

EXHIBIT 8A—Asset Purchase Agreement (Buyer’s Perspective)

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ASSET PURCHASE AGREEMENT¹

by and among

as Buyer

as Seller

and

Seller’s Stockholders²

[DATE]

¹This draft Asset Purchase Agreement has been prepared for use in an asset transaction in which the consideration is cash and a promissory note. It assumes that the seller is a manufacturing company with no subsidiaries. The draft has been prepared from the buyer’s viewpoint and should not be offered on behalf of a seller without very substantial revisions. Bracketed alternative language reflects probable concessions to the seller in a “friendly” transaction and may be included in the initial buyer’s draft if the client wants to take a more reasonable approach in order to facilitate negotiations. Additional drafting or negotiating issues are described in footnotes.

²This agreement contemplates that all stockholders of the seller are made additional parties to the agreement in order to give the buyer direct claims against them in the event of a default. If there are stockholders who own small percentages of the seller’s stock or are not involved in the management of the seller’s business, it may be appropriate not to include them as additional parties.

ASSET PURCHASE AGREEMENT

AGREEMENT entered into as of _____ by and between _____, a _____, corporation (“Buyer”), _____, a _____ corporation (“Seller”), and each of the stockholders of Seller listed on Exhibit 1 hereto (individually, a “Stockholder” and collectively, the “Stockholders”).

WITNESSETH

WHEREAS, subject to the terms and conditions hereof, Seller desires to sell substantially all of its properties and assets; and

WHEREAS, subject to the terms and conditions hereof, Buyer desires to purchase said properties and assets of Seller for the consideration specified herein and the assumption by Buyer of certain liabilities and obligations of Seller;

NOW, THEREFORE, in order to consummate said purchase and sale and in consideration of the mutual agreements set forth herein, the parties hereto agree as follows:

SECTION 1. PURCHASE AND SALE OF ASSETS.

Section 1.01. Sale of Assets. Subject to the provisions of this Agreement, Seller agrees to sell and Buyer agrees to purchase, at the Closing (as defined in Section 1.04 hereof), all of the properties, assets and business of Seller of every kind and description, tangible and intangible, real, personal or mixed, and wherever located, including, without limitation, all assets shown or reflected in the Base Balance Sheet (as defined in Section 2.07 hereof) of Seller, and all of Seller’s good will and the exclusive right to use the name of Seller as all or part of a trade or corporate name; provided, however, that there shall be excluded from such purchase and sale the following property:

- (a) Assets and property disposed of since the date of the Base Balance Sheet in the ordinary course of business and such other assets as have been or are disposed of pursuant to this Agreement; and
- (b) Seller’s corporate franchise, stock record books, corporate record books containing minutes of meetings of directors and stockholders and such other records as have to do exclusively with Seller’s organization or stock capitalization (collectively, the “Corporate Records”); provided, however, that Seller shall provide Buyer prior to the Closing with copies of each of the foregoing, certified by Seller to be true and correct copies.

The assets, property and business of Seller to be sold to and purchased by Buyer under this Agreement are hereinafter sometimes referred to as the “Subject Assets.”

Section 1.02. Assumption of Liabilities. Upon the sale and purchase of the Subject Assets, Buyer shall assume and agree to pay or discharge when due in accordance with their respective terms all liabilities of Seller shown or reflected on the Base Balance Sheet which are outstanding at the time of the Closing, and all liabilities and obligations incurred by Seller since the date of the Base Balance Sheet in the ordinary course of business and consistent with the terms of this Agreement which are outstanding at the time of the Closing, provided, however, that Buyer shall not assume and shall not pay the following liabilities:

- (i) Liabilities incurred by Seller in connection with this Agreement and the transactions provided for herein, including, without limitation, counsel and accountant fees, and expenses pertaining to the performance by Seller of its obligations hereunder;
- (ii) Taxes (as defined in Section 2.08 hereof) of Seller (whether relating to periods before or after the transactions contemplated in this Agreement or incurred by Seller in connection with this Agreement and the transactions provided for herein), including any liability for Taxes arising out of the inclusion of Seller in any group filing consolidated, combined or unitary tax returns or arising out of any transferee liability;
- (iii) Liabilities of Seller to its dissenting Shareholders, if any, under the Massachusetts Business Corporation Law;
- (iv) Liabilities of Seller with respect to any options, warrants, agreements or convertible or other rights to acquire any shares of its capital stock of any class; and
- (v) Liabilities in connection with or relating to all actions, suits, claims, proceedings, demands, assessments and judgments, costs, losses, liabilities, damages, deficiencies and expenses (whether or not arising out of third-party claims), including, without limitation, interest, penalties, reasonable attorney and accountant fees and all amounts paid in investigation, defense or settlement of any of the foregoing.

The liabilities to be assumed by Buyer under this Agreement are hereinafter sometimes referred to as the “Liabilities,” and the liabilities which are not assumed by Buyer under this Agreement are hereinafter sometimes referred to as the “Excluded Liabilities.” The assumption of said liabilities by any party hereunder shall not enlarge any rights of third parties under contracts or

arrangements with Buyer or Seller, and nothing herein shall prevent any party from contesting in good faith with any third party any of said liabilities.

Section 1.03. Purchase Price and Payment. In consideration of the sale by Seller to Buyer of the Subject Assets, subject to the assumption by Buyer of the Liabilities and the satisfaction of all of the conditions contained herein, Buyer agrees that at the Closing it will (a) deliver to Seller ____ dollars (\$____) by bank cashiers checks in Boston Clearing House Funds or by wire transfer of immediately available funds, (b) deliver to the Escrow Agent ____ dollars (\$____) (the “Escrow Amount”) to be held by the Escrow Agent pursuant to and in accordance with the terms of the Escrow Agreement to be executed substantially in the form attached hereto as Exhibit 1.03(b), and (c) deliver to Seller a junior subordinated promissory note in the principal amount of ____ dollars (\$____) (the “Note”) substantially in the form attached hereto as Exhibit 1.03(c).³ Said Note shall be subject to the provisions of this Agreement and shall permit Buyer to set-off the amount of any indemnification payable by Seller or Stockholders to Buyer under Section 9 hereof.⁴

Section 1.04. Time and Place of Closing. The closing of the purchase and sale provided for in this Agreement (herein called the “Closing”) shall be held at the offices of _____ at _____ on [date] or at such other place or earlier or later date or time as may be fixed by mutual agreement of Buyer and Seller. [Either party shall have the right to postpone the Closing for an additional period not exceeding ____ days by giving written notice to the other in order to permit the satisfaction of conditions precedent by such party pursuant to this Agreement.]⁵

Section 1.05. Delivery of Agreement of Assumption of Liabilities. At the Closing, Buyer shall deliver or cause to be delivered to Seller, an Agreement for Assumption of the Liabilities by Buyer in the form of Exhibit 1.05 hereto.

Section 1.06. Transfer of Subject Assets. At the Closing, Seller shall deliver or cause to be delivered to Buyer good and sufficient instruments of transfer transferring to Buyer title to all the Subject Assets. Such instruments of transfer

³Any promissory note delivered pursuant to the agreement may be considered a security, and the usual private placement issues (including blue sky) should be addressed.

⁴It may also be appropriate to provide for adjustments to the purchase price to reflect changes in the seller’s performance or financial condition between the date of signing and the closing date.

⁵The bracketed provision probably favors the seller since it usually has more conditions to perform, but it may also be helpful to a buyer if it needs to finalize financing arrangements, obtain consents, etc.

(a) shall be in the form and will contain the warranties, covenants and other provisions (not inconsistent with the provisions hereof) which are usual and customary for transferring the type of property involved under the laws of the jurisdictions applicable to such transfers, (b) shall be in form and substance satisfactory to Buyer and its counsel, and (c) shall effectively vest in Buyer good and marketable title to all the Subject Assets free and clear of all liens, restrictions and encumbrances not shown or reflected on the Base Balance Sheet.

Section 1.07. Delivery of Records and Contracts. At the Closing, Seller shall deliver or cause to be delivered to Buyer all of Seller's leases, contracts, commitments, agreements (including, without limitation, noncompetition agreements) and rights, with such assignments thereof and consents to assignments as are necessary to assure Buyer of the full benefit of the same. Seller shall also deliver to Buyer at the Closing all of Seller's business records, tax returns, books and other data relating to its assets, business and operations (except corporate records and other property of Seller excluded under Subsection 1.01(b), as to which only copies need be delivered in accordance with such Section), and Seller shall take all requisite steps to put Buyer in actual possession and operating control of the assets and business of Seller. After the Closing, Buyer shall afford to Seller and its accountants and attorneys, for the purpose of preparing such tax returns of Seller or Stockholders as may be required after the Closing, reasonable access to the books and records of Seller delivered to Buyer under this Section and shall permit Seller, at Seller's expense, to make extracts and copies therefrom.

Section 1.08. Further Assurances. Seller from time to time after the Closing at the request of Buyer and without further consideration shall execute and deliver further instruments of transfer and assignment and take such other action as Buyer may reasonably require to more effectively transfer and assign to, and vest in, Buyer each of the Subject Assets. Seller shall cooperate with Buyer to permit Buyer to enjoy Seller's rating and benefits under the worker's compensation laws and unemployment compensation laws of applicable jurisdictions, to the extent permitted by such laws. Nothing herein shall be deemed a waiver by Buyer of its right to receive at the Closing an effective assignment of each of the leases, contracts, commitments or rights of Seller as otherwise set forth in this Agreement.

Section 1.09. Allocation of Purchase Price. Within _____ days of the Closing, Buyer shall allocate the purchase price (and all other capitalized costs) among the Subject Assets. Such allocation shall be made in accordance with the provisions of Section 1060 of the Internal Revenue Code of 1986, as amended (the "Code"), and shall be binding upon Buyer and Seller for all purposes (including financial accounting purposes, financial and regulatory reporting

purposes and tax purposes). Buyer and Seller also each agree to file IRS Form 8594 consistently with the foregoing and in accordance with Section 1060 of the Code.⁶

Section 1.10. Stockholders' Representative.⁷

- (a) In order to efficiently administer the waiver of any condition or right of the Stockholders and the settlement of any dispute arising under the Agreement, the Stockholders hereby designate _____ as their representative (the "Stockholders' Representative").
- (b) The Stockholders hereby authorize the Stockholders' Representative (i) to take all action necessary in connection with the waiver of any condition to the obligations of the Stockholders under this Agreement, the waiver of any right of the Stockholders hereunder, or the settlement of any dispute arising hereunder, (ii) to give and receive all notices required to be given under this Agreement, and (iii) to take any and all additional action as is contemplated to be taken by or on behalf of the Stockholders by the terms of this Agreement; [provided, however, that the Stockholders' Representative shall not have authority to commence legal proceedings on behalf of the Stockholders without their consent].
- (c) In the event that the Stockholders' Representative dies, becomes legally incapacitated, or resigns from such position, _____ shall fill such vacancy and shall be deemed to be the Stockholders' Representative for all purposes of this Agreement; however, no change in the Stockholders' Representative shall be effective until Buyer is given notice of it by the Stockholders.
- (d) All decisions and actions by the Stockholders' Representative shall be binding upon all of the Stockholders, and no Stockholder shall have the right to object, dissent, protest or otherwise contest the same.

⁶This allocation provision is favorable to the buyer, and the seller may insist that the buyer and the seller agree to the allocation prior to closing the transaction. If this alternative is used, the agreement may include figures, if they are available at the closing, or a formula with respect to items that would be hard to determine at or before the closing, such as inventory. For example, it would be customary to value current assets at 100 percent of their book values at the closing (assuming that such value is indicative of fair market value), and to use appraised fair market values for fixed assets, leases or licenses.

⁷Although Section 1.10 is more typically included in a stock purchase agreement, it may be helpful to include it in an asset purchase agreement if a number of stockholders are party to the agreement and Buyer does not wish to deal with them individually. It is also possible to cover these provisions in separate powers of attorney given by stockholders to the representative.

- (e) By their execution of this Agreement, the Stockholders agree that:
- (i) Buyer shall be able to rely conclusively on the instructions and decisions of the Stockholders' Representative as to any actions required or permitted to be taken by the Stockholders or the Stockholders' Representative hereunder, and no party hereunder shall have any cause of action against Buyer for any action taken by Buyer in reliance upon the instructions or decisions of the Stockholders' Representative;
 - (ii) all actions, decisions and instructions of the Stockholders' Representative shall be conclusive and binding upon all of the Stockholders and no Stockholder shall have any cause of action against the Stockholders' Representative for any action taken, decision made or instruction given by the Stockholders' Representative under this Agreement, except for fraud or willful breach of this Agreement by the Stockholders' Representative;
 - (iii) remedies available at law for any breach of the provisions of this Section 1.10 are inadequate; therefore, Buyer and Seller shall be entitled to temporary and permanent injunctive relief without the necessity of proving damages if either Buyer or Seller brings an action to enforce the provisions of this Section 1.10; and
 - (iv) the provisions of this Section 1.10 are independent and severable, shall constitute an irrevocable power of attorney, coupled with an interest and surviving death, granted by the Stockholders to the Stockholders' Representative, and shall be binding upon the executors, heirs, legal representatives and successors of each Stockholder.
- (f) All fees and expenses incurred by the Stockholders' Representative shall be paid by the Stockholders.

Section 1.11. Sales and Transfer Taxes. All sales and transfer taxes, fees and duties under applicable law incurred in connection with this Agreement or the transactions contemplated thereby will be borne and paid by Seller, and Seller shall promptly reimburse Buyer for the payment of any such tax, fee or duty which it is required to make under applicable law.

SECTION 2. REPRESENTATIONS AND WARRANTIES OF SELLER AND STOCKHOLDERS.

Section 2.01. Making of Representations and Warranties. As a material inducement to Buyer to enter into this Agreement and consummate the transactions contemplated hereby, Seller and each of the Stockholders jointly

and severally hereby make to Buyer the representations and warranties contained in this Section 2; provided, however, that [(i) the Stockholder warranties in Sections 2.04(b) and 2.05(b) are only made severally by each Stockholder with respect to his own shares,⁸ [and (ii) the Stockholder warranties in Sections _____ are made only to the knowledge of the Stockholders.]]⁹

Section 2.02. Organization and Qualifications of Seller. Seller is a corporation duly organized, validly existing and in good standing under the laws of [STATE] with full corporate power and authority to own or lease its properties, and to conduct its business in the manner and in the places where such properties are owned or leased, or such business is currently conducted or proposed to be conducted. The copies of Seller's [Articles of Organization], as amended to date, certified by the _____ Secretary of State, and of Seller's bylaws, as amended to date, certified by Seller's Clerk or Secretary, and heretofore delivered to Buyer's counsel, are complete and correct, and no amendments thereto are pending. Seller is not in violation of any term of its [Articles of Organization] or bylaws. Seller is duly qualified to do business as a foreign corporation in [LIST STATES], and it is not required to be licensed or qualified to conduct its business or own its property in any other jurisdiction.

⁸Small stockholders of the seller not involved in its management may insist that their participation in the agreement be limited to their warranties with respect to their shares and an agreement to vote for the transaction. If several stockholders of the seller are jointly and severally liable for warranties, they may need to enter into an indemnity or contribution agreement, or they may ask the buyer to agree to apportion the liability among them on some basis, which is in effect joint liability. The latter is not desirable from the buyer's viewpoint, and may not be feasible unless all of the stockholders have consented to jurisdiction and service of process in a convenient court. See Section 10.11.

⁹The seller may insist on defining what is meant by a "knowledge" qualifier in the agreement in order to avoid possible attribution of the knowledge of any of its employees or agents regarding matters covered by indemnification. It is probably best from the buyer's viewpoint not to include such a definition. However, if such a definition is to be included, the following language may be appropriate:

For the purposes of this Agreement, the knowledge of each Stockholder shall be attributed to the other Stockholders and to Seller, and the knowledge of the officers and directors of Seller and of its supervisory employees with reason to know about the matter in question shall be attributed to Seller, but the knowledge of its other employees or agents which has not been communicated to such an officer, director or supervisory employee of Seller shall not be attributed to it.

Section 2.03. Subsidiaries.¹⁰ Seller has no subsidiaries and does not own any securities issued by any other business organization or governmental authority, except U.S. Government securities, bank certificates of deposit and money market accounts acquired as short-term investments in the ordinary course of its business. Seller does not own or have any direct or indirect interest in or control over any corporation, partnership, joint venture or entity of any kind.

Section 2.04. Capital Stock of Seller; Beneficial Ownership.

- (a) The authorized capital stock of Seller consists of _____ shares of Common Stock, [par value or no par value] par value, of which _____ shares are duly and validly issued, outstanding, fully paid and nonassessable and of which _____ shares are authorized but unissued. There are no outstanding options, warrants, rights, commitments, preemptive rights or agreements of any kind for the issuance or sale of, or outstanding securities convertible into, any additional shares of capital stock of any class of Seller. None of Seller's capital stock has been issued in violation of any federal or state law. There are no voting agreements, trusts, proxies or other agreements, instruments or undertakings with respect to the voting of Seller's capital stock to which Seller or any of the Stockholders is a party.
- (b) Each of the Stockholders owns beneficially and of record the number of shares of Common Stock of Seller set forth opposite such Stockholder's name on Exhibit 1 hereto.

Section 2.05. Authority of Seller and the Stockholders.

- (a) Seller has full right, authority and power to enter into this Agreement and each agreement, document and instrument to be executed and delivered by Seller pursuant to this Agreement and to carry out the transactions contemplated hereby. The execution, delivery and performance by Seller of this Agreement and each such other agreement, document and instrument have been duly authorized by all necessary action of Seller and its stockholders, and no other action on the part of Seller or its stockholders is required in connection therewith.¹¹

¹⁰This document assumes that the seller has no subsidiaries. If the seller has material subsidiaries, consideration should be given to which representations should apply to those subsidiaries and whether additional representations should be added.

¹¹This provision contemplates that the seller has obtained stockholder approval under Section 75 of the Business Corporation Law before signing the agreement, and that no stockholder has asserted appraisal rights under Section 76. See subsection 1.02(iii).

This Agreement and each agreement, document and instrument executed and delivered by Seller pursuant to this Agreement constitutes, or when executed and delivered will constitute, valid and binding obligations of Seller enforceable in accordance with their terms.¹² The execution, delivery and performance by Seller of this Agreement and each such agreement, document and instrument:

- (i) does not and will not violate any provision of the [Articles of Organization] or bylaws of Seller;
 - (ii) does not and will not violate any laws of the United States, or any state or other jurisdiction applicable to Seller or require Seller to obtain any approval, consent or waiver of, or make any filing with, any person or entity (governmental or otherwise) that has not been obtained or made; and
 - (iii) does not and will not result in a breach of, constitute a default under, accelerate any obligation under, or give rise to a right of termination of any indenture or loan or credit agreement or any other agreement, contract, instrument, mortgage, lien, lease, permit, authorization, order, writ, judgment, injunction, decree, determination or arbitration award to which Seller is a party or by which the property of Seller is bound or affected, or result in the creation or imposition of any mortgage, pledge, lien, security interest or other charge or encumbrance on any of the Subject Assets, except as specifically identified on Schedule 2.05(a).
- (b) Each Stockholder¹³ has full right, authority, power and capacity to enter into this Agreement and each agreement, document and instrument to be executed and delivered by or on behalf of him or her pursuant to this Agreement, and to carry out the transactions contemplated hereby and thereby.

This Agreement and each agreement, document and instrument executed and delivered by each Stockholder pursuant to this Agreement constitutes, or when executed and delivered will constitute, valid and binding obligations of such Stockholder enforceable in accordance with their respective terms. The execution, delivery and performance by each Stockholder of this Agreement and each such agreement, document and instrument:

¹²The seller or the stockholders may request an exception for bankruptcy and insolvency laws, but this is only necessary in the context of legal opinions.

¹³This agreement assumes that all stockholders are natural persons.

- (i) does not and will not violate any laws of the United States, or any state or other jurisdiction applicable to such Stockholder, or require such Stockholder to obtain any approval, consent or waiver of, or make any filing with, any person or entity (governmental or otherwise) that has not been obtained or made; and
- (ii) does not and will not result in a breach of, constitute a default under, accelerate any obligation under, or give rise to a right of termination of, any indenture or loan or credit agreement or any other agreement, contract, instrument, mortgage, lien, lease, permit, authorization, order, writ, judgment, injunction, decree, determination or arbitration award to which such Stockholder is a party or by which the property of such Stockholder is bound or affected, or result in the creation or imposition of any mortgage, pledge, lien, security interest or other charge or encumbrance on any of the Subject Assets.

Section 2.06. Real and Personal Property.

- (a) **Owned Real Property.**¹⁴ All of the real property owned by Seller is identified on Schedule 2.06(a) (collectively referred to herein as the “Owned Real Property”). Seller hereby makes the following representations and warranties with respect to the Owned Real Property:
 - (i) **Title and Description.** Seller has good, clear, record and marketable fee simple title to the Owned Real Property, free and clear of all mortgages, deeds of trust, ground leases, assessments, leases and tenancies, claims, covenants, conditions, restrictions, easements, judgments or other encumbrances and free of encroachments onto or off of the Owned Real Property, except for (x) easements, covenants, restrictions and similar encumbrances that do not and could not [materially] interfere with the use of the Owned Real Property as currently used and improved, and (y) minor encroachments that do not and could not [materially] adversely affect the value or use of the Owned Real Property as currently used and improved and that could be removed without material cost ((x) and (y) are collectively referred to as “Permitted Encumbrances”), and except for matters set forth on Schedule 2.06(a).
 - (ii) **Security Interests.** All of the mortgages, deeds of trust, ground leases, security interests or similar encumbrances on the Owned Real Property

¹⁴This representation assumes that the seller owns and occupies real estate. If real properties are very material to the seller’s business or are held as an investment and leased to others, additional warranties may be appropriate, and a member of the real estate department should be consulted.

are set forth on Schedule 2.06(a) (collectively, the “Mortgages”). Except as set forth on Schedule 2.06(a), Seller has obtained the consent of the holder of any Mortgage if the transfer of the Owned Real Property to Buyer would otherwise cause a default under the Mortgage, and such transfer will not give the holder of any Mortgage any remedy, or the right to charge any premium or penalty. Schedule 2.06(a) also indicates all Mortgages which are, by their terms, by means of a separate guaranty or otherwise, recourse, in whole or in part, to Seller.

- (iii) **Condition.** Except as set forth on Schedule 2.06(a), there are no material defects in the physical condition of any improvements constituting a part of the Owned Real Property, including, without limitation, structural elements, mechanical systems, roofs or parking and loading areas, and all of such improvements are in good operating condition and repair, have been well maintained and are free from infestation by rodents or insects. Except as set forth on Schedule 2.06(a), none of the Owned Real Property is subject to special flood or mudslide hazards or within the 100-year flood plain. All water, sewer, gas, electric, telephone, drainage and other utilities required by law or necessary for the current or planned operation of the Owned Real Property have been connected pursuant to valid permits and are sufficient to service the Owned Real Property.

- (iv) **Compliance with Law; Government Approvals.** Seller has received no notice from any governmental authority of any violation of any law, ordinance, regulation, license, permit or authorization issued with respect to any of the Owned Real Property that has not been corrected heretofore, and no such violation exists which could have an adverse effect on the operation or value of any of the Owned Real Property. All improvements constituting part of the Owned Real Property have been completed and are now in compliance in all respects with all applicable laws, ordinances, regulations, licenses, permits and authorizations, and there are presently in effect all licenses, permits and authorizations required by law, ordinance or regulation. The conveyance of the Owned Real Property to Buyer shall include all rights to the use of any off-site facilities necessary to ensure compliance with all such laws, ordinances, codes and regulations. There is at least the minimum access required by applicable subdivision or similar law to the Owned Real Property. Seller has received no notice of any pending or threatened real estate tax deficiency or reassessment or condemnation of all or any portion of any of the Owned Real Property.

- (b) **Leased Real Property.**¹⁵ All of the real property leased by Seller as tenant or lessee is identified on Schedule 2.06(b) (collectively referred to herein as the “Leased Real Property”). Seller hereby makes the following representations and warranties with respect to the Leased Real Property:
- (i) **Leases.** The copies of the leases of the Leased Real Property (collectively, the “Leases”) delivered by Seller to Buyer and the information with respect to each of the Leases set forth in Schedule 2.06(b) is complete, accurate, true and correct. With respect to each of the Leases, except as set forth on Schedule 2.06(b):
 - (A) each of the Leases is in full force and effect and has not been modified, amended or altered, in writing or otherwise;
 - (B) all obligations of the landlord or lessor under the Leases which have accrued have been performed, and, to the best of the knowledge of Seller, no landlord or lessor is in default under any Lease;
 - (D) all obligations of the tenant or lessee under the Leases which have accrued have been performed, and Seller is not in default under any Lease, and no circumstance presently exists which, with notice or the passage of time, or both, would give rise to a default by Seller; and
 - (E) Seller has obtained or will obtain prior to the Closing the consent of each landlord or lessor under any Leases whose consent is required to the transfer of the Leased Real Property to Buyer, and such transfer will not give any landlord or lessor under any Lease any remedy, including, without limitation, any right to declare a default under any Lease.
 - (ii) **Title and Description.** Seller holds a good, clear, marketable, valid and enforceable leasehold interest in the Leased Real Property pursuant to the Leases, subject only to the right of reversion of the landlord or lessor under the Leases, free and clear of all other prior or subordinate interests, including, without limitation, mortgages, deeds of trust, ground leases, leases, subleases, assessments, tenancies, claims, covenants, conditions, restrictions, easements, judgments or other

¹⁵The representation in (i) should be included as to all leases. The representations in (ii)–(iv) should only be used where the seller is responsible for taxes and maintenance, and includes representations that may not be appropriate or may need to be modified if the seller leases property on another basis. Consult with members of the real estate department if appropriate.

encumbrances or matters affecting title, and free of encroachments onto or off of the Leased Real Property, except for (x) easements, covenants, restrictions and similar encumbrances that do not and could not [materially] interfere with the use of the Leased Real Property as currently used and improved, and (y) minor encroachments that do not and could not [materially] adversely affect the value or use of the Leased Real Property as currently used and improved, and that could be removed without material cost ((x) and (y) are collectively referred to as “Permitted Encumbrances”) except for matters set forth on Schedule 2.06(b).

- (iii) **Condition.** Except as set forth on Schedule 2.06(b), there are no material defects in the physical condition of any improvements constituting a part of the Leased Real Property, including, without limitation, structural elements, mechanical systems, roofs or parking and loading areas, and all of such improvements are in good operating condition and repair, have been well maintained and are free from infestation by rodents or insects. Except as set forth on Schedule 2.06(b), none of the Leased Real Property is subject to special flood or mudslide hazards or within the 100-year flood plain. All water, sewer, gas, electric, telephone, drainage and other utilities required by law or necessary for the current or planned operation of the Leased Real Property have been installed and connected pursuant to valid permits, and are sufficient to service the Leased Real Property.
- (iv) **Compliance with Law; Government Approvals.** Seller has received no notice from any governmental authority of any violation of any law, ordinance, regulation, license, permit or authorization issued with respect to any of the Leased Real Property that has not been corrected heretofore, and no such violation now exists which could have an adverse effect on the operation or value of any of the Leased Real Property. All improvements constituting a part of the Leased Real Property are in compliance in all respects with all applicable laws, ordinances, regulations, licenses, permits and authorizations, and there are presently in effect all licenses, permits and authorizations required by law, ordinance or regulation. The transfer of the Leased Real Property to Buyer shall include all rights to the use of any off-site facilities necessary to ensure compliance with all such laws, ordinances, codes and regulations. There is at least the minimum access required by applicable subdivision or similar law to the Leased Real Property. Seller has received no notice of any pending or threatened real estate tax deficiency or reassessment or condemnation of all or any portion of any of the Leased Real Property.

- (c) **Personal Property.** A complete description of Seller’s machinery, equipment and other tangible personal property is contained in Schedule 2.06(c). Except as specifically disclosed in said Schedule or in the Base Balance Sheet (as hereinafter defined), Seller has good and marketable title to all of its personal property. None of such personal property or assets is subject to any mortgage, pledge, lien, conditional sale agreement, security agreement, encumbrance or other charge except as specifically disclosed in said Schedule or in the Base Balance Sheet. The Base Balance Sheet reflects all personal property of Seller, and the Subject Assets are sufficient for Buyer to continue the business of Seller as conducted by Seller. Except as otherwise specified in Schedule 2.06(c), all leasehold improvements, furnishings, machinery and equipment of Seller are in good repair, have been well maintained, and substantially comply with all applicable laws, ordinances and regulations, and such machinery and equipment is in good working order. Seller does not know of any pending or threatened change of any such laws, ordinances or regulations which could adversely affect Seller or its business.

Section 2.07. Financial Statements.

- (a) Seller has delivered to Buyer the following financial statements, copies of which are attached hereto as Schedule 2.07:
- (i) Balance sheets of Seller for its fiscal years ending on _____ and statements of income, retained earnings and cash flows for the _____ years then ended, with appropriate footnotes, certified by _____, independent public accountants.
 - (ii) A balance sheet of Seller as of _____ (herein the “Base Balance Sheet”),¹⁶ and statements of income, retained earnings and cash flows for the period then ended, with appropriate footnotes, certified by Seller’s chief financial officer.

Said financial statements have been prepared in accordance with generally accepted accounting principles applied consistently during the periods covered thereby, are complete and correct in all material respects, and present fairly in all material respects the financial condition of Seller at the dates of said statements and the results of its operations and its cash flows for the periods covered thereby.

- (b) As of the date of the Base Balance Sheet, Seller had no liabilities [(which liabilities, when taken individually or in the aggregate, are material)] of any

¹⁶Consideration should be given to the appropriate date of the base balance sheet, since many of the representations are based on the base balance sheet.

nature, whether accrued, absolute, contingent or otherwise, asserted or unasserted, known or unknown (including, without limitation, liabilities as guarantor or otherwise with respect to obligations of others, or liabilities for taxes due or then accrued or to become due or contingent or potential liabilities relating to activities of Seller or the conduct of its business prior to the date of the Base Balance Sheet regardless of whether claims in respect thereof had been asserted as of such date), except liabilities stated or adequately reserved against on the Base Balance Sheet, or reflected in Schedules furnished to Buyer hereunder as of the date hereof [or immaterial liabilities incurred in the ordinary course of Seller's business which are not required to be reflected in the Base Balance Sheet or the notes thereto under generally accepted accounting principles].¹⁷

- (c) As of the date hereof and as of the Closing, Seller had and will have no liabilities of any nature, whether accrued, absolute, contingent or otherwise, asserted or unasserted, known or unknown (including, without limitation, liabilities as guarantor or otherwise with respect to obligations or others, or liabilities for taxes due or then accrued or to become due or contingent or potential liabilities relating to activities of Seller or the conduct of its business prior to the date hereof or the Closing, as the case may be, regardless of whether claims in respect thereof had been asserted as of such date), except liabilities (i) stated or adequately reserved against on the Base Balance Sheet or the notes thereto, (ii) reflected in Schedules furnished to Buyer hereunder on the date hereof, or (iii) incurred [after the date of the Base Balance Sheet] in the ordinary course of business of Seller consistent with the terms of this Agreement.

Section 2.08. Taxes.

- (a) Seller has paid or caused to be paid all federal, state, local, foreign and other taxes, including, without limitation, income taxes, estimated taxes, alternative minimum taxes, excise taxes, sales taxes, use taxes, value-added taxes, gross receipts taxes, franchise taxes, capital stock taxes, employment

¹⁷The warranties in subsections 2.07(b) and (c) require the seller to take responsibility for certain undisclosed liabilities, including contingent or potential claims, even though the subject matter may be covered in detail by another warranty. The bracketed language at the end of subsection (b) reflects the fact that generally accepted accounting principles allow immaterial variations in the recording of some liabilities in financial statements, and may be unnecessary if a materiality qualifier is used at the start of the subsection. Subsection (c) applies this concept to liabilities that may exist at the closing and in effect may require the seller to take responsibility for future events. See subsection 6.01(a). The seller may insist on a materiality qualifier to subsection (c) equivalent to that contained in subsection (b).

and payroll-related taxes, withholding taxes, stamp taxes, transfer taxes, windfall profit taxes, environmental taxes and property taxes, whether or not measured in whole or in part by net income, and all deficiencies, or other additions to tax, interest, fines and penalties owed by it (collectively, "Taxes"), required to be paid by it through the date hereof, whether disputed or not.

- (b) Seller has in accordance with applicable law filed all federal, state, local and foreign tax returns required to be filed by it through the date hereof, and all such returns correctly and accurately set forth the amount of any Taxes relating to the applicable period. A list of all federal, state, local and foreign income tax returns filed with respect to Seller for taxable periods ended on or after _____ [use end of taxable year ending five years prior to the Closing] is set forth in Schedule 2.08 attached hereto, and said Schedule indicates those returns that have been audited or currently are the subject of an audit. Seller has delivered to Buyer correct and complete copies of all federal, state, local and foreign income tax returns listed on said Schedule, and of all examination reports and statements of deficiencies assessed against or agreed to by Seller with respect to said returns.
- (c) Neither the Internal Revenue Service nor any other governmental authority is now asserting or, to the knowledge of Seller or any Stockholder, threatening to assert against Seller any deficiency or claim for additional Taxes. No claim has ever been made by an authority in a jurisdiction where Seller does not file reports and returns that Seller is or may be subject to taxation by that jurisdiction. There are no security interests on any of the assets of Seller that arose in connection with any failure (or alleged failure) to pay any Taxes. Seller has never entered into a closing agreement pursuant to Section 7121 of the Internal Revenue Code of 1986, as amended (the "Code").
- (d) Except as set forth in Schedule 2.08, there has not been any audit of any tax return filed by Seller, no audit of any tax return of Seller is in progress, and Seller has not been notified by any tax authority that any such audit is contemplated or pending. Except as set forth in Schedule 2.08, no extension of time with respect to any date on which a tax return was or is to be filed by Seller is in force, and no waiver or agreement by Seller is in force for the extension of time for the assessment or payment of any Taxes.
- (e) Seller has never been (and has never had any liability for unpaid Taxes because it once was) a member of an "affiliated group" (as defined in Section 1504(a) of the Code). Seller has never filed, and has never been required to file, a consolidated, combined or unitary tax return with any other entity. Seller does not own and has never owned a direct or indirect

interest in any trust, partnership, corporation or other entity, and therefore Buyer is not acquiring from Seller an interest in any entity, except as provided in Section 2.03. Except as set forth in Schedule 2.08, Seller is not a party to any tax-sharing agreement.¹⁸

- (f) Seller is not a “foreign person” within the meaning of Section 1445 of the Code and Treasury Regulations Section 1.1445-2.
- (g) For purposes of this Agreement, all references to Sections of the Code shall include any predecessor provisions to such Sections and any similar provisions of federal, state, local or foreign law.

Section 2.09. Collectibility of Accounts Receivable. All of the accounts receivable of Seller (less the reserve for bad debts set forth on the Base Balance Sheet) are or will be at the Closing valid and enforceable claims, fully collectible and subject to no setoff or counterclaim. Seller has no accounts or loans receivable from any person, firm or corporation which is affiliated with Seller or from any director, officer or employee of Seller, except as disclosed on Schedule 2.09, and all accounts and loans receivable from any such person, firm or corporation shall be paid in cash prior to the Closing.

Section 2.10. Inventories. Except as disclosed in Schedule 2.10, all items in the inventories of Seller are of a quality and quantity saleable in the ordinary course of its business at profit margins consistent with Seller’s experience during the fiscal year ended _____. Except as disclosed in Schedule 2.10, said inventories reflect write-downs to realizable values in the case of items which are below standard quality or have become obsolete or unsaleable (except at prices less than cost) through regular distribution channels in the ordinary course of the business of Seller. No such write-downs since [date of beginning of third prior fiscal year] have had a material adverse affect on the financial condition or results of operations of Seller. The values of the inventories stated in the Base Balance Sheet and any subsequent financial statements of Seller reflect the normal inventory valuation policies of Seller and were determined at the lower of cost or market in accordance with generally accepted accounting principles, practices and methods consistently applied. Purchase commitments for raw materials and parts are not in excess of normal requirements, and none are at prices materially in excess of current market prices. All inventory items are

¹⁸The tax provisions in this agreement are based on the assumption that the assets acquired by the buyer do not include interests in any subsidiaries of the seller or any other entities. If the buyer is acquiring such an interest, other tax provisions or elections under Code section 338 may be necessary. Acquisition of an interest in an entity could, for example, jeopardize the buyer’s ability to step-up the tax basis of the assets acquired, and additional representations would be required to deal with taxes of the entity.

located on the Owned or Leased Real Property. Since the date of the Base Balance Sheet, no inventory items have been sold or disposed of except through sales in the ordinary course of business at profit margins consistent with Seller's experience during the fiscal year ended _____, and all sales commitments made for Seller's products are at prices not less than inventory values plus selling expenses and said profit margins.¹⁹

Section 2.11. Absence of Certain Changes. Except as disclosed in Schedule 2.11, since the date of the Base Balance Sheet, there has not been:

- (a) Any change in the financial condition, properties, assets, liabilities, business or operations of Seller, which change by itself or in conjunction with all other such changes, whether or not arising in the ordinary course of business, has been materially adverse with respect to Seller;
- (b) Any contingent liability incurred by Seller as guarantor or otherwise with respect to the obligations of others or any cancellation of any material debt or claim owing to, or waiver of any material right of, Seller;
- (c) Any mortgage, encumbrance or lien placed on any of the properties of Seller which remains in existence on the date hereof or will remain on the Closing Date;
- (d) Any obligation or liability of any nature incurred by Seller, whether accrued, absolute, contingent or otherwise, asserted or unasserted, known or unknown (including, without limitation, liabilities for Taxes due or to become due or contingent, or potential liabilities relating to products or services provided by Seller or the conduct of Seller's business since the date of the Base Balance Sheet, regardless of whether claims in respect thereof have been asserted), other than obligations and liabilities incurred in the ordinary course of business consistent with the terms of this Agreement (it being understood that product or service liability claims shall not be deemed to be incurred in the ordinary course of business);
- (e) Any purchase, sale or other disposition, or any agreement or other arrangement for the purchase, sale or other disposition, of any of the properties or assets of Seller other than in the ordinary course of business;
- (f) Any damage, destruction or loss, whether or not covered by insurance, materially and adversely affecting the properties, assets or business of Seller;

¹⁹Additional inventory warranties may be appropriate for a retail business, including a representation that the types and quantities of inventories are appropriate for the seller's business.

- (g) Any declaration, setting aside or payment of any dividend by Seller, or the making of any other distribution in respect of the capital stock of Seller, or any direct or indirect redemption, purchase or other acquisition by Seller of its own capital stock;
- (h) Any labor trouble or claim of unfair labor practices involving Seller; any change in the compensation payable or to become payable by Seller to any of its officers, employees, agents or independent contractors other than normal merit increases in accordance with its usual practices, or any bonus payment or arrangement made to or with any of such officers, employees, agents or independent contractors;
- (i) Any change with respect to the officers or management of Seller;
- (j) Any payment or discharge of a material lien or liability of Seller which was not shown on the Base Balance Sheet or incurred in the ordinary course of business thereafter;
- (k) Any obligation or liability incurred by Seller to any of its officers, directors, stockholders or employees, or any loans or advances made by Seller to any of its officers, directors, stockholders or employees, except normal compensation and expense allowances payable to officers or employees;
- (l) Any change in accounting methods or practices, credit practices or collection policies used by Seller;
- (m) Any other transaction entered into by Seller other than transactions in the ordinary course of business; or
- (n) Any agreement or understanding, whether in writing or otherwise, for Seller to take any of the actions specified in paragraphs (a) through (m) above.

Section 2.12. Ordinary Course. Since the date of the Base Balance Sheet, Seller has conducted its business only in the ordinary course and consistently with its prior practices.

Section 2.13. Banking Relations. All of the arrangements which Seller has with any banking institution are completely and accurately described in Schedule 2.13, indicating with respect to each of such arrangements the type of arrangement maintained (such as checking account, borrowing arrangements, safe deposit box, etc.) and the person or persons authorized in respect thereof.

Section 2.14. Intellectual Property.

- (a) Except as described in Schedule 2.14, Seller has exclusive ownership of, or exclusive license to use, all patent, copyright, trade secret, trademark or other proprietary rights (collectively, “Intellectual Property”) used or to be used in the business of Seller as presently conducted or contemplated. Seller’s rights in all of such Intellectual Property are freely transferable. There are no claims or demands of any other person pertaining to any of such Intellectual Property and no proceedings have been instituted, or are pending or threatened, which challenge the rights of Seller in respect thereof. Seller has the right to use, free and clear of claims or rights of other persons, all customer lists, designs, manufacturing or other processes, computer software, systems, data compilations, research results and other information required for or incident to its products or its business as presently conducted or contemplated.
- (b) All patents, patent applications, trademarks, trademark applications and registrations and registered copyrights which are owned by or licensed to Seller or used or to be used by Seller in its business as presently conducted or contemplated, and all other items of Intellectual Property which are material to the business or operations of Seller, are listed in Schedule 2.14. All of such patents, patent applications, trademark registrations, trademark applications and registered copyrights have been duly registered in, filed in or issued by the United States Patent and Trademark Office, the United States Register of Copyrights, or the corresponding offices of other jurisdictions as identified on said Schedule, and have been properly maintained and renewed in accordance with all applicable provisions of law and administrative regulations of the United States and each such jurisdiction.
- (c) All licenses or other agreements under which Seller is granted rights in Intellectual Property are listed in Schedule 2.14. All said licenses or other agreements are in full force and effect, there is no material default by any party thereto, and, except as set forth on Schedule 2.14, all of Seller’s rights thereunder are freely assignable. To the knowledge of Seller, the licensors under said licenses and other agreements have and had all requisite power and authority to grant the rights purported to be conferred thereby. True and complete copies of all such licenses or other agreements, and any amendments thereto, have been provided to Buyer.
- (d) All licenses or other agreements under which Seller has granted rights to others in Intellectual Property owned or licensed by Seller are listed in Schedule 2.14. All of said licenses or other agreements are in full force and effect, there is no material default by any party thereto, and, except as set forth on Schedule 2.14, all of Seller’s rights thereunder are freely

assignable. True and complete copies of all such licenses or other agreements, and any amendments thereto, have been provided to Buyer.

- (e) Seller has taken all steps required in accordance with sound business practice to establish and preserve its ownership of all Intellectual Property rights with respect to its products, services and technology. Seller has required all professional and technical employees, and other employees having access to valuable nonpublic information of Seller, to execute agreements under which such employees are required to convey to Seller ownership of all inventions and developments conceived or created by them in the course of their employment and to maintain the confidentiality of all such information of Seller. Seller has not made any such information available to any person other than employees of Seller except pursuant to written agreements requiring the recipients to maintain the confidentiality of such information, and appropriately restricting the use thereof. Seller has no knowledge of any infringement by others of any of its Intellectual Property rights.
- (f) The present and contemplated business, activities and products of Seller do not infringe any Intellectual Property of any other person. No proceeding charging Seller with infringement of any adversely held Intellectual Property has been filed or is threatened to be filed. To Seller's knowledge, there exists no unexpired patent or patent application which includes claims that would be infringed by or otherwise adversely affect the products, activities or business of Seller. Seller is not making unauthorized use of any confidential information or trade secrets of any person, including, without limitation, any former employer of any past or present employee of Seller. Except as set forth in Schedule 2.14, neither Seller nor, to the knowledge of Seller, any of its employees have any agreements or arrangements with any persons other than Seller related to confidential information or trade secrets of such persons or restricting any such employee's ability to engage in business activities of any nature. The activities of Seller's employees on behalf of Seller do not violate any such agreements or arrangements known to Seller which any such employees have with other persons.

Section 2.15. Contracts. Except for contracts, commitments, plans, agreements and licenses described in Schedule 2.15 (true and complete copies of which have been delivered to Buyer), Seller is not a party to or subject to:

- (a) any plan or contract providing for bonuses, pensions, options, stock purchases, deferred compensation, retirement payments, profit sharing, collective bargaining or the like, or any contract or agreement with any labor union;

- (b) any employment contract or contract for services which requires the payment of more than _____ dollars (\$_____) annually or which is not terminable within thirty (30) days by Seller without liability for any penalty or severance payment;
- (c) any contract or agreement for the purchase of any commodity, material or equipment, except purchase orders in the ordinary course for less than _____ dollars (\$_____) each, such orders not exceeding _____ dollars (\$_____) in the aggregate;
- (d) any other contracts or agreements creating any obligations of Seller of _____ dollars (\$_____) or more with respect to any such contract or agreement not specifically disclosed elsewhere under this Agreement;
- (e) any contract or agreement providing for the purchase of all or substantially all of its requirements of a particular product from a supplier;
- (f) any contract or agreement [involving more than _____ dollars (\$_____)] which by its terms does not terminate or is not terminable without penalty by Seller or any successor or assign within one year after the date hereof;
- (g) any contract or agreement for the sale or lease of its products not made in the ordinary course of business;
- (h) any contract with any sales agent or distributor of products of Seller;
- (i) any contract containing covenants limiting the freedom of Seller to compete in any line of business or with any person or entity;
- (j) any contract or agreement for the purchase of any fixed asset for a price in excess of _____ dollars (\$_____), whether or not such purchase is in the ordinary course of business;
- (k) any license agreement (as licensor or licensee);
- (l) any indenture, mortgage, promissory note, loan agreement, guaranty or other agreement or commitment for the borrowing of money; or
- (m) any contract or agreement with any officer, employee, director or stockholder of Seller or with any persons or organizations controlled by or affiliated with any of them.

Seller is not in default under any such contracts, commitments, plans, agreements or licenses described in said Schedule and has no knowledge of conditions or facts which with notice or passage of time, or both, would constitute a default.

Section 2.16. Litigation. Schedule 2.16 hereto lists all currently pending litigation and governmental or administrative proceedings or investigations to which Seller is a party. Except for matters described in Schedule 2.16, there is no litigation or governmental or administrative proceeding or investigation pending or, to the knowledge of Seller, threatened against Seller or any affiliate of Seller which may have any [material] adverse effect on Seller's properties, assets, prospects, financial condition or business, or which would prevent or hinder the consummation of the transactions contemplated by this Agreement. With respect to each matter set forth therein, Schedule 2.16 sets forth a description of the matter, the forum (if any) in which it is being conducted, the parties thereto and the type and amount of relief sought.

Section 2.17. Compliance with Laws. Except as set forth in Schedule 2.17, Seller is in compliance [in all material respects] with all applicable statutes, ordinances, orders, judgments, decrees and rules and regulations promulgated by any federal, state, municipal or other governmental authority which apply to the Seller or to the conduct of its business, and Seller has not received notice of a violation or alleged violation of any such statute, ordinance, order, rule or regulation.²⁰

Section 2.18. Insurance. The physical properties and assets of Seller are insured to the extent disclosed in Schedule 2.18, and all insurance policies and arrangements of Seller are disclosed in said Schedule. Said insurance policies and arrangements are in full force and effect, all premiums with respect thereto are currently paid, and Seller is in compliance in all material respects with the terms thereof. Said insurance is adequate and customary for the business engaged in by Seller and is sufficient for compliance by Seller with all requirements of law and all agreements and leases to which Seller is a party. Each such insurance policy shall continue to be in full force and effect upon Buyer's purchase of the Subject Assets, and Seller shall provide Buyer at the Closing with one or more assignments or endorsements by the insurer under each such policy continuing the coverage of such policy following the Closing for the benefit of Buyer.

Section 2.19. Warranty or Other Claims. There are no existing or threatened product liability, warranty or other similar claims, or any facts upon which a material claim of such nature could be based, against Seller for products or services which are defective or fail to meet any product or service warranties, except as disclosed in Schedule 2.19. No claim has been asserted against Seller for renegotiation or price redetermination of any business transaction, and there are no facts upon which any such claim could be based.

²⁰This is a blanket warranty to protect the buyer that the seller may view as inconsistent with other more specific warranties. If the seller insists, it may be appropriate to carve out of this warranty subject matters specifically covered by another warranty, such as environmental matters.

Section 2.20. Powers of Attorney. Neither Seller nor any Stockholder has granted powers of attorney which are presently outstanding.

Section 2.21. Finder's Fee. Neither Seller nor any Stockholder has incurred or become liable for any broker's commission or finder's fee relating to or in connection with the transactions contemplated by this Agreement.

Section 2.22. Permits; Burdensome Agreements. Schedule 2.22 lists all permits, registrations, licenses, franchises, certifications and other approvals (collectively, the "Approvals") required from federal, state or local authorities in order for Seller to conduct its business. Seller has obtained all such Approvals, which are valid and in full force and effect, and is operating in compliance therewith. Such Approvals include, but are not limited to, those required under federal, state or local statutes, ordinances, orders, requirements, rules, regulations, or laws pertaining to environmental protection, public health and safety, worker health and safety, buildings, highways or zoning. Except as disclosed in Schedule 2.22, all such Approvals will be available and assigned to Buyer, and remain in full force and effect upon Buyer's purchase of the Subject Assets, and no further Approvals will be required in order for Buyer to conduct the business currently conducted by Seller subsequent to the Closing. Except as disclosed in Schedule 2.22 or in any other Schedule hereto, Seller is not subject to or bound by any agreement, arrangement, judgment, decree or order which may materially and adversely affect its business or prospects, its condition, financial or otherwise, or any of its assets or properties.

Section 2.23. Corporate Records; Copies of Documents. The corporate record books of Seller accurately record all corporate action taken by its stockholders and board of directors and committees thereof. The copies of the corporate records of Seller, as delivered to Buyer pursuant to Section 1.01(b), are true and complete copies of the originals of such documents. Seller has made available for inspection and copying by Buyer and its counsel complete and correct copies of all documents referred to in this Section or in the Schedules delivered to Buyer pursuant to this Agreement.

Section 2.24. Transactions with Interested Persons. Except as set forth in Schedule 2.24 hereto, neither Seller, nor any stockholder, officer, supervisory employee or director of Seller or, to the knowledge of Seller, any of their respective spouses or family members owns directly or indirectly on an individual or joint basis any material interest in, or serves as an officer or director or in another similar capacity of, any competitor or supplier of Seller, or any organization which has a material contract or arrangement with Seller.

Section 2.25. Employee Benefit Programs.

- (a) Schedule 2.25 lists every Employee Program (as defined below) that has been maintained (as defined below) by Seller at any time during the three-year period ending on the Closing date.
- (b) Each Employee Program which has ever been maintained by Seller and which has at any time been intended to qualify under Section 401(a) or 501(c)(9) of the Code has received a favorable determination or approval letter from the Internal Revenue Service (“IRS”) regarding its qualification under such section and has, in fact, been continuously qualified under the applicable section of the Code since the effective date of such Employee Program. No event or omission has occurred which would cause any such Employee Program to lose its qualification under the applicable Code section.
- (c) Seller does not know, and has no reason to know, of any failure of any party to comply with any laws applicable to the Employee Programs that have been maintained by Seller. With respect to any Employee Program ever maintained by Seller, there has occurred no “prohibited transaction,” as defined in Section 406 of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) or Section 4975 of the Code, or breach of any duty under ERISA or other applicable law (including, without limitation, any health care continuation requirements or any other tax law requirements, or conditions to favorable tax treatment, applicable to such plan), which could result, directly or indirectly, in any taxes, penalties or other liability to Buyer. No litigation, arbitration, or governmental administrative proceeding (or investigation) or other proceeding (other than those relating to routine claims for benefits) is pending or threatened with respect to any such Employee Program.
- (d) Neither Seller nor any Affiliate (as defined below) (i) has ever maintained any Employee Program which has been subject to Title IV of ERISA (including, but not limited to, any Multiemployer Plan (as defined below)) or (ii) has ever provided health care or any other nonpension benefits to any employees after their employment is terminated (other than as required by part 6 of subtitle B of title I of ERISA) or has ever promised to provide such post-termination benefits.
- (e) With respect to each Employee Program maintained by Seller within the three years preceding the Closing, complete and correct copies of the following documents (if applicable to such Employee Program) have previously been delivered to Buyer: (i) all documents embodying or governing such Employee Program, and any funding medium for the Employee Program (including, without limitation, trust agreements) as they may have been amended; (ii) the most recent IRS determination or approval

letter with respect to such Employee Program under Code Section 401 or 501(c)(9), and any applications for determination or approval subsequently filed with the IRS; (iii) the three most recently filed IRS Forms 5500, with all applicable schedules and accountants' opinions attached thereto; (iv) the summary plan description for such Employee Program (or other descriptions of such Employee Program provided to employees) and all modifications thereto; (v) any insurance policy (including any fiduciary liability insurance policy) related to such Employee Program; (vi) any documents evidencing any loan to an Employee Program that is a leveraged employee stock ownership plan; and (vii) all other materials reasonably necessary for Buyer to perform any of its responsibilities with respect to any Employee Program subsequent to the Closing (including, without limitation, health care continuation requirements).

(f) For purposes of this section:

- (i) "Employee Program" means (A) all employee benefit plans within the meaning of ERISA Section 3(3), including, but not limited to, multiple employer welfare arrangements (within the meaning of ERISA Section 3(4)), plans to which more than one unaffiliated employer contributes and employee benefit plans (such as foreign or excess benefit plans) which are not subject to ERISA; and (B) all stock or cash option plans, restricted stock plans, bonus or incentive award plans, severance pay policies or agreements, deferred compensation agreements, supplemental income arrangements, vacation plans, and all other employee benefit plans, agreements and arrangements not described in (A) above. In the case of an Employee Program funded through an organization described in Code Section 501(c)(9), each reference to such Employee Program shall include a reference to such organization.
- (ii) An entity "maintains" an Employee Program if such entity sponsors, contributes to, or provides (or has promised to provide) benefits under such Employee Program, or has any obligation (by agreement or under applicable law) to contribute to or provide benefits under such Employee Program, or if such Employee Program provides benefits to or otherwise covers employees of such entity, or their spouses, dependents or beneficiaries.
- (iii) An entity is an "Affiliate" of Seller if it would have ever been considered a single employer with Seller under ERISA Section 4001(b) or part of the same "controlled group" as Seller for purposes of ERISA Section 302(d)(8)(C).

- (iv) “Multiemployer Plan” means a (pension or nonpension) employee benefit plan to which more than one employer contributes and which is maintained pursuant to one or more collective bargaining agreements.

Section 2.26. Environmental Matters.

- (a) Except as set forth in Schedule 2.26, (i) Seller has never generated, transported, used, stored, treated, disposed of, or managed any Hazardous Waste (as defined below); (ii) no Hazardous Material (as defined below) has ever been or is threatened to be spilled, released, or disposed of at any site presently or formerly owned, operated, leased or used by Seller, or has ever been located in the soil or groundwater at any such site; (iii) no Hazardous Material has ever been transported from any site presently or formerly owned, operated, leased or used by Seller for treatment, storage or disposal at any other place; (iv) Seller does not presently own, operate, lease, or use, nor has it previously owned, operated, leased or used any site on which underground storage tanks are or were located; and (v) no lien has ever been imposed by any governmental agency on any property, facility, machinery or equipment owned, operated, leased or used by Seller in connection with the presence of any Hazardous Material.
- (b) Except as set forth in Schedule 2.26, (i) Seller has no liability under, nor has it ever violated, any Environmental Law (as defined below); (ii) Seller, any property owned, operated, leased or used by Seller, and any facilities and operations thereon are presently in compliance with all applicable Environmental Laws; (iii) Seller has never entered into or been subject to any judgment, consent decree, compliance order or administrative order with respect to any environmental or health and safety matter or received any request for information, notice, demand letter, administrative inquiry, or formal or informal complaint or claim with respect to any environmental or health and safety matter or the enforcement of any Environmental Law; and (iv) Seller has no knowledge or reason to know that any of the items enumerated in clause (iii) of this subsection will be forthcoming.
- (c) Except as set forth in Schedule 2.26 hereto, no site owned, operated, leased or used by Seller contains any asbestos or asbestos-containing material, any polychlorinated biphenyls (PCBs) or equipment containing PCBs, or any urea formaldehyde foam insulation.
- (d) Seller has provided to Buyer copies of all documents, records and information available to Seller concerning any environmental or health and safety matter relevant to Seller, whether generated by Seller or others, including, without limitation, environmental audits, environmental risk assessments, site assessments, documentation regarding off-site disposal of

Hazardous Materials, spill control plans, and reports, correspondence, permits, licenses, approvals, consents and other authorizations related to environmental or health and safety matters issued by any governmental agency.

- (e) For purposes of this Section 2.26, (i) "Hazardous Material" shall mean and include any hazardous waste, hazardous material, hazardous substance, petroleum product, oil, toxic substance, pollutant, contaminant or other substance which may pose a threat to the environment or to human health or safety, as defined or regulated under any Environmental Law; (ii) "Hazardous Waste" shall mean and include any hazardous waste as defined or regulated under any Environmental Law; (iii) "Environmental Law" shall mean any environmental or health and safety-related law, regulation, rule, ordinance or bylaw at the foreign, federal, state, or local level, whether existing as of the date hereof, previously enforced or subsequently enacted; and (iv) "Seller" shall mean and include Seller and all other entities for whose conduct Seller is or may be held responsible under any Environmental Law.

Section 2.27. Directors and Officers.

- (a) Schedule 2.27 contains a true and complete list of all current directors and officers of Seller. In addition, Schedule 2.27 contains a list of all managers, employees and consultants of Seller who, individually, have received or are scheduled to receive compensation from Seller for the fiscal year ending _____, in excess of _____ dollars (\$_____). In each case such Schedule includes the current job title and aggregate annual compensation of each such individual.

Section 2.28. Disclosure. The representations, warranties and statements contained in this Agreement and in the certificates, exhibits and schedules delivered by Seller pursuant to this Agreement to Buyer do not contain any untrue statement of a material fact, and, when taken together, do not omit to state a material fact required to be stated therein or necessary in order to make such representations, warranties or statements not misleading in light of the circumstances under which they were made. There are no facts [known to Seller]²¹ which presently or may in the future have a material adverse affect on the business, properties, prospects, operations or condition of Seller which have

²¹The buyer may want to take advantage of any change in circumstances that diminishes the value of the acquired business, whether or not known to the seller.

not been specifically disclosed herein or in a Schedule furnished herewith, other than general economic conditions affecting Seller's industry.²²

Section 2.29. Backlog. As of the date hereof, Seller has a backlog of firm orders for the sale or lease of products or services, for which revenues have not been recognized by Seller, as set forth in Schedule 2.29.

Section 2.30. Employees; Labor Matters. Seller employs approximately _____ full-time employees and _____ part-time employees and generally enjoys good employer-employee relationships. [Seller does not currently employ, will not as of the Closing date employ, or will not have employed during the six calendar months prior to the Closing date, 50 or more full-time employees in any single facility in Massachusetts.] [Seller does not employ 100 or more employees (excluding employees who work less than 20 hours per week or who have worked for Seller less than six of the last twelve months) and will not have employed 100 or more employees at any point during the 90 days prior to and including the Closing date.]²³ Seller is not delinquent in payments to any of its employees for any wages, salaries, commissions, bonuses or other direct compensation for any services performed for it to the date hereof or amounts required to be reimbursed to such employees. Upon termination of the employment of any of said employees, neither Seller nor Buyer will by reason of the acquisition transaction or anything done prior to the Closing be liable to any of said employees for so-called "severance pay" or any other payments, except as set forth in Schedule 2.31. Seller does not have any policy, practice, plan or program of paying severance pay or any form of severance compensation in connection with the termination of employment, except as set forth in said Schedule. Seller is in compliance with all applicable laws and regulations respecting labor, employment, fair employment practices, work place safety and health, terms and conditions of employment, and wages and hours. There are no charges of employment discrimination or unfair labor practices, nor are there any strikes, slowdowns, stoppages of work, or any other concerted interference with normal operations existing, pending or threatened against or involving Seller. No question concerning representation exists respecting any group of employees of Seller. There are no grievances, complaints or charges that have been filed against Seller under any dispute resolution procedure (including, but not limited to, any proceedings under any

²²The buyer may seek to have this warranty apply to offering materials furnished by the seller. The seller, on the other hand, may seek to eliminate this warranty on the grounds that disclosures under the Agreement will be fully negotiated, and the seller should not have to furnish information that the buyer does not request.

²³The bracketed clauses are intended to smoke out whether the seller is subject to the Massachusetts or federal plant-closing laws, and may not be appropriate for larger employers.

dispute resolution procedure under any collective bargaining agreement) that might have an adverse effect on Seller or the conduct of its business, and no arbitration or similar proceeding is pending and no claim therefor has been asserted. No collective bargaining agreement is in effect or is currently being or is about to be negotiated by Seller. Seller has received no information to indicate that any of its employment policies or practices is currently being audited or investigated by any federal, state or local government agency. Seller is, and at all times since November 6, 1986 has been, in compliance with the requirements of the Immigration Reform Control Act of 1986.²⁴

Section 2.31. Customers, Distributors and Suppliers. Schedule 2.31(a) sets forth any customer, representative or distributor (whether pursuant to a commission, royalty or other arrangement) who accounts for more than _____ percent (____%) of the sales of Seller for the twelve months ended _____ or the _____ months ended as of the date of the Base Balance Sheet (collectively, the “Customers and Distributors”). Schedule 2.31(b) is a true and complete list of the suppliers of Seller to whom during the fiscal year ended _____ Seller made payments aggregating _____ dollars (\$____) or more, showing, with respect to each, the name, address and dollar volume involved (the “Suppliers”). The relationships of Seller with its Customers, Distributors and Suppliers are good commercial working relationships. No Customer, Distributor or Supplier of Seller has cancelled, materially modified or otherwise terminated its relationship with Seller, or has during said period decreased materially its usage or purchase of the services or products of Seller or its services, supplies or materials furnished to Seller, nor does any Customer, Distributor or Supplier have, to the knowledge of Seller, any plan or intention to do any of the foregoing.

SECTION 3. COVENANTS OF SELLER AND THE STOCKHOLDERS.

Section 3.01. Making of Covenants and Agreements. Seller and the Stockholders hereby make their respective covenants and agreements set forth in this Section 3.²⁵

²⁴These representations assume that the seller’s operations are located solely in Massachusetts. If the seller has operations elsewhere, the labor department should be consulted about applicable laws in other jurisdictions.

²⁵If there are stockholders directly involved in the executive management of the seller, it may be appropriate to require that such stockholders agree to cause the seller to comply with the covenants and agreements set forth in Section 3. The buyer may wish to include in Section 3 additional financial covenants of the seller, requiring it to maintain a minimum net worth, working capital levels, earnings, etc. before the closing. Alternatively, financial tests could be included as conditions to the buyer’s obligation to close in Section 6.01.

Section 3.02. Conduct of Business. Between the date of this Agreement and the Closing Date, Seller will:

- (a) Conduct its business only in the ordinary course and refrain from changing or introducing any method of management or operations, except in the ordinary course of business and consistent with prior practices;
- (b) Refrain from making any purchase, sale or disposition of any asset or property other than in the ordinary course of business, from purchasing any capital asset costing more than _____ dollars (\$_____), and from mortgaging, pledging, subjecting to a lien or otherwise encumbering any of its properties or assets, other than in the ordinary course of business;
- (c) Refrain from incurring any contingent liability as a guarantor or otherwise with respect to the obligations of others, and from incurring any other contingent or fixed obligations or liabilities, except in the ordinary course of business;
- (d) Refrain from making any change or incurring any obligation to make a change in its [Articles of Organization], Bylaws or authorized or issued capital stock;
- (e) Refrain from declaring, setting aside or paying any dividend, making any other distribution in respect of its capital stock or making any direct or indirect redemption, purchase or other acquisition of its stock;
- (f) Refrain from making any change in the compensation payable or to become payable to any of its officers, employees, agents or independent contractors;
- (g) Refrain from prepaying loans (if any) from its stockholders, officers or directors, or making any change in its borrowing arrangements;
- (h) Use its best efforts to prevent any change with respect to its management and supervisory personnel and banking arrangements;
- (i) Use its best efforts to keep intact its business organization, to keep available its present officers and employees and to preserve the goodwill of all suppliers, customers, independent contractors and others having business relations with it;
- (j) Have in effect and maintain at all times all insurance of the kind, in the amount and with the insurers set forth in the Schedule 2.18 hereto or equivalent insurance with any substitute insurers approved in writing by Buyer; and

- (k) Furnish Buyer with unaudited monthly balance sheets and statements of income and retained earnings and cash flows of Seller within ten (10) days after each month end for each month ending more than ten (10) days before the Closing.
- (l) Permit Buyer and its authorized representatives to have full access to all its properties, assets, records, tax returns, contracts and documents, and furnish to Buyer or its authorized representatives such financial and other information with respect to its business or properties as Buyer may from time to time reasonably request.
- [(m) Furnish Buyer with a balance sheet of Seller as of _____ and statements of income and retained earnings and cash flows for the year then ended, certified by the chief financial officer of Seller, which financial statements shall be prepared in accordance with generally accepted accounting principles applied consistently during the periods covered thereby, shall be complete and correct in all material respects and present fairly in all material respects the financial condition of Seller at the dates of said statements and the results of its operations and cash flows for the periods covered thereby.]²⁶

Section 3.03. Authorization from Others. Prior to the Closing Date, Seller will use its best efforts to obtain all authorizations, consents and permits of others required to permit the consummation by Seller of the transactions contemplated by this Agreement.

Section 3.04. Notice of Default. Promptly upon the occurrence of, or promptly upon Seller or a Stockholder becoming aware of the impending or threatened occurrence of, any event which would cause or constitute a breach or default, or would have caused or constituted a breach or default had such event occurred or been known to Seller or such Stockholder prior to the date hereof, of any of the representations, warranties or covenants of Seller or the Stockholders contained in or referred to in this Agreement or in any Schedule or Exhibit referred to in this Agreement, Seller shall give detailed written notice thereof to Buyer and shall use its best efforts to prevent or promptly remedy the same.

Section 3.05. Consummation of Agreement. Seller and the Stockholders shall use their best efforts to perform and fulfill all conditions and obligations on their parts to be performed and fulfilled under this Agreement, to the end that the transactions contemplated by this Agreement shall be fully carried out. To this end, Seller will obtain prior to the Closing all necessary authorizations or

²⁶This subsection (m) is appropriate if the end of the seller's current fiscal year is to occur after the signing, and it is possible for the seller to deliver its unaudited year-end financial statements prior to the closing.

approvals of its stockholders and Board of Directors, including, without limitation, the following:

- (a) The change of Seller's corporate name to another title which does not include the words [list words]; and
- (b) Authorization of the officers and directors of Seller to discharge all debts and obligations of Seller (other than those assumed by Buyer hereunder).

Section 3.06. Cooperation of Seller. Seller and Stockholders shall cooperate with all reasonable requests of Buyer and Buyer's counsel in connection with the consummation of the transactions contemplated hereby.

Section 3.07. Noncompetition. Seller agrees that for _____ years after the Closing, it will not, without the prior written consent of Buyer, directly or indirectly, engage or participate in, be employed by or assist in any manner or in any capacity, or have any interest in or make any loan to any person, firm, corporation or business which engages in any activity anywhere in the world which is similar to or competitive with any business in which Seller is presently engaged or proposes to engage, so long as Buyer (or its successor, if any) shall engage in such activity; provided, however, the foregoing shall not prevent Seller from owning beneficially or of record up to one percent (1%) of the outstanding securities of a publicly-held corporation which engages in competitive activities. In addition, Seller shall refrain from soliciting or encouraging any employee of Buyer to terminate his or her employment by Buyer and to become employed by Seller, or any business or entity with which it is affiliated as an owner, investor, lender or in any other capacity.²⁷

Section 3.08. No Solicitation of Other Offers. Neither Seller, the Stockholders, nor any of their representatives will, directly or indirectly, solicit, encourage, assist, initiate discussions or engage in negotiations with, provide any information to, or enter into any agreement or transaction with, any person or persons, other than Buyer, concerning the possible acquisition of Seller or any of Seller's assets, except for the sale of assets in the ordinary course of business of Seller consistent with the terms of this Agreement.

²⁷It may be appropriate for the stockholders (or at least those active in the business) to sign separate noncompetition agreements in consideration of the future distribution to them of net proceeds of the transaction. See Section 6.01(l). If a significant portion of the purchase price paid to Seller is to be allocated to its noncompetition covenant, it may be appropriate to incorporate this covenant in a separate noncompetition agreement with Seller. The tax department should be consulted regarding the allocation of purchase price to noncompetition agreements.

Section 3.09. Confidentiality. Seller and the Stockholders agree that, unless and until the Closing has been consummated, Seller, its officers, directors, agents and representatives, and the Stockholders will hold in strict confidence, and will not use, any confidential or proprietary data or information obtained from Buyer with respect to its business or financial condition except for the purpose of evaluating, negotiating and completing the transaction contemplated hereby. Information generally known in Buyer's industry or which has been disclosed to Seller or the Stockholders by third parties which have a right to do so shall not be deemed confidential or proprietary information for purposes of this agreement. If the transaction contemplated by this Agreement is not consummated, Seller and the Stockholders will return to Buyer (or certify that it has destroyed) all copies of such data and information, including, but not limited to, financial information, customer lists, business and corporate records, worksheets, test reports, tax returns, lists, memoranda and other documents prepared by or made available to Seller in connection with the transaction.

Section 3.10. Hart-Scott-Rodino Filings. Seller shall cooperate with Buyer in connection with all required filings under Section 7A of the Clayton Act ("Hart-Scott-Rodino") and shall furnish all follow-up information required in connection therewith.²⁸

Section 3.11. Tax Returns. Seller, with the approval of Buyer and in accordance with applicable law, shall (i) promptly prepare and file on or before the due date or any extension thereof all federal, state and local tax returns required to be filed by it with respect to taxable periods of Seller that include any period ending on or before the Closing and (ii) pay all Taxes of Seller attributable to periods ending on or before the Closing.

SECTION 4. REPRESENTATIONS AND WARRANTIES OF BUYER.

Section 4.01. Making of Representations and Warranties. As a material inducement to Seller and the Stockholders to enter into this Agreement and consummate the transactions contemplated hereby, Buyer hereby makes the representations and warranties to Seller and the Stockholders contained in this Section 4.

Section 4.02. Organization of Buyer. Buyer is a corporation duly organized, validly existing and in good standing under the laws of [STATE] with full corporate power to own or lease its properties and to conduct its business in the manner and in the places where such properties are owned or leased or such business is conducted by it.

²⁸Given the increased filing fee for Hart-Scott-Rodino filings, it may be appropriate to include language in the agreement regarding sharing of this expense.

Section 4.03. Authority of Buyer. Buyer has full right, authority and power to enter into this Agreement, the Note and each agreement, document and instrument to be executed and delivered by Buyer pursuant to this Agreement, and to carry out the transactions contemplated hereby. The execution, delivery and performance by Buyer of this Agreement, the Note, and each such other agreement, document and instrument have been duly authorized by all necessary corporate action of Buyer, and no other action on the part of Buyer is required in connection therewith. This Agreement, the Note and each other agreement, document and instrument executed and delivered by Buyer pursuant to this Agreement constitute, or when executed and delivered will constitute, valid and binding obligations of Buyer enforceable in accordance with their terms. [The execution, delivery and performance by Buyer of this Agreement, the Note and each such agreement, document and instrument:

- (i) does not and will not violate any provision of the [Articles of Organization] or bylaws of Buyer;
- (ii) does not and will not violate any laws of the United States or of any state or any other jurisdiction applicable to Buyer, or require Buyer to obtain any approval, consent or waiver of, or make any filing with, any person or entity (governmental or otherwise) which has not been obtained or made; and
- (iii) does not and will not result in a breach of, constitute a default under, accelerate any obligation under, or give rise to a right of termination of any indenture, loan or credit agreement, or any other agreement, mortgage, lease, permit, order, judgment or decree to which Buyer is a party, and which is material to the business and financial condition of Buyer and its parent and affiliated organizations on a consolidated basis.]²⁹

Section 4.04. Litigation. There is no litigation or governmental or administrative proceeding or investigation pending or, to its knowledge, threatened against Buyer which would prevent or hinder the consummation of the transactions contemplated by this Agreement or the payment of the Note.

Section 4.05. Finder's Fee. Buyer has not incurred or become liable for any broker's commission or finder's fee relating to or in connection with the transactions contemplated by this Agreement.

²⁹The provisions of Sections 4.03 and 4.04 are almost identical to the seller's warranties to forestall obvious objections by the seller's counsel. This may not be appropriate if the buyer is much larger than the seller and the transaction is not materially relative to the buyer's financial condition. However, the seller has a legitimate interest in the buyer's ability to make payments under the note, and may seek financial warranties and covenants from the buyer unless it is a public company or the transaction is not material.

SECTION 5. COVENANTS OF BUYER.

Section 5.01. Making of Covenants and Agreement. Buyer hereby makes the covenants and agreements set forth in this Section 5.

Section 5.02. Confidentiality. Buyer agrees that, unless and until the Closing has been consummated, Buyer and its officers, directors, agents and representatives will hold in strict confidence, and will not use any confidential or proprietary data or information obtained from Seller or the Stockholders with respect to the business or financial condition of Seller, except for the purpose of evaluating, negotiating and completing the transaction contemplated hereby. Information generally known in Seller's industry or which has been disclosed to Buyer by third parties which have a right to do so shall not be deemed confidential or proprietary information for purposes of this agreement. If the transaction contemplated by this Agreement is not consummated, Buyer will return to Seller (or certify that it has destroyed) all copies of such data and information, including, but not limited to, financial information, customer lists, business and corporate records, worksheets, test reports, tax returns, lists, memoranda and other documents prepared by or made available to Buyer in connection with the transaction.

Section 5.03. Hart-Scott-Rodino Filings. Buyer shall cooperate with Seller in connection with all required filings under Section 7A of the Clayton Act "Hart-Scott-Rodino" and shall furnish all information required in connection therewith.

[**Section 5.04. Consummation of Agreement**]. Buyer shall use its best efforts to perform and fulfill all conditions and obligations on its part to be performed and fulfilled under this agreement, to the end that the transactions contemplated by this agreement shall be fully carried out. To this end, Buyer will obtain prior to the Closing all necessary authorizations or approvals of its [stockholders and] Board of Directors.]³⁰

SECTION 6. CONDITIONS.

Section 6.01. Conditions to the Obligations of Buyer. The obligation of Buyer to consummate this Agreement and the transactions contemplated hereby are

³⁰The seller may want the buyer to include this covenant, since it is equivalent to the covenant of the seller in Section 3.05. The buyer should consider whether it is wise for it to agree to use its *best efforts* to fulfill all of its obligations under this agreement, particularly when the transaction is conditional on financing, a satisfactory acquisition audit or other subjective matters. In some cases, it may be preferable to eliminate both 3.05 and 5.04.

subject to the fulfillment, prior to or at the Closing, of the following conditions precedent:

- (a) **Representations; Warranties; Covenants.** Each of the representations and warranties of Seller and Stockholders contained in Section 2 shall be true and correct [in all material respects (except for such representations and warranties that are qualified by their terms as to materiality, which representations and warranties so qualified shall be true in all respects)]³¹ as though made on and as of the Closing; and Seller shall, on or before the Closing, have performed all of its obligations hereunder, which by the terms hereof are to be performed on or before the Closing.
- (b) **No Material Change.** There shall have been no material adverse change in the financial condition, prospects, properties, assets, liabilities, business or operations of Seller since the date hereof, whether or not in the ordinary course of business.
- (c) **Certificate from Officers.** Seller shall have delivered to Buyer a certificate of Seller's President and Chief Financial Officer dated as of the Closing to the effect that the statements set forth in paragraph (a) and (b) above in this Section 6.01 are true and correct.
- (d)
 - (1) **Title Insurance—Owned Real Property.**³² Seller shall have arranged for (as evidenced by assurances from the issuer reasonably satisfactory to Buyer) Buyer to receive, immediately after the Closing, a current ALTA owner's form title insurance policy insuring marketable title to the Owned Real Property and all appurtenances thereto as more fully set forth in Section 2.06(a) above, subject only to the Permitted Encumbrances and any Mortgages and other matters disclosed on Schedule 2.06(a) that Buyer has agreed to assume or accept. All general printed exceptions for mechanics' liens and parties in possession shall be deleted from such policy at Seller's expense, and the exception relating to matters appearing on a survey shall be limited to matters disclosed on Schedule 2.06(a) or approved by the Buyer in its reasonable discretion. The policy shall provide for a coverage amount equal to the fair market value of the Owned Real Property as

³¹By using a materiality qualifier for warranties, the buyer will try to forestall the seller's objections that it cannot be forced to make warranties with respect to future events which it cannot control. Also, a court is unlikely to allow the buyer to terminate the agreement for an immaterial breach of the seller's warranties. No materiality qualifier is applicable to covenants since some of them need to be performed completely—i.e., transfers of purchased assets.

determined by Buyer in its reasonable discretion and shall be issued by a title insurance company reasonably acceptable to Buyer, and Seller shall pay the premium for such title insurance policy.

- (2) **Title Insurance—Leased Real Property.**³² Seller shall have arranged (as evidenced by assurances from the issuer reasonably satisfactory to Buyer) for Buyer to receive, immediately after the Closing, a current ALTA leasehold form title insurance policy insuring marketable leasehold title to the Leased Real Property and all appurtenances thereto as more fully set forth in Section 2.06(b) above, subject only to the Permitted Encumbrances and any other matters disclosed on Schedule 2.06(b) which Buyer has agreed to accept. All general printed exceptions for mechanics' liens and parties in possession shall be deleted from such policy at Seller's expense, and the exception relating to matters appearing on a survey shall be limited to matters disclosed on Schedule 2.06(b) or approved by the Buyer in its reasonable discretion. The policy shall provide for a coverage amount equal to the fair market value of the leasehold as determined by Buyer in its reasonable discretion, and shall be issued by a title insurance company reasonably acceptable to Buyer, and Seller shall pay the premium for such title insurance policy.

- (e) **Approval of Buyer's Counsel.** All actions, proceedings, instruments and documents required to carry out this Agreement and the transactions contemplated hereby, and all related legal matters contemplated by this Agreement shall have been approved by _____ as counsel for Buyer, and such counsel shall have received on behalf of Buyer such other certificates, opinions, and documents in form satisfactory to such counsel, as Buyer may reasonably require from Seller and the Stockholders to evidence compliance with the terms and conditions hereof as of the Closing, and the correctness as of the Closing of the representations and warranties of the Stockholders and Seller and the fulfillment of their respective covenants.³³

³²These provisions are to be used if there is material owned real property or leased real property included in the subject assets. Depending on the materiality of the properties, the buyer should consider obtaining surveys. When in doubt, consult with a member of the real estate department.

³³Including this provision as a condition of closing makes it likely that the seller will insist that a similar clause be included as a condition to its obligations. See Section 6.02(b).

- (f) **Escrow Agreement.** Each of Seller, Buyer, the Stockholders and the Escrow Agent shall have executed and delivered the Escrow Agreement, substantially in the form attached hereto as Exhibit 1.03(b).
- (g) **Opinion of Counsel.** On the Closing Date, Buyer shall have received from _____, counsel for Seller, an opinion as of said date, in form attached hereto as Exhibit 6.01(g).³⁴
- (h) **No Litigation.** There shall have been no determination by Buyer, acting in good faith, that the consummation of the transactions contemplated by this Agreement has become inadvisable or impracticable by reason of the institution or threat by any person or any federal, state or other governmental authority of litigation, proceedings or other action against Buyer, Seller or any Stockholder [or any material adverse change in the laws or regulations applicable to Seller].
- (i) **Consents.** Seller shall have made all filings with and notifications of governmental authorities, regulatory agencies and other entities required to be made by Seller in connection with the execution and delivery of this Agreement, the performance of the transactions contemplated hereby and the continued operation of the business of Seller by Buyer subsequent to the Closing; and Seller and Buyer shall have received all authorizations, waivers, consents and permits, in form and substance reasonably satisfactory to Buyer, from all third parties, including, without limitation, applicable governmental authorities, regulatory agencies, lessors, lenders and contract parties, required to permit the continuation of the business of Seller and the consummation of the transactions contemplated by this Agreement, and in connection with the transfer of Subject Assets or Seller's contracts, permits, leases, licenses and franchises, to avoid a breach, default, termination, acceleration or modification of any [material] indenture, loan or credit agreement or any other [material] agreement, contract, instrument, mortgage, lien, lease, permit, authorization, order, writ, judgment, injunction, decree, determination or arbitration award as a result of, or in connection with, the execution and performance of this Agreement.³⁵

³⁴It is customary for the buyer to specify the matters to be covered by the opinion and for the seller's counsel to draft and attach its opinion in a form that it is comfortable with. If appropriate, the buyer should reserve the right to ask for additional opinions on important legal matters that arise between signing and closing.

³⁵If there are material financial or business contracts or leases of the seller that are important to the continuation of the acquired business, it may be appropriate to require that specific consents to assignment by the other parties are a condition to the buyer's obligation to close. Similarly, if material contracts with insiders or outsiders should be modified in order to meet the buyer's objectives

- (j) **Hart-Scott-Rodino.** All required filings under the Hart-Scott-Rodino Act shall have been completed and all applicable time limitations under such Act shall have expired without a request for further information by the relevant federal authorities under such Act, or in the event of such a request for further information, the expiration of all applicable time limitations under the Act shall have occurred without the objection of such federal authorities.
- (k) **Employment Agreements.** Each of _____ shall have executed and delivered to Buyer an Employment Agreement in substantially the form of Exhibit 6.01(k) attached hereto.
- (l) **Noncompetition Agreements.** Each Stockholder shall have executed and delivered to Buyer a Noncompetition Agreement in substantially the form of Exhibit 6.01(l) attached hereto.
- (m) **FIRPTA Withholding.** At or prior to the Closing, Buyer shall have received from each Stockholder a “transferor’s certificate of nonforeign status” as provided in the Treasury Regulations under Section 1445 of the Code substantially in the form attached hereto as Exhibit 6.01(m).
- (n) **Acquisition Audit.** Buyer shall have received a satisfactory audit report from [name of accounting firm] with respect to the financial statements and financial condition of Seller as of _____.
- (o) **Financing.** Buyer shall have received debt [and equity] financing on terms and conditions reasonably satisfactory to Buyer and in amounts sufficient to provide _____ percent (____%) of the consideration for the acquisition transaction contemplated hereby, plus adequate working capital for the acquired business.³⁶
- (p) **Business Relations.** Buyer shall be reasonably satisfied based on personal interviews with Seller’s Customers, Distributors and Suppliers that such

_____ for the acquired business (an example is a lease of the seller’s facilities from certain of its stockholders), it may be appropriate to include the contract amendments as additional conditions. If the seller has material leases of real property, add the requirement that the buyer receive an estoppel certificate from the landlords, dated within 30 days before the closing and in form and substance reasonably satisfactory to the buyer.

³⁶These conditions give the buyer some discretion to pull out of the deal, perhaps subject to the requirement that it act reasonably in determining that conditions are not met, and that it use its best efforts to fulfill the conditions. See Section 5.04. If the seller will not accept these conditions, the buyer should consider completing its investigation and financing arrangements before the agreement is signed.

Customers, Distributors and Suppliers intend to continue their current level of business with Seller after the Closing.³⁶

- (q) **Massachusetts Tax Waivers.** At or prior to the Closing, Buyer shall have received from Seller:
- (i) A certificate of payment/good standing from the Commissioner of Revenue as provided in Massachusetts General Laws Chapter 62C, Section 44(a); and
 - (ii) A copy of a waiver of tax lien issued by the Commissioner of Revenue pursuant to Massachusetts General Laws Chapter 62C, Sections 51 and 52 and recorded with the appropriate register of deeds as provided in Section 51 of Massachusetts General Laws Chapter 62C, if required by applicable law.
- (r) **Employee Programs.** Seller shall have taken all steps necessary under the relevant documents and applicable law for Buyer to succeed to the position of Seller with respect to each Employee Program identified on Schedule 2.25.³⁷

Section 6.02. Conditions to Obligations of Seller. Seller's obligation to consummate this Agreement and the transactions contemplated hereby is subject to the fulfillment, prior to or at the Closing, of the following conditions precedent:

- (a) **Representations; Warranties; Covenants.** Each of the representations and warranties of Buyer contained in Section 4 shall be true and correct [in all material respects] as though made on and as of the Closing; Buyer shall, on or before the Closing, have performed all of its obligations hereunder which by the terms hereof are to be performed on or before the Closing; and Buyer shall have delivered to Seller a certificate of the President or any Vice President of Buyer dated on the Closing to such effect.
- (b) **Approval of Seller's Counsel.** All actions, proceedings, instruments and documents required to carry out this Agreement and the transactions contemplated hereby and all related legal matters contemplated by this agreement shall have been approved by _____ as counsel for Seller, and such counsel shall have received on behalf of Seller and the Stockholders such other certificates, opinions and documents in form satisfactory to counsel for Seller as Seller may reasonably require from

³⁷Careful thought should be given to what additional conditions should be added for particular situations, such as financial conditions regarding net income or net worth as reflected in subsequent financial reports of sellers.

Buyer to evidence compliance with the terms and conditions hereof as of the Closing, and the correctness as of the Closing of the representations and warranties of Buyer and the fulfillment of its covenants.³⁸

- (c) **No Litigation.** There shall have been no determination by Seller, acting in good faith, that the consummation of the transactions contemplated by this Agreement has become inadvisable or impracticable by reason of the institution or threat by any person or any federal, state or other governmental authority of material litigation, proceedings or other action against Buyer, Seller or any Stockholder.
- (d) **Opinion of Counsel.** On the Closing Date, Seller shall have received from _____, counsel for Buyer, an opinion as of said date, in form attached hereto as Exhibit 6.02(d).
- (e) **Hart-Scott-Rodino.** All required filings under the Hart-Scott-Rodino Act shall have been completed and all applicable time limitations under such Act shall have expired without a request for further information by the relevant federal authorities under such Act, or in the event of such a request for further information, the expiration of all applicable time limitations under the Act without the objection of such federal authorities.³⁹

SECTION 7. TERMINATION OF AGREEMENT; RIGHTS TO PROCEED.

Section 7.01. Termination. At any time prior to the Closing, this Agreement may be terminated as follows:

- (a) by mutual written consent of all of the parties to this Agreement;
- (b) by Buyer, pursuant to written notice by Buyer to Seller, if any of the conditions set forth in Section 6.01 of this Agreement have not been

³⁸See Note 33.

³⁹The seller may seek to include additional conditions for its benefit and the benefit of the stockholders, including:

- employment and consulting agreements;
- revisions of material insider contracts;
- consents to assignments of material contracts to avoid a breach by the seller as a result of the acquisition; and
- release of personal guaranties of bank debt.

Whether some of these requests should be anticipated in the initial draft agreement is a matter to be discussed with the buyer.

satisfied at or prior to the Closing, or if it has become reasonably and objectively certain that any of such conditions, other than a condition within the control of Seller or any Stockholder, will not be satisfied at or prior to the Closing, such written notice to set forth such conditions which have not been or will not be so satisfied; and

- (c) by Seller, pursuant to written notice by Seller to Buyer, if any of the conditions set forth in Section 6.02 of this Agreement have not been satisfied at or prior to the Closing, or if it has become reasonably and objectively certain that any of such conditions, other than a condition within the control of Buyer, will not be satisfied at or prior to the Closing, such written notice to set forth such conditions which have not been or will not be so satisfied.

Section 7.02. Effect of Termination. All obligations of the parties hereunder shall cease upon any termination pursuant to Section 7.01, provided, however, that (i) the provisions of this Section 7, Section 3.09, Section 5.02, Section 10.02 and Section 10.10 hereof shall survive any termination of this Agreement; (ii) nothing herein shall relieve any party from any liability for a material error or omission in any of its representations or warranties contained herein or a material failure to comply with any of its covenants, conditions or agreements contained herein, [if such error, omission or failure was willful or deliberate (a “Deliberate Breach”),⁴⁰ but in the absence of a Deliberate Breach, the liability of the responsible party to the other party shall be limited to out-of-pocket expenses incurred by the other party in connection with negotiating, preparing and entering into this Agreement and carrying out the transactions contemplated hereby], and (iii) the parties shall have rights to proceed as further set forth in Section 7.03 below.

Section 7.03. Right to Proceed. Anything in this Agreement to the contrary notwithstanding, if any of the conditions specified in Section 6.01 hereof have not been satisfied, Buyer shall have the right to proceed with the transactions contemplated hereby without waiving any of its rights hereunder, and if any of the conditions specified in Section 6.02 hereof have not been satisfied, Seller shall have the right to proceed with the transactions contemplated hereby without waiving any of its rights hereunder.⁴¹

⁴⁰This definition needs to be included only if certain optional language is used in Section 7.03.

⁴¹Section 7.03 may allow either party to proceed and make indemnification claims even if the party knows of problems or breaches at the time of closing. The seller and the stockholders may object to this provision on the basis that the buyer shouldn't be able to proceed with the transaction and then collect under the indemnification provisions for claims known prior to the closing. However, the seller should be equally aware of the problems or breaches and could prevent

SECTION 8. RIGHTS AND OBLIGATIONS SUBSEQUENT TO CLOSING.

Section 8.01. Survival of Warranties. Each of the representations, warranties, agreements, covenants and obligations herein or in any schedule, exhibit, certificate or financial statement delivered by any party to the other party incident to the transactions contemplated hereby are material, shall be deemed to have been relied upon by the other party and shall survive the Closing regardless of any investigation, and shall not merge in the performance of any obligation by either party hereto; [provided, however, that such representations and warranties shall expire on the same dates as and to the extent that the rights to indemnification with respect thereto under Section 9 shall expire⁴²].

Section 8.02. Collection of Assets. Subsequent to the Closing, Buyer shall have the right and authority to collect all receivables and other items transferred

the dispute by disclosing them prior to the closing, and therefore should not benefit from gambling on whether the buyer will discover them. If it is necessary to compromise the issue, it may be appropriate to use the following alternative provision:

Anything in this Agreement to the contrary notwithstanding, if a party to this Agreement has actual knowledge at the Closing of matters giving it the right to terminate this Agreement pursuant to Subsections 7.01(ii) or (iii) and such party does not exercise such right, then no indemnification shall be payable pursuant to Section 9 of this Agreement to such party with respect to claims relating to such matters, unless they constituted a Deliberate Breach, in which event such party shall have the right to proceed with this Agreement and the transactions contemplated hereby without waiving any of its rights hereunder.

⁴²If the time limit for indemnity claims is short and indemnity under Section 9 is not an exclusive remedy, the buyer may wish not to include this proviso, so that it can sue the seller for damages for material breaches outside of the time and other limitations of Section 9. Alternatively, the parties may negotiate an expiration date for warranties, which should not be earlier than the statute of limitation for tax and other important warranties.

and assigned to it by Seller hereunder, and to endorse with the name of Seller any checks received on account of such receivables or other items, and Seller agrees that it will promptly transfer or deliver to Buyer, from time to time, any cash or other property that Seller may receive with respect to any claims, contracts, licenses, leases, commitments, sales orders, purchase orders, receivables of any character or any other items included in the Subject Assets.

Section 8.03. Payment of Obligations. Seller shall pay all of the Excluded Liabilities in the ordinary course of business as they become due.

SECTION 9. INDEMNIFICATION.

Section 9.01. Indemnification by Seller and Stockholders. Seller and Stockholders jointly and severally⁴³ agree subsequent to the Closing to indemnify and hold Buyer and its respective subsidiaries and affiliates and persons serving as officers, directors, partners or employees thereof (individually, a “Buyer Indemnified Party,” and collectively, the “Buyer Indemnified Parties”) harmless from and against any damages, liabilities, losses, taxes, fines, penalties, costs, and expenses (including, without limitation, reasonable fees of counsel) of any kind or nature whatsoever (whether or not arising out of third-party claims, and including all amounts paid in investigation, defense or settlement of the foregoing) which may be sustained or suffered by any of them arising out of or based upon any of the following matters:

- (a) fraud, intentional misrepresentation or a deliberate or willful breach by Seller or any Stockholder of any of their representations, warranties or covenants under this Agreement or in any certificate, schedule or exhibit delivered pursuant hereto;
- (b) any other breach of any representation, warranty or covenant of Seller or any Stockholder under this Agreement or in any certificate, schedule or exhibit delivered pursuant hereto, or by reason of any claim, action or proceeding asserted or instituted growing out of any matter or thing constituting a breach of such representations, warranties or covenants;
- (c) all claims asserted under the Bulk Sales Act relative to any Excluded Liabilities;

⁴³See Section 2.01 and its footnote. It may be appropriate to limit the exposure of certain stockholders to warranties regarding their shares and authority and to covenants and conditions to be specifically performed by them. However, joint liability should be retained to the extent that the buyer wishes to offset indemnity claims against the note or recover from the escrow fund after distribution to the stockholders in liquidation.

- (d) any failure by Seller or the Stockholders to perform and discharge any of the Excluded Liabilities as set forth in this Agreement; and
- (e) any liability of Seller or any Stockholder for Taxes (as defined in Section 2.08) which are not included in the assumed Liabilities.

Section 9.02. Limitations on Indemnification by Seller and Stockholders.⁴⁴

Notwithstanding the foregoing, the right of Buyer Indemnified Parties to indemnification under Section 9.01 shall be subject to the following provisions:

- (a) No indemnification shall be payable pursuant to Subsection 9.01(b) above to any Buyer Indemnified Party, unless the total of all claims for indemnification pursuant to Section 9.01 shall exceed _____ dollars (\$_____) in the aggregate, whereupon the full amount of such claims shall be recoverable in accordance with the terms hereof;⁴⁵
- (b) No indemnification shall be payable to a Buyer Indemnified Party with respect to claims asserted pursuant to Subsection 9.01(b) (exclusive of claims for indemnification for Taxes or a breach of any representation, warranty or covenant with respect to Taxes or tax-related matters) after _____ (the “Indemnification Cut-Off Date”); and
- [(c) No indemnification shall be payable for certain claims as set forth in Section 7.03 of this Agreement.]⁴⁶

Section 9.02. Indemnification by Buyer. Buyer agrees to indemnify and hold Seller and its respective affiliates and persons serving as officers, directors or employees thereof and each of the Stockholders (individually, a “Seller Indemnified Party,” and collectively, the “Seller Indemnified Parties”) harmless from and against any damages, liabilities, losses and expenses (including, without limitation, reasonable fees of counsel) of any kind or nature whatsoever

⁴⁴This Section includes customary limitations on indemnification that an aggressive buyer may not want to include in its initial draft. It does not include an overall cap on the amount of indemnification that is collectible, such as the proceeds received by the seller or a stockholder as a result of the transaction.

⁴⁵This provision is drafted as a threshold—i.e., the full amount is collectible once a certain dollar level is reached. It may also be drafted as a deductible—i.e., the only amount collectible is the excess over the deductible. Either provision must be related to use of a materiality qualifier throughout the agreement so that the seller does not get double protection against immaterial breaches and breaches less than the threshold or deductible.

⁴⁶This subsection 9.02(c) should only be included if the alternate language in the footnote to Section 7.03 is used limiting indemnification where a party proceeds knowing of a breach by the other party that is not a “Deliberate Breach.”

(whether or not arising out of third-party claims, and including all amounts paid in investigation, defense or settlement of the foregoing) which may be sustained or suffered by any of them arising out of or based upon any of the following matters:

- (a) a breach of any representation, warranty or covenant made by Buyer in this Agreement or in any certificate delivered by Buyer hereunder, or by reason of any claim, action or proceeding asserted or instituted growing out of any matter or thing constituting such a breach; and
- (b) any failure by Buyer to perform and discharge any of the Liabilities as set forth in this Agreement.

Section 9.04. Limitation on Indemnification by Buyer.⁴⁷ Notwithstanding the foregoing, the right of Seller Indemnified Parties to indemnification under Section 9.03 shall be subject to the following provisions:

- (a) No indemnification pursuant to Section 9.03(a) shall be payable to Seller or the Stockholders, unless the total of all claims for indemnification pursuant to Section 9.03(a) shall exceed _____ dollars (\$_____) in the aggregate, whereupon the full amount of such claims shall be recoverable in accordance with the terms hereof;
- (b) No indemnification shall be payable to Seller or the Stockholders with respect to claims asserted pursuant to Section 9.03(a) above after the Indemnification Cut-Off Date[; and]
- [(c) No indemnification shall be payable for certain claims as set forth in Section 7.03 of this Agreement]⁴⁸.

Section 9.05. Notice; Defense of Claims. An indemnified party may make claims for indemnification hereunder by giving written notice thereof to the indemnifying party within the period in which indemnification claims can be made hereunder. If indemnification is sought for a claim or liability asserted by a third party, the indemnified party shall also give written notice thereof to the indemnifying party promptly after it receives notice of the claim or liability being asserted, but the failure to do so shall not relieve the indemnifying party from any liability except to the extent that it is prejudiced by the failure or delay in giving such notice. Such notice shall summarize the bases for the claim for indemnification and any claim or liability being asserted by a third party. Within

⁴⁷Any limitations included in this section should probably parallel those in Section 9.02.

⁴⁸Again, this subsection 9.04(c) should only be included if the alternate language in the footnote to Section 7.03 is used in the agreement.

20 days after receiving such notice, the indemnifying party shall give written notice to the indemnified party stating whether it disputes the claim for indemnification and whether it will defend against any third-party claim or liability at its own cost and expense. If the indemnifying party fails to give notice that it disputes an indemnification claim within 20 days after receipt of notice thereof, it shall be deemed to have accepted and agreed to the claim, which shall become immediately due and payable. The indemnifying party shall be entitled to direct the defense against a third-party claim or liability with counsel selected by it (subject to the consent of the indemnified party, which consent shall not be unreasonably withheld) as long as the indemnifying party is conducting a good faith and diligent defense. The indemnified party shall at all times have the right to fully participate in the defense of a third-party claim or liability at its own expense directly or through counsel; provided, however, that if the named parties to the action or proceeding include both the indemnifying party and the indemnified party, and the indemnified party is advised that representation of both parties by the same counsel would be inappropriate under applicable standards of professional conduct, the indemnified party may engage separate counsel at the expense of the indemnifying party. If no such notice of intent to dispute and defend a third-party claim or liability is given by the indemnifying party, or if such good faith and diligent defense is not being or ceases to be conducted by the indemnifying party, the indemnified party shall have the right, at the expense of the indemnifying party, to undertake the defense of such claim or liability (with counsel selected by the indemnified party), and to compromise or settle it, exercising reasonable business judgment. If the third-party claim or liability is one that by its nature cannot be defended solely by the indemnifying party, then the indemnified party shall make available such information and assistance as the indemnifying party may reasonably request and shall cooperate with the indemnifying party in such defense, at the expense of the indemnifying party.

Section 9.06. Satisfaction of Seller and Stockholder Indemnification Obligations. In order to satisfy the indemnification obligations of Seller and the Stockholders pursuant to Sections 9.01 above, a Buyer Indemnified Party shall have the right (in addition to collecting directly from Seller and the Stockholders) to (i) proceed directly against the Escrow Amount as further set forth in the Escrow Agreement, or (ii) set off its indemnification claims against any and all amounts of interest and principal under the Note (whether or not then due and payable) in accordance with the terms of the Note, or (iii) exercise both of such remedies.⁴⁹

⁴⁹This agreement does not provide for arbitration or alternative dispute resolution (ADR) of disputed claims for indemnification. The buyer is permitted to chose between making a claim against the escrow fund or a set off against the notes, or both, and only in the case of a claim against the escrow fund would the

SECTION 10. MISCELLANEOUS.

Section 10.01. Bulk Sales Law. Buyer waives compliance by Seller with the provisions of any applicable bulk sales, fraudulent conveyance or other law for the protection of creditors in connection with the transfer of the Subject Assets under this Agreement.⁵⁰

Section 10.02. Fees and Expenses.⁵¹

- (a) Except as set forth in Section 7.02, each of the parties will bear its own expenses in connection with the negotiation and the consummation of the transactions contemplated by this Agreement, and no expenses of Seller relating in any way to the purchase and sale of the Subject Assets hereunder

arbitration clause in the attached escrow agreement be applicable (assuming that the buyer wished to retain this provision). The buyer can also assert claims directly against the seller and the stockholders in a legal proceeding, but this is seldom advantageous while other remedies are available. The seller will often insist that indemnification claims be made against the escrow fund first, until it is exhausted, since it may be deemed to have received the escrow fund for tax purposes.

Subject to the buyer's directions, it is possible to draft an arbitration or ADR clause for this agreement, to apply to all claims for indemnification or all controversies or disputes arising under the agreement, including claims for breach of the agreement. If the buyer wishes to use the ADR mechanism, the following is a clause suggested by members of the trial department, which should be consulted further regarding its implementation:

Section 10.07. Alternative Dispute Resolution. *The parties agree that any controversy or dispute arising under this Agreement, including, without limitation, claims for indemnification under Section 10, shall be referred to a qualified person (the "tribunal") chosen by the chief justice of the [] superior court of Massachusetts, and the decision of the tribunal with respect to all matters referred to him or her shall be final and binding upon the parties and enforceable in any court with jurisdiction. The procedures and rules of evidence to be used in determining the matter shall be decided by the tribunal or agreed to by the parties. The expenses of the tribunal shall be shared equally between the parties, and each of the parties shall pay for their own counsel and other expenses in connection with the matter, unless the tribunal determines that it is appropriate to assess all or any part of the expenses of the tribunal and the legal and other expenses of the winning party against the losing party.*

⁵⁰This clause may be inappropriate if the buyer and its lenders are not willing to permit trade creditors of the seller to assert statutory liens against certain of the subject assets under applicable bulk sales laws. However, in most cases, the buyer gives the waiver to avoid damaging trade creditor relationships by sending the required statutory notice.

and the transactions contemplated hereby, including, without limitation, legal, accounting or other professional expenses of Seller or any Stockholder, shall be charged to or paid by Buyer or included in any of the Liabilities.

- (b) Seller will pay all costs incurred, whether at or subsequent to the Closing, in connection with the transfer of the Subject Assets to Buyer as contemplated by this Agreement, including, without limitation, all sales, use, excise, real property and other transfer taxes and charges applicable to such transfer; all recording charges and fees applicable to the recordation of deeds and mortgages and other instruments of transfer; and all costs of obtaining or transferring permits, registrations, applications and other tangible and intangible properties. Buyer will pay all premiums, charges and costs of obtaining and providing surveys, appraisals, UCC and title searches and title insurance for the benefit of Buyer with respect to the Subject Assets.

Section 10.03. Governing Law. This Agreement shall be construed under and governed by the internal laws of the Commonwealth of Massachusetts without regard to its conflict of laws provisions.

Section 10.04. Notices. Any notice, request, demand or other communication required or permitted hereunder shall be in writing and shall be deemed to have been given if delivered or sent by facsimile transmission, upon receipt, or if sent by registered or certified mail, upon the sooner of the date on which receipt is acknowledged or the expiration of three days after deposit in United States post office facilities properly addressed with postage prepaid. All notices to a party will be sent to the addresses set forth below or to such other address or person as such party may designate by notice to each other party hereunder:

TO BUYER: [name and address; attention of officer]

With a copy to: [name and address of counsel]

TO SELLER: [name and address; attention of officer]

With a copy to: [name and address of counsel]

TO ANY

STOCKHOLDER: [name and address of Stockholder Representative]

With a copy to: [name and address of counsel]

⁵¹If there is material real estate, consider adding a provision for prorating real estate taxes, assessments or other major periodic expenses where the assumption of these expenses as accrued would unduly favor the seller.

Any notice given hereunder may be given on behalf of any party by his counsel or other authorized representatives.

Section 10.05. Entire Agreement. This Agreement, including the Schedules and Exhibits referred to herein and the other writings specifically identified herein or contemplated hereby, is complete, reflects the entire agreement of the parties with respect to its subject matter, and supersedes all previous written or oral negotiations, commitments and writings. No promises, representations, understandings, warranties and agreements have been made by any of the parties hereto except as referred to herein or in such Schedules and Exhibits or in such other writings; and all inducements to the making of this Agreement relied upon by either party hereto have been expressed herein or in such Schedules or Exhibits or in such other writings.⁵²

Section 10.06. Assignability; Binding Effect. Prior to the Closing, this Agreement shall only be assignable by Buyer to a corporation or partnership controlling, controlled by or under common control with Buyer upon written notice to Seller, [and such assignment shall not relieve Buyer of any liability hereunder]. After the Closing, Buyer's rights and obligations hereunder [except for its obligations under the Note] shall be freely assignable. This Agreement may not be assigned by Seller without the prior written consent of Buyer. This Agreement shall be binding upon and enforceable by, and shall inure to the benefit of, the parties hereto and their respective successors and permitted assigns.

Section 10.07. Captions and Gender. The captions in this Agreement are for convenience only and shall not affect the construction or interpretation of any term or provision hereof. The use in this Agreement of the masculine pronoun in reference to a party hereto shall be deemed to include the feminine or neuter, as the context may require.

Section 10.08. Execution in Counterparts. For the convenience of the parties and to facilitate execution, this Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same document.

Section 10.09. Amendments. This Agreement may not be amended or modified, nor may compliance with any condition or covenant set forth herein be waived, except by a writing duly and validly executed by each party hereto, or, in the case of a waiver, the party waiving compliance.⁵³

⁵²This language would prevent the buyer from claiming that it relied on the seller's offering materials unless they are included as an exhibit to the agreement.

⁵³A problem may be presented if several stockholders are parties and there is no stockholder representative authorized to agree to amendments or waivers.

Section 10.10. Publicity and Disclosures. No press releases or public disclosure, either written or oral, of the transactions contemplated by this Agreement, shall be made by a party to this Agreement without the prior knowledge and written consent of Buyer and Seller.

Section 10.11. Consent to Jurisdiction. Solely for the purpose of allowing a party to enforce its indemnification and other rights hereunder, each of the parties hereby consents to personal jurisdiction, service of process and venue in the federal or state courts of Massachusetts, [another state], or in the court in which any claim for which indemnification may be sought hereunder is brought against an indemnified party.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date set forth above by their duly authorized representatives.

BUYER:

By: _____
Title: _____

SELLER:

By: _____
Title: _____

STOCKHOLDERS:

By: _____
Title: _____

List of Schedules and Exhibits

Schedule 2.05(a)	Defaults
Schedule 2.06(a)	Owned Real Property
Schedule 2.06(b)	Leased Real Property
Schedule 2.06(c)	Machinery, Equipment and Other Tangible Personal Property
Schedule 2.07	Financial Statements
Schedule 2.08	Income Tax Returns
Schedule 2.09	Accounts or Loans Receivable from Affiliated Persons
Schedule 2.10	Inventory
Schedule 2.11	Absence of Certain Changes
Schedule 2.13	Banking Relations
Schedule 2.14	Intellectual Property
Schedule 2.15	Contracts
Schedule 2.16	Litigation
Schedule 2.17	Compliance with Laws
Schedule 2.18	Insurance
Schedule 2.19	Warranty or Other Claims
Schedule 2.22	Permits; Burdensome Agreement
Schedule 2.24	Transactions with Interested Persons
Schedule 2.25	Employee Benefit Programs
Schedule 2.26	Environmental Matters
Schedule 2.27	Directors and Officers
Schedule 2.29	Backlog
Schedule 2.31	Labor Matters
Schedule 2.31(a)	Customers and Distributors
Schedule 2.31(b)	Suppliers
Exhibit 1	Stockholders of Seller
Exhibit 1.03(b)	Escrow Agreement
Exhibit 1.03(c)	Promissory Note
Exhibit 1.05	Agreement of Assumption of Liabilities
Exhibit 6.01(g)	Opinion of Counsel for Seller
Exhibit 6.01(k)	Employment Agreements
Exhibit 6.01(l)	Noncompetition Agreements
Exhibit 6.01(m)	FIRPTA Withholding Certificate
Exhibit 6.02(d)	Opinion of Counsel for Buyer