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A Walk Through Purchase and Sale Agreements****Cliff Ernst****William H. Hornberger**

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# **Sale of Partnership and LLC Interests: A Walk Through Purchase and Sale Agreements**

## **CONSIDERATIONS RELATING TO NEGOTIATING AND DRAFTING PURCHASE AND SALE AGREEMENTS**

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**SELECTED FEDERAL INCOME TAX CONSIDERATIONS  
RELATING TO SALES OF PARTNERSHIP INTERESTS**

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# **Sale of Partnership and LLC Interests: A Walk Through Purchase and Sale Agreements**

## **CONSIDERATIONS RELATING TO NEGOTIATING AND DRAFTING PURCHASE AND SALE AGREEMENTS**

**Cliff Ernst  
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### **I. Introduction.**

The Business and Public Filings Division of the Office of the Texas Secretary of State reports that unincorporated entities, and in particular limited liability companies, have become the entities of choice in the State of Texas. More than half of all new entities formed in Texas in 2005 and 2006 were limited liability companies or limited partnerships.<sup>1</sup> It remains to be seen what impact, if any, the recently adopted changes in the Texas franchise tax laws (sometimes called the “margin tax”) will have on future choices of entity for business enterprises in the state of Texas, but if current trends continue, it is likely that more and more businesses in Texas and elsewhere will be conducted as unincorporated entities. As these businesses mature, it seems inevitable that lawyers, accountants, brokers and others who deal with the purchase and sale of business enterprises will be encountering transactions involving the sale of a limited liability company or limited partnership.

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<sup>1</sup> The Master File Statistics Report generated on July 1, 2007 by the Office of the Texas Secretary of State shows the following total number of active (i.e., “in existence”) for-profit corporations, limited liability companies and limited partnerships :

Domestic For-Profit Corporations:	392,717
Domestic Limited Liability Companies:	251,714
Domestic Limited Partnerships:	142,900

The Filed Documents Report by the Office of the Texas Secretary of State shows the following number of certificates of formation were filed to create new for-profit corporations, limited liability companies and limited partnerships (consequently, these statistics do not include those entities created by conversion or merger):

Domestic For-Profit Corporations:	33,757
Domestic Limited Liability Companies:	58,288
Domestic Limited Partnerships:	16,355

The Filed Documents Report by the Office of the Texas Secretary of State for calendar year 2005 shows the following:

Domestic For-Profit Corporations:	34,856
Domestic Limited Liability Companies:	53,097
Domestic Limited Partnerships:	20,835

The primary purpose of this outline is to consider a form of purchase and sale agreement that might be appropriate for a transaction involving the purchase and sale of ownership interests in a limited liability company or limited partnership and certain issues related to such a transaction in the context of the form.

Before examining the form, a few preliminary observations are helpful.

## II. Why Sell Ownership Interests?

One of the first questions always considered in connection with the purchase and sale of a business enterprise is the appropriate structure for the transaction. In particular, should the transaction be structured as a sale of assets by the target entity, or should it be structured as a sale of the ownership interests by the owners of the target entity (in a stock transaction, a sale of stock by the stockholders). Several factors affect this decision. We will begin by a brief examination of these factors in the context of the sale of an unincorporated entity.

**A. Tax Considerations.** Federal income tax considerations are an important, if not the most important, consideration in structuring any purchase and sale of a business. If the target entity is classified as a C Corporation for federal income tax purposes, then the sellers will likely have a strong incentive for structuring the transaction as a sale of stock or ownership interests to avoid the double taxation that would arise upon a sale of assets. If the entity is classified as a partnership or a disregarded entity, then the concern of double taxation will be eliminated, although other taxation considerations may apply. Refer to the outline prepared by William H. Hornberger, which follows the forms presented in this outline, for a discussion of selected federal income tax considerations relating to sales of partnership interests.

**B. Liability Protection.** Purchasers typically prefer to purchase the assets of a corporation rather than purchase the corporation through the purchase of its outstanding stock to avoid liabilities of the corporation, especially unknown or contingent liabilities. This is also a valid consideration in the context of the sale of the business enterprise conducted as a limited liability company or limited partnership. While a purchaser will attempt to protect itself from liability by conducting a thorough due diligence review of the business and by obtaining representations and warranties and indemnities from the sellers (all of which will be discussed further later in this outline), it would still seem to be the case that, all other factors being equal, a purchaser will have a strong preference for purchasing the assets of the business from the target entity, paying the purchase consideration to the target entity.

**C. Post Purchase Distributions.** If the sale of a business is structured as purchase and sale of assets by the target entity, then such transaction is typically followed by a distribution of the purchase proceeds to the owners of the entity, either in liquidation of the target entity, or otherwise. In the context of a sale by a limited liability company or limited partnership, the post-purchase distributions will be governed by the governing documents of the seller, either the Company Agreement or Regulations of the limited liability company<sup>2</sup> or the Agreement of

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<sup>2</sup> The governing document of a limited liability company formed before the effectiveness of the Texas Business Organization Code on January 1, 2006 is called the Regulations; the governing document of a limited liability company formed under the Texas Business Organization Code is called the Company Agreement.

Limited Partnership of the limited partnership. These governing documents should be reviewed carefully in connection with the structuring of the purchase and sale transaction to be sure that the owners understand and are comfortable with way the sale proceeds will be distributed and will not surprised by the final distribution of the purchase consideration. For example, some governing documents provide for a different distribution scheme that applies to the distributions of the proceeds of a “capital transaction” versus the distribution of ordinary income. It seems unlikely the distribution provisions of the governing documents will be a strong determining factor in choosing a sale of ownership interests instead of a sale of assets, but they should be considered.

**D. Avoidance of Assignments and Separate Conveyances.** Besides tax considerations, the most frequent reason that the purchase and sale of a business is structured as a sale of the ownership interests (i.e. a stock sale) and not a sale of assets, is to avoid having to separately convey all of the assets of the business. If the target entity has entered into numerous contracts, then each of these contracts will need to be assigned by the target entity to the purchaser, typically with a separate assignment document for each contract. If the contracts require the consent of the other contracting party or parties, then additional labor and time will be required to obtain proper consents. In addition, the pending purchase and sale will have to be disclosed and described to customers, vendors, landlords and other contracting parties where consents are needed. It is general practice to document the sale of other tangible and intangible assets through the use of a General Conveyance that identifies in a schedule or otherwise the transferred assets. Depending upon the complexity of the business and the desires of the purchaser and seller for specificity, preparation of this schedule of assets can, in many cases, be a very cumbersome and expensive proposition. Additionally, if the assets being conveyed consist of real estate, motor vehicles or other “titled” assets, then a separate deed, title assignment, etc. will have to be prepared, executed and recorded or filed in the land office, motor vehicle registration office or other appropriate filing office. Filing fees and transfer taxes, if applicable, will be incurred in connection with the filings and transfers. Sometimes the daunting task of identifying and scheduling and conveying all assets together with the desire to minimize the need obtain consents and the desire to keep the transaction confidential prevails over the risk that the purchaser perceives in taking on the liabilities of the target entity. These considerations would apply regardless of whether the target entity is a corporation or an unincorporated entity.

### **III. Due Diligence Considerations.**

A detailed discussion of due diligence procedures is beyond the scope of this outline. Many of the elements of a due diligence examination are “gender neutral” and will not be affected by the organizational form of the target entity. However, as will be discussed further later in this outline in the context of specific representations and warranties, certain aspects of the ownership and operation of an unincorporated entity, particularly accounting and tax matters, will be remarkably different for an unincorporated entity as compared to a corporation. Special attention should be focused during the due diligence process on such matters as capital account maintenance, records of distributions, any indication of wrongful distributions,<sup>3</sup> transfers and

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<sup>3</sup> Wrongful distributions, which may create an obligation of limited partners to return the distribution, are dealt with in Section 153.112 and Section 153.210 of the Texas Business Organizations Code.

redemptions of ownership interest, and employee compensation arrangements that involve granting to employees or consultants ownership interests in the target entity.

#### **IV. Mergers.**

Another common structure for the acquisition of a business enterprise is a merger of the acquiring entity (or a subsidiary of the acquiring entity) with the target entity. A detailed examination of the many tax and business law issues involved in the mergers of unincorporated entities with other unincorporated entities or with corporations is beyond the scope of this outline. These issues have been examined in detail in the following excellent outlines: *Mergers, Conversions and Transmogrification* by Robert Keatinge, presented at The University of Texas School of Law Continuing Legal Education Program on Current Issues Affecting Partnerships, Limited Partnerships and Limited Liability Companies, July 17 and 18, 2003, and *Mergers, Acquisitions and Conversions with Partnerships and LLCs* by Michael K. Pierce and Kevin Thomson, presented at The University of Texas School of Law Continuing Legal Education Program on Current Issues Affecting Partnerships, Limited Partnerships and Limited Liability Companies on July 15 and 16, 2004.

If one were presented with the task of preparing a form of Merger Agreement involving an unincorporated entity, the form presented in this outline might be of some utility. Although the portions of the form dealing with the mechanics of the transaction (Article 2) would change, certain portion of the form such, as the sellers' representations and warranties (Article 3 and Article 4), covenants and conditions (Article 7, Article 8, and Article 9) and indemnities (Article 11) might be instructive.

#### **V. The Form.**

This brings us to our examination of our form of purchase and sale agreement. The following form is an amalgamation of provisions from a number of purchase and sale agreements and is not the product of a real, negotiated transaction. In particular the author wishes to acknowledge and are indebted to the members of the Committee on Negotiated Acquisitions of the American Bar Association's Business Law Section for their *Model Stock Purchase Agreement with Commentary* and the *Manual on Acquisition Review*, both published in 1995, and their *Model Asset Purchase Agreement with Commentary* published in 2001.

The form agreement commences on the next page. Commentary on the form for the balance of this outline will be presented in the form of footnotes to the form.

**FORM<sup>4</sup> OF  
[MEMBERSHIP / PARTNERSHIP] INTEREST<sup>5</sup>  
PURCHASE AGREEMENT**

This [Membership / Partnership] Interest Purchase Agreement (“Agreement”) is made as of \_\_\_\_\_, 20\_\_, by \_\_\_\_\_, a \_\_\_\_\_ [limited liability company / limited partnership / corporation] (the “Purchaser”), and each of the Persons listed on Exhibit “A” (collectively, the “Sellers” and each a “Seller”) <sup>6</sup>.

**W I T N E S S E T H**

**WHEREAS**, the Sellers own, respectively, the [membership / partnership] interests (the “Interests”) of \_\_\_\_\_, a Texas [limited liability company / limited partnership] (the “Company” / the “Partnership”), indicated in Exhibit “A”, and

**WHEREAS**, \_\_\_\_\_, [a \_\_\_\_\_ corporation / limited liability company] and \_\_\_\_\_, [a \_\_\_\_\_ corporation / limited liability company] (the “Principal Seller[s]”) [is / are] the [managing member[s] / manager[s] / general partner[s]] of the [Company / Partnership] and [is / are] actively involved in managing the business of the [Company / Partnership], and accordingly, [is / are] in a position to make certain representations, warranties and covenants in respect of the [Company / Partnership] <sup>7</sup>; and

**WHEREAS**, each of the Sellers wishes to sell, and the Purchaser wishes to purchase, the Interests, subject to the conditions contained in this Agreement;

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<sup>4</sup> This form agreement is not a form to be completed by filling in the blanks. Drafters should be certain that any agreement used by them is appropriate for the particular transaction. The presence or the absence of a particular provision in this form should not be taken as an indication that the provision is or is not “market standard.”

<sup>5</sup> Consistent with the *Model Limited Liability Company Membership Interest Redemption Agreement* prepared by the Subcommittee on Limited Liability Companies of the Committee on Partnerships and Unincorporated Business Organizations, Section of Business Law, American Bar Association (published at 61 Bus. Law 1197, 2005–2006), we have chosen to call our form a “Membership Interest Purchase Agreement” or “Partnership Interest Purchase Agreement.” Some Company Agreements and Partnership Agreements designate membership or partnership interests as “Units.” If drafting an agreement in a transaction where interests are designated as “Units,” it may be appropriate to name the agreement “Unit Purchase Agreement.”

<sup>6</sup> In stock purchase agreements, the sellers of stock are typically designated Stockholders or Shareholders. To simplify this form, the interest owners who are selling interests are called Sellers, rather than Unitholders, Interestholders, Limited and General Partners, Members or other similar designations.

<sup>7</sup> In stock sale transactions where one or more “principal” stockholders own a controlling interest in the target entity and participate actively in the management of the target entity and minority shareholders play a passive role, the Sellers may prevail in limiting the representations and warranties made by the minority shareholders to matters, such as share ownership, within their knowledge and control. Because limited partnerships are managed and controlled by a general partner and because limited liability companies are frequently managed and controlled by one or more managers or one or more managing members, this form contemplates that the limited partners or members not involved in management would persuade the Purchaser to accept similar limited representations from the passive owners.



**NOW, THEREFORE**, in consideration of the mutual covenants and agreements set forth in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties do hereby agree as follows:

## ARTICLE 1

### Definitions

Section 1.1 **Definitions.** Certain terms used in this instrument are capitalized. Such terms shall have the meaning set forth in the text or in Section 12.18.

## ARTICLE 2

### Sale and Transfer of Interests; Closing

Section 2.1 **Agreement to Purchase and Sell.** Subject to the terms and conditions of this Agreement, at the Closing, the Sellers will sell, transfer and assign the Interests to the Purchaser, and the Purchaser will purchase the Interests from the Sellers.

Section 2.2 **Purchase Price.** The purchase price for the Interests (the "Purchase Price") is the aggregate sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_).<sup>8</sup> The Purchase Price shall be payable by the Purchaser to the Sellers as set forth on Exhibit "A".<sup>9</sup>

Section 2.3 **Closing.** The closing of the transactions contemplated by this Agreement (the "Closing") will take place at the offices of the Purchaser's counsel at \_\_\_\_\_, at 10:00 a.m. (local time) on the later of (i) \_\_\_\_\_, 20\_\_ or (ii) the date that is two business

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<sup>8</sup> *The Model Stock Purchase Agreement* promulgated by the Committee on Negotiated Acquisitions of the Section of Business Law of the American Bar Association provides for an adjustment to the agreed purchase price based upon changes in the target corporation's consolidated stockholder's equity between the date of the balance sheet relied upon by the Purchaser to determine the purchase price and the closing date. Mechanics are included for a post-closing preparation of financial statements as of the closing date and a "true-up" of the purchase price after the closing date financial statements are finalized. It has been the author's experience that there are no "standard" provisions for post closing adjustments to purchase price. In fact purchasers differ widely in their approach to post closing adjustments and the language they use regarding post closing adjustments. For this reason, this form does not include provisions for a post closing adjustment to the purchase price. However, it should be anticipated that the Purchaser may insist on such provisions and that such provisions will likely be among the most heavily negotiated provisions in the purchase agreement.

<sup>9</sup> In a stock sale transaction, the purchase price is often expressed as \$X per share. This is a function of the fact that shares are more or less fungible; each share of a particular class of stock represents essentially the same rights as every other share of that class. The rights and obligations respecting ownership interests in partnerships and limited liability companies often vary widely from partner to partner or from member to member. For example, a "money partner" may be entitled preference distributions calculated based upon a percentage return of her invested capital or based upon a specified internal rate of return as well as return of her capital contribution before the "sweat equity" partner receives any distributions. These differences in rights of partners or members will of course affect the value of the interests. This form attempts to take into account the fact that it is likely the purchase price paid to each Seller will not be just a function of the Percentage Interest or number of Units owned by the Seller. Instead of describing the price as \$X per Unit, this form contemplates that an exhibit (Exhibit "A") would list the name of each Seller and the amount of the Purchase Price to be paid to each.

days following the termination of the applicable waiting period under the HSR Act<sup>10</sup>, or at such other time and place as the parties may agree. Subject to the provisions of Article 10, failure to consummate the purchase and sale provided for in this Agreement on the date and time and at the place determined pursuant to this Section 2.3 will not result in the termination of this Agreement and will not relieve any party of any obligation under this Agreement.

**Section 2.4 Closing Obligations.** At the Closing:

(a) Each of the Sellers will deliver to the Purchaser:

(i) an assignment of interest in substantially the form of Exhibit “B”<sup>11</sup> or other form of assignment or transfer document reasonably satisfactory to the Purchaser, with all blanks properly completed to indicate the Interest being sold by the Seller hereunder and executed by the Seller;

(ii) a certificate executed by the Seller representing and warranting to the Purchaser that each of the Seller’s representations and warranties contained in Article 3 was accurate in all respects as of the date of this Agreement and is accurate in all respects as of the Closing Date as if made on the Closing Date (giving full effect to any supplements to the Disclosure Letter that were delivered by the Sellers to the Purchaser prior to the Closing Date in accordance with Section 6.5); and

(b) The Principal Seller[s] will deliver or cause to be delivered to the Purchaser:

(i) an employment agreement in the form of Exhibit “C”, executed by each of the Key Employees (collectively, “Employment Agreements”);

(ii) a noncompetition agreement in the form of Exhibit “D”, executed by each of the Principal Seller[s] and Key Employees (collectively, the “Noncompetition Agreements”); and

(iii) a certificate executed by the Principal Seller[s] representing and warranting to the Purchaser that each of the representations and warranties of the Principal Seller[s] in Article 4 was accurate in all respects as of the date of this Agreement and is accurate in all respects as of the Closing Date as if made on the Closing Date (giving full effect to any supplements to the Disclosure Letter that were delivered by the Sellers to the Purchaser prior to the Closing Date in accordance with Section 6.5); and

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<sup>10</sup> For purposes of The Hart-Scott-Rodino Antitrust Improvements Act of 1976, the term “entity” means “any natural person, corporation, company, partnership, joint venture, association, joint-stock company, trust, estate of a deceased natural person, foundation, fund, institution, society, union, or club, whether incorporated or not . . .” C.F.R. § 801.1(a)(2). (Emphasis added.)

<sup>11</sup> Interests in partnerships and limited liability companies are typically not certificated interests. Such interests are usually transferred by means of an assignment instrument. A form of assignment is included as Exhibit “B” to this form.

(c) The Purchaser will:

(i) pay to the Sellers the respective amounts indicated as the “Closing Payments” on Exhibit “A” by direct wire transfers of immediately available funds to the accounts of Sellers as set forth in Exhibit “A” or to such other account of which a Seller may notify the Purchaser in writing prior to the Closing;

(ii) deliver promissory notes payable to each of the Sellers in the respective principal amounts indicated in Exhibit “A” (collectively, “Promissory Notes”);

(iii) pay the sum of \$ \_\_\_\_\_ (the “Escrowed Funds”) to the Escrow Agent by direct wire transfer of immediately available funds to the account specified by the Escrow Agent;

(iv) deliver a certificate executed by the Purchaser to the effect that, except as otherwise stated in such certificate, each of the Purchaser’s representations and warranties in this Agreement was accurate in all respects as of the date of this Agreement and is accurate in all respects as of the Closing Date as if made on the Closing Date; and

(v) deliver the Employment Agreements, executed by the Purchaser; and

(d) the Purchaser and the Sellers will enter into an escrow agreement in the form of Exhibit “E” (the “Escrow Agreement”) with \_\_\_\_\_ (the “Escrow Agent”); and<sup>12</sup>

(e) the Sellers will enter into a contribution agreement in the form of Exhibit “F”; and

(f) the Purchaser will be admitted as a [member / general partner / limited partner] of the [Company / Partnership] and will continue the business of the [Company / Partnership], and immediately following such admission, the Sellers will cease to be [members / partners] of the [Company / Partnership].<sup>13</sup>

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<sup>12</sup> The Purchaser may require that a portion of the purchase price be paid into an escrow account either to satisfy “true-up” obligations or to provide readily available funds for any liability of the Sellers under the indemnification provisions of the Agreement.

<sup>13</sup> Notice that the withdrawal of the Seller(s) occurs immediately following the admission of the Purchaser(s) so that there is no moment in time in which the target has no members or partners, resulting an inadvertent dissolution of the target.

## ARTICLE 3

### Representations and Warranties of Each of the Sellers

Each of the Sellers, separately and severally,<sup>14</sup> represents and warrants to the Purchaser as follows:

**Section 3.1 Execution, Validity and Authority.** The Seller has the full legal right and capacity to enter into this Agreement and perform the Seller's obligations hereunder. This Agreement has been duly and validly executed and delivered by the Seller and, assuming due authorization, execution and delivery by the Purchaser, constitutes a legal, valid and binding obligation of the Seller, enforceable against the Seller in accordance with its terms, subject to laws of general application relating to bankruptcy, insolvency, and the relief of debtors and rules of law governing specific performance, injunctive relief or other equitable remedies (the "Bankruptcy Exception").

**Section 3.2 Ownership.** The Seller is the true and lawful owner of the Interest set forth opposite its name in Exhibit "A" to this Agreement, and such Interest is owned by the Seller free and clear of any and all Liens.

**Section 3.3 No Options.** Except as set forth in Section 3.3 of the Disclosure Letter, the Seller is not a party to any outstanding subscriptions, options, rights, warrants, calls, commitments or arrangements of any kind affecting the Interest owned by the Seller and there are no agreements or understandings with respect to the sale or transfer of such Interest other than as set forth in this Agreement.

**Section 3.4 No Default of [Company / Partnership] Agreement.** The Seller is not in default or breach of the [Company / Partnership] Agreement.

**Section 3.5 Capital Contributions.** The Seller has paid all capital contributions, assessments and other requests for funds for which it has received a capital call, invoice or other demand from the [Company / Partnership] and has no current or future obligation to contribute additional capital to the [Company / Partnership].<sup>15</sup>

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<sup>14</sup> Consistent with the theory that Sellers who are passive, minority interest holders in the target will only make representations and warranties as to matters within their knowledge and control, the limited representations and warranties of all Sellers are presented in this form as separate and several representations.

<sup>15</sup> This representation as to satisfaction of capital contribution obligations and the representation in Section 3.4 regarding no breach of the Company or Partnership Agreement correspond to similar representations in *The Model Limited Liability Company Membership Interest Redemption Agreement* referenced in footnote 5. A stock purchase agreement will typically include a "capitalization" representation stating that the outstanding shares have been duly authorized and validly issued and are fully paid and nonassessable. In the context of an unincorporated entity without shares of stock, the purchaser should be able to satisfy itself regarding the capitalization of the target entity through a combination of this Section 3.5 representation, the representation in Section 3.4, the representation in Section 4.1(b) regarding the target entity's governing agreement and the financial statement representations in Section 4.4.

Section 3.6 **Certain Proceedings.** There is no pending Proceeding that has been commenced against the Seller and that challenges, or may have the effect of preventing, delaying, making illegal, or otherwise interfering with, any of the Contemplated Transactions. To the Seller's Knowledge, no such Proceeding has been Threatened.

Section 3.7 **Non-Contravention.** The execution and delivery by the Seller of this Agreement, the performance by the Seller of the Seller's obligations hereunder and the consummation of the transactions contemplated hereby, will not (a) result in the violation by the Seller of any Legal Requirement or Order of any Governmental or Regulatory Authority applicable to the Seller or any of Seller's assets or properties; or (b) if the consents and notices set forth in Section 3.8 of the Disclosure Letter are obtained or given, conflict with, result in a violation or breach of, constitute (with or without notice or lapse of time or both) a default under, require the Seller (except as set forth in the Disclosure Letter) to obtain any consent, approval or action of, make any filing with or give any notice to any Person pursuant to, result in or give to any Person any right of payment or reimbursement, termination, cancellation, modification or acceleration of, or result in the creation or imposition of any Liens upon any of the assets or properties of the Seller under, any of the terms, conditions or provisions of any Contract to which the Seller is a party or by which the Seller or any of the Seller's assets or properties is bound.

Section 3.8 **Approvals and Consents.** Except as set forth in Section 3.8 of the Disclosure Letter, no consent, approval, authorization or action of, registration or filing with, or notice to any Governmental or Regulatory Authority or other Person is necessary or required under any of the terms, conditions or provisions of any Legal Requirement or Order of any Governmental or Regulatory Authority or any Contract to which the Seller is a party or by which the Seller or any of the Seller's assets or properties is bound in connection with the execution and delivery by the Seller of this Agreement, the performance by the Seller of the Seller's obligations hereunder or the consummation of the transactions contemplated hereby.

Section 3.9 **Interests in Customers, Suppliers, Etc.** Except as set forth in Section 3.9 of the Disclosure Letter, neither the Seller, nor any Person controlled by the Seller, and to the Knowledge of the Seller no parent, brother, sister, child or spouse of the Seller, and no Person controlled by any parent, brother, sister, child or spouse of the Seller:

(a) owns, directly or indirectly, any interest in (except for ownership for investment purposes of less than 1% of the securities of any publicly held and traded company), or received or has any right to receive payments from, or is an officer, director, manager, employee, agent or consultant of, any Person which is, or is engaged in business as, a competitor, lessor, lessee, supplier, distributor, sales agent, customer or client of the [Company / Partnership];

(b) owns, directly or indirectly (other than through the Seller's ownership of the Interest of the Seller), in whole or in part, any tangible or intangible property (including, but not limited to, Intellectual Property) that the [Company / Partnership] uses in the conduct of its business; or

(c) is owed any amount by, has any cause of action or other claim whatsoever against, or owes any amount to, the [Company / Partnership], except for claims in the ordinary

course of business such as for accrued vacation pay, accrued benefits under employee benefit plans, and similar matters and agreements existing on the date hereof.

**Section 3.10 Investment Intent.** The Seller is acquiring its Promissory Note for its own account and not with a view to distribution within the meaning of Section 2(11) of the Securities Act. [The Seller is an “accredited investor” as such term is defined in Rule 501(a) under the Securities Act.]

**Section 3.11 Disclosure by the Seller.**

(a) No representation or warranty of the Seller in this Agreement omits to state a material fact necessary to make the statements herein or therein, in light of the circumstances in which they were made, not misleading.

(b) No notice given pursuant to Section 6.5 by the Seller will contain any untrue statement or omit to state a material fact necessary to make the statements therein or in this Agreement, in light of the circumstances in which they were made, not misleading.

## **ARTICLE 4**

### **Representations and Warranties of the Principal Seller[s]**

The Principal Seller[s], jointly and severally<sup>16</sup>, represent[s] and warrant[s] to the Purchaser as follows:

**Section 4.1 Organization and Good Standing.**

(a) The [Company / Partnership] is a [limited liability company / limited partnership] duly organized, validly existing, and in good standing under the laws of the State of Texas, with full power and authority to conduct its business as it is now being conducted, to own or use the properties and assets that it purports to own or use, and to perform all its obligations under Applicable Contracts. The [Company / Partnership] is duly qualified to do business as a foreign entity and is in good standing under the laws of each state or other jurisdiction in which either the ownership or use of the properties owned or used by it, or the nature of the activities conducted by it, requires such qualification.

(b) The Principal Seller[s] [has / have] delivered to the Purchaser copies of the [Certificate of Formation / Articles of Organization / Certificate of Limited Partnership] and [Company Agreement / Partnership Agreement] of the [Company / Partnership], as currently in effect.

**Section 4.2 Non-Contravention.** The execution and delivery by the Sellers of this Agreement, the performance by the Sellers of the Seller’s obligations hereunder and the

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<sup>16</sup> While the Purchaser may be convinced to accept separate and several representations and warranties with respect of a few limited matters such as individual power and authority and ownership, if there are multiple Sellers who have managed and controlled the target, it is likely that the Purchaser will insist that their representations regarding the business of the target entity be made jointly.

consummation of the transactions contemplated hereby, will not (a) contravene, conflict with, or result in a violation of any provision of the [Certificate of Formation / Articles of Organization or Company Agreement / Regulations of the Company / Certificate of Formation / Certificate of Limited Partnership or Partnership Agreement of the Partnership]; (b) result in the violation by the [Company / Partnership] of any Legal Requirement or Order of any Governmental or Regulatory Authority applicable to the [Company / Partnership] or any assets or properties of the [Company / Partnership]; or (c) if the consents and notices set forth in Section 4.3 of the Disclosure Letter are obtained or given, conflict with, result in a violation or breach of, constitute (with or without notice or lapse of time or both) a default under, require the [Company / Partnership] (except as set forth in the Disclosure Letter) to obtain any consent, approval or action of, make any filing with or give any notice to any Person pursuant to, result in or give to any Person any right of payment or reimbursement, termination, cancellation, modification or acceleration of, or result in the creation or imposition of any Liens upon any of the assets or properties of the [Company / Partnership] under, any of the terms, conditions or provisions of any Contract to which the [Company / Partnership] is a party or by which the [Company / Partnership] or any of the assets or properties of the [Company / Partnership] is bound.

**Section 4.3 Approvals and Consents.** Except as set forth in Section 4.3 of the Disclosure Letter, no consent, approval, authorization or action of, registration or filing with, or notice to any Governmental or Regulatory Authority or other Person is necessary or required under any of the terms, conditions or provisions of any Legal Requirement or Order of any Governmental or Regulatory Authority or any Contract to which the [Company / Partnership] is a party or by which the [Company / Partnership] or any of the assets or properties of the [Company / Partnership] is bound in connection with the execution and delivery by the Sellers of this Agreement, the performance by the Sellers of the Sellers' obligations hereunder or the consummation of the transactions contemplated hereby.

**Section 4.4 Financial Statements.**<sup>17</sup>

The Principal Seller[s] [has / have] delivered to the Purchaser:

(a) the [unaudited] balance sheets of the [Company / Partnership] as at \_\_\_\_\_ in each of the years \_\_\_ through \_\_\_, and the related [unaudited] statements of

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<sup>17</sup> In most cases, a target corporation will own subsidiary corporations and/or interests in unincorporated entities and financial statements and tax returns will be prepared for the group of entities on a consolidated basis. In recognition of this common situation, the *ABA Model Stock Purchase Agreement* uses the concept of "Acquired Companies" in connection with the Sellers' representations and warranties regarding the business enterprise. Another way this situation is commonly handled is to refer to the "Corporation and Its Subsidiaries" or the "Company and Its Owned Entities" or some other formulation that assures that the representations and warranties encompass the entire enterprise. For simplicity, this form does not include the concept of "Acquired Companies" and assumes that the target limited liability company or partnership does not own other entities. The form should be adjusted to include owned entities, if appropriate.

operations<sup>18</sup>, partners' equity,<sup>19</sup> and cash flow for each of the fiscal years then ended, [together with the report thereon of \_\_\_\_\_, independent certified public accountants,]

(b) a balance sheet of the [Company / Partnership] as at \_\_\_\_\_ (including the notes thereto, the "Balance Sheet"), and the related statements of operations, partners' equity, and cash flow for the fiscal year then ended, together with the report thereon of \_\_\_\_\_, independent certified public accountants, and

(c) an unaudited consolidated balance sheet of the [Company / Partnership] as at \_\_\_\_\_ (the "Interim Balance Sheet") and the related unaudited statements of operations, partners' equity, and cash flow for the \_\_\_ months then ended, including in each case the notes thereto. Such financial statements and notes fairly present the financial condition and the results of operations, changes in partner capital accounts, and cash flow of the [Company / Partnership] as at the respective dates of and for the periods referred to in such financial statements, all in accordance with GAAP<sup>20</sup> [, subject, in the case of interim financial statements, to normal recurring year-end adjustments (the effect of which will not, individually or in the aggregate, be materially adverse) and the absence of notes (that, if presented, would not differ materially from those included in the Balance Sheet)]; the financial statements referred to in this Section 4.4 reflect the consistent application of such accounting principles throughout the periods involved [, except as disclosed in the notes to such financial statements].

**Section 4.5 Books and Records.** The books of account, [minute book,<sup>21</sup> or other] records of meetings and written consents of [members of the Company / partners of the Partnership], records regarding the transfers of Interests, records showing the equity interests of the [Company / Partnership] and other records of the [Company / Partnership], all of which have been made available to the Purchaser, are complete and correct and have been maintained in accordance with sound business practices, including the maintenance of an adequate system of internal controls. [The minute book of the Company contains accurate and complete records of all meetings held of, and action taken by, the members, managers and committees of the managers of the Company, and no meeting of the member managers, or any such committee has been held for which minutes have not been prepared and are not contained in minute book]. Upon or immediately following the Closing Date the Principal Seller[s] will cause all of those

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<sup>18</sup> When a limited liability company or limited partnership is classified as a partnership for federal income tax purposes, and thus is a pass-through entity, the term "statement of operations" is typically used instead of the term "statement of income" in the financial statements for an unincorporated entity.

<sup>19</sup> Financial statements for a corporation include statements of changes in shareholders' equity for the period or periods covered by the report. The term "statement of partners' equity" is used for the equivalent portion of the financial statements for an unincorporated entity classified as a partnership. The author has also encountered the term "partners' capital account reconciliation" used to identify this portion of the financial statements.

<sup>20</sup> Unincorporated entities classified as partnerships often maintain dual or multiple sets of financial records including financial records prepared according to GAAP and financial records prepared according to federal income tax accounting. The Purchaser may require that the Sellers make representations covering each set of financial records.

<sup>21</sup> Many unincorporated entities do not maintain minute books.



books and records to be delivered to the Purchaser; provided that the Principal Seller[s] may retain any such books and records that in [its / their] opinion may be required to be maintained by the Principal Seller[s] and the other Seller[s] in connection with the taxation of the Seller[s] with respect to their ownership of the Interests prior to the Closing Date.<sup>22</sup>

**Section 4.6 Title to Properties; Liens.** Section 4.6 of the Disclosure Letter contains a complete and accurate list of all real property, leaseholds, or other interests therein owned by the [Company / Partnership]. The Principal Seller[s] [has / have] delivered or made available to the Purchaser copies of the deeds and other instruments (as recorded) by which the [Company / Partnership] acquired such real property and interests, and copies of all title insurance policies, opinions, abstracts, and surveys in the possession of the Principal Seller[s] or the [Company / Partnership] and relating to such property or interests. The [Company / Partnership] owns (with good and marketable title in the case of real property, subject only to the matters permitted by the following sentence) all the properties and assets (whether real, personal, or mixed and whether tangible or intangible) it purports to own [located in the facilities owned or operated by the [Company / Partnership] or reflected as owned in the books and records of the [Company / Partnership], including all of the properties and assets reflected in the Balance Sheet and the Interim Balance Sheet (except for assets held under capitalized leases disclosed or not required to be disclosed in Section 4.6 of the Disclosure Letter and personal property sold since the date of the Balance Sheet and the Interim Balance Sheet, as the case may be, in the Ordinary Course of Business), and all of the properties and assets purchased or otherwise acquired by the [Company / Partnership] since the date of the Balance Sheet (except for personal property acquired and sold since the date of the Balance Sheet in the Ordinary Course of Business and consistent with past practice), which subsequently purchased or acquired properties and assets (other than inventory and short-term investments) are listed in Section 4.6 of the Disclosure Letter. All material properties and assets reflected in the Balance Sheet and the Interim Balance Sheet are free and clear of all Liens and are not, in the case of real property, subject to any rights of way, building use restrictions, exceptions, variances, reservations, or limitations of any nature except, with respect to all such properties and assets, (a) mortgages or security interests shown on the Balance Sheet or the Interim Balance Sheet as securing specified liabilities or obligations, with respect to which no default (or event that, with notice or lapse of time or both, would constitute a default) exists, (b) mortgages or security interests incurred in connection with the purchase of property or assets after the date of the Interim Balance Sheet (such mortgages and security interests being limited to the property or assets so acquired), with respect to which no default (or event that, with notice or lapse of time or both, would constitute a default) exists, (c) Liens for current taxes not yet due, and (d) with respect to real property, (i) minor imperfections of title, if any, none of which is substantial in amount, materially detracts from the value or impairs the use of the

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<sup>22</sup> Any tax audit or other question regarding taxation of a corporation after a stock sale will be the responsibility of the new Purchaser, as the new management of the corporation. For this reason, a typical stock purchase agreement provides that all books and records will remain in the possession of the corporation (and thus in the possession and control of the Purchaser). Because an unincorporated entity classified as a partnership is a pass-through entity, any tax audit or other question regarding taxation with respect to any period prior to the sale of Interests likely will be the responsibility of the members or partners. For this reason, this form provides that the general partner or manager or managing member will retain possession of the books and records that might be involved with any tax audit or other tax questions that arise after the Closing with respect to any period before the Closing Date. Note that mutual access is provided to all books and records in Section 12.4.

property subject thereto, or impairs the operations of the [Company / Partnership], and (ii) zoning laws and other land use restrictions that do not impair the present or anticipated use of the property subject thereto. All buildings, plants, and structures owned by the [Company / Partnership] lie wholly within the boundaries of the real property owned by the [Company / Partnership] and do not encroach upon the property of, or otherwise conflict with the property rights of, any other Person.

**Section 4.7 Condition and Sufficiency of Assets.** The buildings, plants, structures, and equipment of the [Company / Partnership] are structurally sound, are in good operating condition and repair, and are adequate for the uses to which they are being put, and none of such buildings, plants, structures, or equipment is in need of maintenance or repairs except for ordinary, routine maintenance and repairs that are not material in nature or cost. The building, plants, structures, and equipment of the [Company / Partnership] are sufficient for the continued conduct of the business of the [Company / Partnership] after the Closing in substantially the same manner as conducted prior to the Closing.

**Section 4.8 Accounts Receivable.** All accounts receivable of the [Company / Partnership] that are reflected on the Balance Sheet or the Interim Balance Sheet or on the accounting records of the [Company / Partnership] as of the Closing Date (collectively, the “Accounts Receivable”) represent or will represent valid obligations arising from sales actually made or services actually performed in the Ordinary Course of Business. Unless paid prior to the Closing Date, the Accounts Receivable are or will be as of the Closing Date current and collectible net of the respective reserves shown on the Balance Sheet or the Interim Balance Sheet or on the accounting records of the [Company / Partnership] as of the Closing Date (which reserves are adequate and calculated consistent with past practice and, in the case of the reserve as of the Closing Date, will not represent a greater percentage of the Accounts Receivable as of the Closing Date than the reserve reflected in the Interim Balance Sheet represented of the Accounts Receivable reflected therein and will not represent a material adverse change in the composition of such Accounts Receivable in terms of aging). Subject to such reserves, each of the Accounts Receivable either has been or will be collected in full, without any set-off, within ninety days after the day on which it first becomes due and payable. There is no contest, claim, or right of set-off, other than returns in the Ordinary Course of Business, under any Contract with any obligor of an Accounts Receivable relating to the amount or validity of such Accounts Receivable. Section 4.8 of the Disclosure Letter contains a complete and accurate list of all Accounts Receivable as of the date of the Interim Balance Sheet, which list sets forth the aging of such Accounts Receivable.

**Section 4.9 Inventory.** All inventory of the [Company / Partnership], whether or not reflected in the Balance Sheet or the Interim Balance Sheet, consists of a quality and quantity usable and salable in the Ordinary Course of Business, except for obsolete items and items of below-standard quality, all of which have been written off or written down to net realizable value in the Balance Sheet or the Interim Balance Sheet or on the accounting records of the [Company / Partnership] as of the Closing Date, as the case may be. All inventories not written off have been priced at the lower of cost or [market] [net realizable value] on a [last in, first out] [first in, first out] basis. The quantities of each item of inventory (whether raw materials, work-in-process, or finished goods) are not excessive, but are reasonable in the present circumstances of the [Company / Partnership].

**Section 4.10 No Undisclosed Liabilities.** Except as set forth in Section 4.10 of the Disclosure Letter, the [Company / Partnership] has no liabilities or obligations of any nature (whether known or unknown and whether absolute, accrued, contingent, or otherwise) except for liabilities or obligations reflected or reserved against in the Balance Sheet or the Interim Balance Sheet and current liabilities incurred in the Ordinary Course of Business since the respective dates thereof.

**Section 4.11 Taxes**

(a) The [Company / Partnership] has filed or caused to be filed all Tax Returns that are or were required to be filed by or with respect to it pursuant to applicable Legal Requirements. All such Tax Returns were correct and complete in all material respects. The Principal Seller[s] [has / have] delivered [or made available] to the Purchaser correct and complete copies of, and Section 4.11 of the Disclosure Letter contains a complete and accurate list of, all such Tax Returns relating to income or franchise taxes filed since \_\_\_\_\_. The [Company / Partnership] has paid, or made provision for the payment of, all Taxes that have or may have become due pursuant to those Tax Returns or otherwise, or pursuant to any assessment received by the [Company / Partnership], except such Taxes, if any, as are listed in Section 4.11 of the Disclosure Letter and are being contested in good faith and as to which adequate reserves (determined in accordance with GAAP) have been provided in the Balance Sheet and the Interim Balance Sheet.

(b) Section 4.11 of the Disclosure Letter contains a complete and accurate list of all Tax Returns filed since \_\_\_\_\_ that have been audited, including a reasonably detailed description of the nature and outcome of each audit, and indicates those Tax Returns that currently are the subject of audit. All deficiencies proposed as a result of such audits have been paid, reserved against, settled, or, as described in Section 4.11 of the Disclosure Letter, are being contested in good faith by appropriate proceedings. Except as described in Section 4.11 of the Disclosure Letter, the [Company / Partnership] has not been given or been requested to give waivers or extensions (or is or would be subject to a waiver or extension given by any other Person) of any statute of limitations relating to the payment of Taxes of the [Company / Partnership] or for which the [Company / Partnership] may be liable.

(c) Except as disclosed in the Balance Sheet or in Section 4.11 of the Disclosure Letter, there is no material dispute or claim concerning any Taxes of [the Company / Partnership] either (i) claimed or raised by any authority in writing or (ii) as to which any of the Sellers has Knowledge based upon personal contact with any agent of such authority.

(d) The unpaid Taxes of the [Company / Partnership] do not exceed by any material amount the charges, accruals, and reserves with respect to Taxes on the Interim Balance Sheet of the [Company / Partnership] and will not exceed by any material amount such charges, accruals and reserves as adjusted for operations and transactions through the Closing Date.

(e) All Taxes that the [Company / Partnership] is or was required by Legal Requirements to withhold or collect have been duly withheld or collected and, to the extent required, have been paid to the proper Governmental or Regulatory Authority or other Person.

(f) There is no tax sharing agreement that will require any payment by the [Company / Partnership] after the date of this Agreement.

(g) The [Company / Partnership] qualifies (and has since the date of its formation qualified) to be treated as a partnership for federal income tax purposes and none of the Partnership or any Partner or any taxing authority has taken a position inconsistent with such treatment.

(h) There are no Liens for Taxes upon any property of the [Company / Partnership] except for Liens for current Taxes not yet due and payable.

(i) None of the Sellers is a “foreign person” within the meaning of IRC Section 1445 and each of Sellers will furnish Purchaser with an affidavit satisfying the requirements of IRC Section 1445(b)(2) and the regulations thereunder of the United States Department of the Treasury.

**Section 4.12 No Material Adverse Change.** Since the date of the Balance Sheet, there has not been any material adverse change in the business, operations, properties, prospects, assets, or condition of the [Company / Partnership], and no event has occurred or circumstance exists that may result in such a material adverse change.

#### **Section 4.13 Employee Benefits.**

(a) Set forth in Section 4.13(a) of the Disclosure Letter is a complete and correct list of all “employee benefit plans” as defined by Section 3(3) of ERISA, all specified fringe benefit plans as defined in Section 6039D of the IRC, and all other bonus, incentive-compensation, deferred-compensation, profit-sharing, stock-option, stock-appreciation-right, stock-bonus, stock-purchase, employee-stock-ownership, savings, severance, change-in-control, supplemental-unemployment, layoff, salary-continuation, retirement, pension, health, life-insurance, disability, accident, group-insurance, vacation, holiday, sick-leave, fringe-benefit or welfare plan, and any other employee compensation or benefit plan, agreement, policy, practice, commitment, contract or understanding (whether qualified or nonqualified, currently effective or terminated, written or unwritten) and any trust, escrow or other agreement related thereto that:

(i) is maintained or contributed to by the [Company / Partnership] or any other entity or trade or business controlled by, controlling or under common control with the [Company / Partnership] (within the meaning of Section 414 of the IRC or Section 4001(a)(14) or 4001(b) of ERISA) (“ERISA Affiliate”) or has been maintained or contributed to in the last six (6) years by the [Company / Partnership] or any ERISA Affiliate, or with respect to which the [Company / Partnership] or any ERISA Affiliate has or may have any liability.

(ii) provides benefits, or describes policies or procedures applicable to any current or former director, officer, employee or service provider of the [Company / Partnership] or any ERISA Affiliate, or the dependents of any thereof, regardless of how (or whether) liabilities for the provision of benefits are accrued or assets are acquired or dedicated with respect to the funding thereof (collectively the “Employee Plans”).

Section 4.13(a) of the Disclosure Letter identifies as such any Employee Plan that is (A) a “Defined Benefit Plan” (as defined in Section 414(l) of the IRC); (B) a plan intended to meet the requirements of Section 401(a) of the IRC; (C) a “Multiemployer Plan” (as defined in Section 3(37) of ERISA); or (D) a plan subject to Title IV of ERISA, other than a Multiemployer Plan. Also set forth in Section 4.13(a) of the Disclosure Letter is a complete and correct list of all ERISA Affiliates of the [Company / Partnership] during the last six years.

(b) The Principal Seller[s] [has / have] delivered or caused to be delivered to the Purchaser true, accurate and complete copies of:

(i) the documents comprising each Employee Plan (or, with respect to any Employee Plan which is unwritten, a detailed written description of eligibility, participation, benefits, funding arrangements, assets and any other matters which relate to the obligations of The [Company / Partnership] or any ERISA Affiliate);

(ii) all trust agreements, insurance contracts or any other funding instruments related to the Employee Plans;

(iii) all rulings, determination letters, no-action letters or advisory opinions from the IRS, the U.S. Department of Labor, the Pension Benefit Guaranty Corporation (“PBGC”) or any other Governmental or Regulatory Authority that pertain to each Employee Plan and any open requests therefor;

(iv) the most recent actuarial and financial reports (audited and/or unaudited) and the annual reports filed with any Governmental or Regulatory Authority with respect to the Employee Plans during the current year and each of the three preceding years;

(v) all collective bargaining agreements pursuant to which contributions to any Employee Plan[s] have been made or obligations incurred (including both pension and welfare benefits) by the [Company / Partnership] or any ERISA Affiliate, and all collective bargaining agreements pursuant to which contributions are being made or obligations are owed by such entities;

(vi) all securities registration statements filed with respect to any Employee Plan;

(vii) all contracts with third-party administrators, actuaries, investment managers, consultants and other independent contractors that relate to any Employee Plan;

(viii) with respect to Employee Plans that are subject to Title IV of ERISA, the Form PBGC-1 filed for each of the three most recent plan years; and

(ix) all summary plan descriptions, summaries of material modifications and memoranda, employee handbooks and other written communications regarding the Employee Plans.

(c) Except as disclosed in Section 4.13(c) of the Disclosure Letter, full payment has been made of all amounts that are required under the terms of each Employee Plan to be paid as

contributions with respect to all periods prior to and including the last day of the most recent fiscal year of such Employee Plan ended on or before the date of this Agreement and all periods thereafter prior to the Closing Date, and no accumulated funding deficiency or liquidity shortfall (as those terms are defined in Section 302 of ERISA and Section 412 of the IRC) has been incurred with respect to any such Employee Plan, whether or not waived. The value of the assets of each Employee Plan exceeds the amount of all benefit liabilities (determined on a plan termination basis using the actuarial assumptions established by the PBGC as of the Closing Date) of such Employee Plan. The [Company / Partnership] is not required to provide security to an Employee Plan under Section 401(a)(29) of the IRC. The funded status of each Employee Plan that is a Defined Benefit Plan is disclosed in Section 4.13(c) of the Disclosure Letter in a manner consistent with the Statement of Financial Accounting Standards No. 87. The [Company / Partnership] has paid in full all required insurance premiums, subject only to normal retrospective adjustments in the ordinary course, with regard to the Employee Plans for all policy years or other applicable policy periods ending on or before the Closing Date.

(d) Except as disclosed in Section 4.13(d) of the Disclosure Letter, no Employee Plan, if subject to Title IV of ERISA, has been completely or partially terminated, nor has any event occurred nor does any circumstance exist that could result in the partial termination of such Employee Plan. The PBGC has not instituted or threatened a Proceeding to terminate or to appoint a trustee to administer any of the Employee Plans pursuant to Subtitle 1 of Title IV of ERISA, and no condition or set of circumstances exists that presents a material risk of termination or partial termination of any of the Employee Plans by the PBGC. None of the Employee Plans has been the subject of, and no event has occurred or condition exists that could be deemed, a reportable event (as defined in Section 4043 of ERISA) as to which a notice would be required (without regard to regulatory monetary thresholds) to be filed with the PBGC. The [Company / Partnership] has paid in full all insurance premiums due to the PBGC with regard to the Employee Plans for all applicable periods ending on or before the Closing Date.

(e) Neither the [Company / Partnership] nor any ERISA Affiliate has any liability or has Knowledge of any facts or circumstances that might give rise to any liability, and the Contemplated Transactions will not result in any liability:

(i) for the termination of or withdrawal from any Employee Plan under Sections 4062, 4063 or 4064 of ERISA,

(ii) for any lien imposed under Section 302(f) of ERISA or Section 412(n) of the IRC;

(iii) for any interest payments required under Section 302(e) of ERISA or Section 412(m) of the IRC;

(iv) for any excise tax imposed by Section 4971 of the IRC;

(v) for any minimum funding contributions under Section 302(c)(11) of ERISA or Section 412(c)(11) of the IRC or (vi) for withdrawal from any Multiemployer Plan under Section 4201 of ERISA.

(f) The [Company / Partnership] has, at all times, complied, and currently complies, in all material respects with the applicable continuation requirements for its welfare benefit plans, including (1) Section 4980B of the IRC (as well as its predecessor provision, Section 162(k) of the IRC) and Sections 601 through 608, inclusive, of ERISA, which provisions are hereinafter referred to collectively as “COBRA” and (2) any applicable state statutes mandating health insurance continuation coverage for employees.

(g) The form of all Employee Plans is in compliance with the applicable terms of ERISA, the IRC, and any other applicable laws, including the Americans with Disabilities Act of 1990, the Family Medical Leave Act of 1993 and the Health Insurance Portability and Accountability Act of 1996, and such plans have been operated in compliance with such laws and the written Employee Plan documents. Neither the [Company / Partnership] nor any fiduciary of an Employee Plan has violated the requirements of Section 404 of ERISA. All required reports and descriptions of the Employee Plans (including Internal Revenue Service Form 5500 Annual Reports, Summary Annual Reports and Summary Plan Descriptions and Summaries of Material Modifications) have been (when required) timely filed with the IRS, the U.S. Department of Labor or other Governmental or Regulatory Authority and distributed as required, and all notices required by ERISA or the IRC or any other Legal Requirement with respect to the Employee Plans have been appropriately given.

(h) Each Employee Plan that is intended to be qualified under Section 401(a) of the IRC has received a favorable determination letter from the IRS, and the Principal Seller[s] [has / have] no Knowledge of any circumstances that will or could result in revocation of any such favorable determination letter. Each trust created under any Employee Plan has been determined to be exempt from taxation under Section 501(a) of the IRC, and the Principal Seller[s] [has / have] no knowledge of any circumstance that will or could result in a revocation of such exemption. Each Employee Welfare Benefit Plan (as defined in Section 3(1) of ERISA) that utilizes a funding vehicle described in Section 501(c)(9) of the IRC or is subject to the provisions of Section 505 of the IRC has been the subject of a notification by the IRS that such funding vehicle qualifies for tax-exempt status under Section 501(c)(9) of the IRC or that the plan complies with Section 505 of the IRC, unless the IRS does not, as a matter of policy, issue such notification with respect to the particular type of plan. With respect to each Employee Plan, no event has occurred or condition exists that will or could give rise to a loss of any intended tax consequence or to any Tax under Section 511 of the IRC.

(i) There is no material pending or threatened Proceeding relating to any Employee Plan, nor is there any basis for any such Proceeding. Neither the [Company / Partnership] nor any fiduciary of an Employee Plan has engaged in a transaction with respect to any Employee Plan that, assuming the taxable period of such transaction expired as of the date hereof, could subject the [Company / Partnership] or the Purchaser to a Tax or penalty imposed by either Section 4975 of the IRC or Section 502(l) of ERISA or a violation of Section 406 of ERISA. The Contemplated Transactions will not result in the potential assessment of a Tax or penalty under Section 4975 of the IRC or Section 502(l) of ERISA nor result in a violation of Section 406 of ERISA.

(j) The [Company / Partnership] has maintained workers' compensation coverage as required by applicable state law through purchase of insurance and not by self-insurance or otherwise except as disclosed to the Purchaser in Section 4.13(j) of the Disclosure Letter.

(k) Except as required by Legal Requirements, the consummation of the Contemplated Transactions will not accelerate the time of vesting or the time of payment, or increase the amount, of compensation due to any director, employee, officer, former employee or former officer of the [Company / Partnership]. There are no contracts or arrangements providing for payments that could subject any person to liability for tax under Section 4999 of the IRC.

(l) Except for the continuation coverage requirements of COBRA, the [Company / Partnership] has no obligations or potential liability for benefits to employees, former employees or their respective dependents following termination of employment or retirement under any of the Employee Plans that are Employee Welfare Benefit Plans.

(m) None of the Contemplated Transactions will result in an amendment, modification or termination of any of the Employee Plans. No written or oral representations have been made to any employee or former employee of the [Company / Partnership] promising or guaranteeing any employer payment or funding for the continuation of medical, dental, life or disability coverage for any period of time beyond the end of the current plan year (except to the extent of coverage required under COBRA). No written or oral representations have been made to any employee or former employee of the [Company / Partnership] concerning the employee benefits of the Purchaser.

(n) With respect to any Employee Plan that is a "multiemployer plan" within the meaning of Section 4001(a)(3) of ERISA ("Multiemployer Plan"), and any other Multiemployer Plan to which the [Company / Partnership] has at any time had an obligation to contribute:

(i) all contributions required by the terms of such Multiemployer Plan and any collective bargaining agreement have been made when due; and

(ii) the [Company / Partnership] would not be subject to any withdrawal liability under Part 1 of Subtitle E of Title IV of ERISA if, as of the date hereof, the [Company / Partnership] were to engage in a "complete withdrawal" (as defined in ERISA Section 4203) or a "partial withdrawal" (as defined in ERISA Section 4205) from such Multiemployer Plan.

**Section 4.14 Compliance With Legal Requirements; Governmental Authorizations.**

(a) Except as set forth in Section 4.14 of the Disclosure Letter:

(i) the [Company / Partnership] is, and at all times since \_\_\_\_\_, 20\_\_\_\_ has been, in full compliance with each Legal Requirement that is or was applicable to it or to the conduct or operation of its business or the ownership or use of any of its assets;

(ii) no event has occurred or circumstance exists that (with or without notice or lapse of time) (A) may constitute or result in a violation by the [Company / Partnership] of, or a failure on the part of the [Company / Partnership] to comply with, any Legal Requirement, or



(B) may give rise to any obligation on the part of the [Company / Partnership] to undertake, or to bear all or any portion of the cost of, any remedial action of any nature; and

(iii) the [Company / Partnership] has received, at any time since \_\_\_\_\_, 20\_\_\_, any notice or other communication (whether oral or written) from any Governmental or Regulatory Authority or any other Person regarding (A) any actual, alleged, possible, or potential violation of, or failure to comply with, any Legal Requirement, or (B) any actual, alleged, possible, or potential obligation on the part of the [Company / Partnership] to undertake, or to bear all or any portion of the cost of, any remedial action of any nature.

(b) Section 4.14 of the Disclosure Letter contains a complete and accurate list of each Governmental Authorization that is held by the [Company / Partnership] or that otherwise relates to the business of, or to any of the assets owned or used by, the [Company / Partnership]. Each Governmental Authorization listed or required to be listed in Section 4.14 of the Disclosure Letter is valid and in full force and effect. Except as set forth in Section 4.14 of the Disclosure Letter:

(i) the [Company / Partnership] is, and at all times since \_\_\_\_\_, 20\_\_\_ has been, in full compliance with all of the terms and requirements of each Governmental Authorization identified or required to be identified in Section 4.14 of the Disclosure Letter;

(ii) no event has occurred or circumstance exists that may (with or without notice or lapse of time) (A) constitute or result directly or indirectly in a violation of or a failure to comply with any term or requirement of any Governmental Authorization listed or required to be listed in Section 4.14 of the Disclosure Letter, or (B) result directly or indirectly in the revocation, withdrawal, suspension, cancellation, or termination of, or any modification to, any Governmental Authorization listed or required to be listed in Section 4.14 of the Disclosure Letter;

(iii) the [Company / Partnership] has not received, at any time since \_\_\_\_\_, 20\_\_\_, any notice or other communication (whether oral or written) from any Governmental or Regulatory Authority or any other Person regarding (A) any actual, alleged, possible, or potential violation of or failure to comply with any term or requirement of any Governmental Authorization, or (B) any actual, proposed, possible, or potential revocation, withdrawal, suspension, cancellation, termination of, or modification to any Governmental Authorization, and

(iv) all applications required to have been filed for the renewal of the Governmental Authorizations listed or required to be listed in Section 4.14 of the Disclosure Letter have been duly filed on a timely basis with the appropriate Governmental or Regulatory Authority, and all other filings required to have been made with respect to such Governmental Authorizations have been duly made on a timely basis with the appropriate Governmental or Regulatory Authority.

(c) The Governmental Authorizations listed in Section 4.14 of the Disclosure Letter collectively constitute all of the Governmental Authorizations necessary to permit the [Company / Partnership] to lawfully conduct and operate its businesses in the manner it currently conducts

and operates such businesses and to permit the [Company / Partnership] to own and use its assets in the manner in which it currently owns and uses such assets.

**Section 4.15 Legal Proceedings; Orders.**

(a) Except as set forth in Section 4.15 of the Disclosure Letter, there is no pending Proceeding:

(i) that has been commenced by or against the [Company / Partnership] or that otherwise relates to or may affect the business of, or any of the assets owned or used by, the [Company / Partnership]; or

(ii) that challenges, or that may have the effect of preventing, delaying, making illegal, or otherwise interfering with, any of the Contemplated Transactions.

To the Knowledge of the Principal Seller[s], (A) no such Proceeding has been Threatened, and (B) no event has occurred or circumstance exists that may give rise to or serve as a basis for the commencement of any such Proceeding. The Principal Seller[s] [has / have] delivered to the Purchaser copies of all pleadings, correspondence, and other documents relating to each Proceeding listed in Section 4.15 of the Disclosure Letter. The Proceedings listed in Section 4.15 of the Disclosure Letter will not have a material adverse effect on the business, operations, assets, condition, or prospects of the [Company / Partnership].

(b) Except as set forth in Section 4.15 of the Disclosure Letter:

(i) there is no Order to which the [Company / Partnership], or any of the assets owned or used by the [Company / Partnership], is subject;

(ii) [to the Knowledge of the Principal Seller[s]] no [officer, manager, agent, or employee of the Company / partner, agent or employee of the Partnership or officer, director, manager, agent or employee of the General Partner]<sup>23</sup> is subject to any Order that prohibits such person from engaging in or continuing any conduct, activity, or practice relating to the business of the [Company / Partnership].

(c) Except as set forth in Section 4.15 of the Disclosure Letter:

(i) the [Company / Partnership] is, and at all times since \_\_\_\_\_, 20\_\_ has been, in full compliance with all of the terms and requirements of each Order to which it, or any of the assets owned or used by it, is or has been subject;

(ii) no event has occurred or circumstance exists that may constitute or result in (with or without notice or lapse of time) a violation of or failure to comply with any term or

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<sup>23</sup> Frequently, limited partnerships have no employees. The entity is managed by officers and employees of the General Partner. Occasionally, limited liability companies likewise have a manager entity that employs management personnel. This language and similar language throughout this form represents an attempt to be certain that provisions of the agreement intended to describe or cover the target entity's management team take into account this kind of "layered" management arrangement.

requirement of any Order to which the [Company / Partnership], or any of the assets owned or used by the [Company / Partnership], is subject; and

(iii) the [Company / Partnership] has not received, at any time since \_\_\_\_\_, 20\_\_\_, any notice or other communication (whether oral or written) from any Governmental or Regulatory Authority or any other Person regarding any actual, alleged, possible, or potential violation of, or failure to comply with, any term or requirement of any Order to which the [Company / Partnership], or any of the assets owned or used by the [Company / Partnership], is or has been subject.

**Section 4.16 Absence of Certain Changes and Events.** Except as set forth in Section 4.16 of the Disclosure Letter, since the date of the Balance Sheet, the [Company / Partnership] has conducted its business only in the Ordinary Course of Business and there has not been any:

(a) transfer or change of record or beneficial ownership by any [member / partner] of its Interest or any other voting, equity or ownership interest in the [Company / Partnership], issuance of any voting, equity or ownership interest in the [Company / Partnership] or grant of any option or right to purchase any voting, equity or ownership interest in the [Company / Partnership], admission or agreement to admit any new [member / partner] to the [Company / Partnership], grant of any purchase, redemption, retirement, or other acquisition by the [Company / Partnership] of any Interest or other voting, equity or ownership interest in the [Company / Partnership], payment of or agreement to pay any distribution in respect of any of the Interests<sup>24</sup>;

(b) amendment to the [Certificate of Formation / Articles of Organization / Certificate of Limited Partnership] or [Company Agreement / Regulations / Partnership Agreement] of the [Company / Partnership];

(c) payment or increase by the [Company / Partnership] of any bonuses, salaries, or other compensation to any [any member, manager, officer or (except in the Ordinary Course of Business) employee of the Company / any partner of the Partnership, shareholder, member, director, manager or officer of the General Partner, or (except in the Ordinary Course of Business) employee of the Partnership or of the General Partner] or entry into any employment, severance, or similar Contract with any such person;

(d) adoption of, or increase in the payments to or benefits under, any profit sharing, bonus, deferred compensation, savings, insurance, pension, retirement, or other employee benefit plan for or with any employees of the [Company / Partnership];

(e) damage to or destruction or loss of any asset or property of the [Company / Partnership], whether or not covered by insurance, materially and adversely affecting the properties, assets, business, financial condition, or prospects of the [Company / Partnership];

(f) entry into, termination of, or receipt of notice of termination of (i) any license, distributorship, dealer, sales representative, joint venture, credit, or similar agreement, or (ii) any

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<sup>24</sup> Note that these provisions have been tailored to refer to an unincorporated entity.

Contract or transaction involving a total remaining commitment by or to the [Company / Partnership] of at least \$\_\_\_\_\_;

(g) sale (other than sales of inventory in the Ordinary Course of Business), lease, or other disposition of any asset or property of the [Company / Partnership] or mortgage, pledge, or imposition of any other Lien on any material asset or property of the [Company / Partnership], including the sale, lease, or other disposition of any of the Intellectual Property of the [Company / Partnership];

(h) cancellation or waiver of any claims or rights with a value to the [Company / Partnership] in excess of \$\_\_\_\_\_;

(i) material change in the accounting methods used by the [Company / Partnership],  
or

(j) agreement, whether oral or written, by the [Company / Partnership] to do any of the foregoing.

#### Section 4.17 **Contracts; No Defaults.**

(a) Section 4.17(a) of the Disclosure Letter contains a complete and accurate list, and the Principal Seller[s] [has / have] delivered to the Purchaser true and complete copies, of:

(i) each Applicable Contract that involves performance of services or delivery of goods or materials by the [Company / Partnership] of an amount or value in excess of \$\_\_\_\_\_;

(ii) each Applicable Contract that involves performance of services or delivery of goods or materials to the [Company / Partnership] of an amount or value in excess of \$\_\_\_\_\_;

(iii) each Applicable Contract that was not entered into in the Ordinary Course of Business and that involves expenditures or receipts of the [Company / Partnership] in excess of \$\_\_\_\_\_;

(iv) each lease, rental or occupancy agreement, license, installment and conditional sale agreement, and other Applicable Contract affecting the ownership of, leasing of, title to, use of, or any leasehold or other interest in, any real or personal property (except personal property leases and installment and conditional sales agreements having a value per item or aggregate payments of less than \$\_\_\_\_\_ and with terms of less than one year);

(v) each licensing agreement or other Applicable Contract with respect to patents, trademarks, copyrights, or other Intellectual Property of the [Company / Partnership], including agreements with current or former employees, consultants, or contractors regarding the appropriation or the non-disclosure of any of the Intellectual Property;

(vi) each collective bargaining agreement and other Applicable Contract to or with any labor union or other employee representative of a group of employees;

(vii) each joint venture, partnership, and other Applicable Contract (however named) involving a sharing of profits, losses, costs, or liabilities by the [Company / Partnership] with any other Person;

(viii) each Applicable Contract containing covenants that in any way purport to restrict the business activity of the [Company / Partnership] or any Affiliate of the [Company / Partnership] or limit the freedom of the [Company / Partnership] or any Affiliate of the [Company / Partnership] to engage in any line of business or to compete with any Person;

(ix) each Applicable Contract providing for payments to or by any Person based on sales, purchases, or profits, other than direct payments for goods;

(x) each power of attorney that is currently effective and outstanding;

(xi) each Applicable Contract entered into other than in the Ordinary Course of Business that contains or provides for an express undertaking by the [Company / Partnership] to be responsible for consequential damages;

(xii) each Applicable Contract for capital expenditures in excess of \$ \_\_\_\_\_;

(xiii) each written warranty, guaranty, and or other similar undertaking with respect to contractual performance extended by the [Company / Partnership] other than in the Ordinary Course of Business; and

(xiv) each amendment, supplement, and modification (whether oral or written) in respect of any of the foregoing.

Section 4.17 of the Disclosure Letter sets forth reasonably complete details concerning such Contracts, including the parties to the Contracts, the amount of the remaining commitment of the [Company / Partnership] under the Contracts, and the office of the [Company / Partnership] where details relating to the Contracts are located.

(b) Except as set forth in Section 4.17(b) of the Disclosure Letter, [to the Knowledge of the Principal Seller[s]] no [officer, manager, employee, consultant, agent or contractor of the Company / partner, employee, consultant, agent or contractor of the Partnership or officer, manager, director, employee, consultant, agent or contractor of the General Partner] is bound by any Contract that purports to limit the ability of such Person to (A) engage in or continue any conduct, activity, or practice relating to the business of the [Company / Partnership], or (B) assign to the [Company / Partnership] or to any other Person any rights to any invention, improvement, or discovery.

(c) Except as set forth in Section 4.17(c) of the Disclosure Letter, each Contract identified or required to be identified in Section 4.17(c) of the Disclosure Letter is in full force and effect and is valid and enforceable in accordance with its terms.

(d) Except as set forth in Section 4.17(d) of the Disclosure Letter:

(i) the [Company / Partnership] is, and at all times since \_\_\_\_\_, 20\_\_ has been, in full compliance with all applicable terms and requirements of each Contract under which the [Company / Partnership] has or had any obligation or liability or by which the [Company / Partnership] or any of the assets owned or used by the [Company / Partnership] is or was bound;

(ii) each other Person that has or had any obligation or liability under any Contract under which the [Company / Partnership] has or had any rights is, and at all times since \_\_\_\_\_, 20\_\_ has been, in full compliance with all applicable terms and requirements of such Contract;

(iii) no event has occurred or circumstance exists that (with or without notice or lapse of time) may contravene, conflict with, or result in a violation or breach of, or give the [Company / Partnership] or other Person the right to declare a default or exercise any remedy under, or to accelerate the maturity or performance of, or to cancel, terminate, or modify, any Applicable Contract; and

(iv) the [Company / Partnership] has given to or received from any other Person, at any time since \_\_\_\_\_, 20\_\_, any notice or other communication (whether oral or written) regarding any actual, alleged, possible, or potential violation or breach of, or default under, any Contract.

(e) There are no renegotiations of, attempts to renegotiate, or outstanding rights to renegotiate any material amounts paid or payable to the [Company / Partnership] under current or completed Contracts with any Person and [, to the Knowledge of the Principal Seller[s],] no such Person has made written demand for such renegotiation.

(f) The Contracts relating to the sale, design, manufacture, or provision of products or services by the [Company / Partnership] have been entered into in the Ordinary Course of Business and have been entered into without the commission of any act alone or in concert with any other Person, or any consideration having been paid or promised, that is or would be in violation of any Legal Requirement.

#### Section 4.18 **Insurance.**

(a) the Principal Seller[s] [has / have] delivered to the Purchaser:

(i) true and complete copies of all policies of insurance to which the [Company / Partnership] is a party or under which the [Company / Partnership], or [any officer or manager of the Company / officer, manager or director of the General Partner], is or has been covered at any time within the \_\_\_\_\_ years preceding the date of this Agreement;

(ii) true and complete copies of all pending applications for policies of insurance; and

(iii) any statement by the auditor of the [Company's / Partnership's] financial statements with regard to the adequacy of such entity's coverage or of the reserves for claims.

(b) Section 4.18(b) of the Disclosure Letter describes:

(i) any self-insurance arrangement by or affecting the [Company / Partnership], including any reserves established thereunder;

(ii) any contract or arrangement, other than a policy of insurance, for the transfer or sharing of any risk by the [Company / Partnership]; and

(iii) all obligations of the [Company / Partnership] to third parties with respect to insurance (including such obligations under leases and service agreements) and identifies the policy under which such coverage is provided.

(c) Section 4.18(c) of the Disclosure Letter sets forth, by year, for the current policy year and each of the \_\_\_\_\_ preceding policy years:

(i) a summary of the loss experience under each policy;

(ii) a statement describing each claim under an insurance policy for an amount in excess of \$\_\_\_\_\_, which sets forth:

(A) the name of the claimant;

(B) a description of the policy by insurer, type of insurance, and period of coverage; and

(C) the amount and a brief description of the claim; and

(iii) a statement describing the loss experience for all claims that were self-insured, including the number and aggregate cost of such claims.

(d) Except as set forth on Section 4.18(d) of the Disclosure Letter:

(i) All policies to which the [Company / Partnership] is a party or that provide coverage to the [Company / Partnership] or any [officer or manager of the Company / officer, manager or director of the General Partner]:

(A) are valid, outstanding, and enforceable;

(B) are issued by an insurer that is financially sound and reputable;

(C) taken together, provide adequate insurance coverage for the assets and the operations of the [Company / Partnership] [for all risks normally insured against by a Person carrying on the same business or businesses as the [Company / Partnership]] [for all risks to which the [Company / Partnership] are normally exposed];

(D) are sufficient for compliance with all Legal Requirements and Contracts to which the [Company / Partnership] is a party or by which it is bound;

(E) will continue in full force and effect following the consummation of the Contemplated Transactions; and

(F) do not provide for any retrospective premium adjustment or other experienced-based liability on the part of the [Company / Partnership].

(ii) None of the Principal Seller[s] nor the [Company / Partnership] has received:

(A) any refusal of coverage or any notice that a defense will be afforded with reservation of rights, or

(B) any notice of cancellation or any other indication that any insurance policy is no longer in full force or effect or will not be renewed or that the issuer of any policy is not willing or able to perform its obligations thereunder.

(iii) The [Company / Partnership] has paid all premiums due, and has otherwise performed all of its obligations, under each policy to which the [Company / Partnership] is a party or that provides coverage to the [Company / Partnership] or any [officer or manager of the Company / officer, manager or director of the General Partner].

(iv) The [Company / Partnership] has given notice to the insurer of all claims that may be insured thereby.

Section 4.19 **Environmental Matters.** Except as set forth in Section 4.19 of the Disclosure Letter:

(a) The [Company / Partnership] is, and at all times has been, in full compliance with, and has not been and is not in violation of or liable under, any Environmental Law. None of the Principal Seller[s] nor the [Company / Partnership] has any basis to expect, nor has any of them or any other Person for whose conduct they are or may be held to be responsible received, any actual or Threatened order, notice, or other communication from (i) any Governmental or Regulatory Authority or private citizen acting in the public interest, or (ii) the current or prior owner or operator of any Facilities, of any actual or potential violation or failure to comply with any Environmental Law, or of any actual or Threatened obligation to undertake or bear the cost of any Environmental, Health, and Safety Liabilities with respect to any of the Facilities or any other properties or assets (whether real, personal, or mixed) in which the [Company / Partnership] has had an interest, or with respect to any property or Facility at or to which Hazardous Materials were generated, manufactured, refined, transferred, imported, used, or processed by the [Company / Partnership], or any other Person for whose conduct the [Company / Partnership] is or may be held responsible, or from which Hazardous Materials have been transported, treated, stored, handled, transferred, disposed, recycled, or received.

(b) There are no pending or, to the Knowledge of the Principal Seller[s], Threatened claims, Liens, or other restrictions of any nature, resulting from any Environmental, Health, and Safety Liabilities or arising under or pursuant to any Environmental Law, with respect to or affecting any of the Facilities or any other properties and assets (whether real, personal, or mixed) in which the [Company / Partnership] has or had an interest.



(c) The Principal Seller[s] [does / do] not have any basis to expect, nor has any of them or any other Person for whose conduct they are or may be held responsible, received, any citation, directive, inquiry, notice, Order, summons, warning, or other communication that relates to any Hazardous Activity, Hazardous Materials, or any alleged, actual, or potential violation or failure to comply with any Environmental Law, or of any alleged, actual, or potential obligation to undertake or bear the cost of any Environmental, Health, and Safety Liabilities with respect to any of the Facilities or any other properties or assets (whether real, personal, or mixed) in which the [Company / Partnership] had an interest, or with respect to any property or facility to which Hazardous Materials generated, manufactured, refined, transferred, imported, used, or processed by the [Company / Partnership], or any other Person for whose conduct it is or may be held responsible, have been transported, treated, stored, handled, transferred, disposed, recycled, or received.

(d) Neither the [Company / Partnership], nor any other Person for whose conduct it is or may be held responsible, has any Environmental, Health, and Safety Liabilities with respect to the Facilities or [, to the Knowledge of the Principal Seller[s]] with respect to any other properties and assets (whether real, personal, or mixed) in which the [Company / Partnership] (or any predecessor), has or had an interest, or at any property geologically or hydrologically adjoining the Facilities or any such other property or assets.

(e) There are no Hazardous Materials present on or in the Environment at the Facilities or at any geologically or hydrologically adjoining property, including any Hazardous Materials contained in barrels, above or underground storage tanks, landfills, land deposits, dumps, equipment (whether moveable or fixed) or other containers, either temporary or permanent, and deposited or located in land, water, sumps, or any other part of the Facilities or such adjoining property, or incorporated into any structure therein or thereon. Neither the [Company / Partnership], nor any other Person for whose conduct it is or may be held responsible, or [to the Knowledge of the Principal Seller[s],] any other Person, has permitted or conducted, or is aware of, any Hazardous Activity conducted with respect to the Facilities or any other properties or assets (whether real, personal, or mixed) in which the [Company / Partnership] has or had an interest [except in full compliance with all applicable Environmental Laws].

(f) There has been no Release or, to the Knowledge of the Principal Seller[s], Threat of Release, of any Hazardous Materials at or from the Facilities or at any other locations where any Hazardous Materials were generated, manufactured, refined, transferred, produced, imported, used, or processed from or by the Facilities, or from or by any other properties and assets (whether real, personal, or mixed) in which the [Company / Partnership] has or had an interest, or [to the Knowledge of the Principal Seller[s]] any geologically or hydrologically adjoining property, whether by the [Company / Partnership] or any other Person.

(g) the Principal Seller[s] [has/ have] delivered to the Purchaser true and complete copies and results of any reports, studies, analyses, tests, or monitoring possessed or initiated by the [Company / Partnership] pertaining to Hazardous Materials or Hazardous Activities in, on, or under the Facilities, or concerning compliance by the [Company / Partnership], or any other Person for whose conduct it is or may be held responsible, with Environmental Laws.

## Section 4.20 **Employees.**

(a) Section 4.20 of the Disclosure Letter contains a complete and accurate list of the following information for each employee or director of the [Company / Partnership], including each employee on leave of absence or layoff status: employer; name; job title; current compensation paid or payable and any change in compensation since \_\_\_\_\_, 20\_\_\_; vacation accrued; and service credited for purposes of vesting and eligibility to participate under the pension, retirement, profit-sharing, thrift-savings, deferred compensation, plan granting options to receive ownership interests in the [Company / Partnership],<sup>25</sup> cash bonus, employee, severance pay, insurance, medical, welfare, or vacation plan or other Employee Plans.

(b) No [employee, officer or manager of the Company / employee of the Partnership or employee, officer, manager or director of the General Partner] is a party to, or is otherwise bound by, any agreement or arrangement, including any confidentiality, noncompetition, or proprietary rights agreement (“Proprietary Rights Agreement”) that in any way adversely affects or will affect (i) the performance of his duties as an [employee, officer or manager of the Company / employee of the Partnership or employee, officer, manager or director of the General Partner], or (ii) the ability of the [Company / Partnership] to conduct its business, including any Proprietary Rights Agreement with the [Company / Partnership] by any such Person. To the Knowledge of the Principal Seller[s], no [employee, officer or manager of the Company / employee of the Partnership or employee, officer, manager or director of the General Partner] intends to terminate his employment with the [Company / Partnership or the General Partner].

(c) Section 4.20 of the Disclosure Letter also contains a complete and accurate list of the following information for each retired [employee, officer or manager of the Company / employee of the Partnership or employee, officer, manager or director of the General Partner], or their dependents, receiving benefits or scheduled to receive benefits in the future: name, pension benefit, pension option election, retiree medical insurance coverage, retiree life insurance coverage, and other benefits.

**Section 4.21 Labor Relations; Compliance.** Since \_\_\_\_\_, 20\_\_\_, the [Company / Partnership] has not been and is not a party to any collective bargaining or other labor Contract. Since \_\_\_\_\_, 20\_\_\_, there has not been, there is not presently pending or existing, and [to the Knowledge of the Principal Seller[s]] there is not Threatened, (a) any strike, slowdown, picketing, work stoppage, or employee grievance process, (b) any Proceeding against or affecting the [Company / Partnership] relating to the alleged violation of any Legal Requirement pertaining to labor relations or employment matters, including any charge or complaint filed by an employee or union with the National Labor Relations Board, the Equal

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<sup>25</sup> The legal and tax effects of granting options and other incentive compensation arrangements when the employer is a corporation are fairly widely understood. However, such compensation arrangements when the employer is a limited liability company or a limited partnership classified as a partnership have much more complicated tax and legal repercussions. The following outlines contain excellent overviews of this topic: *The Murky World of Compensation Issues in Passthroughs* by Robert R. Keatinge, presented at The University of Texas School of Law Continuing Legal Education Program on Partnership, Limited Partnerships and Limited Liability Companies, July 15 and 16, 2004 and *Primer on Compensation Issues for Unincorporated Entities* by Robert R. Keatinge, John R. Maxfield and Thomas E. Yearout, presented at The University of Texas School of Law Continuing Legal Education Program on Partnerships, Limited Partnerships and LLCs, July 20 and 21, 2006.

Employment Opportunity Commission, or any comparable Governmental or Regulatory Authority, organizational activity, or other labor or employment dispute against or affecting the [Company / Partnership] or its Facility, or (c) any application for certification of a collective bargaining agent. [To the Knowledge of the Principal Seller[s]] no event has occurred or circumstance exists that could provide the basis for any work stoppage or other labor dispute. There is no lockout of any employees by the [Company / Partnership], and no such action is contemplated by the [Company / Partnership]. The [Company / Partnership] has complied in all respects with all Legal Requirements relating to employment, equal employment opportunity, nondiscrimination, immigration, wages, hours, benefits, collective bargaining, the payment of social security and similar taxes, occupational safety and health, and plant closing. The [Company / Partnership] is not liable for the payment of any compensation, damages, taxes, fines, penalties, or other amounts, however designated, for failure to comply with any of the foregoing Legal Requirements.

#### Section 4.22 **Intellectual Property**

(a) Section 4.22 of the Disclosure Letter sets forth a true, accurate and complete list of all:

(i) patents, patent applications, registered trademarks, applications for registered trademarks, registered service marks, applications for registered service marks, registered copyrights and applications for registered copyrights which are used in connection with the business of the [Company / Partnership] (the “Registered IP”); and

(ii) unregistered trademarks, unregistered service marks and unregistered copyrights which are used in connection with the business of the [Company / Partnership] (the “Unregistered IP”).

(b) Except as set forth in Section 4.22 of the Disclosure Letter, the registrations and applications of the Registered IP listed and owned by the [Company / Partnership] are in the name of the [Company / Partnership], and are valid, in proper form, enforceable and subsisting, all necessary registration and renewal fees in connection with such registrations have been made and all necessary documents and certificates in connection with such registrations have been filed with the relevant patent, copyrights and trademark authorities in the United States and any other jurisdiction where the business of the [Company / Partnership] is conducted for the purposes of maintaining such Intellectual Property registrations, and applications therefor. No registration, or application therefor, of any of the Registered IP has lapsed, expired, or been abandoned, and no such registrations, or applications therefor, are the subject of any opposition, interference, cancellation, or other legal, quasi-legal, or governmental proceeding pending before any Governmental or Regulatory Authority.

(c) Except as set forth in Section 4.22 of the Disclosure Letter:

(i) no Person has any rights to use any of the Intellectual Property of the [Company / Partnership];

(ii) the [Company / Partnership] has not granted to any Person, nor authorized any Person to retain, any rights in the Intellectual Property of the [Company / Partnership];

(iii) the [Company / Partnership] owns all rights, title and interest in, or has the right to use pursuant to valid license agreements, all Intellectual Property used in, or necessary for, the conduct of the business of the [Company / Partnership], free and clear of all Liens; and

(iv) all Off-the-Shelf Software in the possession of the [Company / Partnership] or used in the operation of the business of the [Company / Partnership] has been properly licensed from the owner of such software and the [Company / Partnership] possesses all license agreements, certificates or documentation sufficient to substantiate such rights.

(d) Except as set forth in Section 4.22 of the Disclosure Letter, the consummation of the transactions contemplated hereby will not result in any loss or impairment of the rights of the [Company / Partnership] to own or use any Intellectual Property, nor will such consummation require the consent of any third party in respect of any Intellectual Property. The operation of the business of the [Company / Partnership] does not infringe directly, indirectly or contributorily, on the Intellectual Property of any other Person. There are no proceedings pending or, to the Knowledge of the Principal Seller[s], threatened against the [Company / Partnership], alleging the infringement or misappropriation by [Company / Partnership] of any Intellectual Property of any Person, and the [Company / Partnership] has not received notice from any Person that the operation of the business of the [Company / Partnership] infringes the Intellectual Property of any Person. There are no claims pending or, to the Knowledge of the Principal Seller[s], threatened challenging the validity of any Intellectual Property of the [Company / Partnership] or any Intellectual Property used by the [Company / Partnership] in the conduct of the business of the [Company / Partnership]. The [Company / Partnership] has not entered into or is otherwise bound by any consent, forbearance or any settlement agreement limiting the rights of the [Company / Partnership] to use the Intellectual Property of the [Company / Partnership]. To the Knowledge of the Principal Sellers, no Person is infringing or misappropriating any of the Intellectual Property of the [Company / Partnership].

(e) All computer software and applications, other than widely distributed off-the-shelf applications subject to shrink-wrap and similar non-negotiated end-user license agreements (“Off-the-Shelf Software”), included in the Intellectual Property of the [Company / Partnership] (“Software”) was developed:

(i) by employees of the [Company / Partnership] within the scope of such employee’s employment duties;

(ii) by independent contractors as “works-made-for-hire,” as that term is defined under the United States Copyright Act, 17 U.S.C. § 101, pursuant to a written agreement between the [Company / Partnership] and each such independent contractor; or

(iii) by third parties who have assigned all of their rights therein to the [Company / Partnership] pursuant to a written agreement with the [Company / Partnership].

(f) Except as set forth in Section 4.22 of the Disclosure Letter, no former or present [employees, officers or managers of the Company / employees of the Partnership or employees, officers, managers or directors of the General Partner] retain any rights of ownership or use of

any Software, and no employees or third parties who have developed or participated in the development of Software have any similar or other claims to any rights therein.

**Section 4.23 Certain Payments.** Since \_\_\_\_\_, 20\_\_\_\_, neither the [Company / Partnership] nor [to the Knowledge of the Principal Seller[s]] any other Person associated with or acting for or on behalf of the [Company / Partnership], has directly or indirectly (a) made any contribution, gift, bribe, rebate, payoff, influence payment, kickback, or other payment to any Person, private or public, regardless of form, whether in money, property, or services (i) to obtain favorable treatment in securing business, (ii) to pay for favorable treatment for business secured, (iii) to obtain special concessions or for special concessions already obtained, for or in respect of the [Company / Partnership] or any Affiliate of the [Company / Partnership], or (iv) in violation of any Legal Requirement, (b) established or maintained any fund or asset that has not been recorded in the books and records of the [Company / Partnership].

**Section 4.24 Disclosure.**

(a) No statement in the Disclosure Letter omits to state a material fact necessary to make the statements herein or therein, in light of the circumstances in which they were made, not misleading.

(b) There is no fact known to the Principle Seller[s] that has specific application to the Principal Seller[s] or the [Company / Partnership] (other than general economic or industry conditions) and that materially adversely affects [or, as far as the Principal Seller[s] can reasonably foresee, materially threatens,] the assets, business, prospects, financial condition, or results of operations of the [Company / Partnership] (on a consolidated basis) that has not been set forth in this Agreement or the Disclosure Letter.

**Section 4.25 Brokers or Finders.** The Seller[s] and their agents have incurred no obligation or liability, contingent or otherwise, for brokerage or finders' fees or agents' commissions or other similar payment in connection with this Agreement.

## ARTICLE 5

### Representations and Warranties of the Purchaser

The Purchaser represents and warrants to the Sellers as follows:

**Section 5.1 Organization and Good Standing.** The Purchaser is a [corporation / limited liability company / limited partnership] duly organized, validly existing, and in good standing under the laws of the State of \_\_\_\_\_.

**Section 5.2 Execution and Validity of Agreement.** The Purchaser has the full power and authority to execute and deliver this Agreement, to perform its obligations hereunder and to consummate the transactions contemplated hereby. The execution and delivery by the Purchaser of this Agreement, the performance by the Purchaser of its obligations hereunder and the consummation of the transactions contemplated hereby have been duly authorized by all required [corporate / limited liability company / partnership action] on behalf of the Purchaser. This Agreement has been duly and validly executed and delivered by the Purchaser and, assuming due

authorization, execution and delivery by the Sellers, constitutes a legal, valid and binding obligation of the Purchaser, enforceable against the Purchaser in accordance with its terms, subject to the Bankruptcy Exception.

Section 5.3 **Investment Intent.** The Purchaser is acquiring the Interests for its own account and not with a view to their distribution within the meaning of Section 2(11) of the Securities Act.

Section 5.4 **Certain Proceedings.** There is no pending Proceeding that has been commenced against the Purchaser and that challenges, or may have the effect of preventing, delaying, making illegal, or otherwise interfering with, any of the Contemplated Transactions. To the Purchaser's Knowledge, no such Proceeding has been Threatened.

Section 5.5 **Non-Contravention.** The execution and delivery by the Purchaser of this Agreement, the performance by the Purchaser of its obligations hereunder and the consummation of the transactions contemplated hereby, will not (a) violate, conflict with or result in the breach of any provision of the charter documents or by-laws (or other comparable documents) of the Purchaser, or (b) result in the violation by the Purchaser of any Legal Requirements or Orders of any Governmental or Regulatory Authority applicable to the Purchaser or any of its assets or properties, or (c) conflict with, result in a violation or breach of, constitute (with or without notice or lapse of time or both) a default under, require the Purchaser to obtain any consent, approval or action of, make any filing with or give any notice to any Person pursuant to, result in or give to any Person any right of payment or reimbursement, termination, cancellation, modification or acceleration of, or result in the creation or imposition of any Lien upon any of the assets or properties of the Purchaser under, any of the terms, conditions or provisions of any Contracts to which the Purchaser is a party or by which the Purchaser or any of its assets or properties is bound.

Section 5.6 **Approvals and Consents.** [Except for filing and approval or termination of the waiting period under the HSR Act and except as set forth in Exhibit "G"], no consent, approval, authorization or action of, registration or filing with, or notice to any Governmental or Regulatory Authority or other Person is necessary or required under any of the terms, conditions or provisions of any Legal Requirement or Order of any Governmental or Regulatory Authority or any Contract to which the Purchaser is a party or by which the Purchaser or any of its assets or properties is bound in connection with the execution and delivery by the Purchaser of this Agreement, the performance by the Purchaser of its obligations hereunder or the consummation of the transactions contemplated hereby.

Section 5.7 **Brokers or Finders.** the Purchaser and its officers and agents have incurred no obligation or liability, contingent or otherwise, for brokerage or finders' fees or agents' commissions or other similar payment in connection with this Agreement and will indemnify and hold the Sellers harmless from any such payment alleged to be due by or through the Purchaser as a result of the action of the Purchaser or its officers or agents.

## ARTICLE 6

### Covenants of the Sellers Prior to Closing Date

Section 6.1 **Access and Investigation.** Between the date of this Agreement and the Closing Date, the Principal Seller[s] will, and will cause the [Company / Partnership] and its Advisors to, (a) afford the Purchaser and its Advisors and prospective lenders and their Advisors (collectively, “Purchaser’s Advisors”) full and free access to the [Company’s / Partnership’s] personnel, properties (including subsurface testing), contracts, books and records, and other documents and data, (b) furnish the Purchaser and the Purchaser’s Advisors with copies of all such contracts, books and records, and other existing documents and data as the Purchaser may reasonably request, and (c) furnish the Purchaser and the Purchaser’s Advisors with such additional financial, operating, and other data and information as the Purchaser may reasonably request.

Section 6.2 **Operation of the Business of the [Company / Partnership].** Between the date of this Agreement and the Closing Date, the Principal Seller[s] will, and will cause the [Company / Partnership] to:

(a) conduct the business of the [Company / Partnership] only in the Ordinary Course of Business;

(b) use [its / their] Best Efforts to preserve intact the current business organization of the [Company / Partnership], keep available the services of the current [officers,] employees, and agents of the [Company / Partnership] [and of the General Partner], and maintain the relations and good will with suppliers, customers, landlords, creditors, employees, agents, and others having business relationships with the [Company / Partnership];

(c) confer with the Purchaser concerning operational matters of a material nature; and

(d) otherwise report periodically to the Purchaser concerning the status of the business, operations, and finances of the [Company / Partnership].

Section 6.3 **Negative Covenant.** Except as otherwise expressly permitted by this Agreement, between the date of this Agreement and the Closing Date, the Principal Seller[s] will not, and will cause the [Company / Partnership] not to, without the prior consent of the Purchaser, take any affirmative action, or fail to take any reasonable action within their or its control, as a result of which any of the changes or events listed in Section 4.16 is likely to occur.

Section 6.4 **Required Approvals.** As promptly as practicable after the date of this Agreement, the Principal Seller[s] will, and will cause the [Company / Partnership] to, make all filings required by Legal Requirements to be made by them in order to consummate the Contemplated Transactions (including all filings under the HSR Act). Between the date of this Agreement and the Closing Date, the Principal Seller[s] will, and will cause the [Company / Partnership] to, (a) cooperate with the Purchaser with respect to all filings that the Purchaser elects to make or is required by Legal Requirements to make in connection with the Contemplated Transactions, and (b) cooperate with the Purchaser in obtaining all consents

identified in Exhibit “G” [including taking all actions requested by the Purchaser to cause early termination of any applicable waiting period under the HSR Act].

**Section 6.5 Notification.** Between the date of this Agreement and the Closing Date, each Seller will promptly notify the Purchaser in writing if the Seller becomes aware of any fact or condition that causes or constitutes a Breach of any of the Sellers’ representations and warranties as of the date of this Agreement, or if the Seller becomes aware of the occurrence after the date of this Agreement of any fact or condition that would (except as expressly contemplated by this Agreement) cause or constitute a Breach of any such representation or warranty had such representation or warranty been made as of the time of occurrence or discovery of such fact or condition. Should any such fact or condition require any change in the Disclosure Letter if the Disclosure Letter were dated the date of the occurrence or discovery of any such fact or condition, the Seller will promptly deliver to the Purchaser a supplement to the Disclosure Letter specifying such change. During the same period, each Seller will promptly notify the Purchaser of the occurrence of any Breach of any covenant of the Seller in this Article 6 or of the occurrence of any event that may make the satisfaction of the conditions in Article 8 impossible or unlikely.

**Section 6.6 Payment of Indebtedness by Related Persons.** Except as expressly provided in this Agreement, the Principal Seller[s] will cause all indebtedness owed to the [Company / Partnership] by either any Seller or any Related Person of any of the Sellers to be paid in full prior to Closing.

**Section 6.7 No Negotiation.** Until such time, if any, as this Agreement is terminated pursuant to Article 10, the Sellers will not, and the Principal Seller[s] will cause the [Company / Partnership] and its Advisors not to, directly or indirectly solicit, initiate, or encourage any inquiries or proposals from, discuss or negotiate with, provide any non-public information to, or consider the merits of any unsolicited inquiries or proposals from, any Person (other than the Purchaser) relating to any transaction involving the sale of the business or assets (other than in the Ordinary Course of Business) of the [Company / Partnership] or any merger, consolidation, business combination, or similar transaction involving the [Company / Partnership].

**Section 6.8 Best Efforts.** Between the date of this Agreement and the Closing Date, the Sellers will use their Best Efforts to cause the conditions in Article 8 and Article 9 to be satisfied.

## ARTICLE 7

### Covenants of the Purchaser Prior to Closing Date

**Section 7.1 Approvals of Governmental Bodies.** As promptly as practicable after the date of this Agreement, the Purchaser will, and will cause each of its Related Persons to, make all filings required by Legal Requirements to be made by them to consummate the Contemplated Transactions [including all filings under the HSR Act]. Between the date of this Agreement and the Closing Date, the Purchaser will, and will cause each Related Person to, cooperate with the Sellers with respect to all filings that the Sellers are required by Legal Requirements to make in connection with the Contemplated Transactions, and (ii) cooperate with



the Sellers in obtaining all consents identified in Section 3.8 and Section 7.1 of the Disclosure Letter; provided that this Agreement will not require the Purchaser to dispose of or make any change in any portion of its business or to incur any other burden to obtain a Governmental Authorization.

Section 7.2 **Best Efforts.** Except as set forth in the provisions to Section 7.1, between the date of this Agreement and the Closing Date, the Purchaser will use its Best Efforts to cause the conditions in Article 8 and Article 9 to be satisfied.

## ARTICLE 8

### Conditions Precedent to the Purchaser's Obligations to Close

The Purchaser's obligation to purchase the Interests and to take the other actions required to be taken by the Purchaser at the Closing is subject to the satisfaction, at or prior to the Closing, of each of the following conditions (any of which may be waived by the Purchaser, in whole or in part):

#### Section 8.1 Accuracy of Representations.

(a) All of the Sellers' representations and warranties in this Agreement (considered collectively), and each of these representations and warranties (considered individually), must have been accurate in all material respects as of the date of this Agreement, and must be accurate in all material respects as of the Closing Date as if made on the Closing Date, without giving effect to any supplement to the Disclosure Letter.

(b) Each of the Sellers' representations and warranties in [Section 3.5, Section 3.11, Section 4.2 and Section 4.12] must have been accurate in all respects as of the date of this Agreement, and must be accurate in all respects as of the Closing Date as if made on the Closing Date, without giving effect to any supplement to the Disclosure Letter.

#### Section 8.2 The Sellers' Performance.

(a) All of the covenants and obligations that the Sellers are required to perform or to comply with pursuant to this Agreement at or prior to the Closing (considered collectively), and each of these covenants and obligations (considered individually), must have been duly performed and complied with in all material respects.

(b) Each document required to be delivered pursuant to Section 2.4(a) and Section 2.4(b) must have been delivered, and each of the other covenants and obligations in Section 6.4 and Section 6.8 must have been performed and complied with in all respects.

Section 8.3 **Consents.** Each of the Consents identified in Section 3.8 and Section 4.3 and of the Disclosure Letter, and each Consent identified in Exhibit "G", must have been obtained and must be in full force and effect.

Section 8.4 **Additional Documents.** Each of the following documents must have been delivered to the Purchaser:

(a) an opinion of \_\_\_\_\_, dated the Closing Date, in the form of Exhibit "H"<sup>26</sup>; and

(b) such other documents as the Purchaser may reasonably request for the purpose of:

(i) enabling its counsel to provide the opinion referred to in Section 8.4(a);

(ii) evidencing the accuracy of any of the Sellers' representations and warranties;

(iii) evidencing the performance by either the Seller of, or the compliance by either the Seller with, any covenant or obligation required to be performed or complied with by the Seller;

(iv) evidencing the satisfaction of any condition referred to in this Article 8; or

(v) otherwise facilitating the consummation or performance of any of the Contemplated Transactions.

**Section 8.5 No Proceedings.** Since the date of this Agreement, there must not have been commenced or Threatened against the Purchaser, or against any Person affiliated with the Purchaser, any Proceeding

(a) involving any challenge to, or seeking damages or other relief in connection with, any of the Contemplated Transactions; or

(b) that may have the effect of preventing, delaying, making illegal, or otherwise interfering with any of the Contemplated Transactions.

**Section 8.6 No Claim Regarding Ownership of Interests or Sale Proceeds.** There must not have been made or Threatened by any Person any claim asserting that such Person (a) is the holder or the beneficial owner of, or has the right to acquire or to obtain beneficial ownership of, any Interests, or any other voting, equity, or ownership interest in the [Company / Partnership], or (b) is entitled to all or any portion of the Purchase Price payable for the Interests.

**Section 8.7 No Prohibition.** Neither the consummation nor the performance of any of the Contemplated Transactions will, directly or indirectly (with or without notice or lapse of time), materially contravene, or conflict with, or result in a material violation of, or cause the Purchaser or any Person affiliated with the Purchaser to suffer any material adverse consequence under, (a) any applicable Legal Requirement or Order, or (b) any Legal Requirement or Order that has been published, introduced, or otherwise [formally] proposed by or before any Governmental or Regulatory Authority.

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<sup>26</sup> A thorough discussion of legal opinions for transactions involving limited liability companies and limited partnerships under the Texas Business Organizations Code can be found in *Legal Opinions Under the New BOC* by Gail Merel, presented at The University of Texas School of Law Continuing Legal Education Program on Partnerships, Limited Partnerships and LLCs, July 20 and 21, 2006.

## ARTICLE 9

### Conditions Precedent to the Sellers' Obligation to Close

The Sellers' obligation to sell the Interests and to take the other actions required to be taken by the Sellers at the Closing is subject to the satisfaction, at or prior to the Closing, of each of the following conditions (any of which may be waived by the Sellers, in whole or in part):

**Section 9.1 Accuracy of Representations.** All of the Purchaser's representations and warranties in this Agreement (considered collectively), and each of these representations and warranties (considered individually), must have been accurate in all material respects as of the date of this Agreement and must be accurate in all material respects as of the Closing Date as if made on the Closing Date.

#### Section 9.2 The Purchaser's Performance.

(a) All of the covenants and obligations that the Purchaser is required to perform or to comply with pursuant to this Agreement at or prior to the Closing (considered collectively), and each of these covenants and obligations (considered individually), must have been performed and complied with in all material respects.

(b) The Purchaser must have delivered each of the documents required to be delivered by the Purchaser pursuant to Section 2.4 and must have made the cash payments required to be made by the Purchaser pursuant to Section 2.4(c)(i) and Section 2.4(c)(iii).

**Section 9.3 Consents.** Each of the Consents identified in Section 3.8 and Section 4.3 of the Disclosure Letter and Exhibit "G" must have been obtained and must be in full force and effect.

**Section 9.4 Additional Documents.** The Purchaser must have caused the following documents to be delivered to the Sellers:

(a) an opinion of \_\_\_\_\_, dated the Closing Date, in the form of Exhibit "I"; and

- (b) such other documents as the Sellers may reasonably request for the purpose of:
- (i) enabling their counsel to provide the opinion referred to in Section 9.4(a);
  - (ii) evidencing the accuracy of any representation or warranty of the Purchaser;
  - (iii) evidencing the performance by the Purchaser of, or the compliance by the Purchaser with, any covenant or obligation required to be performed or complied with by the Purchaser;
  - (iv) evidencing the satisfaction of any condition referred to in this Article 9; or

(v) otherwise facilitating the consummation of any of the Contemplated Transactions.

Section 9.5 **No Injunction.** There must not be in effect any Legal Requirement or any injunction or other Order that:

- (a) prohibits the sale of the Interests by the Sellers to the Purchaser; and
- (b) has been adopted or issued, or has otherwise become effective, since the date of this Agreement.

## ARTICLE 10

### Termination

Section 10.1 **Termination Events.** This Agreement may, by notice given prior to or at the Closing, be terminated:

(a) by either the Purchaser or the Sellers if a material Breach of any provision of this Agreement;

(b)

(i) by the Purchaser if any of the conditions in Article 8 has not been satisfied as of the Closing Date or if satisfaction of such a condition is or becomes impossible (other than through the failure of the Purchaser to comply with its obligations under this Agreement) and the Purchaser has not waived such condition on or before the Closing Date; or

(ii) by the Sellers, if any of the conditions in Article 9 has not been satisfied of the Closing Date or if satisfaction of such a condition is or becomes impossible (other than through the failure of the Sellers to comply with their obligations under this Agreement) and the Sellers have not waived such condition on or before the Closing Date;

(c) by mutual consent of the Purchaser and the Principal Seller[s], or

(d) by either the Purchaser or the Principal Seller[s] if the Closing has not occurred (other than through the failure of any party seeking to terminate this Agreement to comply fully with its obligations under this Agreement) on or before \_\_\_\_\_, or such later date as the parties may agree upon.

Section 10.2 **Effect of Termination.** Each party's right of termination under Section 10.1 is in addition to any other rights it may have under this Agreement or otherwise, and the exercise of a right of termination will not be an election of remedies. If this Agreement is terminated pursuant to Section 10.1, all further obligations of the parties under this Agreement will terminate, except that the obligations in Section 12.1 and Section 12.3 will survive; provided, however, that if this Agreement is terminated by a party because of the Breach of the Agreement by the other party or because one or more of the conditions to the terminating party's obligations under this Agreement is not satisfied as a result of the other party's failure to comply

with its obligations under this Agreement, the terminating party's right to pursue all legal remedies will survive such termination unimpaired.

## ARTICLE 11

### Survival; Indemnification

Section 11.1 **Survival** Notwithstanding any right of any party hereto fully to investigate the affairs of any other party, and notwithstanding any Knowledge of facts determined or determinable pursuant to such investigation or right of investigation, each party hereto shall have the right to rely fully upon the representations, warranties, covenants and agreements of the other parties contained in this Agreement and the Disclosure Letter, or in any document delivered at the Closing in connection with this Agreement. The respective representations, warranties, covenants and agreements of the Sellers and the Purchaser contained in this Agreement shall survive the Closing.

Section 11.2 **Obligation of the Sellers to Indemnify.** The Sellers hereby agree, jointly and severally,<sup>27</sup> to indemnify the Purchaser and its officers, directors, managers, employees, agents, stockholders, members, successors and affiliates (individually, a "Purchaser Indemnified Party" and collectively, the "Purchaser Indemnified Parties") against, and to protect, save and keep harmless the Purchaser Indemnified Parties from, and to assume liability for, the payment of all liabilities (including liabilities for Taxes), obligations, losses, damages, penalties, claims, actions, suits, judgments, settlements, out-of-pocket costs, expenses and disbursements (including reasonable costs of investigation, and reasonable attorneys', accountants' and expert witnesses' fees) of whatever kind and nature (collectively, "Losses"), that may be imposed on or incurred by any Purchaser Indemnified Party as a consequence of or in connection with:

- (a) any misrepresentation, inaccuracy or breach of any representation or warranty contained in Article 3 or Article 4 hereof;
- (b) any breach of or failure by the any of the Sellers to comply with or perform any agreement or covenant contained in this Agreement or in any other document, agreement or instrument executed in connection with the transactions contemplated hereby;
- (c) any litigation or claim disclosed in Section 4.3 of the Disclosure Letter; and
- (d) any Taxes due and owing by the [Company / Partnership]<sup>28</sup> or any of the Sellers with respect to any period ending on or prior to the Closing Date and/or any Taxes that are

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<sup>27</sup> Even though the Purchaser may accept "several" representations and warranties from the minority Sellers, the Purchaser may insist upon and prevail in joint liability from all of the Sellers. If one or more Sellers held a majority of the Interests and thus received a majority of the purchase price, then the Purchaser may seek to satisfy its damages from the majority Seller. To establish that all Sellers will share in the damages according to their proportionate interests in the purchase consideration, the Sellers may wish to enter into a Contribution Agreement. A form of Contribution Agreement is included as Exhibit "F" to this Form.

<sup>28</sup> Even if the Company or Partnership is classified as a partnership (pass-through entity) for federal income tax purposes, it may still incur and owe state franchise taxes, local or county property taxes, payroll taxes and other taxes.

ultimately determined to have arisen on account of the operations of the [Company / Partnership] prior to the Closing Date, [except to the extent accrued for on the Balance Sheet].

The term “Losses” as used herein is not limited to matters asserted by third parties against an Indemnified Party but includes Losses incurred or sustained by an Indemnified Party in the absence of third party claims.

**Section 11.3 Obligation of the Purchaser to Indemnify.** The Purchaser hereby agrees to indemnify the Sellers (collectively, the “Seller Indemnified Parties”) (the Purchaser Indemnified Parties and the Seller Indemnified Parties collectively, the “Indemnified Parties”) against, and to protect, save and keep harmless the Seller Indemnified Parties from, and to assume liability for, the payment of all Losses that may be imposed on or incurred by the Indemnified Parties as a consequence of or in connection with:

(a) any misrepresentation, inaccuracy or breach of any representation or warranty contained in Article 5 hereof; and

(b) any breach of or failure by the Purchaser to comply with or perform any agreement or covenant by the Purchaser contained in this Agreement or in any other document, agreement or instrument executed in connection with the transactions contemplated hereby.

**Section 11.4 Right of Offset.** Without limiting any other rights or remedies available to it, the Purchaser shall be entitled to offset any claim for indemnity made pursuant to Section 11.2, as to which notice has been given pursuant to Section 11.5, against any payment of the Purchase Price due under the Promissory Notes.

**Section 11.5 Indemnification Procedures.**

(a) In the event that any Indemnified Party asserts a claim for indemnification, which does not involve a Third Party Claim against which a Person is required to provide indemnification under this Agreement (an “Indemnifying Party”), the Indemnifying Party may acknowledge and agree by notice to the Indemnified Party in writing to satisfy such claim within 20 days after receipt of notice of such claim from the Indemnified Party. In the event that the Indemnifying Party disputes such claim, the Indemnifying Party shall provide written notice of such dispute to the Indemnified Party within 20 days after receipt of written notice of such claim, setting forth a reasonable basis of such dispute. In the event that the Indemnifying Party shall fail to provide written notice to the Indemnified Party within 20 days after receipt of notice from the Indemnified Party that the Indemnifying Party either acknowledges and agrees to pay such claim or disputes such claim, the Indemnifying Party shall be deemed to have acknowledged and agreed to pay such claim in full and to have waived any right to dispute such claim. Once the Indemnifying Party has acknowledged and agreed to pay any claim pursuant to this Section 11.5(a), or once any dispute under this Section 11.5(a) has been finally resolved in favor of indemnification by a court or other tribunal of competent jurisdiction, the Indemnifying Party shall pay the amount of such claim to the Indemnified Party within 10 days after the date of acknowledgement or resolution, as the case may be, to such account and in such manner as is designated in writing by the Indemnified Party.

(b)

(i) In the event that any Indemnified Party receives notice of the commencement of any action or proceeding by any Person who is not a party to this Agreement or an affiliate of a party to this Agreement (a “Third Party Claim”) against an Indemnified Party, the Indemnified Party shall give written notice together with a statement of any available information regarding such claim to the Indemnifying Party (the “Claims Notice”) within 30 days after learning of such claim (or within such shorter time as may be necessary to give the Indemnifying Party a reasonable opportunity to respond to such claim). The Indemnifying Party shall have the right, upon written notice to the Indemnified Party (the “Defense Notice”) within 15 days after receipt from the Indemnified Party of the Claims Notice, which Defense Notice by the Indemnifying Party shall specify the counsel it will appoint to defend such claim (“Defense Counsel”), to conduct at its expense the defense against such claim in its own name, or if necessary in the name of the Indemnified Party; provided, however, that the Indemnified Party shall have the right to approve the Defense Counsel, which approval shall not be unreasonably withheld or delayed, and in the event the Indemnifying Party and the Indemnified Party cannot agree upon such counsel within 10 days after the Defense Notice is provided, then the Indemnifying Party shall propose an alternate Defense Counsel, which shall be subject again to the Indemnified Party’s approval, which approval shall not be unreasonably withheld or delayed. If the parties still fail to agree on the Defense Counsel, then, at such time, they shall mutually agree in good faith on a procedure to determine the Defense Counsel.

(ii) In the event that the Indemnifying Party shall fail to give the Defense Notice within such 15 day period, it shall be deemed to have elected not to conduct the defense of the subject claim, and in such event the Indemnified Party shall have the right to conduct the defense and to compromise and settle the claim without prior consent of the Indemnifying Party and the Indemnifying Party will be liable for all reasonable costs, expenses, settlement amounts or other Losses paid or incurred in connection therewith.

(iii) In the event that the Indemnifying Party disputes the claim for indemnification against it, such Indemnifying Party shall notify the Indemnified Party to such effect within 15 days after receipt of the Claims Notice (or within such shorter time as may be necessary to give the Indemnified Party a reasonable opportunity to respond to such Third Party Claim). In such event the Indemnified Party shall have the right to conduct the defense and to compromise and settle such Third Party Claim, with the prior consent of the Indemnifying Party (which consent will not be unreasonably withheld or delayed), and, once such dispute has been finally resolved in favor of indemnification by a court or other tribunal of competent jurisdiction or by mutual agreement of the Indemnified Party and the Indemnifying Party, subject to the provisions of Section 11.6, the Indemnifying Party shall within 10 days after the date of such resolution or agreement, pay to the Indemnified Party all reasonable costs, expenses, settlement amounts or other Losses paid or incurred by the Indemnified Party in connection with such Third Party Claim including the costs and expenses (including, without limitation, reasonable attorneys’ fees and expenses) incurred by the Indemnified Party in obtaining indemnification hereunder.

(iv) In the event that the Indemnifying Party does deliver a Defense Notice and thereby elects to conduct the defense of the subject claim, the Indemnifying Party shall be entitled to have the exclusive control over the defense and settlement of the subject claim and the Indemnified Party will cooperate with and make available to the Indemnifying Party such

assistance and materials as it may reasonably request, all at the expense of the Indemnifying Party; the Indemnified Party shall have the right at its expense to participate in the defense assisted by counsel of its own choosing at its expense. In such an event, the Indemnifying Party will not settle the subject claim without the prior written consent of the Indemnified Party, which consent will not be unreasonably withheld or delayed.

(v) Without the prior written consent of the Indemnified Party, the Indemnifying Party will not enter into any settlement of any Third Party Claim or cease to defend against such claim, if pursuant to or as a result of such settlement or cessation, (i) injunctive relief or specific performance would be imposed against the Indemnified Party, or (ii) such settlement or cessation would lead to liability or create any financial or other obligation on the part of the Indemnified Party for which the Indemnified Party is not entitled to indemnification hereunder.

(vi) If an Indemnified Party refuses to consent to a bona fide offer of settlement which provides for a full release of the Indemnified Party and its affiliates and solely for a monetary payment which the Indemnifying Party wishes to accept, the Indemnified Party may continue to pursue such matter, free of any participation by the Indemnifying Party, at the sole expense of the Indemnified Party. In such an event, the obligation of the Indemnifying Party shall be limited to the amount of the offer of settlement which the Indemnified Party refused to accept plus the costs and expenses of the Indemnified Party incurred prior to the date the Indemnifying Party notified the Indemnified Party of the offer of settlement.

(vii) Notwithstanding clause (iv) above, the Indemnifying Party shall not be entitled to control, but may participate in, and the Indemnified Party shall be entitled to have sole control over, the defense or settlement of any claim (A) that seeks a temporary restraining order, a preliminary or permanent injunction or specific performance against the Indemnified Party, (B) to the extent such claim involves criminal allegations against the Indemnified Party, (C) that if unsuccessful, would set a precedent that would have a material adverse effect on the business or financial condition of the Indemnified Party, (D) if such claim would impose liability on the part of the Indemnified Party for which the Indemnified Party is not entitled to indemnification hereunder, or (E) if such claim involves any client or supplier of the Purchaser or any of its subsidiaries or affiliates and the Purchaser determines, in its sole discretion, that the manner in which the defense of such claim is conducted could have a material adverse effect on the relationship between such client or supplier and the Purchaser or any of its subsidiaries or affiliates. In such an event, the Indemnifying Party will still have all of its obligations hereunder, provided that the Indemnified Party will not settle the subject claim without the prior written consent of the Indemnifying Party, which consent will not be unreasonably withheld or delayed.

(viii) Any final judgment entered or settlement agreed upon in the manner provided herein shall be binding upon the Indemnifying Party, and shall conclusively be deemed to be an obligation with respect to which the Indemnified Party is entitled to prompt indemnification hereunder.

(ix) A failure by an Indemnified Party to give timely, complete or accurate notice as provided in this Section 11.5 will not affect the rights or obligations of any party hereunder except and only to the extent that, as a result of such failure, any party entitled to



receive such notice was deprived of its right to recover any payment under its applicable insurance coverage or was otherwise directly and materially damaged as a result of such failure to give timely notice.

(c) All decisions and determinations to be made by the Purchaser and/or a Purchaser Indemnified Party under Article 11 shall be made by the Purchaser in the name of and on behalf of the Purchaser or such other Purchaser Indemnified Party and all such decisions and determinations shall be binding upon the parties hereto and such Purchaser Indemnified Party.

(d) All parties to this Agreement agree that any indemnification by the Sellers of the Purchaser hereunder is intended to be, and shall be, treated by each of such parties as an adjustment to the Purchase Price for all purposes (including tax purposes).

#### Section 11.6 Limitations On and Other Matters Regarding Indemnification

(a) Subject to Section 11.6(c), the Sellers shall not have any liability to any Purchaser Indemnified Party with respect to Losses arising out of any of the matters referred to in Section 11.2 until such time as the amount of all of such Losses shall exceed \$ \_\_\_\_\_ in the aggregate (in which case the Sellers shall be liable for all Losses in excess of \$ \_\_\_\_\_). [Notwithstanding anything to the contrary herein, but subject to Section 11.4 or Section 11.6(c), the maximum aggregate collective liability of the Sellers for indemnity payments under Section 11.2 shall be an amount equal to the total Purchase Price paid pursuant to Section 2.2 of this Agreement (the “Indemnity Cap”).]

(b) The indemnity obligations of the Sellers under Section 11.2 and of the Purchaser under Section 11.3 shall terminate on such date that is [three] years after the Closing Date except (A) as to matters as to which the applicable Indemnified Party has made a claim for indemnification on or prior to such date specifically addressing an actual claim or demand, (B) as to matters as to which the applicable Indemnified Party has suffered Losses arising out of the Indemnifying Party’s fraudulent acts or omissions or intentional misrepresentations, and (C) in the case of the indemnity obligations of the Sellers, with respect to any claim pertaining to a misrepresentation, inaccuracy or breach of warranty under [Section 3.1 (regarding execution, validity and authority), Section 3.2 (regarding ownership), Section 3.5 (regarding capital contributions), Section 4.11 (regarding Taxes) and Section 4.25 (regarding brokers and finders),]<sup>29</sup> [or a claim under any other Section of this Agreement relating to the payment and reporting of Taxes by the Company]. The obligation to indemnify referred to in:

(i) the preceding clause (A) shall survive the expiration of such period until such claims are finally resolved and any obligations with respect thereto are fully satisfied; and

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<sup>29</sup> Most purchase transactions involve considerable negotiation with respect to the survival of representations and warranties, whether there is an Indemnity Cap, and which representations and warranties, if any, are excluded from the termination provisions. This representative listing of excluded warranties represents an example of certain warranties that purchasers typically seek to exclude from termination provisions. This listing should not be considered inclusive, exclusive or representative of any “market standard.”

(ii) the preceding clauses (B) and (C) shall terminate 90 days after the expiration of the relevant federal, state or local statute of limitations, except as to matters as to which any Indemnified Party has made a claim for indemnification on or prior to such date, in which case the right to indemnification with respect thereto shall survive the expiration of any such period until such claim is finally resolved and any obligations with respect thereto are fully satisfied.

(c) Each of the limitations set forth above in this Section 11.6 shall in no event apply to:

(i) any Losses incurred by a Purchaser Indemnified Party which relate, directly or indirectly, to:

(A) any fraudulent acts or omissions or intentional misrepresentations committed by the Sellers or the [Company / Partnership] (including, without limitation, fraud in connection with the transactions contemplated hereby and any fraudulent acts by any officer, manager, employee, agent, member or partner of the [Company / Partnership]);

(B) any indemnification obligation under Section 11.2(b), Section 11.2(c) or Section 11.2(d);

(C) any breach of a representation or warranty contained in [Section 3.1, Section 3.2, Section 3.5, Section 4.11 or Section 4.25];

(D) any provision of this Agreement relating to Taxes; or

(E) the Sellers' obligations set forth in Section 12.1 to pay certain expenses; or

(ii) any Losses incurred by a Seller Indemnified Party which relate, directly or indirectly, to:

(A) any fraudulent acts or omissions or intentional misrepresentations committed by the Purchaser (including, without limitation, fraud in connection with the transactions contemplated hereby and any fraudulent acts by any officer, director, manager, employee, agent, shareholder, member or partner of the Purchaser);

(B) any indemnification obligation under Section 11.3(b); or

(C) the Purchaser's obligations set forth in Section 12.1 to pay certain expenses.

Section 11.7 Indemnification Escrow. Subject to the terms and conditions of the Escrow Agreement, the Escrowed Funds shall be held by the Escrow Agent as collateral for the amounts due from Sellers pursuant to the indemnification obligations under Section 11.2; provided, however, that nothing contained in this Agreement or the Escrow Agreement shall limit the recovery of the Purchaser Indemnified Parties to the amount of the Escrowed Funds, and provided further, however, that the Purchaser Indemnified Parties shall first seek recovery

for amounts due from the Escrowed Funds prior to seeking recovery from the Sellers directly or exercising its right of offset under Section 11.4. \_\_\_\_\_ percent (\_\_\_%) of the Escrowed Funds shall be released on the [first] anniversary of the Closing Date if the amount of claims for Losses made by the Purchaser Indemnified Parties pursuant to Section 11.2 prior to such date shall be less than \$\_\_\_\_\_ in the aggregate, and the remainder of the Escrowed Funds shall be released on the [third] anniversary of the Closing Date (subject to appropriate reserves for then pending indemnification claims, if any). Any Escrowed Funds released by the Escrow Agent shall be paid to the Sellers in the same proportions, respectively, as the Closing Payments were paid.

## ARTICLE 12

### General Provisions

Section 12.1 **Expenses.** Except as otherwise expressly provided in this Agreement, each party to this Agreement will bear its respective expenses incurred in connection with the preparation, execution, and performance of this Agreement and the Contemplated Transactions, including all fees and expenses of agents, representatives, counsel, and accountants. [\_\_\_\_\_ will pay all amounts payable to [finder or investment banker] in connection with this Agreement and the Contemplated Transactions.] [The Purchaser will pay one-half and the Sellers will pay one-half of the HSR Act filing fee.] The Sellers will cause the [Company / Partnership] not to incur any out-of-pocket expenses in connection with this Agreement [except for professional fees not in excess of \$\_\_\_\_\_]. In the event of termination of this Agreement, the obligation of each party to pay its own expenses will be subject to any rights of such party arising from a breach of this Agreement by another party.

Section 12.2 **Publicity.** Subject to the provisions of the next sentence, no party to this Agreement shall, and the Principal Seller[s] shall insure that no Advisor of the [Company / Partnership] shall, issue any press release or other public document or make any public statement relating to this Agreement or the matters contained herein without obtaining the prior written approval of the Purchaser and the Principal Seller[s]. Notwithstanding the foregoing, the foregoing provision shall not apply to any announcement by any party pursuant to a Legal Requirement.

### Section 12.3 **Confidentiality.**

(a) Between the date of this Agreement and the Closing Date, the Purchaser and the Sellers will maintain in confidence, and will cause the directors, managers, partners, officers, employees, agents, and advisors of the Purchaser and the [Company / Partnership] to maintain in confidence, [and not use to the detriment of another party or the [Company / Partnership]] any [written, oral, or other information obtained in confidence from] [written information stamped "confidential" when originally furnished by] another party or the [Company / Partnership] in connection with this Agreement or the Contemplated Transactions, unless (a) such information is already known to such party or to others not bound by a duty of confidentiality or such information becomes publicly available through no fault of such party, (b) the use of such information is necessary or appropriate in making any filing or obtaining any consent or approval required for the consummation of the Contemplated Transactions, or (c) the furnishing or use of

such information is required by [or necessary or appropriate in connection with] legal proceedings.

(b) If the Contemplated Transactions are not consummated, each party will return or destroy as much of such written information as the other party may reasonably request. [Whether or not the Closing takes place, the Sellers waive, and upon the Purchaser's request the Principal Seller[s] will cause the [Company / Partnership] to waive, any cause of action, right, or claim arising out of the access of the Purchaser or its Advisors to any trade secrets or other confidential information of the [Company / Partnership] except for the intentional competitive misuse by the Purchaser of such trade secrets or confidential information.]

**Section 12.4 Access to Books and Records.** After the Closing Date, upon reasonable notice to the Principal Seller[s], the Purchaser will be entitled to copies of and access to any books and records that are retained by the Principal Seller[s] pursuant to Section 4.5. Upon reasonable notice to the Purchaser, the Principal Seller[s] shall be entitled to copies of and access to any books and records that are transferred to the Purchaser pursuant to Section 4.5.

**Section 12.5 Notices.** Unless otherwise provided in this Agreement, any notice, request, instruction or other document to be given hereunder by any party to any other party shall be in writing and shall be deemed to have been given (a) upon personal delivery, if delivered by hand, (b) three days after the date of deposit in the mails, postage prepaid, if mailed by certified or registered mail, or (c) the next business day if sent by facsimile transmission (if receipt is electronically confirmed) or by a prepaid overnight courier service, and in each case at the respective addresses or numbers set forth below or such other address or number as such party may have fixed by notice:

If to the Purchaser, addressed to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attention: \_\_\_\_\_  
Fax: (\_\_\_\_) \_\_\_\_\_

with a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attention: \_\_\_\_\_  
Fax: (\_\_\_\_) \_\_\_\_\_

and

If to the Sellers, addressed to [the Sellers' Representative at]:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attention: \_\_\_\_\_  
Fax: (\_\_\_\_) \_\_\_\_\_

with a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attention: \_\_\_\_\_  
Fax: (\_\_\_\_) \_\_\_\_\_

**Section 12.6 Jurisdiction; Service of Process.** Any action or proceeding seeking to enforce any provision of, or based on any right arising out of, this Agreement may be brought against any of the parties in the courts of the State of \_\_\_\_\_, County of \_\_\_\_\_, or, if it has or can acquire jurisdiction, in the United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_, and each of the parties consents to the jurisdiction of such courts (and of the appropriate appellate courts) in any such action or proceeding and waives any objection to venue laid therein. Process in any action or proceeding referred to in the preceding sentence may be served on any party anywhere in the world.

**Section 12.7 Further Assurances.** The parties agree (a) to furnish upon request to each other such further information, (b) to execute and deliver to each other such other documents, and (c) to do such other acts and things, all as the other party may reasonably request

for the purpose of carrying out the intent of this Agreement and the documents referred to in this Agreement.

**Section 12.8 Waiver.** The rights and remedies of the parties to this Agreement are cumulative and not alternative. Neither the failure nor any delay by any party in exercising any right, power, or privilege under this Agreement or the documents referred to in this Agreement will operate as a waiver of such right, power, or privilege, and no single or partial exercise of any such right, power, or privilege will preclude any other or further exercise of such right, power, or privilege or the exercise of any other right, power, or privilege. To the maximum extent permitted by applicable law, (a) no claim or right arising out of this Agreement or the documents referred to in this Agreement can be discharged by one party, in whole or in part, by a waiver or renunciation of the claim or right unless in writing signed by the other party; (b) no waiver that may be given by a party will be applicable except in the specific instance for which it is given; and (c) no notice to or demand on one party will be deemed to be a waiver of any obligation of such party or of the right of the party giving such notice or demand to take further action without notice or demand as provided in this Agreement or the documents referred to in this Agreement.

**Section 12.9 Entire Agreement and Modification.** This Agreement supersedes all prior agreements between the parties with respect to its subject matter (including the Letter of Intent between the Purchaser and the Sellers dated \_\_\_\_\_, 20\_\_ ) and constitutes (along with the documents referred to in this Agreement) a complete and exclusive statement of the terms of the agreement between the parties with respect to its subject matter. This Agreement may not be amended except by a written agreement executed by the party to be charged with the amendment.

**Section 12.10 Disclosure Letter.**

(a) The disclosures in the Disclosure Letter, and those in any Supplement thereto, must relate only to the representations and warranties in the Section of the Agreement to which they expressly relate and not to any other representation or warranty in this Agreement.

(b) In the event of any inconsistency between the statements in the body of this Agreement and those in the Disclosure Letter (other than an exception expressly set forth as such in the Disclosure Letter with respect to a specifically identified representation or warranty), the statements in the body of this Agreement will control.

**Section 12.11 Assignments; Successors, and No Third-Party Rights.** No party may assign any of its rights under this Agreement without the prior consent of the other parties[, which will not be unreasonably withheld,] except that the Purchaser may assign any of its rights under this Agreement to any Subsidiary of the Purchaser. Subject to the preceding sentence, this Agreement will apply to, be binding in all respects upon, and inure to the benefit of the successors and permitted assigns of the parties. Nothing expressed or referred to in this Agreement will be construed to give any Person other than the parties to this Agreement any legal or equitable right, remedy, or claim under or with respect to this Agreement or any provision of this Agreement. This Agreement and all of its provisions and conditions are for the sole and exclusive benefit of the parties to this Agreement and their successors and assigns.

Section 12.12 **Severability.** If any provision of this Agreement is held invalid or unenforceable by any court of competent jurisdiction, the other provisions of this Agreement will remain in full force and effect. Any provision of this Agreement held invalid or unenforceable only in part or degree will remain in full force and effect to the extent not held invalid or unenforceable.

Section 12.13 **Time of Essence.** With regard to all dates and time periods set forth or referred to in this Agreement, time is of the essence.

Section 12.14 **Governing Law.** This Agreement will be governed by the laws of the State of Texas without regard to conflicts of laws principles.

Section 12.15 **Counterparts.** This Agreement may be executed in one or more counterparts, each of which will be deemed to be an original copy of this Agreement and all of which, when taken together, will be deemed to constitute one and the same agreement.

Section 12.16 **Sellers' Representative.**<sup>30</sup> Each Seller hereby irrevocably constitutes and appoints \_\_\_\_\_ as his or her true and lawful agent and attorney-in-fact (the "Sellers' Representative") with full power and authority to act, including, without limitation, full power of substitution, in his or her name and on his or her behalf with respect to all matters arising from or in any way relating to this Agreement or the transactions contemplated hereby, including to do all things and to perform all acts required or deemed advisable, in the Sellers' Representative's sole discretion, in connection with the transactions contemplated by this Agreement as fully as the Seller could if then personally present and acting alone. Each Seller hereby irrevocably constitutes and appoints the Sellers' Representative as his or her true and lawful agent and attorney-in-fact with full power and authority to act, including full power of substitution, in his or her name and on his or her behalf with respect to the acceptance of delivery of any amounts required to be delivered hereunder as fully as the Seller could if then personally present and acting alone. Without limitation, (a) any communication or other delivery validly delivered to the Sellers' Representative shall be deemed to have been validly delivered to each of the Sellers and any delivery of any portion of the Purchase Price validly delivered to the Sellers' Representative shall be deemed to have been validly delivered to each of the Sellers, (b) any waiver of any provision of this Agreement or consent, or compromise of any claim arising from or relating to this Agreement, by the Sellers' Representative shall be binding upon each and every the Seller, and (c) the Sellers' Representative is hereby authorized to execute for and on behalf of each Seller any amendment to this Agreement. The Purchaser shall be entitled to rely (without investigation) on any action taken by the Sellers' Representative as being taken by the Sellers' Representative for herself and on behalf of each of the Sellers, and fully authorized by

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<sup>30</sup> It may be expedient to appoint the general partner, manager, managing member or another person to serve as a the Sellers' Representative. The limited partners, with respect to most limited partnerships, and the members, with respect to many limited liability companies, will be accustomed to relying upon the general partner or manager or managing member to handle the negotiation and completion of transactions involving the entity, including the sale of assets. Following the sale of interest in the unincorporated entity, the authority of such person to act for the Sellers may cease. The suggested language is intended to give such person legal authority to continue to act on behalf of the Sellers when the Sellers will not longer be parties to the Partnership Agreement or members of the limited liability company giving rise to the management authority.

each of the Sellers. This appointment of agency and this power of attorney is coupled with an interest and shall be irrevocable and shall not be terminated by any Seller or by operation of law, whether by the death or incapacity of any Seller or the occurrence of any other event, and any action taken by the Sellers' Representative shall be as valid as if such death, incapacity or other event had not occurred, regardless of whether or not any Seller or the Sellers' Representative shall have received any notice thereof. In the event that \_\_\_\_\_ is unable or unwilling to serve as Sellers' Representative, \_\_\_\_\_ shall serve as Sellers' Representative. Sellers' Representative shall act solely as a representative and agent of the Sellers. Nothing in this Agreement is intended to, or shall be deemed to, constitute a partnership or joint venture among the Sellers or between the Sellers' Representative and any of the other the Sellers.

**Section 12.17 Section Headings, Construction.** The headings of Sections in this Agreement are provided for convenience only and will not affect its construction or interpretation. All references to "Section" or "Sections" refer to the corresponding Section or Sections of this Agreement or of the Disclosing Letter, as the context shall require. All references to "Exhibits" refer to the corresponding Exhibits of this Agreement. All words used in this Agreement will be construed to be of such gender or number as the circumstances require. Unless otherwise expressly provided, the word "including" does not limit the preceding words or terms.

**Section 12.18 Definitions.** For purposes of this Agreement, the following terms have the meanings specified or referred to in this Section 12.18.

"Accounts Receivable" is defined in Section 4.8.

"Advisor" means with respect to a particular Person, any director, officer, employee, agent, consultant, advisor, or other representative of such Person, including legal counsel, accountants, and financial advisors.

"Applicable Contract" means any Contract (a) under which the [Company / Partnership] has or may acquire any rights, (b) under which the [Company / Partnership] has or may become subject to any obligation or liability, or (c) by which the [Company / Partnership] or any of the assets owned or used by it is or may become bound.

"Balance Sheet" is defined in Section 4.4.

"Bankruptcy Exception" is defined in Section 3.1.

"Best Efforts" means the efforts that a prudent Person desirous of achieving a result would use in similar circumstances to ensure that such result is achieved as expeditiously as possible [; provided, however, that an obligation to use Best Efforts under this Agreement does not require the Person subject to that obligation to take actions that would result in a materially adverse change in the benefits to such Person of this Agreement and the Contemplated Transactions].

"Breach" means a breach of a representation, warranty, covenant, obligation, or other provision of this Agreement or any instrument delivered pursuant to this Agreement, which will be deemed to have occurred if there is or has been (a) any inaccuracy in, or any failure to



perform or comply with, such representation, warranty, covenant, obligation, or other provision, or (b) any claim (by any Person) or other occurrence or circumstance that is or was inconsistent with such representation, warranty, covenant, obligation, or other provision, and the term “Breach” means any such inaccuracy, breach, failure, claim, occurrence, or circumstance.

“Claims Notice” is defined in Section 11.5(b).

“Closing” is defined in Section 2.3.

“Closing Date” means the date and time as of which the Closing actually takes place.

“Closing Payment” is defined in Section 2.4(c).

“[Company / Partnership]” is defined in the Recitals of this Agreement.

“Company Partnership Agreement” means the [Company Agreement / Agreement of Limited Partnership of the Company / Limited Partnership.

“Consent” means any approval, consent, ratification, waiver, or other authorization (including any Governmental Authorization).

“Contemplated Transactions” means all of the transactions contemplated by this Agreement, including:

- (a) the sale of the Interests by the Sellers to the Purchaser;
- (b) the execution, delivery, and performance of the Promissory Note, the Employment Agreements, the Noncompetition Agreements, the Escrow Agreement and the Contribution Agreement;
- (c) the performance by the Purchaser and the Sellers of their respective covenants and obligations under this Agreement; and
- (d) the Purchaser’s acquisition and ownership of the Interests and exercise of control over the [Company / Partnership].

“Contract” means any agreement, contract, obligation, promise, or undertaking (whether written or oral and whether express or implied) that is legally binding.

“Defense Counsel” is defined in Section 11.5(b).

“Defense Notice” is defined in Section 11.5(b).

“Disclosure Letter” means the disclosure letter delivered by the Sellers to the Purchaser concurrently with the execution and delivery of this Agreement.

“Employee Plans” is defined in Section 4.13.

“Employment Agreements” is defined in Section 2.4(b)(i).

“Environment” means soil, land surface or subsurface strata, surface waters (including navigable waters, ocean waters, streams, ponds, drainage basins, and wetlands), groundwaters, drinking water supply, stream sediments, ambient air (including indoor air), plant and animal life, and any other environmental medium or natural resource.

“Environmental, Health, and Safety Liabilities” means any cost, damages, expense, liability, obligation, or other responsibility arising from or under Environmental Law or Occupational Safety and Health Law and consisting of or relating to:

(a) any environmental, health, or safety matters or conditions (including on-site or off-site contamination, occupational safety and health, and regulation of chemical substances or products);

(b) fines, penalties, judgments, awards, settlements, legal or administrative proceedings, damages, losses, claims, demands and response, investigative, remedial, or inspection costs and expenses arising under Environmental Law or Occupational Safety and Health Law;

(c) financial responsibility under Environmental Law or Occupational Safety and Health Law for cleanup costs or corrective action, including any investigation, cleanup, removal, containment, or other remediation or response actions (“Cleanup”) required by applicable Environmental Law or Occupational Safety and Health Law (whether or not such Cleanup has been required or requested by any Governmental or Regulatory Authority or any other Person) and for any natural resource damages; or

(d) any other compliance, corrective, investigative, or remedial measures required under Environmental Law or Occupational Safety and Health Law.

The terms “removal,” “remedial,” and “response action,” include the types of activities covered by the United States Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq., as amended (“CERCLA”).

“Environmental Law” means any Legal Requirement that requires or relates to:

(a) advising appropriate authorities, employees, and the public of intended or actual releases of pollutants or hazardous substances or materials, violations of discharge limits, or other prohibitions and of the commencements of activities, such as resource extraction or construction, that could have significant impact on the Environment;

(b) preventing or reducing to acceptable levels the release of pollutants or hazardous substances or materials into the Environment;

(c) reducing the quantities, preventing the release, or minimizing the hazardous characteristics of wastes that are generated;

(d) assuring that products are designed, formulated, packaged, and used so that they do not present unreasonable risks to human health or the Environment when used or disposed of;

- (e) protecting resources, species, or ecological amenities;
- (f) reducing to acceptable levels the risks inherent in the transportation of hazardous substances, pollutants, oil, or other potentially harmful substances;
- (g) cleaning up pollutants that have been released, preventing the Threat of Release, or paying the costs of such clean up or prevention; or
- (h) making responsible parties pay private parties, or groups of them, for damages done to their health or the Environment, or permitting self-appointed representatives of the public interest to recover for injuries done to public assets.

“ERISA” means the Employee Retirement Income Security Act of 1974 or any successor law, and regulations and rules issued pursuant to that Act or any successor law.

“Escrow Agent” means \_\_\_\_\_, as Escrow Agent under the Escrow Agreement.

“Escrow Agreement” is defined in Section 2.4(d).

“Escrowed Funds” is defined in Section 2.4(c)(iii).

“Facilities” means any real property, leaseholds, or other interests currently or formerly owned or operated by the [Company / Partnership] and any buildings, plants, structures, or equipment (including motor vehicles, tank cars, and rolling stock) currently or formerly owned or operated by the [Company / Partnership].

“GAAP” means generally accepted United States accounting principles, applied on a basis consistent with the basis on which the Balance Sheet and the other financial statements referred to in Section 4.4 were prepared.

“General Partner” means \_\_\_\_\_, a Texas [limited liability company / corporation], which is the general partner of the Partnership.

“Governmental or Regulatory Authority” means any (a) court, tribunal, arbitrator, authority, agency, commission, official or other instrumentality of the United States, any foreign country or any domestic or foreign state, county, city or other political subdivision of any kind, or (b) body exercising, or entitled to exercise any administrative, executive, judicial, legislative, police, regulatory, or taxing authority or power of any nature, including any arbitral tribunal.

“Governmental Authorization” means any approval, consent, license, permit, waiver, or other authorization issued, granted, given, or otherwise made available by or under the authority of any Governmental or Regulatory Authority or pursuant to any Legal Requirement.

“Hazardous Activity” means the distribution, generation, handling, importing, management, manufacturing, processing, production, refinement, Release, storage, transfer, transportation, treatment, or use (including any withdrawal or other use of groundwater) of Hazardous Materials in, on, under, about, or from the Facilities or any part thereof into the

Environment, and any other act, business, operation, or thing that increases the danger, or risk of danger, or poses an unreasonable risk of harm to persons or property on or off the Facilities, or that may affect the value of the Facilities or the [Company / Partnership].

“Hazardous Materials” means any waste or other substance that is listed, defined, designated, or classified as, or otherwise determined to be, hazardous, radioactive, or toxic or a pollutant or a contaminant under or pursuant to any Environmental Law, including any admixture or solution thereof, and specifically including petroleum and all derivatives thereof or synthetic substitutes therefor and asbestos or asbestos-containing materials.

“HSR Act” means the Hart-Scott-Rodino Antitrust Improvements Act of 1976 or any successor law, and regulations and rules issued pursuant to that Act or any successor law.

“Indemnified Parties” is defined in Section 11.3.

“Indemnifying Party” is defined in Section 11.5(a).

“Indemnity Cap” is defined in Section 11.6(a).

“Intellectual Property” means and shall include, without limitation, any or all of the following and all rights associated therewith, all United States and foreign (as applicable): (a) domestic and foreign patents, and applications therefor, and all reissues, reexaminations, divisions, renewals, extensions, continuations and continuations-in-part thereof; (b) inventions (whether patentable or not), invention disclosures and improvements; (c) trade secrets, confidential and proprietary information, know how, technology, technical data, customer lists, financial and marketing data, pricing and cost information, business and marketing plans, databases and compilations of data, rights of privacy and publicity, and all documentation relating to any of the foregoing; (d) copyrights, copyright registrations and applications therefor, unregistered copyrights, the content of all World Wide Web sites and all other rights corresponding thereto throughout the world; (e) mask works, mask work registrations and applications therefor; (f) industrial designs and any registrations and applications therefor; (g) trade names, entity names, logos, trade dress, common law trademarks and service marks, trademark and service mark registrations and applications therefor and all goodwill associated therewith; (h) Internet domain names and Web sites, including all software and applications, and all components and/or modules thereof used in connection therewith; and (i) computer software including all source code, object code, firmware, development tools, files, records and data.

“Intellectual Property of the [Company / Partnership]” means any Intellectual Property: (a) that is owned by or exclusively licensed to the [Company / Partnership], including, but not limited to, Registered IP and Unregistered IP, or (b) which is used in the operation the business of the [Company / Partnership] (including the design, manufacture and use of the products and services of the Company) as it currently is operated, but shall specifically not include any Off-the-Shelf Software or any rights in or to materials created for clients as “work-made-for-hire” or which are subject to an assignment in favor of clients of the [Company / Partnership].

“Interests” is defined in the Recitals of this Agreement.

“Interim Balance Sheet” is defined in Section 4.4.

“IRC” means the Internal Revenue Code of 1986 or any successor law, and regulations issued by the IRS pursuant to the Internal Revenue Code or any successor law.

“IRS” means the United States Internal Revenue Service or any successor agency, and, to the extent relevant, the United States Department of the Treasury.

“Key Employees” means those employees of the (Company / Partnership or General Partner) identified by the Purchaser to the Principal Seller[s] on or before \_\_\_\_\_ days prior to the Closing as Persons with whom the Purchaser will require Employment Agreements pursuant to Section 2.4(b)(i).

“Knowledge” means an individual will be deemed to have “Knowledge” of a particular fact or other matter if:

(a) such individual is actually aware of such fact or other matter; or

(b) a prudent individual could be expected to discover or otherwise become aware of such fact or other matter in the course of conducting a reasonably comprehensive investigation concerning the existence of such fact or other matter.

A Person (other than an individual) will be deemed to have “Knowledge” of a particular fact or other matter if any individual who is serving, or who has at any time served, as a manager, director, officer, partner, executor, or trustee of such Person or of a manager or general partner of such Person (or in any similar capacity) has, or at any time had, Knowledge of such fact or other matter.

“Legal Requirement” means any federal, state, local, municipal, foreign, international, multinational, or other administrative order, constitution, law, ordinance, principle of common law, regulation, statute, or treaty.

“Liens” means any security interest, lien, pledge, claim, charge, escrow, encumbrance, option, right of first offer, right of first refusal, pre-emptive right, mortgage, indenture, security agreement or other restriction of any kind or character.

“Losses” is defined in Section 11.2.

“Noncompetition Agreements” is defined in Section 2.4(b)(ii).

“Occupational Safety and Health Law” means any Legal Requirement designed to provide safe and healthful working conditions and to reduce occupational safety and health hazards, and any program, whether governmental or private (including those promulgated or sponsored by industry associations and insurance companies), designed to provide safe and healthful working conditions.

“Order” means any award, decision, injunction, judgment, order, ruling, subpoena, or verdict entered, issued, made, or rendered by any court, administrative agency, or other Governmental or Regulatory Authority or by any arbitrator.

“Ordinary Course of Business” means an action taken by a Person only if:

(a) such action is consistent with the past practices of such Person and is taken in the ordinary course of the normal day-to-day operations of such Person;

(b) such action is not required to be authorized by the managers or board of directors of such Person (or by any Person or group of Persons exercising similar authority) [and is not required to be specifically authorized by the parent entity (if any) of such Person]; and

(c) such action is similar in nature and magnitude to actions customarily taken, without any authorization by the managers or board of directors (or by any Person or group of Persons exercising similar authority), in the ordinary course of the normal day-to-day operations of other Persons that are in the same line of business as such Person.

“Partnership Agreement” means the Agreement of Limited Partnership of the Partnership dated \_\_\_\_\_, including all amendments thereto.

“Person” means any individual, corporation (including any non-profit corporation), general or limited partnership, limited liability company, joint venture, estate, trust, association, organization, labor union, or other entity or Governmental or Regulatory Authority.

“Principal Seller[s]” is defined in the Recitals of this Agreement.

“Proceeding” means any action, arbitration, audit, hearing, investigation, litigation, or suit (whether civil, criminal, administrative, investigative, or informal) commenced, brought, conducted, or heard by or before, or otherwise involving, any Governmental or Regulatory Authority or arbitrator.

“Promissory Notes” is defined in Section 2.4(c)(ii).

“Purchase Price” is defined in Section 2.2.

“Purchaser” is defined in the first paragraph of this Agreement.

“Purchaser Indemnified Party” and “Purchaser Indemnified Parties” are defined in Section 11.2.

“Related Person” means with respect to a particular individual:

(a) each other member of such individual’s Family;

(b) any Person that is directly or indirectly controlled by such individual or one or more members of such individual’s Family;

(c) any Person in which such individual or members of such individual’s Family hold (individually or in the aggregate) a Material Interest; and

(d) any Person with respect to which such individual or one or more members of such individual's Family serves as a director, officer, partner, executor, or trustee (or in a similar capacity).

With respect to a specified Person other than an individual:

(a) any Person that directly or indirectly controls, is directly or indirectly controlled by, or is directly or indirectly under common control with such specified Person;

(b) any Person that holds a Material Interest in such specified Person;

(c) each Person that serves as a manager, managing member, director, officer, partner, executor, or trustee of such specified Person (or in a similar capacity);

(d) any Person in which such specified Person holds a Material Interest;

(e) any Person with respect to which such specified Person serves as a general partner or a trustee (or in a similar capacity); and

(f) any Related Person of any individual described in clause (b) or (c).

For purposes of this definition, (i) the "Family" of an individual includes (1) the individual, (2) the individual's spouse, (3) any other natural person who is related to the individual or the individual's spouse within the second degree, and (4) any other natural person who resides with such individual, and (ii) "Material Interest" means direct or indirect beneficial ownership (as defined in Rule 13d-3 under the Securities Exchange Act of 1934) of voting securities or other voting interests representing at least \_\_% of the outstanding voting power of a Person or equity securities or other equity interests representing at least \_\_% of the outstanding equity securities or equity interests in a Person.

"Release" means any spilling, leaking, emitting, discharging, depositing, escaping, leaching, dumping, or other releasing into the Environment, whether intentional or unintentional.

"Securities Act" means the Securities Act of 1933 or any successor law, and regulations and rules issued pursuant to that Act or any successor law.

"Seller" and "Sellers" are defined in the first paragraph of this Agreement.

"Seller Indemnified Parties" is defined in Section 11.3.

"Subsidiary" means with respect to any Person (the "Owner"), any corporation or other Person of which securities or other interests having the power to elect a majority of that corporation's or other Person's board of directors or similar governing body, or otherwise having the power to direct the business and policies of that corporation or other Person (other than securities or other interests having such power only upon the happening of a contingency that has not occurred) are held by the Owner or one or more of its Subsidiaries.

“Tax Return” means any return (including any information return), report, statement, schedule, notice, form, or other document or information filed with or submitted to, or required to be filed with or submitted to, any Governmental or Regulatory Authority in connection with the determination, assessment, collection, or payment of any Taxes or in connection with the administration, implementation, or enforcement of or compliance with any Legal Requirement relating to any Taxes.

“Taxes” means any federal, state, local or foreign tax with respect to income, accumulated earnings, franchise, capital, employees’ income withholding, back-up withholding, withholding on payments to foreign persons, social security, unemployment, disability, real property, personal property, sales, use, excise, transfer or any other taxes, duties, charges or levies of any nature imposed by any taxing or other Governmental or Regulatory Authority (including interest, penalties or additions to tax in respect of the foregoing).

“Third Party Claim” is defined in Section 11.5(b).

“Threat of Release” means a substantial likelihood of a Release that may require action in order to prevent or mitigate damage to the Environment that may result from such Release.

“Threatened” means a claim, Proceeding, dispute, action, or other matter will be deemed to have been “Threatened” if any demand or statement has been made (orally or in writing) or any notice has been given (orally or in writing), or if any other event has occurred or any other circumstances exist, that would lead a prudent Person to conclude that such a claim, Proceeding, dispute, action, or other matter is likely to be asserted, commenced, taken, or otherwise pursued in the future.

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

PURCHASER:

[NAME OF PURCHASER]

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

Name: \_\_\_\_\_

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



SELLERS:

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**FORM OF  
[MEMBERSHIP / PARTNERSHIP]  
INTEREST PURCHASE AGREEMENT**

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**EXHIBIT A  
TO  
[MEMBERSHIP / PARTNERSHIP] INTEREST  
PURCHASE AGREEMENT**

**SELLERS INFORMATION**

<u>Seller Name, Address and Account Information:</u>	<u>Description of Interest:</u>	<u>Amount of Closing Payment:</u>	<u>Principal Amount of Promissory Note:</u>
Acme GP, LLC _____ _____ Account Name: Account Number: Name of Bank: Bank Address: Routing #/ABA #:	1.0% General Partner Interest	\$ _____	\$ _____
Jane Investor _____ _____ Account Name: Account Number: Name of Bank: Bank Address: Routing #/ABA #:	25.0% Class A Limited Partner Interest	\$ _____	\$ _____
John Investor _____ _____ Account Name: Account Number: Name of Bank: Bank Address: Routing #/ABA #:	25.0% Class A Limited Partner Interest	\$ _____	\$ _____
Jill Founder _____ _____ Account Name: Account Number: Name of Bank: Bank Address: Routing #/ABA #:	49.0% Class B Limited Partner Interest	\$ _____	\$ _____

**EXHIBIT B  
TO  
[MEMBERSHIP / PARTNERSHIP] INTEREST  
PURCHASE AGREEMENT**

**FORM OF ASSIGNMENT OF  
[MEMBERSHIP / LIMITED PARTNERSHIP] INTEREST**

**This** Assignment (“Assignment”) is executed on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between \_\_\_\_\_ (the “Seller”), and \_\_\_\_\_, a \_\_\_\_\_ [limited liability company / limited partnership / corporation], (the “Purchaser”).

**W I T N E S S E T H :**

**WHEREAS**, the Seller, the Purchaser and other parties have entered into a [Membership / Partnership] Interest Purchase Agreement dated \_\_\_\_\_, 20\_\_\_\_, (the “Agreement”); and

**WHEREAS**, the Seller owns a \_\_\_\_% interest as [a / the] [member / general partner / Class \_\_\_\_ limited partner / limited partner] (the “Interest”) of \_\_\_\_\_, a Texas [limited liability company / limited partnership], (the “Company” / “Partnership”); and

**WHEREAS**, pursuant to the Agreement, the Seller desires to sell, transfer and assign the Interest to the Purchaser and the Purchaser desires to accept such assignment and to purchase the Interest from the Seller;

**NOW, THEREFORE**, for good and valuable consideration, including without limitation the mutual representations, warranties and covenants contained in the Agreement, the Seller hereby conveys, grants, transfers, assigns and delivers the Interest to the Purchaser [and grants to Purchaser the right to become a substitute limited partner of the Partnership with respect to the Interest] and the Purchaser hereby accepts the Interest [and subject to the terms and conditions of the Agreement, assumes and agrees to pay or perform all obligations of the Seller as a [member of the Company / limited partner of the Partnership] with respect to the Interest, elects to become a [member of the Company / limited partner of the Partnership] with respect to the Interest pursuant to the [Company Agreement / Regulations / Partnership Agreement] of the [Company / Partnership], and pursuant to Section \_\_\_\_\_ of the [Company Agreement / Regulations / Partnership Agreement] the Purchaser accepts and adopts all of the terms and provisions of [Company Agreement / Regulations / Partnership Agreement].<sup>31</sup>

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<sup>31</sup> Partnership Agreements frequently contain and Company Agreements occasionally contain, provisions setting out procedural requirements for assigning ownership interests, such as a requirement that an assignee accept and adopt the provisions of the agreement. The bracketed list contains examples of such requirements. The drafter should consult, and conform the assignment to, the applicable provisions of the governing document.

**IN WITNESS WHEREOF**, the parties hereto have executed or caused this instrument to be executed as of the date first above written.

**SELLER:**

\_\_\_\_\_

**PURCHASER:**

\_\_\_\_\_

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

Name: \_\_\_\_\_

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

**EXHIBIT F  
TO  
[MEMBERSHIP / PARTNERSHIP] INTEREST  
PURCHASE AGREEMENT**

**FORM OF CONTRIBUTION AGREEMENT**

This Contribution Agreement (this “Agreement”) is made as of \_\_\_\_\_, 20\_\_ by and among \_\_\_\_\_ (collectively, the “Sellers”);

**W I T N E S S E T H:**

**WHEREAS**, the Sellers were formerly the owners of the [membership / partnership] interests (the “Interests”) of \_\_\_\_\_, a Texas [limited liability company / limited partnership] (the [“Company” / “Partnership”]); and

**WHEREAS**, pursuant to the [Membership / Partnership] Interest Purchase Agreement (the “Purchase Agreement”) dated as of \_\_\_\_\_, 20\_\_, by and among the Sellers and \_\_\_\_\_, a [limited liability company / limited partnership / corporation] (the “Purchaser”), the Purchaser has purchased from the Sellers all of the Interests; and

**WHEREAS**, pursuant to the Purchase Agreement, the Sellers agreed jointly and severally to indemnify the Purchaser with respect to certain representations, warranties and covenants; and

**WHEREAS**, the Sellers desire to execute this Agreement to apportion certain liabilities or obligations that may arise pursuant to the Purchase Agreement and this Agreement;

**NOW, THEREFORE**, in consideration of these premises, and for other good and valuable consideration, the receipt and sufficiency of all of which are hereby acknowledged, the parties hereby agree as follows:

**ARTICLE 1**

**Certain Definitions**

As used in this Agreement:

(a) “General Seller Obligations” means the obligations of the Sellers to indemnify the Purchaser Indemnified Parties (as defined in the Purchase Agreement) pursuant to Section 11.2 of the Purchase Agreement except to the extent any such obligation arises from or is caused by a Separate Seller Default.

(b) “Losses” means any liabilities, obligations, losses, damages, penalties, claims, actions, suits, judgments, settlements, out-of-pocket costs, expenses and disbursements



(including reasonable costs of investigation, and reasonable attorneys', accountants' and expert witnesses' fees) or whatever kind and nature.

(c) "Pro Rata Portion" means, with respect to any Seller, the percentage set forth opposite such Seller's name on Schedule "A" attached hereto.

(d) "Separate Seller Default" means, with respect to any Seller:

(i) any misrepresentation, inaccuracy or breach of any representation or warranty made by such Seller contained in Article 3 of the Purchase Agreement;

(ii) any breach of or failure by such Seller to comply with or perform any agreement or covenant of such Seller contained in Section 2.4(a) or Section 6.5 of the Purchase Agreement; or

(iii) any breach of or failure by such Seller to comply with or perform any restrictive or affirmative covenant, agreement or other obligation of such Seller in any noncompetition agreement or employment agreement between such Seller and the Purchaser or the [Company / Partnership] under Section 2.4(b) of the Purchase Agreement or otherwise.

## ARTICLE 2

### General Seller Obligations

Each of the Sellers agrees that, as among the Sellers, the liabilities and obligations of each Seller with respect to the General Seller Obligations shall be limited in the aggregate to such Seller's Pro Rata Portion of the amounts (the "General Seller Amounts") paid by the Sellers (or any one or more of them) with respect to the General Seller Obligations. Accordingly, subject to the terms of this Agreement, each Seller shall be liable for and shall bear its Pro Rata Portion of any General Seller Amounts paid by a Seller with respect to the General Seller Obligations. The provisions of this Article 2 shall apply whether the General Seller Amounts paid by any Seller arise based on a claim for breach of representation or warranty, indemnification, or otherwise and whether paid through judgment, compromise, settlement or otherwise.

## ARTICLE 3

### Indemnification

Each of the Sellers (each, an "Indemnifying Seller", and collectively the "Indemnifying Sellers") shall indemnify and hold harmless each other Seller (an "Indemnified Seller") from and against:

(a) the amount, if any, by which any General Seller Amount paid by an Indemnified Seller exceeds such Indemnified Seller's Pro Rata Portion of such General Seller Amounts (but

only up to the Indemnifying Seller's Pro Rata Portion of the total General Seller Amounts paid by the Indemnified Seller);

(b) such Indemnifying Seller's Pro Rata Portion of any Losses that may be incurred by the Indemnified Seller in enforcing an indemnification under paragraph (a) of this Article 3; and

(c) any Losses that may be imposed on or incurred by the Indemnified Seller as a consequence of or in connection with a Separate Seller Default by the Indemnifying Seller.

#### **ARTICLE 4**

##### **Procedure**

(a) Any Indemnified Seller shall notify the other Indemnifying Sellers of any matter in respect of which such Indemnified Seller intends to seek indemnity from the Indemnifying Sellers or any of them promptly after such Indemnified Seller becomes aware of such matter; provided, however, that any failure to give prompt notice of such matter shall not relieve any of the Indemnifying Sellers from any of their obligations hereunder with respect to such matter unless, and then only to the extent that, such failure materially and adversely affects the ability of any of the Indemnifying Sellers to participate in the defense of any claim or action arising out of such matter. The Indemnified Seller shall provide the Indemnifying Sellers with all information reasonably available to the Indemnified Seller regarding such matter. The parties shall reasonably cooperate in connection with the defense of any claim that could reasonably be expected to result in a claim by an Indemnified Seller for indemnification under Article 3 of this Agreement. No Indemnified Seller shall settle any claim relating to a General Seller Obligation without the prior written consent of those Indemnifying Sellers whose collective Pro Rata Portions constitute at least a majority of the Pro Rata Portions held by all Indemnifying Sellers (which consent shall not be unreasonably withheld or delayed). No Indemnified Seller shall settle any claim relating to a Separate Seller Default by an Indemnifying Seller without the prior written consent of such Indemnifying Seller (which consent shall not be unreasonably withheld or delayed). Each party shall use reasonable efforts to keep the other parties informed at all times as to the status of its efforts with respect to any claim covered hereby and consult with the other parties concerning its efforts.

(b) Any amount payable under this Agreement shall be paid on or before the later of (i) thirty (30) days after the notice from the Indemnified Seller pursuant to (a) above or (ii) the date the relevant Losses or General Seller Amounts are paid by such Indemnified Seller.

#### **ARTICLE 5**

##### **Certain Agreements Regarding Seller's Representative**

Pursuant to Section 12.16 of the Purchase Agreement, each Seller has appointed \_\_\_\_\_ as his or her attorney-in-fact with respect to certain matters. Notwithstanding such appointment, \_\_\_\_\_ agrees that he or she will not exercise such rights to amend

the Purchase Agreement in any way that would (i) reduce the amount to be paid to any Seller under the Purchase Agreement or (ii) materially increase the liability of any Seller under the Purchase Agreement without the prior written consent of such Seller. The provisions of this Article 5 shall also apply to \_\_\_\_\_, or to any other Seller, to the extent that \_\_\_\_\_ or such other Seller serves as a successor Representative under Section 12.16 of the Purchase Agreement.

## **ARTICLE 6**

### **Miscellaneous**

(a) The provisions of this Agreement may not be amended, in whole or in part, except by a written agreement executed by all parties.

(b) No waiver of any provision of this Agreement, in whole or in part, shall be valid unless made in writing and signed by the party to be charged with the waiver. The waiver by a party of any breach or default by any other party hereunder shall not constitute the waiver of any subsequent breach or default or the relinquishment of any other rights a party may have hereunder.

(c) THIS AGREEMENT SHALL BE CONSTRUED IN ACCORDANCE WITH, AND GOVERNED BY, THE LAWS OF THE STATE OF TEXAS, EXCLUSIVE OF PRINCIPLES OF CONFLICTS OF LAWS. THE PARTIES HEREBY SUBMIT TO THE JURISDICTION OF ALL FEDERAL AND STATE COURTS OF TRAVIS COUNTY, TEXAS, U.S.A. AND HEREBY AGREE THAT ANY SUCH COURT SHALL BE A PROPER FORUM FOR THE DETERMINATION OF ANY DISPUTE ARISING HEREUNDER.

(d) This Agreement constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior agreements and understandings of the parties with respect to the same, whether communicated in written, oral, or other form.

(e) No party may directly or indirectly transfer or assign any of its rights or obligations under this Agreement without the prior written consent of the other parties, and any transfer or assignment in violation of the foregoing shall be void. This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, successors and permitted assigns.

(f) All notices and other formal communications hereunder must be in writing and either delivered in person (including delivery by courier, facsimile, telex or similar means) or sent by mail, postage prepaid, registered or certified, return receipt requested and addressed to the party entitled to receive such notice or communication at the address set forth on the signature page hereof or at such other address as the party entitled to receive such notice shall request in a written notice sent to the other parties. Except as may be specifically provided herein, any such notice shall be deemed effective as of the date of delivery or, if mailed in the manner set forth above, three days after the date of mailing.

(g) The headings used in this Agreement are for convenience only and shall have no legal effect. Whenever the context requires, the gender of all words used herein shall include the masculine, the feminine and the neuter, and the number of all words shall include the singular and the plural. This Agreement has been negotiated by the parties and their respective counsel and shall be interpreted in accordance with its terms and without any strict construction in favor of or against any party. As used in this Agreement, the term “including” means “including without limitation” and, unless otherwise specified, the term “days” means calendar days.

(h) This Agreement is not intended to create any rights in favor of, or confer any benefits upon, any third parties.

(i) Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision of this Agreement, or the application thereof to any person or entity or under any circumstances, shall be invalid or unenforceable to any extent under applicable law, then such provision shall be deemed severed from this Agreement with respect to such person, entity or circumstance, without invalidating the remainder of this Agreement or the application of such provision to other persons, entities or circumstances, and a new provision shall be deemed substituted in lieu of the provision so severed which new provision shall, to the extent possible, accomplish the intent of the parties hereto as evidenced by the provision so severed.

(j) This Agreement may be executed in two or more counterparts, and each counterpart shall be deemed an original, but all counterparts shall together constitute a single instrument. Signature sent by facsimile transmission shall be binding as evidence of acceptance of the terms hereof by such signatory party.

(k) This Agreement has been prepared by counsel to the Company as an accommodation to the Sellers. Such counsel has not represented any of the Sellers in connection with this Agreement. Each of the Sellers acknowledges that such Seller has been advised to seek independent counsel with respect to all legal and tax matters associated with this Agreement.

[Signature page follows]

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the Effective Date.

**SELLERS:**

\_\_\_\_\_  
Name:

Address:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Name:

Address:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Name:

Address:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Name:

Address:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**[WAIVER AND CONSENT]<sup>32</sup>**

[The undersigned General Partner of the Partnership, hereby (i) consents, in accordance with Section \_\_\_ of the Agreement of Limited Partnership of the Partnership, to the above transfer from the Seller to the Purchaser, (ii) waives any right and option of the Partnership to acquire the Interest for and on behalf of the Partnership as General Partner thereof, including without limitation the right contained in Section \_\_\_ of the Agreement of Limited Partnership of the Partnership, and (iii) consents to and approves the admission of the Purchasers as a substitute limited partner of the Partnership with respect to the Interest.<sup>33</sup>]

**[GENERAL PARTNER:]**

\_\_\_\_\_

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

Name: \_\_\_\_\_

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

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<sup>32</sup> This language is typical of language used in assignments of limited partnership interests in a situation where the General Partner and the Partnership are waiving compliance with the procedural requirements specified in the Partnership Agreement. Any such language would need to be conformed to the applicable Partnership Agreement, Company Agreement or any other agreement that contains procedural requirements or transfer restrictions.

<sup>33</sup> A purchaser of a general or limited partnership interest does not automatically become a partner of the partnership. The purchaser becomes a partner either upon compliance with the relevant admission provisions of the partnership agreement or, if the partnership agreement does not contain relevant admission provisions, upon the written consent of all partners. See Sections 153.101(b) and 153.151(a) of the Texas Business Organizations Code.

**SCHEDULE "A"**  
**TO CONTRIBUTION AGREEMENT**

	<u><b>Name of Seller</b></u>	<u><b>Pro Rata Portion</b></u>
[Name]		_____%
[Name]		_____%
[Name]		_____%
[Name]		_____%