor any of its Subsidiaries has adopted, amended, modified, or terminated any bonus, profit sharing, incentive, severance, or other plan, contract, or commitment for the benefit of any of its directors, officers, and employees (or taken any such action with respect to any other Employee Benefit Plan);

(xvii) neither Target nor any of its Subsidiaries has made any other material change in employment terms for any of its directors, officers, and employees outside the Ordinary Course of Business;

(xviii) neither Target nor any of its Subsidiaries has implemented any employee layoffs requiring notice under the Worker Adjustment and Retraining Notification Act of 1988, as amended, or any similar state, local, or non-U.S. law, regulation, or ordinance (collectively the ‘‘WARN Act’’);

(xix) neither Target nor any of its Subsidiaries has made any loans or advances of money; and

(xx) neither Target nor any of its Subsidiaries has committed to any of the foregoing.

(i) *Undisclosed Liabilities.* Neither Target nor any of its Subsidiaries has any material liability (whether known or unknown, whether asserted or unasserted, whether absolute or contingent, whether accrued or unaccrued, whether liquidated or unliquidated, and whether due or to become due, including any liability for taxes), except for (i) liabilities set forth on the face of the Most Recent Balance Sheet (rather than in any notes thereto) and (ii) liabilities that have arisen after the Most Recent Fiscal Month End in the Ordinary Course of Business.[[31]](#footnote-31)

(j) *Legal Compliance.* Each of Target and its Subsidiaries have complied with all applicable laws (including rules, regulations, codes, plans, injunctions, judgments, orders, decrees, rulings, and charges thereunder and including the Foreign Corrupt Practices Act, 15 U.S.C. 78dd-1 *et seq*.) of federal, state, local, and non-U.S. governments (and all agencies thereof), and no action, suit, proceeding, hearing, investigation, charge, complaint, claim, demand, or notice has been filed or commenced against any of them alleging any failure so to comply, except where the failure to comply would not have a Material Adverse Effect.

(k) Tax Matters.[[32]](#footnote-32)

(i) Each of Target and its Subsidiaries has filed all federal Income Tax Returns and all other material Tax Returns that it was required to file. All such Tax Returns were true, correct, and complete in all material respects. All material Taxes due and owing by Target or any of its Subsidiaries (whether or not shown on any Tax Return) have been paid.[[33]](#footnote-33) Neither Target nor any of its Subsidiaries currently is the beneficiary of any extension of time within which to file any Tax Return. No written claim has been made within the past 3 years by an authority in a jurisdiction where Target or any of its Subsidiaries does not file Tax Returns that Target or any of its Subsidiaries is or may be subject to taxation by that jurisdiction. There are no Liens for Taxes (other than Taxes not yet due and payable) upon any of the assets of Target or any of its Subsidiaries. Each of Target and its Subsidiaries has withheld and paid all Taxes required to have been withheld and paid in connection with amounts paid or owing to any employee, independent contractor, creditor, stockholder, or other third party, and all Forms W-2 and 1099 required with respect thereto have been properly completed and timely filed.

(ii) There is no material dispute or claim concerning any Tax liability of Target or any of its Subsidiaries either (A) claimed or raised by any authority in writing or (B) as to which any of Sellers and the directors and officers of Target and its Subsidiaries has Knowledge based upon personal contact with any agent of such authority.

(iii) §4(k) of the Disclosure Schedule lists all federal, state, local, and non-U.S. Tax Returns filed with respect to Target or any of its Subsidiaries for taxable periods ended on or after \_\_\_\_\_\_\_ \_\_\_, \_\_\_\_,[[34]](#footnote-34) indicates those Tax Returns that have been audited, and indicates those Tax Returns that currently are the subject of audit. Sellers have delivered to Buyer correct and complete copies of all federal Income Tax Returns, examination reports, and statements of deficiencies assessed against, or agreed to by Target or any of its Subsidiaries since \_\_\_\_\_\_\_ \_\_\_, \_\_\_\_.[[35]](#footnote-35) Neither Target nor any of its Subsidiaries 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.

(iv) Neither Target nor any of its Subsidiaries is a party to any agreement, contract, arrangement, or plan that has resulted or could result, separately or in the aggregate, in the payment of (i) any ‘‘excess parachute payment’’ within the meaning of Code §280G (or any corresponding provision of state, local, or non-U.S. Tax law) or (ii) any amount that will not be fully deductible as a result of Code §162(m) (or any corresponding provision of state, local, or non-U.S. Tax law). Neither Target nor any of its Subsidiaries is a party to or bound by any tax allocation or sharing agreement.

(v) Neither Target nor any of its Subsidiaries (A) has been a member of an Affiliated Group filing a consolidated federal Income Tax Return (other than a group the common parent of which was Target) or (B) has any liability for the Taxes of any Person (other than Target or any of its Subsidiaries) under Reg. §1.1502-6 (or any similar provision of state, local, or non-U.S. law), as a transferee or successor, by contract, or otherwise.[[36]](#footnote-36)

(vi) Neither Target nor any of its Subsidiaries will be required to include any item of income in, or exclude any item of deduction from, taxable income for any taxable period (or portion thereof) ending after the Closing Date as a result of any:

(A) change in method of accounting for a taxable period ending on or prior to the Closing Date;

(B) use of an improper method of accounting for a taxable period ending on or prior to the Closing Date;[[37]](#footnote-37)

(C) ‘‘closing agreement’’ as described in Code §7121 (or any corresponding or similar provision of state, local, or non-U.S. income Tax law) executed on or prior to the Closing Date;

(D) intercompany transactions or any excess loss account described in Treasury Regulations under Code §1502 (or any corresponding or similar provision of state, local, or non-U.S. income Tax law);

(E) installment sale or open transaction disposition made on or prior to the Closing Date;

(F) prepaid amount received on or prior to the Closing Date; or

(G) election under Code §108(i).

(vii) Within the past 3 years, neither Target nor any of its Subsidiaries has distributed stock of another Person, or has had its stock distributed by another Person, in a transaction that was purported or intended to be governed in whole or in part by Code §355 or Code §361.

(viii) Neither Target nor any of its Subsidiaries is or has been a party to any ‘‘listed transaction,’’ as defined in Code §6707A(c)(2) and Reg. §1.6011-4(b)(2).[[38]](#footnote-38)

(l) Real Property.[[39]](#footnote-39)

(i) §4(l)(i) of the Disclosure Schedule sets forth the address and description of each parcel of Owned Real Property.[[40]](#footnote-40) With respect to each parcel of Owned Real Property:

(A) Target or 1 of its Subsidiaries has good and marketable fee simple title, free and clear of all Liens, except Permitted Encumbrances;

(B) except as set forth in §4(l)(i)(B) of the Disclosure Schedule, neither Target nor any of its Subsidiaries has leased or otherwise granted to any Person the right to use or occupy such Owned Real Property or any portion thereof; and

(C) other than the right of Buyer pursuant to this Agreement, there are no outstanding options, rights of first offer or rights of first refusal to purchase such Owned Real Property or any portion thereof or interest therein.

(ii) §4(l)(ii) of the Disclosure Schedule sets forth the address of each parcel of Leased Real Property, and a true and complete list of all Leases for each such Leased Real Property (including the date and name of the parties to such Lease document).[[41]](#footnote-41) Sellers have delivered to Buyer a true and complete copy of each such Lease document, and in the case of any oral Lease, a written summary of the material terms of such Lease. Except as set forth in §4(l)(ii) of the Disclosure Schedule, with respect to each of the Leases:

(A) such Lease is legal, valid, binding, enforceable and in full force and effect;

(B) the transactions contemplated by this Agreement do not require the consent of any other party to such Lease (except for those Leases for which Lease Consents are obtained), will not result in a breach of or default under such Lease, and will not otherwise cause such Lease to cease to be legal, valid, binding, enforceable and in full force and effect on identical terms following the Closing;

(C) none of Target’s or any of its Subsidiaries’ possession and quiet enjoyment of the Leased Real Property under such Lease has been disturbed and, to the Knowledge of Sellers and the directors and officers of Target and its Subsidiaries, there are no disputes with respect to such Lease;

(D) to the Knowledge of Sellers and the directors and officers of Target and its Subsidiaries, neither Target, nor any of its Subsidiaries nor any other party to the Lease is in breach of or default under such Lease, and, to the Knowledge of Sellers and the directors and officers of Target and its Subsidiaries, no event has occurred or circumstance exists that, with the delivery of notice, the passage of time or both, would constitute such a breach or default, or permit the termination, modification or acceleration of rent under such Lease;

(E) no security deposit or portion thereof deposited with respect to such Lease has been applied in respect of a breach of or default under such Lease that has not been redeposited in full;

(F) neither Target nor any of its Subsidiaries owes, or will owe in the future, any brokerage commissions or finder’s fees with respect to such Lease;

(G) the other party to such Lease is not an affiliate of, and otherwise does not have any economic interest in, Target or any of its Subsidiaries;

(H) neither Target nor any of its Subsidiaries has subleased, licensed or otherwise granted any Person the right to use or occupy the Leased Real Property or any portion thereof; and

(I) neither Target nor any of its Subsidiaries has collaterally assigned or granted any other Lien in such Lease or any interest therein.[[42]](#footnote-42)

(iii) The Owned Real Property identified in §4(l)(i) of the Disclosure Schedule, and the Leased Real Property identified in §4(l)(ii) of the Disclosure Schedule (collectively, the ‘‘*Real Property*’’) comprise all of the real property used or intended to be used in the business of Target and its Subsidiaries; and neither Target nor any of its Subsidiaries is a party to any agreement or option to purchase any real property or interest therein.

(iv) All buildings, structures, fixtures, building systems and equipment, and all components thereof, included in the Real Property (the ‘‘*Improvements*’’) are in good condition and repair and sufficient for the operation of the business of Target and its Subsidiaries. There are no facts or conditions affecting any of the Improvements that would, individually or in the aggregate, interfere in any material respect with the use or occupancy of the Improvements or any portion thereof in the operation of the business of Target and its Subsidiaries as currently conducted thereon.

(v) Neither Target nor any of its Subsidiaries has received written notice of any condemnation, expropriation or other proceeding in eminent domain affecting any parcel of Owned Real Property or any portion thereof or interest therein. [To the Knowledge of Sellers and the directors and officers of Target and its Subsidiaries’ there is no injunction, decree, order, writ or judgment outstanding, or any claim, litigation, administrative action or similar proceeding, pending or threatened, relating to the ownership, lease, use or occupancy of the Owned Real Property or any portion thereof, or the operation of the business of Target and its Subsidiaries as currently conducted thereon.]

(vi) To the Knowledge of Sellers and the directors and officers of Target and its Subsidiaries, the Real Property is in material compliance with all applicable building, zoning, subdivision, health and safety and other land use Laws, including The Americans with Disabilities Act of 1990, as amended, and all insurance requirements affecting the Real Property (collectively, the ‘‘*Real Property Laws*’’). Neither Target nor any of its Subsidiaries has received any notice of violation of any Real Property Law and, to the Knowledge of Sellers and the directors and officers of Target and its Subsidiaries, there is no Basis for the issuance of any such notice or the taking of any action for such violation.

(vii) Each parcel of Real Property has direct access to a public street adjoining the Real Property or has access to a public street via insurable easements benefitting such parcel of Real Property, and such access is not dependent on any land or other real property interest that is not included in the Real Property. None of the Improvements or any portion thereof is dependent for its access, use or operation on any land, building, improvement or other real property interest that is not included in the Real Property.

(viii) All water, oil, gas, electrical, steam, compressed air, telecommunications, sewer, storm and waste water systems and other utility services or systems for the Real Property have been installed and are operational and sufficient for the operation of the business of Target and its Subsidiaries as currently conducted thereon.

(ix) Target’s and its Subsidiaries’ use or occupancy of the Real Property or any portion thereof and the operation of the business of Target and its Subsidiaries as currently conducted thereon is not dependent on a ‘‘permitted non-conforming use’’ or ‘‘permitted non-conforming structure’’ or similar variance, exemption or approval from any governmental authority.

(x) To the Knowledge of Sellers and the directors and officers of Target and its Subsidiaries, the current use and occupancy of the Owned Real Property and the operation of the business of Target and its Subsidiaries as currently conducted thereon does not violate in any material respect any easement, covenant, condition, restriction or similar provision in any instrument of record or other unrecorded agreement affecting such Owned Real Property.

(xi) None of the Real Property or any portion thereof is located in a flood hazard area (as defined by the Federal Emergency Management Agency).

(m) Intellectual Property.[[43]](#footnote-43)

(i) None of Target or any of its Subsidiaries, or any of its or their respective businesses as presently conducted[, and as presently proposed to be conducted], has or will interfere with, has or will infringe upon, has or will dilute, has or will misappropriate, or otherwise has or will come into conflict with, any Intellectual Property rights of third parties; there are no facts indicating a likelihood of the foregoing; and none of Sellers has ever received any charge, complaint, claim, demand, or notice alleging any such interference, infringement, dilution, misappropriation, or conflict (including any claim that Target or any of its Subsidiaries must license or refrain from accessing or using any Intellectual Property rights of any third party). To the Knowledge of any of Sellers, no third party has interfered with, infringed upon, diluted, misappropriated, or otherwise come into conflict with, any Intellectual Property rights of Target or any of its Subsidiaries.

(ii) §4(m)(ii) of the Disclosure Schedule identifies each unexpired patent or registration which has been issued to Target or any of its Subsidiaries with respect to any of its Intellectual Property, identifies each pending patent application or application for registration that Target or any of its Subsidiaries has made with respect to any of its Intellectual Property, and identifies each existing and material license, sublicense, agreement, covenant not to sue, or other permission that Target or any of its Subsidiaries has granted to any third party with respect to any of its Intellectual Property (each as amended to date). Sellers have delivered to Buyer correct and complete copies of all such licenses, sublicenses, agreements, covenants not to sue, and permissions (as amended to date). §4(m)(ii) of the Disclosure Schedule also identifies each of the following owned by Target or any of its Subsidiaries: (a) material unregistered trademarks, service marks, trade names, corporate names, or other source identifiers; (b) material Internet domain names (along with, in the case of each such Internet domain name, the registrar, registered holder, and administrative contact of record); (c) computer software items used in connection with any product or service offered by the Target or its Subsidiaries, or other material computer software items; (d) material databases and collections of data; [and] (e) material unregistered copyrights[; and (f) non-confidential descriptions of material trade secrets and Confidential Information]. With respect to each item of Intellectual Property identified or required to be identified in §4(m)(ii) of the Disclosure Schedule:

(A) Target and its Subsidiaries own all right, title, and interest in and to the item, free and clear of any Lien, license, or other restriction (except, with respect to personal information included in the item, such restrictions imposed by Data Laws);

(B) the item is not subject to any outstanding injunction, judgment, order, decree, ruling, or charge;

(C) no action, suit, proceeding, hearing, investigation, charge, complaint, claim, or demand is pending or, to the Knowledge of any Seller and the directors and officers of Target and its Subsidiaries, is threatened that challenges the legality, validity, enforceability, access, use, or ownership of the item;

(D) neither Target nor any of its Subsidiaries is subject to any existing agreement to indemnify any Person for or against any interference, infringement, dilution, misappropriation, or other conflict with respect to the item; and

(E) no loss or expiration of the item is threatened, pending, or reasonably foreseeable, except for patents or copyrights expiring at the end of their statutory terms (and not as a result of any act or omission by Sellers, Target or its Subsidiaries, including without limitation, a failure by Sellers, Target or its Subsidiaries to pay any required maintenance or renewal fees).

(iii) §4(m)(iii) of the Disclosure Schedule identifies each material license, sublicense, agreement, covenant not to sue, or permission pursuant to which Target or any of its Subsidiaries accesses or uses any Intellectual Property owned by a third party. Sellers have delivered to Buyer correct and complete copies of all such licenses, sublicenses, agreements, covenants not to sue, and permissions (as amended to date). With respect to each license, sublicense, agreement, covenant not to sue, or permission identified or required to be identified in §4(m)(iii) of the Disclosure Schedule:

(A) the license, sublicense, agreement, covenant not to sue, or permission is legal, valid, binding, enforceable, and in full force and effect in all material respects;

(B) no party to the license, sublicense, agreement, covenant not to sue, or permission is in material breach or default, and no event has occurred that with notice or lapse of time would constitute a material breach or default or permit termination, modification, or acceleration thereunder;

(C) no party to the license, sublicense, agreement, covenant not to sue, or permission has repudiated any material provision thereof; and

(D) neither Target nor any of its Subsidiaries has granted any sublicense or similar right with respect to the license, sublicense, agreement, covenant not to sue, or permission.

(n) *Tangible Assets.* The buildings, machinery, equipment, and other tangible assets that Target and its Subsidiaries own and lease are free from material defects (patent and latent), have been maintained in accordance with normal industry practice, and are in good operating condition and repair (subject to normal wear and tear).

(o) *Inventory.* The inventory of Target and its Subsidiaries consists of raw materials and supplies, manufactured and processed parts, work in process, and finished goods, all of which is merchantable and fit for the purpose for which it was procured or manufactured, and none of which is slow-moving, obsolete, damaged, or defective, subject only to the reserve for inventory writedown set forth on the face of the Most Recent Balance Sheet (rather than in any notes thereto) as adjusted for operations and transactions through the Closing Date in accordance with the past custom and practice of Target and its Subsidiaries.

(p) *Contracts.* §4(p) of the Disclosure Schedule lists the following contracts and other agreements to which Target or any of its Subsidiaries is a party:

(i) any agreement (or group of related agreements) for the lease of personal property to or from any Person providing for lease payments in excess of $\_\_\_\_\_\_\_\_\_\_ per annum;

(ii) any agreement (or group of related agreements) for the purchase or sale of raw materials, commodities, supplies, products, or other personal property, or for the furnishing or receipt of services, the performance of which will extend over a period of more than 1 year or involve consideration in excess of $\_\_\_\_\_\_\_\_\_\_;

(iii) any agreement concerning a partnership or joint venture;

(iv) any agreement (or group of related agreements) under which it has created, incurred, assumed, or guaranteed any indebtedness for borrowed money, or any capitalized lease obligation, in excess of $\_\_\_\_\_\_\_\_\_\_ or under which it has imposed a Lien on any of its assets, tangible or intangible;

(v) any material agreement concerning confidentiality or non-competition;

(vi) any material agreement with any of Sellers and their Affiliates (other than Target and its Subsidiaries);

(vii) any profit sharing, stock option, stock purchase, stock appreciation, deferred compensation, severance, or other material plan or arrangement for the benefit of its current or former directors, officers, and employees;

(viii) any collective bargaining agreement;

(ix) any agreement for the employment of any individual on a full-time, part-time, consulting, or other basis providing annual compensation in excess of $\_\_\_\_\_\_\_\_\_\_ or providing material severance benefits;

(x) any agreement under which it has advanced or loaned any amount to any of its directors, officers, and employees outside the Ordinary Course of Business;

(xi) any agreement under which the consequences of a default or termination could have a Material Adverse Effect;

(xii) any agreement under which it has granted any Person any registration rights (including, without limitation, demand and piggyback registration rights);

(xiii) any settlement, conciliation or similar agreement with any Governmental Entity or which will involve payment after the execution date of this Agreement of consideration in excess of $\_\_\_\_\_\_\_\_\_\_;

(xiv) any agreement under which Target or any of its Subsidiaries has advanced or loaned any other Person amounts in the aggregate exceeding $\_\_\_\_\_\_\_\_\_\_; or

(xv) any other agreement (or group of related agreements) the performance of which involves consideration in excess of $\_\_\_\_\_\_\_\_\_\_.

Sellers have delivered to Buyer a correct and complete copy of each written agreement listed in §4(p) of the Disclosure Schedule (as amended to date) and a written summary setting forth the material terms and conditions of each oral agreement referred to in §4(p) of the Disclosure Schedule. With respect to each such agreement: (A) the agreement is legal, valid, binding, enforceable, and in full force and effect in all material respects; (B) no party is in material breach or default, and no event has occurred that with notice or lapse of time would constitute a material breach or default, or permit termination, modification, or acceleration, under the agreement; and (C) no party has repudiated any material provision of the agreement.

(q) *Notes and Accounts Receivable.* All notes and accounts receivable of Target and its Subsidiaries are reflected properly on their books and records, are valid receivables subject to no setoffs or counterclaims, are current and collectible, and will be collected in accordance with their terms at their recorded amounts, subject only to the reserve for bad debts set forth on the face of the Most Recent Balance Sheet (rather than in any notes thereto) as adjusted for operations and transactions through the Closing Date in accordance with the past custom and practice of Target and its Subsidiaries.

(r) *Powers of Attorney.* To the Knowledge of any Seller and the directors and officers of Target and its Subsidiaries, there are no material outstanding powers of attorney executed on behalf of Target or any of its Subsidiaries.

(s) *Insurance.* §4(s) of the Disclosure Schedule sets forth the following information with respect to each material insurance policy (including policies providing property, casualty, liability, and workers’ compensation coverage and bond and surety arrangements) with respect to which Target or any of its Subsidiaries is a party, a named insured, or otherwise the beneficiary of coverage:

(i) the name, address, and telephone number of the agent;

(ii) the name of the insurer, the name of the policyholder, and the name of each covered insured;

(iii) the policy number and the period of coverage;

(iv) the scope (including an indication of whether the coverage is on a claims made, occurrence, or other basis) and amount (including a description of how deductibles and ceilings are calculated and operate) of coverage; and

(v) a description of any retroactive premium adjustments or other material loss-sharing arrangements.

With respect to each such insurance policy: (A) the policy is legal, valid, binding, enforceable, and in full force and effect in all material respects; (B) neither Target, nor any of its Subsidiaries, nor any other party to the policy is in material breach or default (including with respect to the payment of premiums or the giving of notices), and no event has occurred that, with notice or the lapse of time, would constitute such a material breach or default, or permit termination, modification, or acceleration, under the policy; and (C) no party to the policy has repudiated any material provision thereof. §4(s) of the Disclosure Schedule describes any material self-insurance arrangements affecting Target or any of its Subsidiaries.

(t) *Litigation.* §4(t) of the Disclosure Schedule sets forth each instance in which Target or any of its Subsidiaries is or, at any time during the three (3) years prior to the date of this Agreement, was (i) subject to any outstanding injunction, judgment, order, decree, ruling, or charge or (ii) a party or, to the Knowledge of any Seller and the directors and officers of Target and its Subsidiaries, threatened to be made a party to any action, suit, proceeding, hearing, or investigation of, in, or before (or that could come before) any court or quasi-judicial or administrative agency of any federal, state, local, or non-U.S. jurisdiction or before (or that could come before) any arbitrator.

(u) *Product Warranty.* Substantially all of the products manufactured, sold, leased, and delivered by Target and its Subsidiaries have conformed in all material respects with all applicable contractual commitments and all express and implied warranties, and neither Target nor any of its Subsidiaries has any material liability (whether known or unknown, whether asserted or unasserted, whether absolute or contingent, whether accrued or unaccrued, whether liquidated or unliquidated, and whether due or to become due) for replacement or repair thereof or other damages in connection therewith, subject only to the reserve for product warranty claims set forth on the face of the Most Recent Balance Sheet (rather than in any notes thereto) as adjusted for operations and transactions through the Closing Date in accordance with the past custom and practice of Target and its Subsidiaries. Substantially all of the products manufactured, sold, leased, and delivered by Target and its Subsidiaries are subject to standard terms and conditions of sale or lease. §4(u) of the Disclosure Schedule includes copies of the standard terms and conditions of sale or lease for each of Target and its Subsidiaries (containing applicable guaranty, warranty, and indemnity provisions).

(v) *Product Liability.* Neither Target nor any of its Subsidiaries has any material liability (whether known or unknown, whether asserted or unasserted, whether absolute or contingent, whether accrued or unaccrued, whether liquidated or unliquidated, and whether due or to become due) arising out of any injury to individuals or property as a result of the ownership, possession, or use of any product manufactured, sold, leased, or delivered by Target or any of its Subsidiaries.

(w) *Employees.* To the Knowledge of any Target Stockholder and the directors and officers of Target and its Subsidiaries, no executive, key employee, or significant group of employees plans to terminate employment with Target or any of its Subsidiaries during the next 12 months. Neither Target nor any of its Subsidiaries is a party to or bound by any collective bargaining agreement, nor has any of them experienced any strike or material grievance, claim of unfair labor practices, or other collective bargaining dispute within the past [3] years. Neither Target nor any of its Subsidiaries has committed any material unfair labor practice within the past [3] years. To the Knowledge of any Target Stockholders and the directors and officers of Target and its Subsidiaries, there is no organizational effort presently being made or threatened by or on behalf of any labor union with respect to employees of Target or any of its Subsidiaries and no such effort has occurred within the past [3] years. [With respect to this transaction, any notice required under any law or collective bargaining agreement has been or prior to the Closing Date will be given, and all bargaining obligations with any employee representative have been or prior to the Closing Date will be satisfied.][[44]](#footnote-44) [Within the past 3 years], neither Target nor any of its Subsidiaries has implemented any plant closing or layoff of employees requiring notice under the WARN Act. Each of Target and its Subsidiaries has adequately investigated all sexual harassment allegations of which it is or was made aware within the past [3] years. With respect to each such allegation, each of Target and its Subsidiaries has taken all corrective action necessary under applicable Law.

(x) Employee Benefits.[[45]](#footnote-45)

(i) §4(x) of the Disclosure Schedule lists each Employee Benefit Plan that Target or any of its Subsidiaries maintains, to which Target or any of its Subsidiaries contributes or has any obligation to contribute, or with respect to which Target or any of its Subsidiaries has any liability.

(A) Each such Employee Benefit Plan (and each related trust, insurance contract, or fund) has been maintained, funded and administered in accordance with the terms of such Employee Benefit Plan and complies in form and in operation in all material respects with the applicable requirements of ERISA, the Code, and other applicable laws.

(B) All required reports and descriptions (including Form 5500 annual reports, summary annual reports, and summary plan descriptions) have been timely filed and/or distributed in accordance with the applicable requirements of ERISA and the Code with respect to each such Employee Benefit Plan. The requirements of COBRA have been met in all material respects with respect to each such Employee Benefit Plan and each Employee Benefit Plan maintained by an ERISA Affiliate that is an Employee Welfare Benefit Plan subject to COBRA.

(C) All contributions (including all employer contributions and employee salary reduction contributions) that are due have been made within the time periods prescribed by ERISA and the Code to each such Employee Benefit Plan that is an Employee Pension Benefit Plan and all contributions for any period ending on or before the Closing Date that are not yet due have been made to each such Employee Pension Benefit Plan or accrued in accordance with the past custom and practice of Target and its Subsidiaries. All premiums or other payments for all periods ending on or before the Closing Date have been paid with respect to each such Employee Benefit Plan that is an Employee Welfare Benefit Plan.

(D) Each such Employee Benefit Plan that is intended to meet the requirements of a ‘‘qualified plan’’ under Code §401(a) has received a determination from the Internal Revenue Service that such Employee Benefit Plan is so qualified, and Sellers are not aware of any facts or circumstances that would reasonably be expected to adversely affect the qualified status of any such Employee Benefit Plan.

(E) There have been no Prohibited Transactions with respect to any such Employee Benefit Plan or any Employee Benefit Plan maintained by an ERISA Affiliate. No Fiduciary has any liability for material breach of fiduciary duty or any other material failure to act or comply in connection with the administration or investment of the assets of any such Employee Benefit Plan. No action, suit, proceeding, hearing, or investigation with respect to the administration or the investment of the assets of any such Employee Benefit Plan (other than routine claims for benefits) is pending or, to the Knowledge of any Seller and the directors and officers of Target and its Subsidiaries, threatened.

(F) Sellers have delivered to Buyer correct and complete copies of the plan documents and summary plan descriptions, the most recent determination letter received from the Internal Revenue Service, the most recent annual report (Form 5500, with all applicable attachments), and all related trust agreements, insurance contracts, and other funding arrangements which implement each such Employee Benefit Plan.

**Alternative 1—add the following paragraph if there are No Defined Benefit Plans:**

[(ii) Neither Target, nor any of its Subsidiaries, nor any ERISA Affiliate contributes to, has any obligation to contribute to, or has any material liability under or with respect to any Employee Pension Benefit Plan that is a ‘‘defined benefit plan’’ (as defined in ERISA §3(35)).]

**Alternative 2—add the following paragraph if there are Defined Benefit Plans:**

[(ii) With respect to each Employee Benefit Plan that Target, any of its Subsidiaries, or any ERISA Affiliate maintains, to which any of them contributes or has any obligation to contribute, or with respect to which any of them has any material liability or potential liability:

(A) No such Employee Benefit Plan that is an Employee Pension Benefit Plan (other than any Multiemployer Plan) has been completely or partially terminated or been the subject of a Reportable Event as to which notices would be required to be filed with the PBGC. No proceeding by the PBGC to terminate any such Employee Pension Benefit Plan (other than any Multiemployer Plan) has been instituted or, to the Knowledge of any Seller and the directors and officers of Target and its Subsidiaries, threatened. The market value of assets under each such Employee Benefit Plan that is an Employee Pension Benefit Plan (other than any Multiemployer Plan) equals or exceeds the present value of all vested and non-vested liabilities thereunder (determined in accordance with then current funding assumptions).

(B) Neither Target nor any of its Subsidiaries has incurred any material liability to the PBGC (other than with respect to PBGC premium payments not yet due) or otherwise under Title IV of ERISA or under the Code with respect to any such Employee Benefit Plan that is an Employee Pension Benefit Plan.]

(iii) Neither Target, nor any of its Subsidiaries, nor any ERISA Affiliate contributes to, has any obligation to contribute to, or has any material liability (including withdrawal liability as defined in ERISA §4201) under or with respect to any Multiemployer Plan.

(iv) Neither Target nor any of its Subsidiaries maintains, contributes to or has an obligation to contribute to, or has any material liability or potential liability with respect to, any Employee Welfare Benefit Plan or other arrangement providing health or life insurance or other welfare-type benefits for current or future retired or terminated employees (or any spouse or other dependent thereof) of Target or any of its Subsidiaries other than in accordance with COBRA.

(v) The consummation of the transactions contemplated by this Agreement will not accelerate the time of the payment or vesting of, or increase the amount of, or result in the forfeiture of compensation or benefits under, any Employee Benefit Plan.

(vi) §4(x)(v) of the Disclosure Schedule lists each written agreement, contract, or other arrangement—whether or not an Employee Benefit Plan (collectively a ‘‘Plan’’)—to which Target or any of its Subsidiaries is a party that, to the Knowledge of Sellers or any officer of Target or any of the Subsidiaries, is a ‘‘nonqualified deferred compensation plan’’ subject to Code §409A. [Each Plan has been maintained in good faith compliance with Code §409A and the regulations thereunder and no amounts under any such Plan is or has been subject to the interest and additional tax set forth under Code §409A(a)(1)(B).][[46]](#footnote-46) Neither Target nor any of its Subsidiaries has any actual or potential obligation to reimburse or otherwise ‘‘gross-up’’ any Person for the interest or additional tax set forth under Code §409A(a)(1)(B).

(y) *Guaranties.* Neither Target nor any of its Subsidiaries is a guarantor or otherwise is responsible for any liability or obligation (including indebtedness) of any other Person.

(z) Environmental, Health, and Safety Matters.[[47]](#footnote-47)

(i) Each of Target and its Subsidiaries have for the past 5 years complied and are in compliance, in each case in all material respects, with all Environmental, Health, and Safety Requirements.

(ii) Without limiting the generality of the foregoing, each of Target and its Subsidiaries have obtained, have for the past 5 years complied, and are in compliance with, in each case in all material respects, all material permits, licenses and other authorizations that are required pursuant to Environmental, Health, and Safety Requirements for the occupation of their facilities and the operation of their business.

(iii) Neither Target nor any of its Subsidiaries has received any written notice, report, or other information regarding any actual or alleged material violation of Environmental, Health, and Safety Requirements, or any material liabilities or potential material liabilities, including any material investigatory, remedial, or corrective obligations, relating to any of them, their business, or their past or current facilities arising under Environmental, Health, and Safety Requirements.

(iv) Neither Target nor any of its Subsidiaries, nor any of their respective predecessors or Affiliates have treated, stored, disposed of, arranged for or permitted the disposal of, transported, handled, manufactured, distributed, exposed any person to, or released any substance, including without limitation any hazardous substance, or owned or operated any property or facility which is or has been contaminated by any such substance so as to give rise to any current or future material liabilities, including any material liability for fines, penalties, response costs, corrective action costs, personal injury, property damage, natural resources damages, or attorneys’ fees, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (‘‘CERCLA’’), or the Solid Waste Disposal Act, as amended (‘‘SWDA’’), or any other Environmental, Health, and Safety Requirements.

(v) Neither Target nor any of its Subsidiaries, nor their respective predecessors or Affiliates has designed, manufactured, sold, marketed, installed, repaired, or distributed products or other items containing asbestos and none of such entities is or will become subject to any liabilities with respect to the presence of asbestos in any product or item or in or upon any property, premises, or facility.[[48]](#footnote-48)

(vi) Neither Target nor any of its Subsidiaries has assumed, undertaken, provided an indemnity with respect to, or otherwise become subject to, any Liability, including without limitation any obligation for corrective or remedial action, of any other Person relating to Environmental, Health, and Safety Requirements.

(vii) Sellers, Target, and its Subsidiaries have furnished to Buyer all material environmental audits, reports, and other material environmental documents relating to Target’s, its Subsidiaries’, or their respective predecessors’ or Affiliates’ past or current properties, facilities, or operations that are in their possession, custody, or under their reasonable control.

(aa) *IT Assets.* None of the computer software, computer hardware (whether general or special purpose), telecommunications capabilities (including all voice, data and video networks) and other similar or related items of automated, computerized, and/or software systems and any other networks or systems and related services that are used by or relied on by Target or any of its Subsidiaries in the conduct of its or their business (collectively, the “*IT Systems*”) have experienced bugs, failures, breakdowns, or continued substandard performance in the past twelve (12) months that has caused any substantial disruption or interruption in or to the use of any such IT Systems or data by Target or its Subsidiaries. The IT Systems are sufficient for the needs of the businesses of Target and its Subsidiaries, including as to capacity, scalability, and ability to process current and anticipated peak volumes in a timely manner.[[49]](#footnote-49)

(bb) *Certain Business Relationships with Target and Its Subsidiaries.* None of Sellers, their Affiliates, Sellers’ directors, officers, employees, and shareholders and Target’s and its Subsidiaries’ directors, officers, employees, and shareholders has been involved in any material business arrangement or relationship with Target or any of its Subsidiaries within the past 12 months, and none of the Sellers, their Affiliates, Sellers’ directors, officers, employees, and shareholders and Target’s and its Subsidiaries’ directors, officers, employees, and shareholders owns any material asset, tangible or intangible, that is used in the business of Target or any of its Subsidiaries.[[50]](#footnote-50)

(cc) *Disclosure.* The representations and warranties contained in this §4 do not contain any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements and information contained in this §4 not misleading.

(dd) Customers and Suppliers.

(i) §4(dd) of the Disclosure Schedule lists the \_\_\_\_\_\_\_\_\_\_ largest customers of Target (on a consolidated basis) for each of the 2 most recent fiscal years and sets forth opposite the name of each such customer the percentage of consolidated net sales attributable to such customer. §4(dd) of the Disclosure Schedule also lists any additional current customers that Target anticipates shall be among the \_\_\_\_\_\_\_\_\_\_ largest customers for the current fiscal year.

(ii) Since the date of the Most Recent Balance Sheet, no [material] supplier of Target or any its Subsidiaries has indicated [in writing] that it shall stop, or [materially] decrease the rate of, supplying materials, products or services to Target or any of its Subsidiaries, and no customer listed on §4(dd) of the Disclosure Schedule has indicated [in writing] that it shall stop, or [materially] decrease the rate of, buying materials, products or services from Target or any of its Subsidiaries.

(ee) *Data Privacy and Security.*[[51]](#footnote-51) Target's and its Subsidiaries' respective businesses have complied with and, as presently conducted [and as presently proposed to be conducted], are in compliance with, all Data Laws except, in each case, to the extent that a failure to comply would not have a Material Adverse Effect. Target and its Subsidiaries have complied with, and are presently in compliance with, its and their respective policies applicable to data privacy, data security, and/or personal information except, in each case, to the extent that a failure to comply would not have a Material Adverse Effect. Neither Target nor any of its Subsidiaries has experienced any incident in which personal information or other sensitive data was or may have been stolen or improperly accessed, acquired, destroyed, damaged, disclosed, corrupted, or altered, and neither Target nor any of its Subsidiaries is aware of any facts suggesting the likelihood of the foregoing, including without limitation, any breach of security or receipt of any notices or complaints from any Person regarding personal information or other data.[[52]](#footnote-52)

(ff) *Disclaimer of Other Representations and Warranties*. Buyer, on its own behalf and on behalf of its Affiliates, acknowledges, represents, warrants, and agrees that (x) neither Target nor any Seller makes any representation or warranty, express or implied, in respect of the Target Shares or Target, its Subsidiaries, or any of their respective assets, liabilities, or operations and (y) Buyer has not relied upon the accuracy or completeness of any express or implied representation, warranty, statement, or information of any nature made or provided by any Person on behalf of any Seller or Target, including without limitation in any confidential information statement, management presentation, or document made available in a dataroom, in each case other than the representations and warranties expressly set forth in §3 and this §4; *provided*, however, that nothing herein or elsewhere in this Agreement will limit any remedy Buyer may have for Fraud [or aiding and abetting Fraud] committed by any Seller, Target, or any of their respective officers, directors, employees, agents, or representatives, whether or not such Fraud [or aiding and abetting Fraud] relates to a representation made in a written agreement among the Parties.[[53]](#footnote-53)

§5. *Pre-Closing Covenants.* The Parties agree as follows with respect to the period between the execution of this Agreement and the Closing:[[54]](#footnote-54)

(a) *General.* Each of the Parties will use his, her, or its reasonable best efforts to take all action and to do all things necessary[, proper, or advisable] in order to consummate and make effective the transactions contemplated by this Agreement (including satisfaction, but not waiver, of the Closing conditions set forth in §7 below).

(b) *Notices and Consents.* Sellers will cause each of Target and its Subsidiaries to give any notices to third parties, and will cause each of Target and its Subsidiaries to use their reasonable best efforts to obtain any third-party consents referred to in §4(c) above, the Lease Consents, and the items set forth in §5(b) of the Disclosure Schedule. Each of the Parties will (and Sellers will cause each of Target and its Subsidiaries to) give any notices to, make any filings with, and use its reasonable best efforts to obtain any authorizations, consents, and approvals of governments and governmental agencies in connection with the matters referred to in §3(a)(ii), §3(b)(ii), and §4(c) above. Without limiting the generality of the foregoing, each of the Parties will file (and Sellers will cause each of Target and its Subsidiaries to file) any Notification and Report Forms and related material that he, she, or it may be required to file with the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice under the Hart-Scott-Rodino Act, will use his, her, or its reasonable best efforts to obtain (and Sellers will cause each of Target and its Subsidiaries to use their reasonable best efforts to obtain) a waiver of the applicable waiting period, and will make (and Sellers will cause each of Target and its Subsidiaries to make) any further filings pursuant thereto that may be necessary[, proper, or advisable] in connection therewith.

(c) *Operation of Business.* Sellers will not cause or permit Target or any of its Subsidiaries to engage in any practice, take any action, or enter into any transaction outside the Ordinary Course of Business. Without limiting the generality of the foregoing, Sellers will not cause or permit Target or any of its Subsidiaries to (i) declare, set aside, or pay any dividend or make any distribution with respect to its capital stock or redeem, purchase, or otherwise acquire any of its capital stock, (ii) \_\_\_\_\_\_\_\_\_\_, or (iii) otherwise engage in any practice, take any action, or enter into any transaction of the sort described in §4(h) above.[[55]](#footnote-55)

(d) *Preservation of Business.* Sellers will cause each of Target and its Subsidiaries to keep their business and properties substantially intact, including their present operations, physical facilities, working conditions, insurance policies, and relationships with lessors, licensors, suppliers, customers, and employees.[[56]](#footnote-56)

(e) *Full Access.* Each Seller will permit, and the Sellers will cause each of Target and its Subsidiaries to permit, representatives of Buyer (including legal counsel and accountants) to have full access at all reasonable times, and in a manner so as not to interfere with the normal business operations of Target and its Subsidiaries, to all premises, properties, personnel, books, records (including tax records), contracts, and documents of or pertaining to each of Target and its Subsidiaries. Buyer will treat and hold as such any Confidential Information it receives from any of Sellers, Target, and its Subsidiaries in the course of the reviews contemplated by this §5(e), will not use any of the Confidential Information except in connection with this Agreement, and, if this Agreement is terminated for any reason whatsoever, will return to Sellers, Target, and its Subsidiaries all tangible embodiments (and all copies) of the Confidential Information which are in its possession.[[57]](#footnote-57)

(f) *Notice of Developments.* Sellers will give prompt written notice to Buyer of any material adverse development causing a breach of any of the representations and warranties in §4 above.[[58]](#footnote-58) Each Party will give prompt written notice to the others of any material adverse development causing a breach of any of his, her, or its own representations and warranties in §3 above. No disclosure by any Party pursuant to this §5(f), however, shall be deemed to amend or supplement Annex I, Annex II, or the Disclosure Schedule or to prevent or cure any misrepresentation, breach of warranty, or breach of covenant.[[59]](#footnote-59)

(g) *Exclusivity.* No Seller will (and Sellers will not cause or permit Target or any of its Subsidiaries to) (i) solicit, initiate, or encourage the submission of any proposal or offer from any Person relating to the acquisition of any capital stock or other voting securities, or any substantial portion of the assets, of Target or any of its Subsidiaries (including any acquisition structured as a merger, consolidation, or share exchange) or (ii) participate in any discussions or negotiations regarding, furnish any information with respect to, assist or participate in, or facilitate in any other manner any effort or attempt by any Person to do or seek any of the foregoing.[[60]](#footnote-60) No Seller will vote his, her, or its Target Shares in favor of any such acquisition.

(h) *Maintenance of Real Property.* Sellers will cause each of Target and its Subsidiaries to maintain the Real Property, including all of the Improvements in substantially the same condition as existed on the date of this Agreement, ordinary wear and tear excepted, and shall not demolish or remove any of the existing Improvements, or erect new improvements on the Real Property or any portion thereof, without the prior written consent of Buyer.

(i) *Leases.* Sellers will not cause or permit any Lease to be amended, modified, extended, renewed or terminated, nor shall Target or its Subsidiaries enter into any new lease, sublease, license or other agreement for the use or occupancy of any Real Property requiring rental and other payments in excess of $\_\_\_\_\_\_\_\_\_\_ annually as averaged over the term thereof, without the prior written consent of Buyer.

(j) *Title Insurance and Surveys.* Target and its Subsidiaries shall use reasonable best efforts to assist Buyer in obtaining the Title Commitments, Title Policies and Surveys in form and substance as set out in §7 of this Agreement, within the time periods set forth therein. Sellers shall provide the Title Company with any affidavits, undertakings, memoranda or other assurances reasonably requested by the Title Company to issue the Title Policies.

(k) *Tax Matters.* Without the prior written consent of Buyer, neither Target nor any of its Subsidiaries shall make or change any election, change an annual accounting period, adopt or change any accounting method, file any amended Tax Return, enter into any closing agreement, settle any Tax claim or assessment relating to Target or any of its Subsidiaries, surrender any right to claim a refund of Taxes, consent to any extension or waiver of the limitation period applicable to any Tax claim or assessment relating to Target or any of its Subsidiaries, or take any other similar action relating to the filing of any Tax Return or the payment of any Tax, if such election, adoption, change, amendment, agreement, settlement, surrender, consent or other action would have the effect of increasing the Tax liability of Target or any of its Subsidiaries for any period ending after the Closing Date or decreasing any Tax attribute of Target or any of its Subsidiaries existing on the Closing Date.

§6. *Post-Closing Covenants.*[[61]](#footnote-61) The Parties agree as follows with respect to the period following the Closing:

(a) *General.* In case at any time after the Closing any further actions are necessary to carry out the purposes of this Agreement, each of the Parties will take such further actions (including the execution and delivery of such further instruments and documents) as any other Party may reasonably request, all at the sole cost and expense of the requesting Party (unless the requesting Party is entitled to indemnification therefor under §8 below).[[62]](#footnote-62) Sellers acknowledge and agree that from and after the Closing Buyer will be entitled to possession of all documents, books, records (including tax records), agreements, and financial data of any sort relating to Target and its Subsidiaries.

(b) *Litigation Support.* In the event and for so long as any Party actively is contesting or defending against any action, suit, proceeding, hearing, investigation, charge, complaint, claim, or demand in connection with (i) any transaction contemplated under this Agreement or (ii) any fact, situation, circumstance, status, condition, activity, practice, plan, occurrence, event, incident, action, failure to act, or transaction on or prior to the Closing Date involving Target or any of its Subsidiaries, each of the other Parties will cooperate with him, her, or it and his, her, or its counsel in the contest or defense, make available his, her, or its personnel, and provide such testimony and access to his, her, or its books and records as shall be necessary in connection with the contest or defense, all at the sole cost and expense of the contesting or defending Party (unless the contesting or defending Party is entitled to indemnification therefor under §8 below).[[63]](#footnote-63)

(c) *Transition.* No Seller shall take any action that is designed or intended to have the effect of discouraging any lessor, licensor, customer, supplier, or other business associate of Target or any of its Subsidiaries from maintaining the same business relationships with Target and its Subsidiaries after the Closing as it maintained with Target and its Subsidiaries prior to the Closing.

(d) *Confidentiality.*[[64]](#footnote-64) Each Seller will, using the same degree of care with which it treats its own confidential information (but not less than a reasonable standard of care), treat and hold as such all of the Confidential Information, refrain from using any of the Confidential Information except in connection with this Agreement, and deliver promptly to Buyer or destroy, at the request and option of Buyer, all tangible embodiments (and all copies) of the Confidential Information that are in his, her, or its possession. In the event that any Seller is requested or required pursuant to oral or written question or request for information or documents in any legal proceeding, interrogatory, subpoena, civil investigative demand, or similar process to disclose any Confidential Information, that Seller will notify Buyer promptly of the request or requirement so that Buyer may seek an appropriate protective order or waive compliance with the provisions of this §6(d). If, in the absence of a protective order or the receipt of a waiver hereunder, any Seller is, on the advice of counsel, compelled to disclose any Confidential Information to any tribunal or else stand liable for contempt, that Seller may disclose the Confidential Information to the tribunal; provided, however, that the disclosing Seller shall use his, her, or its reasonable best efforts to obtain, at the reasonable request of Buyer, an order or other assurance that confidential treatment will be accorded to such portion of the Confidential Information required to be disclosed as Buyer shall designate.

(e) *Non-Compete* *Covenant.*[[65]](#footnote-65) For a period of [3 years] from and after the Closing Date, no Seller will engage directly or indirectly in any business that Target or any of its Subsidiaries conducts as of the Closing Date in any geographic area in which Target or any of its Subsidiaries conducts that business as of the Closing Date; provided, however, that no owner of less than 1% of the outstanding stock of any publicly traded corporation shall be deemed to engage solely by reason thereof in its business. If the final judgment of a court of competent jurisdiction declares that any term or provision of this §6(e) is invalid or unenforceable, the Parties agree that the court making the determination of invalidity or unenforceability shall have the power to reduce the scope, duration, or area of the term or provision, to delete specific words or phrases, or to replace any invalid or unenforceable term or provision with a term or provision that is valid and enforceable and that comes closest to expressing the intention of the invalid or unenforceable term or provision, and this Agreement shall be enforceable as so modified after the expiration of the time within which the judgment may be appealed.

(f) *Buyer Notes.* Each Buyer Note shall be imprinted with a legend substantially in the following form:

*This Note was originally issued on* \_\_\_\_\_\_\_ \_\_\_, \_\_\_\_, *and has not been registered under the Securities Act of 1933, as amended. The sale or transfer of this Note is subject to certain restrictions set forth in the Purchase Agreement. The issuer of this Note will furnish a copy of these provisions to the holder hereof without charge upon written request.*

Each holder desiring to transfer a Buyer Note first must furnish Buyer with (i) a written opinion reasonably satisfactory to Buyer in form and substance from counsel reasonably satisfactory to Buyer by reason of experience to the effect that the holder may transfer the Buyer Note as desired without registration under the Securities Act and (ii) a written undertaking executed by the desired transferee reasonably satisfactory to Buyer in form and substance agreeing to be bound by the restrictions on transfer contained herein.[[66]](#footnote-66)

(g) *No Intermediary Transaction Tax Shelter*. Buyer shall promptly notify Sellers in the event Buyer takes any action with respect to the Target subsequent to the Closing that would cause the transactions contemplated hereby to constitute part of a transaction that is the same as, or substantially similar to, the ‘‘Intermediary Transaction Tax Shelter’’ described in Internal Revenue Service Notices 2001-16 and 2008-111.[[67]](#footnote-67)

(h) *Seller’s Post-Acquisition Use of Law Firm*. Each party to this Agreement acknowledges that (a) 1 or more of Target, its Subsidiaries, and Sellers have retained **[insert name of law firm(s)]** (‘‘*Law Firm*’’) to act as their counsel in connection with the negotiation, preparation, execution, and delivery of this Agreement and related agreements, and the consummation of the transactions contemplated hereby or thereby (the ‘‘*Transaction*’’) **[as well as other past and ongoing matters]**, (b) Law Firm has not acted as counsel for any other Person in connection with the Transaction, and (c) no Person other than Target, its Subsidiaries, and Sellers has the status of a Law Firm client for conflict of interest or any other purpose as a result thereof. Buyer (1) waives and will not assert, and will cause each of its Subsidiaries (including, after Closing, Target and its Subsidiaries) to waive and not assert, any conflict of interest relating to Law Firm’s representationafter the Closing of any Seller or Seller’s Affiliate in any matter involving the Transaction (including any litigation, arbitration, mediation, or other proceeding), and (2) consents to, and will cause each of its Subsidiaries (including, after Closing, Target and its Subsidiaries) to consent to, any such representation, even though in each case (x) the interests of such Seller and/or Seller’s Affiliate may be directly adverse to Buyer, Target, or any of their Subsidiaries, or (y) Law Firm may be handling other ongoing matters for Buyer, Target, or any of their respective Subsidiaries.[[68]](#footnote-68)

§7. Conditions to Obligation to Close.

(a) *Conditions to Buyer’s Obligation.*[[69]](#footnote-69) The obligation of Buyer to consummate the transactions to be performed by it in connection with the Closing is subject to satisfaction of the following conditions:

(i) the representations and warranties set forth in §3(a) and §4 above shall be true and correct in all material respects at and as of the Closing Date, except to the extent that such representations and warranties are qualified by the term ‘‘material,’’ or contain terms such as ‘‘Material Adverse Effect’’ or ‘‘Material Adverse Change,’’ in which case such representations and warranties (as so written, including the term ‘‘material’’ or ‘‘Material’’) shall be true and correct in all respects at and as of the Closing Date;[[70]](#footnote-70)

(ii) Sellers shall have performed and complied with all of their covenants hereunder in all material respects through the Closing, except to the extent that such covenants are qualified by the term ‘‘material,’’ or contain terms such as ‘‘Material Adverse Effect’’ or ‘‘Material Adverse Change,’’ in which case Sellers shall have performed and complied with all of such covenants (as so written, including the term ‘‘material’’ or ‘‘Material’’) in all respects through the Closing;

(iii) Target and its Subsidiaries shall have procured all of the third-party consents specified in §5(b) above;[[71]](#footnote-71)

(iv) no action, suit, or proceeding shall be pending before any court or quasi-judicial or administrative agency of any federal, state, local, or non-U.S. jurisdiction or before any arbitrator wherein an unfavorable injunction, judgment, order, decree, ruling, or charge would (A) prevent consummation of any of the transactions contemplated by this Agreement, (B) cause any of the transactions contemplated by this Agreement to be rescinded following consummation, (C) adversely affect the right of Buyer to own Target Shares and to control Target and its Subsidiaries, or (D) materially and adversely affect the right of Target or any of its Subsidiaries to own its assets and to operate its business (and no such injunction, judgment, order, decree, ruling, or charge shall be in effect);[[72]](#footnote-72)

(v) Sellers shall have delivered to Buyer a certificate to the effect that each of the conditions specified above in §7(a)(i)–(iv) is satisfied in all respects;

(vi) all applicable waiting periods (and any extensions thereof) under the Hart-Scott-Rodino Act shall have expired or otherwise been terminated and the Parties, Target, and its Subsidiaries shall have received all other material authorizations, consents, and approvals of governments and governmental agencies referred to in §3(a)(ii), §3(b)(ii), and §4(c) above;

(vii) the relevant Parties shall have entered into side agreements in form and substance as set forth in Exhibits C-1 through C-\_\_\_\_\_\_\_\_\_\_ attached hereto and the same shall be in full force and effect;

(viii) Buyer shall have received from counsel to Sellers an opinion in form and substance as set forth in Exhibit D attached hereto, addressed to Buyer and on which Buyer’s lenders shall be entitled to rely, and dated as of the Closing Date;

(ix) Buyer shall have received the resignations, effective as of the Closing, of each director and officer of Target and its Subsidiaries;[[73]](#footnote-73)

(x) all actions to be taken by Sellers in connection with consummation of the transactions contemplated hereby and all certificates, opinions, instruments, and other documents required to effect the transactions contemplated hereby will be reasonably satisfactory in form and substance to Buyer;

(xi) Buyer shall have obtained, no later than 10 days prior to the Closing Date, a commitment for an ALTA Owner’s Title Insurance Policy 2006 Form or other form of policy acceptable to Buyer for each Owned Real Property (other than Owned Real Property located outside the United States) and each Leased Real Property identified by Buyer (the ‘‘*Material Leased Real Property*’’), issued by a title insurance company satisfactory to Buyer (the ‘‘*Title Company*’’), together with a copy of all documents referenced therein (the ‘‘*Title Commitments*’’);[[74]](#footnote-74)

(xii) at Closing, Buyer shall have obtained title insurance policies from the Title Company (which may be in the form of a mark-up of a pro forma of the Title Commitments) in accordance with the Title Commitments, insuring each of Target’s and its Subsidiaries’ fee simple title to each Owned Real Property or their legal, valid, binding and enforceable leasehold interest in each Material Leased Real Property (as the case may be) as of the Closing Date (including all recorded appurtenant easements insured as separate legal parcels) with gap coverage from Sellers through the date of recording, subject only to Permitted Encumbrances, in such amount as Buyer reasonably determines to be the value of the Real Property insured thereunder and which shall include all requested endorsements (the ‘‘*Title Policies*’’); and each of the Title Policies [shall have the creditor’s rights exception deleted, and] shall include an extended coverage endorsement (insuring over the general or standard exceptions), ALTA Form 3.1 zoning (with parking and loading docks), a non-imputation (to the effect that title defects known to the employees, officers, directors and shareholders of Target and its Subsidiaries prior to the Closing shall not be deemed ‘‘facts known to the insured’’) and all other endorsements reasonably requested by Buyer, in form and substance reasonably satisfactory to Buyer (provided that Sellers and Buyer shall share equally all fees, costs and expenses with respect to the Title Commitments and Title Policies);

(xiii) with respect to any Owned Real Property and Material Leased Real Property located outside the United States, each of Target and its Subsidiaries, at Sellers’ cost and expense, shall provide Buyer with an equivalent form of title assurance in accordance with local custom reasonably satisfactory to Buyer for each parcel of such Owned Real Property and Material Leased Real Property;

(xiv) Buyer shall have obtained, no later than 10 days prior to the Closing Date, a survey for each Owned Real Property and Material Leased Real Property, dated no earlier than the date of this Agreement, prepared by a licensed surveyor reasonably satisfactory to Buyer, and conforming to 2011 ALTA/ACSM Minimum Detail Requirements for Land Title Surveys, including Table A Items Nos. 1, 2, 3, 4, 6, 7(a), 7(b)(1), 7(c), 8, 9, 10, 11(b), 13, 14, 15, and 16, and such other standards as the Title Company and Buyer reasonably require as a condition to the removal of any survey exceptions from the Title Policies, and certified to Buyer, Buyer’s lender and the Title Company, in a form reasonably satisfactory to each of such parties (the ‘‘*Surveys*’’); and the Surveys shall not disclose any encroachment from or onto any of the Real Property or any portion thereof or any other survey defect that has not been cured or insured over to Buyer’s reasonable satisfaction prior to the Closing (provided that Sellers and Buyer shall share equally all fees, costs, and expenses with respect to the Surveys);[[75]](#footnote-75)

(xv) Target and its Subsidiaries shall have obtained and delivered to Buyer a written consent for the assignment of each of the Leases, and, if requested by Buyer’s lender in connection with any Material Leased Real Property, a waiver of landlord liens, collateral assignment of lease or leasehold mortgage from the landlord or other party whose consent thereto is required under such Lease (the ‘‘*Lease Consents*’’), in form and substance satisfactory to Buyer and Buyer’s lender;[[76]](#footnote-76)

[(xvi) Target and its Subsidiaries shall have obtained and delivered to Buyer an estoppel certificate with respect to each of the Leases, dated no more than 30 days prior to the Closing Date, from the other party to such Lease, in form and substance satisfactory to Buyer (the ‘‘*Estoppel Certificates*’’);][[77]](#footnote-77)

(xvii) Target shall deliver to Buyer an affidavit, under penalties of perjury, stating that Target is not and has not been a United States real property holding corporation, dated as of the Closing Date and in form and substance required under Treasury Regulation §1.897-2(h) so that Buyer is exempt from withholding any portion of the Purchase Price thereunder (the ‘‘*FIRPTA Affidavit*’’);[[78]](#footnote-78)

(xviii) no damage or destruction or other change has occurred with respect to any of the Real Property or any portion thereof that, individually or in the aggregate, would materially impair the use or occupancy of the Real Property or the operation of the business of Target and its Subsidiaries;

(xix) each of \_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_ and \_\_\_\_\_\_\_\_\_\_ shall have entered into employment and equity agreements with Buyer on terms reasonably satisfactory to Buyer, and such agreements shall be in full force and effect as of the Closing;

(xx) Sellers shall have delivered to Buyer copies of the certificate of incorporation of each Seller, Target, and Target Subsidiary certified on or soon before the Closing Date by the Secretary of State (or comparable officer) of the jurisdiction of each such Person’s incorporation;

(xxi) Sellers shall have delivered to Buyer copies of the certificate of good standing of each Seller, Target, and Target Subsidiary issued on or soon before the Closing Date by the Secretary of State (or comparable officer) of the jurisdiction of each such Person’s organization [and of each jurisdiction in which each such Person is qualified to do business];

(xxii) Sellers shall have delivered to Buyer a certificate of the secretary or an assistant secretary of each Seller, dated the Closing Date, in form and substance reasonably satisfactory to Buyer, as to: (i) no amendments to the certificate of incorporation of such Seller since the date specified in clause (xxii) above; (ii) the bylaws of such Seller; (iii) the resolutions of the board of directors (or a duly authorized committee thereof) of such Seller authorizing the execution, delivery, and performance of this Agreement and the transactions contemplated hereby; and (iv) incumbency and signatures of the officers of such Seller executing this Agreement or any other agreement contemplated by this Agreement; and

(xxiii) Sellers shall have delivered to Buyer a certificate of the secretary or an assistant secretary of each Target and Target Subsidiary, dated the Closing Date, in form and substance reasonably satisfactory to Buyer, as to: (i) no amendments to the certificate of incorporation of such Person since the date specified in clause (xxii) above; (ii) the bylaws of such Person; and (iii) any resolutions of the board of directors (or a duly authorized committee thereof) of such Person relating to this Agreement and the transactions contemplated hereby.

Buyer may waive any condition specified in this §7(a) if it executes a writing so stating at or prior to the Closing.

(b) *Conditions to Sellers’ Obligation.* The Sellers’ obligation to consummate the transactions to be performed by them in connection with the Closing is subject to satisfaction of the following conditions:

(i) the representations and warranties set forth in §3(b) above shall be true and correct in all material respects at and as of the Closing Date, except to the extent that such representations and warranties are qualified by the terms ‘‘material,’’ or contain terms such as ‘‘Material Adverse Effect’’ or ‘‘Material Adverse Change,’’ in which case such representations and warranties (as so written, including the term ‘‘material’’ or ‘‘Material’’) shall be true and correct in all respects at and as of the Closing Date;

(ii) Buyer shall have performed and complied with all of its covenants hereunder in all material respects through the Closing, except to the extent that such covenants are qualified by the term ‘‘material,’’ or contain terms such as ‘‘Material Adverse Effect’’ or ‘‘Material Adverse Change,’’ in which case Buyer shall have performed and complied with all of such covenants (as so written, including the term ‘‘material’’ or ‘‘Material’’) in all respects through the Closing;

(iii) no action, suit, or proceeding shall be pending before any court or quasi-judicial or administrative agency of any federal, state, local, or non-U.S. jurisdiction or before any arbitrator wherein an unfavorable injunction, judgment, order, decree, ruling, or charge would (A) prevent consummation of any of the transactions contemplated by this Agreement or (B) cause any of the transactions contemplated by this Agreement to be rescinded following consummation (and no such injunction, judgment, order, decree, ruling, or charge shall be in effect);[[79]](#footnote-79)

(iv) Buyer shall have delivered to Sellers a certificate to the effect that each of the conditions specified above in §7(b)(i)-(iii) is satisfied in all respects;

(v) [all applicable waiting periods (and any extensions thereof) under the Hart-Scott-Rodino Act shall have expired or otherwise been terminated and] the Parties, Target, and its Subsidiaries shall have received all [other] material authorizations, consents, and approvals of governments and governmental agencies referred to in §3(a)(ii), §3(b)(ii), and §4(c) above;

(vi) the relevant Parties shall have entered into side agreements in form and substance as set forth in Exhibits C-\_\_\_\_\_\_\_\_\_\_, C-\_\_\_\_\_\_\_\_\_\_, ... and C-\_\_\_\_\_\_\_\_\_\_ and the same shall be in full force and effect;

(vii) Sellers shall have received from counsel to Buyer an opinion in form and substance as set forth in Exhibit E attached hereto, addressed to Sellers, and dated as of the Closing Date; and

(viii) all actions to be taken by Buyer in connection with consummation of the transactions contemplated hereby and all certificates, opinions, instruments, and other documents required to effect the transactions contemplated hereby will be reasonably satisfactory in form and substance to Requisite Sellers.

Requisite Sellers may waive any condition specified in this §7(b) on behalf of Sellers if they execute a writing so stating at or prior to the Closing.

§8. Remedies for Breaches of This Agreement.[[80]](#footnote-80)

(a) *Survival of Representations and Warranties.*[[81]](#footnote-81) The Parties, intending to shorten the applicable statute of limitations period, agree that all of the representations and warranties of Sellers contained in §4 above (other than §4(k) above) shall survive the Closing hereunder (even if Buyer knew or had reason to know of any misrepresentation or breach of warranty at the time of Closing) and shall expire on the [second] anniversary of the Closing; provided, however, that the representations and warranties contained in §4(z) above shall survive the Closing hereunder (even if Buyer knew or had reason to know of any misrepresentation or breach of warranty at the time of Closing) and shall expire on the [fifth] anniversary of the Closing. All of the other representations and warranties of the Parties contained in this Agreement (including the representations and warranties of the Parties contained in §3 above and the representations and warranties of Sellers contained in §4(k) above) shall survive the Closing (even if the damaged Party knew or had reason to know of any misrepresentation or breach of warranty at the time of Closing) and continue in full force and effect for the maximum period for bringing a breach of contract claim permitted under the statute of limitations of the jurisdiction specified in §11(i).

(b) Indemnification Provisions for Buyer’s Benefit.[[82]](#footnote-82)

(i) In the event any Seller breaches any of his, her, or its representations, warranties, and covenants contained herein (other than the covenants in §2(a) above and the representations and warranties in §3(a) above), and provided that Buyer makes a written claim for indemnification against any Seller pursuant to §11(h) below before expiration of the applicable survival period set forth in §8(a) above, then such survival period shall not expire with respect to such claim and each Seller shall be obligated jointly and severally to indemnify Buyer from and against the entirety of any Adverse Consequences Buyer may suffer (including any Adverse Consequences Buyer may suffer after the end of any applicable survival period) resulting from, arising out of, relating to, in the nature of, or caused by the breach[, and any applicable statute of limitations period on filing a lawsuit with respect to such claim shall not expire until 1 year after the later of (1) the date of Buyer’s written claim for indemnification and (2) the expiration of the applicable survival period set forth in §8(a) above];[[83]](#footnote-83) provided, however, that (A) Sellers shall not have any obligation to indemnify Buyer from and against any Adverse Consequences resulting from, arising out of, relating to, in the nature of, or caused by the breach of any representation or warranty of Sellers contained in §4 above until Buyer has suffered Adverse Consequences by reason of all such breaches in excess of a $\_\_\_\_\_\_\_\_\_\_ aggregate deductible (after which point Sellers will be obligated only to indemnify Buyer from and against further such Adverse Consequences),[[84]](#footnote-84) (B) there will be a $\_\_\_\_\_\_\_\_\_\_ aggregate ceiling on the obligation of Sellers to indemnify Buyer from and against Adverse Consequences resulting from, arising out of, relating to, in the nature of, or caused by breaches of the representations and warranties of Sellers contained in §4 above,[[85]](#footnote-85) and (C) Sellers shall have no obligation to indemnify Buyer from and against any Adverse Consequences consisting of or relating to Taxes with respect to any taxable period, or the portion of any Straddle Period, beginning after the Closing Date as a result of any breach of the representations and warranties set forth in §4(k) other than the representations and warranties set forth in paragraph[s] [(v)(B),] (vi)[, (vii),] [or] [(viii)] of such §4(k).[[86]](#footnote-86)

(ii) In the event any Seller breaches any of his, her, or its covenants in §2(a) above or any of his, her, or its representations and warranties in §3(a) above and provided that Buyer makes a written claim for indemnification against such Seller pursuant to §11(h) below before expiration of the applicable survival period set forth in §8(a) above, then such survival period shall not expire with respect to such claim and such Seller shall indemnify Buyer from and against the entirety of any Adverse Consequences Buyer shall suffer (including any Adverse Consequences Buyer shall suffer after the end of any applicable survival period) resulting from, arising out of, relating to, in the nature of, or caused by the breach [, and any applicable statute of limitations period on filing a lawsuit with respect to such claim shall not expire until 1 year after the later of (1) the date of Buyer’s written claim for indemnification and (2) the expiration of the applicable survival period set forth in §8(a) above].[[87]](#footnote-87)

(iii) Each Seller shall be obligated jointly and severally to indemnify Buyer from and against the entirety of any Adverse Consequences Buyer may suffer resulting from, arising out of, relating to, in the nature of, or caused by \_\_\_\_\_\_\_\_\_\_.[[88]](#footnote-88)

(c) *Indemnification Provisions for Sellers’ Benefit*. In the event Buyer breaches any of its representations, warranties, and covenants contained herein and, provided that any Seller makes a written claim for indemnification against Buyer pursuant to §11(h) below within the survival period (if there is an applicable survival period pursuant to §8(a) above), then Buyer agrees to indemnify each Seller from and against the entirety of any Adverse Consequences suffered resulting from, arising out of, relating to, in the nature of, or caused by the breach.

(d) Matters Involving Third Parties.

(i) If any third party notifies any Party (the ‘‘*Indemnified Party*’’) with respect to any matter (a ‘‘*Third-Party Claim*’’) that may give rise to a claim for indemnification against any other Party (the ‘‘*Indemnifying Party*’’) under this §8, then the Indemnified Party shall promptly notify each Indemnifying Party thereof in writing; provided, however, that no delay on the part of the Indemnified Party in notifying any Indemnifying Party shall relieve the Indemnifying Party from any obligation hereunder unless (and then solely to the extent) the Indemnifying Party is thereby prejudiced.

(ii) Any Indemnifying Party will have the right to assume the defense of the Third-Party Claim with counsel of his, her, or its choice reasonably satisfactory to the Indemnified Party at any time within 15 days after the Indemnified Party has given notice of the Third-Party Claim; provided, however, that the Indemnifying Party must conduct the defense of the Third-Party Claim actively and diligently thereafter in order to preserve his, her, or its rights in this regard; and provided further that the Indemnified Party may retain separate co-counsel at its sole cost and expense and participate in the defense of the Third-Party Claim.[[89]](#footnote-89)

(iii) So long as the Indemnifying Party has assumed and is conducting the defense of the Third-Party Claim in accordance with §8(d)(ii) above, (A) the Indemnifying Party will not consent to the entry of any judgment on or enter into any settlement with respect to the Third-Party Claim without the prior written consent of the Indemnified Party (not to be unreasonably withheld) unless the judgment or proposed settlement involves only the payment of money damages by 1 or more of the Indemnifying Parties and does not impose an injunction or other equitable relief upon the Indemnified Party and (B) the Indemnified Party will not consent to the entry of any judgment on or enter into any settlement with respect to the Third-Party Claim without the prior written consent of the Indemnifying Party (not to be unreasonably withheld).

(iv) In the event none of the Indemnifying Parties assumes and conducts the defense of the Third-Party Claim in accordance with §8(d)(ii) above, however, (A) the Indemnified Party may defend against, and consent to the entry of any judgment on or enter into any settlement with respect to, the Third-Party Claim in any manner he, her, or it may reasonably deem appropriate (and the Indemnified Party need not consult with, or obtain any consent from, any Indemnifying Party in connection therewith) and (B) the Indemnifying Parties will remain responsible for any Adverse Consequences the Indemnified Party may suffer resulting from, arising out of, relating to, in the nature of, or caused by the Third-Party Claim to the fullest extent provided in this §8.[[90]](#footnote-90)

(e) *Determination of Adverse Consequences.* Indemnification payments under this §8 and §9 shall be paid by the Indemnifying Party without reduction for any Tax Benefits available to the Indemnified Party. However, to the extent that the Indemnified Party recognizes Tax Benefits as a result of any Adverse Consequences in any tax year in which or prior to which such Adverse Consequences were incurred [(or in any of the [2] immediately succeeding tax years)], the Indemnified Party shall pay the amount of such Tax Benefits (but not in excess of the indemnification payment or payments actually received from the Indemnifying Party with respect to such Adverse Consequences) to the Indemnifying Party as such Tax Benefits are actually recognized by the Indemnified Party. For this purpose, the Indemnified Party shall be deemed to recognize a tax benefit (‘‘Tax Benefit’’) with respect to a taxable year if, and to the extent that, the Indemnified Party’s cumulative liability for Taxes through the end of such taxable year, calculated by excluding any Tax items attributable to the Adverse Consequences from all taxable years, *exceeds* the Indemnified Party’s actual cumulative liability for Taxes through the end of such taxable year, calculated by taking into account any Tax items attributable to the Adverse Consequences for all taxable years (to the extent permitted by relevant Tax law and treating such Tax items as the last items claimed for any taxable year). The Parties shall make appropriate adjustments for insurance coverage and take into account the time cost of money (using the Applicable Rate as the discount rate) in determining Adverse Consequences for purposes of this §8. All indemnification payments under this §8 and §9 shall be deemed adjustments to the Purchase Price.

(f) *Waiver of Certain Damages*. In no event shall any Party be entitled to recover or make a claim under this Agreement for any amounts in respect of, and in no event shall “Adverse Consequences” be deemed to include, (i) punitive damages (unless payable to a third party), (ii) consequential, incidental, special, or indirect damages, or (iii) lost profits, loss of future revenue or income or any diminution of value or similar damages based on “multiple of profits” or “multiple of cash flow” or other valuation methodology, whether or not such damages were reasonably foreseeable or the Parties contemplated that such damages would be a probable result of a breach of this Agreement.[[91]](#footnote-91)

(g) *Exclusive Remedy.*[[92]](#footnote-92)

(i) Except as set forth in §8(g)(ii), Buyer and Sellers acknowledge and agree that, from and after Closing, the foregoing indemnification provisions in this §8 shall be the exclusive remedy of Buyer and Sellers with respect to Target, its Subsidiaries, and the transactions contemplated by this Agreement. Without limiting the generality of the foregoing, and except as set forth in §8(g)(ii), Buyer and Sellers hereby waive any statutory, equitable, or common law rights or remedies relating to any environmental, health, or safety matters, including without limitation any such matters arising under any Environmental, Health, and Safety Requirements and including without limitation any arising under CERCLA.

(ii) Notwithstanding anything in §8(g)(i) to the contrary, nothing in this §8 shall (1) prohibit Buyer or any of its Affiliates from bringing a claim against any Person, including any Seller, alleging such Person committed **[or aided and abetted the commission of]** Fraud in connection with the transactions contemplated by this Agreement, or (2) limit any remedy Buyer or such Affiliate may have against such Person, and only such Person, but only in the event a court of competent jurisdiction finally determines that such Person is liable for Fraud **[or aiding and abetting Fraud]**.

(iii) Each Seller hereby agrees that he, she, or it will not make any claim for indemnification against Target or any of its Subsidiaries by reason of the fact that he, she, or it was a director, officer, employee, or agent of any such entity or was serving at the request of any such entity as a partner, trustee, director, officer, employee, or agent of another entity (whether such claim is for judgments, damages, penalties, fines, costs, amounts paid in settlement, losses, expenses, or otherwise and whether such claim is pursuant to any statute, charter document, bylaw, agreement, or otherwise) with respect to any action, suit, proceeding, complaint, claim, or demand brought by Buyer against such Seller (whether such action, suit, proceeding, complaint, claim, or demand is pursuant to this Agreement, applicable law, or otherwise).[[93]](#footnote-93)

(h) *Recoupment Against Escrow Agreement and Buyer Notes.* Any indemnification to which Buyer is entitled under this Agreement as a result of any Adverse Consequences it may suffer shall first be made as a payment to Buyer from the escrow account in accordance with the terms of the Escrow Agreement and, to the extent that the aggregate amount of such indemnification exceeds the Escrow Amount plus any interest accrued thereon, Buyer shall have the option of recouping all or any part of any remaining or additional Adverse Consequences Buyer may suffer (in lieu of seeking any indemnification to which it is entitled under this §8 or §9) by notifying any Seller that Buyer is reducing the principal amount outstanding under his, her, or its Buyer Note. This reduction of principal amount under the Buyer Note shall affect the timing and amount of payments required under the Buyer Note in the same manner as if Buyer had made a permitted prepayment (without premium or penalty) thereunder.[[94]](#footnote-94)

§9. *Tax Matters.*[[95]](#footnote-95) The following provisions shall govern the allocation of responsibility as between Buyer and Sellers for certain tax matters following the Closing Date:

(a) *Tax Indemnification.* Each Seller shall [jointly and severally] indemnify Target, its Subsidiaries, Buyer, and each Buyer Affiliate and hold them harmless from and against (i) all Income Taxes (or the non-payment thereof) of Target and its Subsidiaries for all taxable periods ending on or before the Closing Date and the portion through the end of the Closing Date for any taxable period that includes (but does not end on) the Closing Date (‘‘*Pre-Closing Tax Period*’’), (ii) any and all Income Taxes of any member of an affiliated, consolidated, combined, or unitary group of which Target or any of its Subsidiaries (or any predecessor of any of the foregoing) is or was a member on or prior to the Closing Date, including pursuant to Treasury Regulation §1.1502-6 or any analogous or similar state, local, or non-U.S. law or regulation,[[96]](#footnote-96) and (iii) any and all Income Taxes of any person (other than Target and its Subsidiaries) imposed on Target or any of its Subsidiaries as a transferee or successor, by contract or pursuant to any law, rule or regulation, which Taxes relate to an event or transaction occurring before the Closing, provided that, Sellers shall have no obligation to indemnify Target, its Subsidiaries, Buyer, or any Buyer Affiliate against any Adverse Consequences consisting of, or relating to, Income Taxes resulting from (x) a Code §338 election with respect to Buyer’s purchase of Target’s capital stock pursuant to this Agreement, (y) any transactions occurring on the Closing Date after the Closing outside the ordinary course of business (other than as explicitly contemplated by this Agreement), or (z) any breach by Buyer of §9(h) of this Agreement.

**Alternative 1—add the following language if the Parties are not seeking a Purchase Price Adjustment:** [; provided, however, that in the case of clauses (i), (ii) and (iii) above, Sellers shall be liable only to the extent that such Income Taxes are in excess of the amount, if any, reserved for such Taxes (excluding any reserve for deferred Taxes established to reflect timing differences between book and Tax income) on the face of the Most Recent Balance Sheet (rather than in any notes thereto)[, as such reserve is adjusted for the passage of time through the Closing Date in accordance with past custom and practice of Target and its Subsidiaries in filing their Tax Returns]].

**Alternative 2—add the following language if the Parties are seeking a Purchase Price Adjustment and Taxes are taken into account:** [; provided, however, that in the case of clauses (i), (ii) and (iii) above, Sellers shall be liable only to the extent that such Income Taxes are in excess of the amount, if any, specifically reserved for such Taxes in the final determination of Closing Indebtedness and taken into account in determining the Purchase Price pursuant to §2(e) above].[[97]](#footnote-97) Sellers shall reimburse Buyer for any Taxes of Target or its Subsidiaries that are the responsibility of Sellers pursuant to this §9(a) within fifteen (15) business days after payment of such Taxes by Buyer, Target, or its Subsidiaries.

(b) *Straddle Period.*[[98]](#footnote-98) In the case of any taxable period that includes (but does not end on) the Closing Date (a ‘‘*Straddle Period*’’), the amount of any Income Taxes for the Pre-Closing Tax Period shall be determined based on an interim closing of the books as of the close of business[[99]](#footnote-99) on the Closing Date (and for such purpose, the taxable period of any partnership or other pass-through entity in which Target or any of its Subsidiaries holds a beneficial interest shall be deemed to terminate at such time).

(c) *Responsibility for Filing Tax Returns.* Buyer shall prepare or cause to be prepared and file or cause to be filed all Income Tax Returns for Target and its Subsidiaries that are filed after the Closing Date [other than income Tax Returns with respect to periods for which a consolidated, unitary or combined income Tax Return of Seller will include the operations of Target and its Subsidiaries].[[100]](#footnote-100) Buyer shall permit Sellers to review and comment on each such Income Tax Return described in the preceding sentence prior to filing and shall make such revisions to such Income Tax Returns as are reasonably requested by Sellers.[[101]](#footnote-101)

(d) *Refunds and Tax Benefits.* Any Income Tax refunds that are received by Buyer or Target and its Subsidiaries, and any amounts credited against Income Tax to which Buyer or Target and its Subsidiaries become entitled, that relate to Income Tax periods or portions thereof ending on or before the Closing Date shall be for the account of Sellers, [(excluding any refund or credit attributable to any loss in a tax year (or portion of a Straddle Period) beginning after the Closing Date applied (e.g., as a carryback) to income in a tax year (or portion of a Straddle Period) ending on or before the Closing Date)], and Buyer shall pay over to Sellers any such refund or the amount of any such credit (net of any Income Taxes of Buyer, Target, or any of its Subsidiaries attributable to such refund or credit) within 15 days after receipt or entitlement thereto.[[102]](#footnote-102)

**Alternative 1—add the following language if the Parties are not seeking a Purchase Price Adjustment:** [; provided, however, Buyer shall not be required to pay over to Sellers any such refund or the amount of any such credit up to the amount of any Tax asset (excluding any deferred Tax asset established to reflect timing differences between book and Tax income) set forth on the face of the Most Recent Balance Sheet (rather than in any notes thereto)[, as such Tax asset is adjusted for the passage of time through the Closing Date in accordance with past custom and practice of Target and its Subsidiaries in filing their Tax Returns]].

**Alternative 2—add the following language if the Parties are seeking a Purchase Price Adjustment:** [; provided, however, Buyer shall not be required to pay over to Sellers any such refund or the amount of any such credit up to the amount of any Tax asset specifically accrued for that purpose in the final determination of Closing Net Working Capital and taken into account in determining the Purchase Price pursuant to §2(e) above].

(e) Cooperation on Tax Matters.

(i) Buyer, Target and its Subsidiaries and Sellers shall cooperate fully, as and to the extent reasonably requested by the other Party, in connection with the filing of Tax Returns pursuant to this §9 and any audit, litigation or other proceeding with respect to Taxes. Such cooperation shall include the retention and (upon the other Party’s request) the provision of records and information that are reasonably relevant to any such audit, litigation or other proceeding and making employees available on a mutually convenient basis to provide additional information and explanation of any material provided hereunder. Target and its Subsidiaries and Sellers agree (A) to retain all books and records with respect to Tax matters pertinent to Target and its Subsidiaries relating to any taxable period beginning before the Closing Date until the expiration of the statute of limitations (and, to the extent notified by Buyer or Sellers, any extensions thereof) of the respective taxable periods, and to abide by all record retention agreements entered into with any taxing authority, and (B) to give the other Party reasonable written notice prior to transferring, destroying or discarding any such books and records and, if the other Party so requests, Target and its Subsidiaries or Sellers, as the case may be, shall allow the other Party to take possession of such books and records.

(ii) Buyer and Sellers further agree, upon request, to use their best efforts to obtain any certificate or other document from any governmental authority or any other Person as may be necessary to mitigate, reduce or eliminate any Tax that could be imposed (including, but not limited to, with respect to the transactions contemplated hereby).

(iii) Buyer and Sellers further agree, upon request, to provide the other Party with all information that either Party may be required to report pursuant to Code §6043, or Code §6043A, or Treasury Regulations promulgated thereunder.

(f) *Tax-Sharing Agreements.* All tax-sharing agreements or similar agreements with respect to or involving Target and its Subsidiaries shall be terminated as of the Closing Date and, after the Closing Date, Target and its Subsidiaries shall not be bound thereby or have any liability thereunder.

(g) *Certain Taxes and Fees.* All transfer, documentary, sales, use, stamp, registration and other such Taxes, and all conveyance fees, recording charges and other fees and charges (including any penalties and interest) incurred in connection with the consummation of the transactions contemplated by this Agreement shall be borne 50% by Buyer and 50% by Sellers.

(h) *Amended Returns and Retroactive Elections.* Buyer shall not, and shall not cause or permit Target or any of its Subsidiaries to, (i) amend any Tax Returns filed with respect to any tax year ending on or before the Closing Date [or with respect to any Straddle Period] or (ii) make any Tax election that has retroactive effect to any such year [or to any Straddle Period], in each such case without the prior written consent of the Requisite Sellers [(not to be unreasonably withheld)].

§10. Termination.

(a) *Termination of Agreement.*[[103]](#footnote-103) Certain of the Parties may terminate this Agreement as provided below:

(i) Buyer and Requisite Sellers may terminate this Agreement by mutual written consent at any time prior to the Closing;

(ii) Buyer may terminate this Agreement by giving written notice to Requisite Sellers at any time prior to the Closing (A) in the event any Seller has breached any material representation, warranty, or covenant contained in this Agreement in any material respect, Buyer has notified Requisite Sellers of the breach, and the breach has continued without cure for a period of [30 days] after the notice of breach or (B) if the Closing shall not have occurred on or before \_\_\_\_\_\_\_ \_\_\_, \_\_\_\_, by reason of the failure of any condition precedent under §7(a) hereof (unless the failure results primarily from Buyer itself breaching any representation, warranty, or covenant contained in this Agreement); and

(iii) Requisite Sellers may terminate this Agreement by giving written notice to Buyer at any time prior to the Closing (A) in the event Buyer has breached any material representation, warranty, or covenant contained in this Agreement in any material respect, any Seller has notified Buyer of the breach, and the breach has continued without cure for a period of [30 days] after the notice of breach or (B) if the Closing shall not have occurred on or before \_\_\_\_\_\_\_ \_\_\_, \_\_\_\_, by reason of the failure of any condition precedent under §7(b) hereof (unless the failure results primarily from any Seller breaching any representation, warranty, or covenant contained in this Agreement).

(b) *Effect of Termination.*[[104]](#footnote-104) If any Party terminates this Agreement pursuant to §10(a) above, all rights and obligations of the Parties hereunder shall terminate without any liability of any Party to any other Party (except for any liability of any Party then in breach); provided, however, that the confidentiality provisions contained in §5(e) above shall survive termination.

§11. Miscellaneous.[[105]](#footnote-105)

(a) Nature of Sellers’ Obligations.

(i) The covenants of each Seller in §2(a) above concerning the sale of his, her, or its Target Shares to Buyer and the representations and warranties of each Seller in §3(a) above concerning the transaction are individual obligations. This means that the particular Seller making the representation, warranty, or covenant shall be solely responsible to the extent provided in §8(b)(ii) above for any Adverse Consequences Buyer may suffer as a result of any breach thereof.

(ii) The remainder of the representations, warranties, and covenants in this Agreement are joint and several obligations. This means that each Seller shall be responsible to the extent provided in §8(b)(i) and (iii) above for the entirety of any Adverse Consequences Buyer may suffer as a result of any breach thereof.[[106]](#footnote-106)

(b) *Press Releases and Public Announcements.* No Party shall issue any press release or make any public announcement relating to the subject matter of this Agreement [prior to the Closing] without the prior written approval of Buyer and Requisite Sellers; provided, however, that any Party may make any public disclosure it believes in good faith is required by applicable law or any listing or trading agreement concerning its publicly traded securities (in which case the disclosing Party will use its [reasonable] best efforts to advise the other Parties prior to making the disclosure).

(c) *No Third-Party Beneficiaries.* This Agreement shall not confer any rights or remedies upon any Person other than the Parties and their respective successors and permitted assigns.

(d) *Entire Agreement.* This Agreement (including the documents referred to herein) constitutes the entire agreement among the Parties and supersedes any prior understandings, agreements, or representations by or among the Parties, written or oral, to the extent they relate in any way to the subject matter hereof.

(e) *Succession and Assignment.* This Agreement shall be binding upon and inure to the benefit of the Parties named herein and their respective successors and permitted assigns. No Party may assign either this Agreement or any of his, her, or its rights, interests, or obligations hereunder without the prior written approval of Buyer and Requisite Sellers; provided, however, that Buyer may (i) assign any or all of its rights and interests hereunder to 1 or more of its Affiliates and (ii) designate 1 or more of its Affiliates to perform its obligations hereunder (in any or all of which cases Buyer nonetheless shall remain responsible for the performance of all of its obligations hereunder).

(f) *Counterparts.* This Agreement may be executed in any number of counterparts (including by pdf or other readable electronic format), each of which shall be deemed an original, with the same effect as if the signatures thereto and hereto were upon the same instrument, and will become effective when one or more counterparts have been signed by each of the parties and delivered (including by email) to the other parties, and all such counterparts together will constitute one and the same instrument.

(g) *Headings.* The section headings contained in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement.

(h) *Notices.*[[107]](#footnote-107) All notices, requests, demands, claims, and other communications hereunder shall be in writing. Any notice, request, demand, claim, or other communication hereunder shall be deemed duly given (i) when delivered personally to the recipient, (ii) 1 business day after being sent to the recipient by reputable overnight courier service (charges prepaid), (iii) 1 business day after being sent to the recipient by facsimile transmission or electronic mail, or (iv) 4 business days after being mailed to the recipient by certified or registered mail, return receipt requested and postage prepaid, and addressed to the intended recipient as set forth below:

|  |  |
| --- | --- |
| *If to Sellers:* | *Copy to:* |
| *If to Buyer:* | *Copy to:* |

Any Party may change the address to which notices, requests, demands, claims, and other communications hereunder are to be delivered by giving the other Parties notice in the manner herein set forth.

(i) *Governing Law. This Agreement shall be governed by and construed in accordance with the domestic laws of the State of* \_\_\_\_\_\_\_\_\_\_ *without giving effect to any choice or conflict of law provision or rule (whether of the State of* \_\_\_\_\_\_\_\_\_\_ *or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of* \_\_\_\_\_\_\_\_\_\_.

(j) *Amendments and Waivers.* No amendment of any provision of this Agreement shall be valid unless the same shall be in writing and signed by Buyer and Requisite Sellers. No waiver by any Party of any provision of this Agreement or any default, misrepresentation, or breach of warranty or covenant hereunder, whether intentional or not, shall be valid unless the same shall be in writing and signed by the Party making such waiver nor shall such waiver be deemed to extend to any prior or subsequent default, misrepresentation, or breach of warranty or covenant hereunder or affect in any way any rights arising by virtue of any prior or subsequent such occurrence.

(k) *Severability.* Any term or provision of this Agreement that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions hereof or the validity or enforceability of the offending term or provision in any other situation or in any other jurisdiction.

(l) *Expenses.* Each Buyer, Seller, Target, and Target Subsidiary will bear his, her, or its own costs and expenses (including legal fees and expenses) incurred in connection with this Agreement and the transactions contemplated hereby; provided, however*,* that (except as provided in §9(f) above) Sellers will also bear the cost and expenses of Target and its Subsidiaries (including all of their legal fees and expenses) in connection with this Agreement and the transactions contemplated hereby in the event that the transactions contemplated by this Agreement are consummated.[[108]](#footnote-108)

(m) *Construction.* 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 or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any of the provisions of this Agreement. Any reference to any federal, state, local, or non-U.S. statute or law shall be deemed also to refer to all rules and regulations promulgated thereunder, unless the context requires otherwise. The word ‘‘including’’ shall mean including without limitation.[[109]](#footnote-109)

(n) *Incorporation of Exhibits, Annexes, and Schedules.* The Exhibits, Annexes, and Schedules identified in this Agreement are incorporated herein by reference and made a part hereof.

(o) *Governing Language.* This Agreement has been negotiated and executed by the Parties in English. In the event any translation of this Agreement is prepared for convenience or any other purpose, the provisions of the English version shall prevail.

[(p) *Tax Disclosure Authorization.*[[110]](#footnote-110) Notwithstanding anything herein to the contrary, the Parties (and each Affiliate and Person acting on behalf of any Party) agree that each Party (and each employee, representative, and other agent of such Party) may disclose to any and all Persons, without limitation of any kind, the tax treatment and tax structure (as such terms are used in regulations promulgated under Code §6011) of the transactions contemplated by this agreement; [provided, however, that such disclosure may not be made until the earlier of date of (A) public announcement of discussions relating to the transaction, (B) public announcement of the transaction, or (C) execution of an agreement (with or without conditions) to enter into the transaction.]This authorization is not intended to permit disclosure of any other information including (without limitation) (A) any portion of any materials to the extent not related to the transaction’s tax treatment or tax structure, (B) the identities of participants or potential participants, (C) the existence or status of any negotiations, (D) any pricing or financial information (except to the extent such pricing or financial information is related to the transaction’s tax treatment or tax structure), or (E) any other term or detail not relevant to the transaction’s tax treatment or the tax structure.]

\* \* \* \* \*

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on [as of] the date first above written.

[BUYER]

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[SELLER #1 (an entity)]

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[SELLER #2 (an entity)]

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[SELLER #3 (an individual)]

1. If Buyer is a corporation, it may generally choose to make a regular Code §338 election on a timely basis after an acquisition structured as a taxable purchase of at least 80% by vote and value of Target’s Shares. See ¶107.1, ¶204, ¶205, ¶403, and ¶406.

If Buyer makes a timely regular Code §338 election, Target in effect becomes ‘‘New Target’’ immediately following the acquisition date: Target’s basis in its assets is stepped up (or down) so that Target’s aggregate asset basis equals the purchase price (plus Target’s liabilities, including tax liabilities generated in the transaction and inherited by New Target, and Buyer’s expenses of the acquisition), and ‘‘Old Target’s’’ corporate attributes—e.g., E&P and tax accounting methods—are expunged. Concomitantly, effective upon the close of the acquisition date, ‘‘Old Target’’ is taxed as if it had sold its assets, i.e., Target is taxed on its full gain or loss inherent in its tangible and intangible assets (including goodwill) with the character of Target’s gain or loss on each asset depending on the nature of each asset treated as sold.

However, even with a regular Code §338 election, Target’s selling shareholders are nevertheless taxed on the stock sale, resulting in double tax, i.e., Target is taxed on the deemed asset sale and the selling shareholders are taxed on the stock sale. See ¶205.

If Buyer intends to make a Code §338 election, it may well be desirable to add language to this Agreement (and to have Target’s board of directors adopt resolutions) stating that New Target ‘‘expressly assumes’’ certain enumerated liabilities (and all other unenumerated liabilities) of Target which have not yet matured into tax deductions. See ¶304.4 and ¶205.11.4.

If (1) Target is a member of a consolidated group or (2) Target is a member of an affiliated (but not consolidated) group, or (3) Target is an S corp, the parties may have the ability to (a) make a Code §338(h)(10) election where Buyer is a corporation purchasing at least 80% of Target’s stock by vote and value or (b) make a Code §336(e) election where Buyer is an individual, partnership, LLC, or a group of such persons purchasing in the aggregate at least 80% by vote and value of Target’s shares. With a Code §338(h)(10) or §336(e) election (as distinguished from a regular Code §338 election), there is no double tax on the transaction because Target is treated as selling assets and then liquidating (so that Target’s shareholders are not treated as selling Target’s stock), and the deemed liquidation of Target will generally not produce a second tax because of Code §332 in the consolidated or affiliated subsidiary situation or because of S pass-through rules in the S corp situation. See ¶206.1, ¶206.2, ¶206.3, ¶209, and ¶1109.3. [↑](#footnote-ref-1)
2. A Code §338(h)(10) election must be made jointly by Buyer and Seller(s). Where Target is a Bigco 80-80 subsidiary, both P and Bigco must make the election. See ¶206.1 and ¶206.2 and sample acquisition agreement 2204.

Where Target is an S corp, P and each of Target’s shareholders including non-selling Target shareholders must make the election. See ¶206.3 and ¶1109.3 and sample acquisition agreement 2206. Hence, if a Code §338(h)(10) election is to be made, see sample acquisition agreements 2204 and 2206 for contractual provisions the parties may desire to add to the acquisition agreement.

A Code §336(e) election must be made jointly by Target and Seller(s). Where Target is a Bigco subsidiary, Bigco and Target must enter into a binding, written agreement to make the election. See ¶209.1 and sample acquisition agreement 2204. Where Target is an S corp, Target and each of Target’s shareholders including non-selling Target shareholders must enter into a binding, written agreement to make the election. See ¶209.1 and sample acquisition agreement 2206. Hence, if a §336(e) election is to be made (or Buyer does not want such election to be made), see sample acquisition agreements 2204 and 2206 for contractual provisions the parties may desire to add to the acquisition agreements. [↑](#footnote-ref-2)
3. For a discussion of accounting issues see ¶1703 regarding purchase accounting.

Some LBO structures prejudice Target’s creditors and hence might permit payments, transfers, liens, and obligations arising out of the LBO to be attacked under fraudulent conveyance law. See ¶1706. [↑](#footnote-ref-3)
4. If Target has so many shareholders that it is unwieldy for all of them to become parties to this Agreement (or if Target has only a few shareholders but some minority shareholders decline to participate), the Parties may wish to use sample acquisition agreement 2500 (reverse subsidiary merger of Buyer’s transitory subsidiary into Target for cash and notes), adjusted to incorporate the pro-buyer, pro-seller, or neutral features of sample acquisition agreement 2201, 2202, or 2203 as appropriate, rather than using this sample acquisition agreement 2203. A reverse subsidiary merger is generally treated as a purchase of Target’s stock by Buyer for federal income tax purposes. See ¶202. [↑](#footnote-ref-4)
5. After Buyer purchases Target Shares, Target will become a subsidiary of Buyer (assuming Buyer is a corporation). Target will generally retain all of its assets and rights and remain responsible for all of its liabilities and obligations. Thus it is generally not necessary to prepare asset transfer documents or liability assumption documents in a stock purchase, as it is in a purchase of assets. [↑](#footnote-ref-5)
6. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) explicitly extends this definition to include legal requirements enacted and in effect prior to, on, or after the Closing Date and also includes within this definition contractual obligations and all public and worker health and safety requirements.

Sample acquisition agreement 2202 (the pro-seller stock purchase agreement) does not include contractual obligations, common law, or health and safety in this definition and explicitly limits this definition to laws as enacted and in effect on or prior to the Closing Date. [↑](#footnote-ref-6)
7. This definition should not be limited to the intellectual property of any particular person or entity (e.g., ‘‘all of the following owned by Target...’’) or to the business. It is useful to have a generic definition that can be used to refer to the intellectual property of any person or entity. [↑](#footnote-ref-7)
8. This definition should be tailored to include specific terms of art relevant to the applicable industry (e.g., if the business being acquired manufactures food products, the definition could be modified to include ‘‘recipes and formulas’’). [↑](#footnote-ref-8)
9. This Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), defines ‘‘Knowledge’’ as actual knowledge after reasonable investigation. Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, defines ‘‘Knowledge’’ as actual knowledge without independent investigation. [↑](#footnote-ref-9)
10. If any of the Leased Real Property is subleased by Target or any of its Subsidiaries, include the following:

, together with all Leased Real Property Subleases.

In addition, add the following:

‘‘Leased Real Property Subleases’’ means all subleases, licenses, or other agreements (written or oral), including all amendments, extensions, renewals, guaranties, and other agreements with respect thereto, pursuant to which Target or any of its Subsidiaries conveys or grants to any Person a subleasehold estate in, or the right to use or occupy, any Leased Real Property or portion thereof, including the right to all security deposits and other amounts and instruments held by or on behalf of Target or any of its Subsidiaries thereunder. [↑](#footnote-ref-10)
11. The definition of ‘‘Material Adverse Effect’’ and ‘‘Material Adverse Change’’ in sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) specifically includes such items as changes in general business conditions, hostilities involving the United States, changes in financial market conditions, changes in law, and changes arising from actions taken pursuant to the stock purchase agreement, regardless of whether Sellers cure such changes or whether Buyer had knowledge of such changes as of the date of the agreement, but is silent on any epidemics, pandemic, or disease outbreaks (including COVID-19).

The definition of “Material Adverse Effect” and “Material Adverse Change” in sample acquisition agreement 2202 (the pro-seller stock purchase agreement) specifically excludes such items as changes in general business conditions, hostilities involving the United States, changes in financial market conditions, changes in law, changes arising from actions taken pursuant to the stock purchase agreement, and changes arising from pandemics, and also excludes any adverse changes or effects either that Buyer had knowledge of as of the date of the agreement or that Sellers cure.

See ¶2101.4 for discussion about using in the acquisition agreement, in addition to the more general language set forth in text above or in lieu of such language, (1) more specific MAE targets focusing on objective criteria (e.g., specified Target minimum EBIT or EBITDA for a specified period, specified Target revenue or cash flow for a specified period, or specified Target gross margin ratio for a specified period) or (2) a description of the required status of specified Target assets, liabilities, or business developments (e.g., Target's customers, products, product development, R&D, executives, plants and equipment, and/or government regulations affecting Target).

See ¶2101.4 for discussion of judicial interpretations of long-term versus short-term MAE where the acquisition agreement is silent, and compare sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) for language explicitly adopting a short-term approach, with acquisition agreement 2202 (the pro-seller stock purchase agreement) for language explicitly adopting a long-term approach. [↑](#footnote-ref-11)
12. While the definition of “Ordinary Course of Business” in this sample acquisition agreement 2203 (the *neutral* stock purchase agreement) specifically provides that any action taken, or omitted to be taken, that relates to, or arises out of, any pandemic, epidemic, or disease outbreak to the extent reasonably consistent with policies, procedures, and protocols recommended by the CDC, WHO, and other health authorities shall be deemed to be in the Ordinary Course of Business, the definition of “Ordinary Course of Business” in sample acquisition agreement 2202 (the *pro-seller* stock purchase agreement) omits the reasonably consistent caveat and instead specifically provides that any action taken, or omitted to be taken, that relates to, or arises out of, any pandemic, epidemic, or disease outbreak shall be deemed to be in the Ordinary Course of Business. By contrast, sample acquisition agreement 2201 (the *pro-buyer* stock purchase agreement) is silent on whether actions taken, or omitted to be taken, that relates to, or arises out of, any pandemic, epidemic, or disease outbreak shall be deemed to be in the Ordinary Course of Business. [↑](#footnote-ref-12)
13. If any of the Owned Real Property is leased by Target or any of its Subsidiaries, include the following:

, together with all Owned Real Property Leases.

In addition, include the following:

‘‘Owned Real Property Lease’’ means all leases, licenses, or other agreements (written or oral), including all amendments, extensions, renewals, guaranties, and other agreements with respect thereto, pursuant to which Target or any of its Subsidiaries conveys or grants to any Person a leasehold estate in, or the right to use or occupy, any Owned Real Property or portion thereof, including the right to all security deposits and other amounts and instruments held by or on behalf of Target or any of its Subsidiaries thereunder. [↑](#footnote-ref-13)
14. If there are any Owned Real Property Leases, include Owned Real Property Leases as a permitted exception. [↑](#footnote-ref-14)
15. It may be necessary to revise this definition if Target has more than 1 class of capital stock.

The ‘‘Requisite Sellers’’ are charged with taking action on behalf of Sellers under various provisions of this purchase agreement. In circumstances where such an approach is impractical or otherwise undesirable (e.g., where ownership of Target’s stock is widely dispersed so that the Requisite Sellers would constitute a large group of persons, possibly with divergent interests with respect to 1 or more matters which require actions on behalf of all Sellers), the parties may in the alternative designate a ‘‘Seller Representative’’ (usually, though not always, the person with the largest ownership interest in Target) to take any actions required to be taken on behalf of all Sellers under the Agreement. Where this approach is taken, the purchase agreement would contain customary provisions setting forth the scope of the Seller Representative’s authority and limitations on the Seller Representative’s liability to Target and the other Sellers for actions taken in its capacity as agent for the other Sellers. [↑](#footnote-ref-15)
16. It may be necessary to revise this definition if Target has additional classes of capital stock. [↑](#footnote-ref-16)
17. Sample acquisition agreement 2202 (the pro-seller stock purchase agreement) contains a provision allowing Sellers to cause Target and its Subsidiaries to distribute their consolidated cash (net of unpaid taxes) to Sellers at the Closing. See §2(c), §4(h), and §5(c) of sample acquisition agreement 2202. This Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), lacks a comparable provision and indeed prohibits Sellers from causing any such distribution. See §4(h)(xi) and §5(c). [↑](#footnote-ref-17)
18. Sellers may seek to have Buyer make an earnest-money deposit upon execution of this Agreement. If the transaction is thereafter completed, the deposit would be applied to the Purchase Price. If the transaction is thereafter aborted, the deposit would be refunded to Buyer or paid to Sellers as liquidated damages depending on the terms of this Agreement and the reasons for the termination. [↑](#footnote-ref-18)
19. Sample acquisition agreement 2205 contains additional provisions for use where there is to be a post-Closing Purchase Price adjustment based on Target’s cash balance, outstanding indebtedness (including Target’s unpaid transaction expenses and, if agreed by the parties, accrued Taxes) and net working capital at Closing. Sample acquisition agreement 2205 can be adapted for other post-Closing Purchase Price adjustments (such as an adjustment based on Target’s net book value as of the Closing or a contingent earnout based on consolidated earnings for a specified period after the Closing). [↑](#footnote-ref-19)
20. Buyer will seek to have a significant portion of the Purchase Price deposited into the escrow account to provide a source of funds for payment of indemnity claims under this Agreement and, when the stock purchase agreement includes a post-Closing Purchase Price adjustment mechanism, post-Closing adjustments to the Purchase Price. See ¶203.5.4 for a discussion regarding taxation of Target when a portion of the Purchase Price is deposited into escrow. [↑](#footnote-ref-20)
21. The Parties should determine whether Sellers or Buyer will owe any stock transfer or similar tax on the transfer of the Target Shares by reason of the chosen Closing location. See §9(g) below for a provision addressing the allocation of such taxes. [↑](#footnote-ref-21)
22. This provision contemplates that Buyer will issue the Buyer Notes pursuant to the exemption from registration under the Securities Act contained in Regulation D. The Parties should determine whether this exemption is available in a particular transaction. If it is not, the Agreement must be modified as necessary to reflect the issuance of the Buyer Notes under a different exemption from securities registration or in an offering registered under the Securities Act. [↑](#footnote-ref-22)
23. Sellers may seek to obtain additional representations and warranties concerning Buyer and its Subsidiaries (e.g., the typical representations and warranties contained in a loan agreement or an underwriting agreement) because Buyer is issuing the Buyer Notes to Sellers as part of the Purchase Price. Any such representations and warranties normally would survive the Closing and remain applicable for so long as the Buyer Notes remained outstanding. [↑](#footnote-ref-23)
24. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) does not contain this covenant. [↑](#footnote-ref-24)
25. Buyer will seek to have Sellers make extensive representations and warranties concerning Target and its Subsidiaries with only occasional qualifications as to knowledge and without any qualification as to materiality. See §4 of sample acquisition agreement 2201 (the pro-buyer stock purchase agreement).

Sellers, on the other hand, will seek to give fewer representations and warranties concerning Target and its Subsidiaries with frequent qualifications as to knowledge and materiality. See §4 of sample acquisition agreement 2202 (the pro-seller stock purchase agreement).

This Agreement, which is intended to favor neither Buyer nor Sellers, contains fairly extensive representations and warranties and relatively frequent qualifications as to knowledge and materiality. [↑](#footnote-ref-25)
26. Buyer will have a closing condition (see §7(a)(i)) and post-Closing indemnification rights (see §8(b)) for certain misrepresentations and breaches of warranty. Buyer will not, however, have a closing condition or post-Closing indemnification rights for any adverse matter that Sellers disclose in the Disclosure Schedule. This is because the disclosure will cure any misrepresentation or breach of warranty that might otherwise have existed. Thus, if Sellers disclose an adverse matter in the Disclosure Schedule, Buyer may seek (a) to add a specific closing condition requiring an acceptable resolution of the matter and/or (b) to obtain specific post-Closing indemnification against the matter. [↑](#footnote-ref-26)
27. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) contains additional provisions to the effect that Sellers’ disclosures will be ineffective unless they meet specified standards for particularity and detail. This Agreement, like sample acquisition agreement 2202 (the pro-seller stock purchase agreement), lacks such provisions. [↑](#footnote-ref-27)
28. It may be necessary to revise this sentence if Target has more than 1 class of capital stock. See the definition of ‘‘Target Shares’’ in §1. [↑](#footnote-ref-28)
29. This Agreement, like sample acquisition agreement 2202 (the pro-seller stock purchase agreement), contains a representation and warranty to the effect that the Financial Statements have been prepared in accordance with GAAP (the definition of which includes a ‘‘consistently applied’’ concept) and fairly present the financial condition and the results of operations of Target and its Subsidiaries. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), on the other hand, contains additional representations and warranties to the effect that the Financial Statements are correct and complete and consistent with the books and records of Target and its Subsidiaries. [↑](#footnote-ref-29)
30. In a neutral approach, this sort of representation is often limited by a material dollar threshold. [↑](#footnote-ref-30)
31. This Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), contains a representation and warranty regarding undisclosed liabilities. Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, lacks such a provision. [↑](#footnote-ref-31)
32. Unless Target was an S corp or was filing a consolidated return with a parent corporation (‘‘Bigco’’) before the stock purchase, it will generally remain liable for its federal income taxes through the Closing.

If Target was an S corp before the stock purchase, it will generally not have paid federal income tax at the corporate level. Thus, Sellers (i.e., Target shareholders) will generally remain liable for federal income taxes through the Closing. When Buyer (a corporation, partnership, or LLC) purchases Target Shares, however, Target will cease to be an S corp. See Chapter 11.

If Target was filing a consolidated return with Bigco before the stock purchase, Target’s liability for federal income taxes through the Closing will turn on the tax allocation agreement in effect between Target and Bigco or on any specific provision in this Agreement. See sample acquisition agreement 2204 (sale of subsidiary out of consolidated group) for specific provisions in this regard.

If Target has an NOL and will be included in Buyer’s consolidated group, Buyer and Target should consider making (on their consolidated federal income tax return for the year of the Buyer-Target acquisition) an irrevocable election to waive all or part of Target’s NOL to avoid a reduction in the outside basis of Target’s stock if and when Target’s NOL expires. See ¶1205.3. [↑](#footnote-ref-32)
33. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) contains a broad representation and warranty to the effect that each of Target and its Subsidiaries has filed all tax returns that it was required to file, that all such tax returns were correct and complete in all respects, and that all taxes owed by Target or any of its Subsidiaries (whether or not shown on any return) have been paid.

Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, contains a narrow representation to the effect that each of Target and its Subsidiaries has filed all income tax returns that it was required to file and has paid all income taxes shown thereon as owing.

This Agreement, intended to favor neither Buyer nor Sellers, contains a broad representation similar to sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), but contains (i) more limited tax indemnity provisions and (ii) a provision (§8(b)(i)(C)) precluding Buyer from relying on the Tax Matters representations and warranties for post-Closing periods (other than certain representations and warranties, e.g., §4(k)(vi), that are intended to ‘‘look forward’’ to post-Closing periods), i.e., precluding Buyer from claiming that Adverse Consequences for which Sellers have an indemnification obligation may include post-Closing period Taxes. [↑](#footnote-ref-33)
34. The date used should be such that Target is obligated to list at least 3 years of Tax Returns. [↑](#footnote-ref-34)
35. The date supplied should be such that Target is obligated to provide at least 3 years of Tax Returns, examination reports, and deficiency statements. [↑](#footnote-ref-35)
36. If Target or any of its Subsidiaries has been a member of an Affiliated Group filing a consolidated federal income tax return, such corporation (or its successor) will be jointly and severally liable under Reg. §1.1502-6 for certain tax liabilities incurred by such Affiliated Group for a tax year when such corporation was a member of such Affiliated Group for all or part of such tax year. See ¶210.

Target or any of its Subsidiaries may also be liable for the unpaid taxes of third parties under similar provisions of state, local, or non-U.S. law, as a transferee or successor, by contract (e.g., a tax-sharing agreement), or otherwise.

After Buyer acquires the stock of Target, Target and its Subsidiaries will remain liable for any such unpaid Tax liabilities.

This Agreement, like sample acquisition agreement 2201 (the pro-buyer agreement), contains representations and warranties (as set forth above) and indemnification provisions (see §9(a) below) designed to protect Buyer against any liability for the unpaid taxes of any person other than Target and its Subsidiaries.

Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, contains only a representation and warranty that, to the knowledge of Sellers, neither Target nor any of its Subsidiaries has been a member of any Affiliated Group filing a consolidated federal income tax return (other than an Affiliated Group the parent of which was Target). [↑](#footnote-ref-36)
37. IRS takes the position that it may require a taxpayer to include an amount in income (as a Code §481(a) adjustment) in any taxable year for which the statute of limitations has not expired to the extent necessary to reverse a deduction that was claimed by the taxpayer in a prior taxable year under an impermissible method of accounting—even if the statute of limitations for the prior taxable year has expired (a ‘‘closed year’’). See ILM 201231004 (8/3/12). That circumstance is arguably not covered by clause (A) in representation §4(k)(vi) because no change in accounting method is actually made in the pre-Closing Date closed year. [↑](#footnote-ref-37)
38. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) contains a broader representation that neither Target nor any of its Subsidiaries is or has been a party to any ‘‘reportable transaction.’’ [↑](#footnote-ref-38)
39. These representations and warranties concerning real property are relatively long and detailed. A condensed version of these provisions may be more appropriate when, for example, the real property of Target and its Subsidiaries is relatively insignificant. [↑](#footnote-ref-39)
40. If there is no Owned Real Property, insert the following representation and warranty in lieu of subsection (i):

Neither Target nor any of its Subsidiaries owns any real property. [↑](#footnote-ref-40)
41. If there is no Leased Real Property, insert the following representation and warranty in lieu of subsection (ii):

Neither Target nor any of any of its Subsidiaries leases or subleases or otherwise uses or occupies pursuant to any license, concession or other agreement (written or oral), any real property. [↑](#footnote-ref-41)
42. If there are any Owned Real Property Leases or Leased Real Property Subleases, include the following:

(iii) §4(l)(iii) of the Disclosure Schedule sets forth a true and complete list of all Owned Real Property Leases and Leased Real Property Subleases (collectively, the ‘‘Landlord Leases’’), including the date and name of the parties to each Landlord Lease document. Sellers have delivered to Buyer a true and complete copy of each Landlord Lease document. Except as set forth in §4(l)(iii) of the Disclosure Schedule, with respect to each of the Landlord Leases: (i) such Landlord Lease is legal, valid, binding, enforceable and in full force and effect; (ii) none of Target, its Subsidiaries or, to the Knowledge of any Seller and the directors and officers of Target and its Subsidiaries, any other party to such Landlord Lease is in breach or default thereunder, and to the Knowledge of any Seller and the directors and officers of Target and its Subsidiaries, no event has occurred or circumstance exists that, with the delivery of notice, the passage of time or both, would constitute such a breach or default thereunder; (iii) no security deposit or portion thereof deposited with respect to such Landlord Lease has been applied in respect of a breach or default under such Landlord Lease that has not been redeposited in full; (iv) neither Target nor any of its Subsidiaries owes, or will owe in the future, any brokerage commissions or finder’s fees with respect to such Landlord Lease; and (v) the other party to such Landlord Lease is not an affiliate of, and otherwise does not have any economic interest in, Target or any of its Subsidiaries. [↑](#footnote-ref-42)
43. These representations and warranties concerning intellectual property are relatively long and detailed. A condensed version of these provisions may be more appropriate when, for example, the intellectual property of Target and its Subsidiaries is relatively insignificant. However, additional representations and warranties that are beyond the scope of this sample acquisition agreement 2203 may be appropriate for certain types of transactions (e.g., representations and warranties regarding use of open source software where Target sells software-based products or services). Finally, consider how intellectual property representations and warranties interact with general representations and warranties (e.g., “title to assets,” “sufficiency of assets,” “compliance with laws,” “material contracts,” or “data privacy and security”). [↑](#footnote-ref-43)
44. Only necessary with a unionized target or foreign employees. [↑](#footnote-ref-44)
45. These representations and warranties concerning employee benefits are relatively long and detailed. A condensed version of these provisions may be more appropriate when, for example, Target and its Subsidiaries have relatively insignificant employee benefit plans. [↑](#footnote-ref-45)
46. Bracketed language is pro-seller and would probably be replaced after 12/31/08 (when IRS’s good faith standard is scheduled to expire) with a representation that no executive will be subject to monetary penalties to IRS exceeding $\_\_\_\_\_\_\_ (i.e., a negotiated threshold). [↑](#footnote-ref-46)
47. These representations and warranties concerning environmental, health, and safety matters are relatively long and detailed. A condensed version may be more appropriate when, for example, the operations of Target and its Subsidiaries appear to have had a relatively insignificant effect upon the environment or upon public or employee health and safety.

While quite comprehensive (including coverage for strict liability for site cleanup under CERCLA and common law liability), these environmental representations and warranties contain a consistent materiality limitation and are otherwise generally more limited and narrowly focused than those in sample acquisition agreement 2201 (the pro-buyer stock purchase agreement).

The environmental representations and warranties in sample acquisition agreement 2202 (the pro-seller stock purchase agreement) are further limited to matters within Sellers’ knowledge, do not extend to strict liability for site cleanup under CERCLA or common law liability, and otherwise limit the disclosure and indemnification obligations of Sellers. [↑](#footnote-ref-47)
48. This representation may not be necessary if it is evident that neither Target nor any Subsidiary sells nor has historically sold any products that could affect the environment or public or worker health and safety. [↑](#footnote-ref-48)
49. Consider how this IT Assets representation and warranty interacts with general representations and warranties (e.g., “sufficiency of assets”). [↑](#footnote-ref-49)
50. This provision is more expansive than the comparable provision in sample acquisition agreement 2202 (the pro-seller stock purchase agreement), in which the representation does not cover directors, officers, employees and shareholders of Sellers, Target, and its Subsidiaries. [↑](#footnote-ref-50)
51. This representation and warranty is most appropriate where the business of Target involves the collection, use, storage, disposal, sharing, or transfer of personal information. This representation and warranty may be further tailored or expanded to reference specific Data Laws (e.g., the Payment Card Industry Data Security Standard (PCI DSS) if Target accepts, processes, stores, or transmits credit or debit card information). Consider also how this Data Privacy and Security representation and warranty interacts with general representations and warranties (e.g., “compliance with laws”). [↑](#footnote-ref-51)
52. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) contains a more expansive data privacy provision, while sample acquisition agreement 2202 (the pro-seller stock purchase agreement) omits any representations regarding data privacy and security, as Target may prefer to rely on the general ‘‘Legal Compliance’’ representation (see §4(i) of sample acquisition agreement 2202). [↑](#footnote-ref-52)
53. Sophisticated Sellers will often wish to limit Buyer’s remedies for misstatements and omissions to those that relate to the representations and warranties set forth in the purchase agreement. See footnote to §4(s) in sample acquisition agreement 2202 (the pro seller stock purchase agreement) for a more detailed discussion of the legal effect of §4(ff). In short, without the proviso at the end of §4(ff), the section would cut off Buyer’s right to make a fraud claim based on a misstatement relating to a matter not covered in the representations and warranties contained in the contract (although it would not cut off Buyer’s right to make a fraud claim based on a misstatement relating to a representation and warranty in the contract). In any event, Buyer will, if it can prove fraud, have a remedy only against the person or persons legally liable for the fraud (e.g., a Target officer or 1 of several Sellers who made a fraudulent statement in a face-to-face meeting with Buyer) and not generally against the Sellers, unless they agree, in §8(b) below, to indemnify Buyer against Adverse Consequences arising out of fraud committed by any person relating to the transaction. In addition, it is unclear how Buyer’s non-reliance statements in §4(ff) would affect Buyer’s ability to establish the “justifiable reliance” element of a fraud claim, even if §4(ff) contains a fraud carve-out. [↑](#footnote-ref-53)
54. Buyer may seek to make Target and its Subsidiaries parties to this Agreement for the purpose of obtaining directly their covenants applicable to the period prior to the Closing.

Whether or not Target and its Subsidiaries become parties to this Agreement, they are likely to incur significant costs and expenses in connection with the transaction (e.g., when they and their agents prepare the Disclosure Schedule and perhaps certain of the Financial Statements, give notices to third parties and obtain their consent, make filings under the Hart-Scott-Rodino Act and respond to requests for additional information, and obtain title insurance and surveys for the Closing).

These costs and expenses of Target and its Subsidiaries are separate and distinguishable from the costs and expenses of Buyer on the one hand and Sellers on the other hand.

§10(1) allocates responsibility among the respective parties for these costs and expenses through the Closing. [↑](#footnote-ref-54)
55. The Parties may prefer to revise this covenant so that it recites specific prohibitions (rather than incorporating the matters in §4(h) by reference). [↑](#footnote-ref-55)
56. This Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), contains a provision regarding preservation of the business of Target and its Subsidiaries. Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, lacks such a provision. [↑](#footnote-ref-56)
57. Unlike sample acquisition agreement 2202 (the pro-seller stock purchase agreement), which contemplates limiting access if it would jeopardize the health and safety of any Target or Subsidiary employee and requires Buyer to comply with applicable safety rules and reasonable controls, sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) and this neutral stock purchase agreement does not contain any such limitation on access.

This Agreement, like sample acquisition agreement 2202 (the pro-seller stock purchase agreement), contains a confidentiality and non-use provision protecting the Confidential Information until Buyer actually purchases Target Shares. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), on the other hand, lacks such a provision. [↑](#footnote-ref-57)
58. This Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), requires Sellers to notify Buyer of any material adverse development prior to the Closing that causes a breach of any of the representations and warranties in §4.

Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, permits (but does not require) Sellers to notify Buyer of any such development. Moreover, if the development gives Buyer any right to terminate the Agreement, Buyer must exercise its termination right within [10 business days] after the notice. Unless Buyer has such a termination right and exercises it within such period, the notice will be deemed to have cured any breach of the representations and warranties that otherwise would have existed by reason of the adverse development. [↑](#footnote-ref-58)
59. This Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), provides that no disclosure (presumably, but not necessarily, by Sellers) between signing and Closing shall be deemed to supplement the previous disclosures or to cure any breach of the Agreement. Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, provides that certain such disclosures will supplement the previous disclosures and cure breaches of the Agreement. See the discussion in the immediately preceding footnote. [↑](#footnote-ref-59)
60. Sample acquisition agreement 2202 (the pro-seller stock purchase agreement) permits Sellers, Target, its Subsidiaries, and their directors and officers to respond to unsolicited proposals to the extent their fiduciary duties may require. This Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), lacks such a provision. [↑](#footnote-ref-60)
61. Sellers may seek to obtain additional covenants from Buyer and its Subsidiaries (e.g., the typical covenants contained in a loan agreement or an indenture) because Buyer is issuing the Buyer Notes to Sellers as part of the Purchase Price. Any such covenants will remain applicable so long as the Buyer Notes remain outstanding. [↑](#footnote-ref-61)
62. The Parties may prefer to allocate responsibility for these post-Closing costs and expenses in some other manner (e.g., the Party incurring the costs and expenses might be responsible for their payment; the Parties might share the costs and expenses in a predetermined ratio; or 1 Party might be responsible for the costs and expenses up to a specified aggregate ceiling and the other Party responsible for any excess).

Compare §10(1), which allocates responsibility among the Parties for their costs and expenses through the Closing. [↑](#footnote-ref-62)
63. The Parties may prefer to allocate responsibility for these post-Closing costs and expenses in some other manner as discussed in the preceding footnote. [↑](#footnote-ref-63)
64. This Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), requires Sellers to keep certain information regarding Target and its Subsidiaries confidential after the Closing. Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, lacks such a provision. [↑](#footnote-ref-64)
65. Unless this Agreement allocates a specified amount of consideration to the non-compete covenant, applicable tax cases will preclude Buyer from seeking to allocate a portion of the purchase price to the covenant and amortizing such amount over the 15-year amortization period for intangibles under Code §197. [↑](#footnote-ref-65)
66. This Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), calls for a legend on the Buyer Notes and provides that any holder who wishes to transfer the Buyer Notes must first obtain an opinion of counsel and an undertaking of the transferee (in each case as to securities law matters). Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, only calls for a legend on the Buyer Notes. Note that any such provision would be inappropriate if Buyer will issue Buyer Notes in an offering registered under the Securities Act. [↑](#footnote-ref-66)
67. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) does not contain this covenant. Sample acquisition agreement 2202 (the pro-seller stock purchase agreement) contains a more restrictive covenant that prohibits Buyer from taking any action with respect to the Target subsequent to the Closing that would cause the transactions contemplated by the Agreement to constitute part of a transaction that is the same as, or substantially similar to, the ‘‘Intermediary Transaction Tax Shelter.’’ [↑](#footnote-ref-67)
68. Typically the right to control Target’s (and its Subsidiaries’) relationships with legal counsel, including the right to assert or waive the attorney-client and other evidentiary privileges, will remain with Target after closing. This may be a problem for Sellers, as after closing Buyer will control Target and may therefore gain access to confidential attorney-client communications relating to the transaction. Sample acquisition agreement 2202 (the *pro-seller* stock purchase agreement) §6(g) contains provisions that address these issues, but this sample acquisition agreement 2203 (the *neutral* stock purchase agreement) does not. [↑](#footnote-ref-68)
69. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) contains an additional closing condition for the benefit of Buyer concerning the receipt of financing for the transaction. This Agreement, like sample acquisition agreement 2202 (the pro-seller stock purchase agreement), lacks a comparable provision. [↑](#footnote-ref-69)
70. This provision will not give Buyer any closing condition with respect to any adverse matter that Sellers may disclose in the Disclosure Schedule. This is because the disclosure will cure any misrepresentation or breach of warranty that might otherwise have existed. Thus, if Sellers disclose an adverse matter in the Disclosure Schedule, Buyer may seek (a) to add a specific closing condition requiring an acceptable resolution of the matter and/or (b) to obtain specific post-Closing indemnification against the matter. [↑](#footnote-ref-70)
71. This Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), includes a closing condition for the benefit of Buyer regarding third-party consents. Unlike sample acquisition agreement 2201, however, the closing condition in this Agreement refers only to material third-party consents. Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, lacks a comparable closing condition altogether. [↑](#footnote-ref-71)
72. This Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), contains a broad closing condition regarding injunctions, judgments, orders, and pending actions, suits, and proceedings that prevent or could have an adverse effect upon the transactions contemplated by the Agreement. Unlike sample acquisition agreement 2201, however, the closing condition in this Agreement does not cover actions, suits, and proceedings that are only threatened. Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, contains a narrower closing condition covering only injunctions, judgments, and orders that prevent consummation of the transactions. [↑](#footnote-ref-72)
73. This Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), contains a closing condition regarding the receipt of director and officer resignations. Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, lacks a comparable closing condition. [↑](#footnote-ref-73)
74. This Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), contains relatively long and detailed provisions concerning title insurance. A condensed version may be more appropriate if, for example, the real property of Target and its Subsidiaries is relatively insignificant.

Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, does not have any such provisions and contemplates that Buyer will obtain any title insurance it requires independently and at its own expense. [↑](#footnote-ref-74)
75. This Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), contains relatively long and detailed provisions concerning real property surveys. A condensed version may be more appropriate if, for example, the real property of Target and its Subsidiaries is relatively insignificant.

Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, does not have any such provisions and contemplates that Buyer will obtain any surveys it requires independently and at its own expense. [↑](#footnote-ref-75)
76. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) has a substantially similar provision, but sample acquisition agreement 2202 (the pro-seller stock purchase agreement) does not contain such a provision. [↑](#footnote-ref-76)
77. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) has a substantially similar provision, but sample acquisition agreement 2202 (the pro-seller stock purchase agreement) does not contain such a provision. [↑](#footnote-ref-77)
78. Sample acquisition agreement 2202 (the pro-seller stock purchase agreement) does not contain such a provision. The provision in sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) requires an affidavit from each Seller of non-foreign status, rather than from Target of non-U.S. real property holding company status. Where no Target shareholder is a foreign person, the former approach would be equally acceptable. [↑](#footnote-ref-78)
79. Because this Sellers’ closing condition conforms in part to the comparable Buyer’s closing condition in §7(a)(iv), it leaves the Sellers with a relatively broad ‘‘out.’’ Thus, Buyer may prefer to narrow the respective closing conditions. Compare the narrower closing conditions in sample acquisition agreement 2202 (the pro-seller stock purchase agreement) and the even broader closing conditions in sample acquisition agreement 2201 (the pro-buyer stock purchase agreement). [↑](#footnote-ref-79)
80. Buyer may seek some form of additional security covering the obligation of Sellers to indemnify Buyer after the Closing. This may include provisions calling for (a) Buyer to have a recoupment remedy with respect to the Buyer Notes, (b) Sellers to deposit a portion of the Purchase Price with a third-party escrow agent, (c) Buyer to hold back a portion of the Purchase Price (to be paid later with interest), or (d) Buyer to obtain a security interest in certain assets of Sellers. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), for example, contains recoupment provisions applicable to the Buyer Notes. [↑](#footnote-ref-80)
81. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) contains alternative provisions for (a) full indemnification to Buyer (the representations and warranties survive until the expiration of the period specified in the applicable statute of limitations, and there is no deductible, threshold, or ceiling on indemnification against breaches thereof) or (b) limited indemnification to Buyer (the representations and warranties for the transaction itself and for tax, environmental, and capitalization matters and certain other fundamental representations and warranties survive until the expiration of the period specified in the applicable statute of limitations, but the other representations and warranties survive only for [3 years]; and there is a threshold, but not a deductible or ceiling, on indemnification against breaches of the latter). The pro-buyer stock purchase agreement also provides that a particular representation and warranty will survive the Closing even if the damaged Party knew or had reason to know of a breach thereof at the time of Closing.

Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, contains alternative provisions for (a) minimal indemnification to Buyer (only the representations and warranties concerning the transaction itself survive the Closing) or (b) limited indemnification to Buyer (the representations and warranties for the transaction itself survive until the expiration of the period specified in the applicable statute of limitations, but the other representations and warranties survive only for [1 year]; and there is a deductible and a ceiling on indemnification against breaches of the latter). The pro-seller stock purchase agreement provides, however, that a particular representation and warranty will not survive the Closing if the damaged Party knew or had reason to know of a breach thereof at the time of Closing.

This neutral Agreement, intended to favor neither Buyer nor Sellers, provides that the representations and warranties for the transaction itself and for taxes will survive until the expiration of the period specified in the applicable statute of limitations; the environmental representations and warranties will survive for [5 years]; the other representations and warranties will survive for [2 years]; and there will be a deductible and a ceiling on indemnification against breaches of any representations and warranties that do not concern the transaction itself. This Agreement, like the pro-buyer stock purchase agreement, also provides that a particular representation and warranty will survive the Closing even if the damaged Party knew or had reason to know of a breach thereof at the time of Closing.

The Parties’ ability to extend the period during which an indemnification claim may be made beyond the period specified in the applicable state statute of limitations—which in the case of a breach of contractual representations and warranties is the period governing a state law breach of contract claim and not, e.g., a federal or state tax claim or environmental claim—or to provide for a shorter period, may vary from state to state. For example, under Delaware law the Parties may agree to shorten the statutory 3-year timeframe during which a claim may be made for an acquisition transaction of the type covered hereby and, under a section of the Delaware statute of limitations (10 Del. C. §8106(c)) that became effective 8/1/14, may agree to extend the timeframe up to 20 years if the agreement involves at least $100,000 (whereas prior to 8/1/14 the Parties could achieve a longer than 3-year survival period [i.e., 20 years] only by signing the contract “under seal”). A 2015 Delaware Chancery Court decision, Bear Stearns Mortgage Funding Trust v. EMC Mortgage LLC (Del. Ch. 2015), held that 10 Del. C. §8106(c) applies retroactively to contracts made before its 8/1/14 effective date and in dicta stated that contractual language providing that a representation or warranty survived “indefinitely” would be interpreted as surviving for 20 years. The New York statute of limitations period for a breach of contract claim is 6 years; the Parties may shorten (but not extend) that period by clear, unambiguous language. Practitioners should consult the law of the state whose law governs the contract, but absent clear guidance on the issue it is safer to assume that a “forever” or “indefinite” survival period will be treated as equivalent to the period specified in the applicable statute of limitations. [↑](#footnote-ref-81)
82. This neutral Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) and sample acquisition agreement 2202 (the pro-seller stock purchase agreement), provides that the representations, warranties, and covenants of the individual Sellers (e.g., each Seller agrees to sell his, her, or its Target Shares to Buyer and makes certain representations and warranties concerning himself, herself, or itself and his, her, or its Target Shares) will be ‘‘individual,’’ defined in such a way that the particular Seller (and no other Seller) will be entirely responsible for Buyer’s Adverse Consequences if the particular Seller fails to perform his, her, or its obligations. See §11(a)(i).

This neutral Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), also provides that the representations, warranties, and covenants of Sellers as a group (e.g., Sellers as a group make representations and warranties concerning Target and its Subsidiaries) will be ‘‘joint and several,’’ defined in such a way that each Seller will be responsible for all of Buyer’s Adverse Consequences if Sellers as a group fail to perform their obligations. See §11(a)(ii). Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, provides that the representations, warranties, and covenants of Sellers as a group will be defined in such a way that each Seller will be responsible for his, her, or its Allocable Portion of Buyer’s Adverse Consequences (based on the percentage of Target’s stock owned by each Seller) if Sellers as a group fail to perform their obligations. [↑](#footnote-ref-82)
83. This neutral Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), requires an indemnifying party (presumably, but not necessarily, Seller) to indemnify an indemnified party (presumably, but not necessarily, Buyer) from and against any Adverse Consequences the indemnified party may suffer through and after the date of the claim for indemnification (including any Adverse Consequences the indemnified party may suffer after the end of any applicable survival period) resulting from, arising out of, relating to, in the nature of, or caused by certain breaches by the indemnifying party of his, her, or its representations, warranties, and covenants.

Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, provides that the indemnifying party (presumably, but not necessarily, Seller) must indemnify the indemnified party (presumably, but not necessarily, Buyer) from and against Adverse Consequences the indemnified party shall suffer caused [proximately] by certain breaches by the indemnifying party of his, her, or its representations, warranties, and covenants.

In most instances, Sellers dispute Buyer’s claim for indemnification, so Buyer should not expect an indemnification claim to be resolved quickly. Buyer should therefore consider the effect the applicable state statute of limitations might have on its right to sue Sellers in the event the indemnification claim cannot be resolved by agreement between the parties. While §8(b)(i) provides that the contractual representation and warranty survival period will not bar an indemnification claim so long as written notice is given before such survival period expires, in order to preserve its right to sue Sellers in court Buyer generally must file a lawsuit before expiration of the state statute of limitations period.

If the purchase agreement is governed by Delaware law or another jurisdiction that allows the Parties to extend by contract the applicable statute of limitations period, Buyer should consider adding the bracketed language to give the Parties at least 1 year after a written claim to resolve the claim before a lawsuit must be filed. If the purchase agreement is governed by New York law or another jurisdiction that does not allow the Parties to extend by contract the applicable statute of limitations period, Buyer generally must file suit prior to the expiration of the state statutory limitations period, regardless of the status of negotiations with Sellers over the outstanding claim. [↑](#footnote-ref-83)
84. Sellers may also seek to impose a per claim deductible. [↑](#footnote-ref-84)
85. This Agreement, like sample acquisition agreement 2202 (the pro-seller stock purchase agreement), imposes a deductible and a ceiling on indemnification for breaches of the representations and warranties in §4 above. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), on the other hand, substitutes a threshold (with relation back to the first dollar once the threshold is exceeded) for the deductible and also eliminates the ceiling on indemnification. [↑](#footnote-ref-85)
86. In this sample acquisition agreement 2203 Sellers expressly do not assume any responsibility for Taxes of Target and Subsidiaries for any tax year (or portion of any Straddle Period) beginning after the Closing Date as a result of representations and warranties made with respect to Tax Matters of Target and its Subsidiaries, other than with respect to representations and warranties that address Tax issues that may arise in post-Closing periods. [↑](#footnote-ref-86)
87. See discussion in the last 2 paragraphs of the footnote to §8(b)(i) above. [↑](#footnote-ref-87)
88. The indemnification provisions in clause (i) above will not give Buyer any post-Closing indemnification rights with respect to any adverse matter that Sellers may disclose in the Disclosure Schedule. This is because the disclosure will cure any misrepresentation or breach of warranty that might otherwise have existed.

Thus, where Sellers disclose an adverse matter in the Disclosure Schedule, Buyer may seek to add a provision conferring specific post-Closing indemnification rights with respect to the particular matter. Buyer normally would seek to draft such a provision so that the indemnification would not be subject to any survival period, threshold, deductible, and/or ceiling.

This Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), provides for such indemnification for particular matters. Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, lacks a comparable provision.

See §9 for provisions relating to indemnification for pre-Closing Taxes of Target and its subsidiaries. [↑](#footnote-ref-88)
89. An indemnifying party (presumably, but not necessarily, Seller) will normally seek to control the defense of any third-party claim that may give rise to a claim for indemnification under §8. However, the indemnified party (presumably, but not necessarily, Buyer) will not want the indemnifying party to control the defense of any third-party claim in which the indemnified party will retain a meaningful interest. For example, the indemnified party may seek to control the defense of a third-party claim if the third party seeks an injunction or other equitable relief or if it is not clear that the indemnifying party will bear the entirety of any money damages or amount paid in settlement.

Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) provides that the indemnified party will control the defense of any third-party claim unless (a) an indemnifying party accepts full responsibility for the matter within [15 days], (b) the indemnifying party demonstrates it has the financial resources necessary to defend against the matter and fulfill its indemnification obligations, (c) the third party seeks only money damages (as opposed to an injunction or other equitable relief), (d) settlement of, or an adverse judgment with respect to, the third-party claim is not likely to establish a precedent [materially] adverse to the indemnified party, and (e) the indemnifying party conducts the defense actively and diligently.

Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, provides that an indemnifying party may assume the defense of a third-party claim at any time during the course of the defense.

This Agreement, intended to favor neither Buyer nor Sellers, provides that an indemnifying party may assume the defense of a third-party claim at any time within 15 days after the indemnified party has given notice of the third-party claim but requires the indemnifying party to conduct the defense of the third-party claim actively and diligently thereafter. [↑](#footnote-ref-89)
90. This Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), provides that the indemnified party will not consent to the entry of any judgment on or enter into any settlement of the third-party claim without the prior written consent of the indemnifying party (not to be unreasonably withheld) unless the indemnifying party fails to assume and conduct the defense of the third-party claim. Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, provides that the indemnified party will not consent to the entry of any judgment on or enter into any settlement of the third-party claim without the prior written consent of the indemnifying party (not to be unreasonably withheld) under any circumstances.

This Agreement, like sample acquisition agreement 2202 (the pro-seller stock purchase agreement), also provides that the indemnifying party will not consent to the entry of any judgment on or enter into any settlement of the third-party claim without the prior written consent of the indemnified party (not to be unreasonably withheld) unless the judgment or proposed settlement involves only the payment of money damages by 1 or more of the indemnifying parties and does not impose an injunction or other equitable relief upon the indemnified party. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), on the other hand, provides that the indemnifying party will not consent to the entry of any judgment on or enter into any settlement of the third-party claim without the prior written consent of the indemnified party (not to be unreasonably withheld) under any circumstances. [↑](#footnote-ref-90)
91. Sophisticated Sellers will often wish to include a “consequential damages” waiver. Consequential damages are generally understood to be damages that do not flow directly and immediately from the act of a breaching party, but rather from the consequences or results of such act, and are recoverable so long as such damages were reasonably foreseeable or were contemplated by the parties at the time they entered into the contract as a probable result of a breach. The determination whether certain damages—such as lost profits or diminution in value—are direct or consequential is a question of fact, so a general consequential damages waiver that does not specifically address the categories set forth in §8(f)(iii) will not necessarily preclude Buyer from recovering such damages. In addition, while most acquisition agreements include a punitive damages waiver (as in §8(f)(i)), punitive damages is a tort remedy not available for a breach of contract in most states, so inclusion of that category is more a matter of habit than necessity.

While this damage waiver expressly applies only to claims made “under this Agreement,” a Buyer concerned that a court may nevertheless apply this provision to a fraud claim may consider adding a fraud carve-out. [↑](#footnote-ref-91)
92. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) states that the indemnification provisions in the Agreement are in addition to and not in derogation of any other statutory, equitable, or common law remedies (including any such remedies relating to environmental matters).

As does this neutral stock purchase agreement, sample acquisition agreement 2202 (the pro-seller stock purchase agreement) states that the remedies available to the Parties under the Agreement are exclusive (i.e., that Buyer has no other statutory, equitable, or common law remedies) and also contains an additional provision by which Buyer specifically waives and releases Sellers from, and agrees to indemnify Sellers against, any environmental liabilities. [↑](#footnote-ref-92)
93. This neutral Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), contains a provision to the effect that no Seller will make a claim for indemnification against Target by reason of the fact that Seller was, before the stock purchase, a director or other officeholder of Target entitled to indemnification from Target, with respect to any suit or claim Buyer might bring against Seller in connection with the stock purchase. This provision responds to the surprising decision in Heffernan v. Pacific Dunlop GNB Corporation, 965 F.2d 369 (7th Cir. 1992). Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, lacks such a provision.

In Heffernan, Buyer of Target's stock sued Sellers (who had sold Target's stock to Buyer) after the closing of the stock sale, alleging that Sellers failed to disclose to Buyer certain of Target's environmental and other liabilities. The court focused on Buyer's claim against Seller A under §12[a](2) of the 1933 Act which makes a seller of securities (here Seller A) liable to the purchaser (here Buyer) for certain material misrepresentations and omissions in connection with the sale.

Seller A, who had been a director as well as a shareholder of Target, countered that Target (now a wholly owned subsidiary of Buyer) should be required to indemnify him for any losses he suffered as a result of Buyer’s lawsuit. He based his argument on Delaware corporate law (which permits a corporation to indemnify its directors against third-party lawsuits under certain circumstances) and Target’s bylaws (which made such director indemnification mandatory).

The federal district court dismissed Seller A’s indemnification claim, holding (quite rationally) that he was not entitled to indemnification because his alleged misconduct was committed as a selling shareholder and not as a director of Target.

On appeal, the Seventh Circuit reversed. The court noted that Seller A’s duty of care under §12(2) (i.e., his duty to ascertain the truth or falsity of Sellers’ representations to Buyer) was higher because he was a director, and hence Buyer’s claim against Seller A may have been related to his status as a former director of Target. Accordingly, the court concluded that it was premature to dismiss Seller A’s indemnification claim before trial. [↑](#footnote-ref-93)
94. Sample acquisition agreement 2202 (the pro seller stock purchase agreement) provides a right of recoupment against the Buyer Notes, but only at Sellers’ option, while the right of recoupment in text above is at Buyer’s option. [↑](#footnote-ref-94)
95. If Target is (1) an S corp, (2) a subsidiary member of a consolidated group, or (3) a subsidiary member of an affiliated (but not consolidated) group, the parties may have the ability to make a Code §338(h)(10) or §336(e) election, in which case all parties (including selling shareholders) are treated for tax purposes as if Buyer purchased Target’s assets. With a Code §338(h)(10) or §336(e) election (as distinguished from a regular Code §338 election), there is no double tax on the transaction, i.e., Target is treated as selling assets and Target’s shareholders are treated as receiving their proceeds in a deemed liquidation of Target, which deemed liquidation generally will not produce a second tax because of the consolidated return regulations in the consolidated group situation, Code §332 in the affiliated subsidiary situation, and subchapter S pass-through rules in the S corp situation. See ¶206.1.1, ¶206.3, ¶206.3.3, ¶209, and ¶1109.3.

See ¶2204, Sale of Subsidiary Out of Consolidated Group, for contractual provisions to use in connection with a Code §338(h)(10) or a Code §336(e) election for Target that is a member of a selling consolidated group. See ¶2206, P’s Purchase of T-S corp’s Stock for Cash and Notes, for contractual provisions to use in connection with a Code §338(h)(10) or a Code §336(e) election for a Target that is an S corp. [↑](#footnote-ref-95)
96. If Target or any of its Subsidiaries has been a member of an Affiliated Group filing a consolidated federal income tax return, such corporation (or its successor) will be jointly and severally liable under Reg. §1.1502-6 for certain tax liabilities incurred by such Affiliated Group for a tax year when such corporation was a member of such Affiliated Group for all or part of such tax year. See ¶210.

Target or any of its Subsidiaries may also be liable for the unpaid taxes of third parties under similar provisions of state, local, or non-U.S. law, as a transferee or successor, by contract (e.g., a tax-sharing agreement), or otherwise.

After Buyer acquires Target’s stock, Target and its Subsidiaries will remain liable for any such unpaid tax liabilities. This indemnification provision, like in sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), is designed to protect Buyer against any liability for the unpaid income taxes of any person other than Target and its Subsidiaries. Sample acquisition agreement 2202 (the pro-seller stock purchase agreement), on the other hand, contains no such provision. [↑](#footnote-ref-96)
97. Clause (i) is intended to protect Buyer from pre-Closing Taxes of Target and its Subsidiaries. Alternative 1 contemplates a fixed purchase price and obligates Sellers to indemnify Buyer to the extent Income Taxes exceed either the reserve therefor on the Most Recent Balance Sheet (as Buyer would prefer) or such reserve adjusted through the Closing Date (as Sellers would prefer). Alternative 2 contemplates that there will be a purchase price adjustment as described in ¶2205. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), on the other hand, obligates Sellers to indemnify for all Income Taxes without regard to the reserve.

If there is a purchase price adjustment but it specifically excludes Taxes from the calculation, then the provisos should be omitted, thereby giving Buyer full indemnity for all pre-closing Taxes.

Although Alternatives 1 and 2 apply to the indemnity obligations described in clauses (i), (ii) and (iii), they are most relevant with respect to clause (i).

In the absence of clause (i), Buyer is generally protected with respect to pre-Closing Taxes only to the extent Sellers have breached 1 or more of the §4(k) Tax representations. Clause (i) may have little or no impact on the scope of Buyer’s protection to the extent the agreement contains an unqualified indemnity for breach of §4(k)(i) and (vii), as this pro-buyer agreement contemplates. However, a provision such as clause (i) can be useful in circumstances where (1) Sellers are willing to give a strong Tax indemnity but are not comfortable giving unqualified Tax representations of the type shown in §4(k)(vii) and elsewhere in §4(k), (2) in contrast to the approach described in §8(a), the §4(k) Tax representations survive for only a limited period, or (3) in contrast to the approach described in §8(b)(i), Sellers are willing to indemnify Buyer for breaches of Tax representations only if the resulting claim (together with any claims arising from breaches of other representations) exceeds a threshold amount. [↑](#footnote-ref-97)
98. This provision is intended to cover the allocation of Tax liability for taxable periods that span the Closing Date and applies to all types of taxes, not just income taxes. Where Target is an S corp or a subsidiary member of a consolidated group or a Code §338(h)(10) or §336(e) election is made, this provision will not apply to allocation of federal income Taxes, because the rules applicable to each of these situations cause a termination of Target’s taxable year at the time of the acquisition. [↑](#footnote-ref-98)
99. If there is a purchase price adjustment mechanism based on Target’s balance sheet as of a time other than the close of business on the Closing Date (e.g., as of the opening of business on the Closing Date), then the interim closing of the books as described in the text above should likewise be calculated as of the same time as the purchase price adjustment. [↑](#footnote-ref-99)
100. This provision gives Buyer the right to prepare and file all Income Tax Returns of Target and its Subsidiaries that have not been filed as of the Closing Date (other than any ‘‘group’’ returns), while Sellers have the right to review and comment on such returns (and Buyer is obligated to take Sellers’ comments into consideration). Alternatively, the parties may agree that Sellers will be responsible for preparing all Income Tax Returns for periods ending on or before the Closing Date or the parties may require Sellers to bear a portion of the costs of preparing all pre-closing Tax Returns. [↑](#footnote-ref-100)
101. The Parties may wish to include a more detailed provision for dealing with any disputes regarding preparation and filing of tax returns that relate, in whole or in part, to pre-Closing tax periods. For instance, the Parties can agree to refer any dispute to an independent accounting firm, whose decision would be binding on both Parties. [↑](#footnote-ref-101)
102. The pro-buyer stock purchase agreement in ¶2201 does not contain any provision addressing the treatment of tax refunds for pre-Closing tax periods. Such refunds of taxes previously paid by Target could arise in 2 circumstances: first, when Target overpaid its taxes for a pre-Closing period, and second, when a Target post-Closing loss can be carried back to Target’s pre-Closing period. In the absence of a specific provision in the agreement, such refunds generally will be paid to Target, and hence Buyer will receive the economic benefit of such refunds, even though Sellers bear the economic burden of taxes for the pre-Closing period (although the parties may agree that the Tax benefit of any loss carried back from a post-Closing period to a pre-Closing period should be for Buyer’s benefit under the theory that Buyer bears the economic burden of the loss that resulted in such Tax benefit).

When Target was, prior to Closing, a member of Sellers’ consolidated group, federal income tax refunds for pre-Closing periods would be paid to the parent of Sellers’ consolidated group, and hence Sellers would receive the economic benefit of such refunds. See ¶2204.4 for a discussion of this topic when Target was a member of Sellers’ consolidated group before the acquisition and ¶2204.7(f) for a sample agreement clause requiring Sellers to pay over to Buyer any tax refund (or reduction of tax liability) resulting from a carryback of a postacquisition tax attribute of Target and its Subsidiaries. [↑](#footnote-ref-102)
103. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) contains a provision giving Buyer a right to terminate the agreement for a limited period after signing if Buyer is not [reasonably] satisfied with the results of its continuing business, legal, environmental, and accounting due diligence concerning Target and its Subsidiaries. This Agreement, like sample acquisition agreement 2202 (the pro-seller stock purchase agreement), lacks a comparable provision. [↑](#footnote-ref-103)
104. Acquisition agreements, especially for transactions where Target is a public 1934 Act reporting company (as defined in ¶1702.11.2.1), often call for 1 party (the “breaching party”) to pay the other party (the “injured party”) liquidated damages (i.e., a breakup fee where Target pays [or Target's shareholders pay] Buyer or a reverse breakup fee where Buyer pays Target) and/or reimburse the injured party's expenses of the aborted transaction (i.e., expense reimbursement) if the breaching party fails to complete the transaction under specified circumstances. For example, Target (or Target's shareholders) may be required to pay a specified amount to Buyer if (although Buyer has not breached the agreement) Target (Target's shareholders) fails to complete the transaction and instead Target is sold to a third party within a specified period. Sample acquisition agreement 2501 (protective provisions) contains additional provisions for use when a party desires to include a breakup fee, reverse breakup fee, no-shop clause, go-shop clause, or certain other “deal protections.” While sample acquisition agreement 2501 is intended for use with sample acquisition agreement 2500 (the reverse subsidiary merger agreement), 1 or more of the 2501 provisions can also be used (with appropriate modifications) along with sample acquisition agreements 2201, 2202, and 2203.

See ¶1702.10.3 for discussion of judicial limitations on a breakup fee. [↑](#footnote-ref-104)
105. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) contains provisions whereby the Parties agree to specific performance, agree to service of process of an agent, and submit to the [exclusive] jurisdiction of the state and federal courts in a particular city. This Agreement, like sample acquisition agreement 2202 (the pro-seller stock purchase agreement), lacks comparable provisions.

The Parties may want to add a provision calling for optional or mandatory arbitration with respect to all or certain issues. [↑](#footnote-ref-105)
106. This Agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), provides that the obligations of Sellers as a group will be ‘‘joint and several,’’ defined in such a way that each Seller would be responsible for all of the Buyer’s Adverse Consequences (instead of only for his, her, or its Allocable Portion based on the percentage of Target’s stock owned by each Seller) if Sellers as a group failed to perform their obligations. This would protect Buyer from having to proceed against all Sellers (some of whom may be insolvent or not subject to service of process) in order to collect all of what is owing it.

Sample acquisition agreement 2202 (the pro-seller stock purchase agreement) on the other hand, provides that the obligations of Sellers as a group will be defined in such a way that each Seller would be responsible for only his, her, or its allocable portion of Buyer’s Adverse Consequences based on the percentage of Target’s stock owned by each Seller (as opposed to the entire amount) if Sellers as a group failed to perform their obligations. This would protect those Sellers who have ‘‘deep pockets’’ (or who otherwise are attractive defendants) from potentially having to indemnify Buyer against a disproportionately large portion (or even all) of its Adverse Consequences. [↑](#footnote-ref-106)
107. The Parties may want to add provisions designating a nominee to act on behalf of Sellers for purposes of receiving notice, agreeing to modifications and amendments, and taking action. [↑](#footnote-ref-107)
108. This neutral stock purchase agreement, like sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) makes Sellers responsible for the transactional costs and expenses of Target and its Subsidiaries in the event that the transactions contemplated hereby are consummated. Otherwise, in the absence of such a provision, Buyer would bear the economic burden of any such costs and expenses when it acquires Target and its Subsidiaries upon consummation of the stock purchase.

To the extent that Buyer is arranging for any acquisition financing (e.g., borrowings) at Target or a Subsidiary level, Sellers should request and Buyer may also agree to a special provision making Target and its Subsidiaries responsible for the costs and expenses of such acquisition financing, as an exception to the general rule stated above making Sellers responsible for the transactional costs and expenses of Target and its Subsidiaries, in the event that the transactions contemplated hereby are consummated.

Unlike sample acquisition agreement 2201 (the pro-buyer stock purchase agreement), however, this neutral stock purchase agreement makes Buyer bear 50% of certain transfer taxes, fees, and charges and Sellers bear the other 50%. See §9(g) above.

Sellers, on the other hand, may seek to make Buyer responsible not only for the costs and expenses of Target and its Subsidiaries but also for some or all of Sellers’ costs and expenses. Sample acquisition agreement 2202 (the pro-seller stock purchase agreement) contains provisions more favorable to Sellers in this regard.

The Parties may settle on a compromise allocation of responsibility (such as sharing the costs and expenses in a predetermined ratio or making 1 Party responsible for the costs and expenses up to a specified aggregate ceiling and the other Party responsible for any excess).

The Parties may seek a different allocation of costs and expenses in the event the transaction is aborted under specified circumstances. See sample acquisition agreement 2501 (protective provisions) for terms related to a breakup fee, reverse breakup fee, no-shop clause, go-shop clause, or certain other provisions relevant to the payment of fees and/or expenses under various circumstances where the transaction is terminated. [↑](#footnote-ref-108)
109. Sample acquisition agreement 2201 (the pro-buyer stock purchase agreement) contains additional provisions construing the representations, warranties, and covenants in a manner more favorable to Buyer. This Agreement, like sample acquisition agreement 2202 (the pro-seller stock purchase agreement), lacks comparable provisions. [↑](#footnote-ref-109)
110. Authorization to disclose the tax treatment and tax structure of a transaction, in the form set forth in text above, was commonly included in M&A transaction documents following IRS’s 2/03 issuance of Code §6011, §6111, and §6112 tax shelter disclosure regulations (as discussed at ¶408, ¶614, ¶910, and ¶1013). Those regulations imposed reporting requirements on taxpayers (and in certain cases reporting and list maintenance requirements on material advisors) with respect to any ‘‘confidential transaction,’’ the broad definition of which potentially encompassed common M&A transactions absent such disclosure authorization.

Revised 12/03 tax shelter disclosure regulations (principally under Code §6011) contain a more limited definition of ‘‘confidential transaction,’’ also applicable for purposes of the excise tax imposed in 5/06 by Code §4965 on certain tax-exempt entities that participate in confidential (and certain other) transactions to which Code §4965 applies. Based on the 12/03 regulations, we believe that disclosure authorization is no longer necessary to avoid classification of a transaction as confidential except where an advisor receiving a large fee imposes confidentiality to protect the advisor’s tax strategy. See ¶408, ¶614, ¶910, and ¶1013. [↑](#footnote-ref-110)