

Morgan Lewis

M&A ACADEMY

REPRESENTATIONS AND WARRANTIES

SAMPLE PROVISIONS

EXAMPLES OF REPRESENTATIONS AND WARRANTIES Index

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DISCLAIMER REGARDING EXAMPLES

The following examples are intended to be used in connection with the Morgan Lewis M&A Academy Representations and Warranties training and serve as models for discussion and comparison. However, the following representations and warranties should not be used in any transaction documents before seeking advice from legal counsel. The following examples cover general corporate representations and warranties, but do not include specific representations and warranties covering intellectual property, taxes or employees and benefit plans. Please confer with legal experts regarding these specific areas.

Knowledge

Actual Knowledge

"Knowledge" means, with respect to a party, the **actual knowledge (without any requirement of investigation other than reviewing this Agreement and the Company Disclosure Schedule)** of the directors, officers, legal or financial personnel of such party.

Reasonable Due Inquiry

"Knowledge" means, with respect to a party, the **actual knowledge** of the directors, officers, legal or financial personnel of such party **after reasonable due inquiry**.

Constructive Knowledge

"Knowledge" means, with respect to a party, the **actual knowledge** of the directors, officers, legal or financial personnel of such party **and such knowledge as would reasonably be expected to be known by such individuals after exercising reasonable due diligence in the conduct of his or her duties and responsibilities with respect to such party**.

Note: In any of the above examples, a specific list of individuals (which is the more common formulation) can be inserted in lieu of a general reference to all directors, officers, legal or financial personnel of a party.

Disclosure
(Seller Draft)

2.1 Company Disclosure Schedule. Any matter set forth on any of the Company Disclosure Schedules **shall be deemed set forth in all other Company Disclosure Schedules whether or not a specific cross-reference appears**. The inclusion of any information (including dollar amounts) in any of the Company Disclosure Schedules **shall not be deemed to be an admission or acknowledgment by the Company that such information is required to be listed in such section or is material to or outside the ordinary course of the business** of the Company, nor shall such information be deemed **to establish a standard of materiality** (and the actual standard of materiality may be higher or lower than the matters disclosed by such information). In addition, matters reflected in the Company Disclosure Schedules **are not necessarily limited to matters required by this Agreement to be reflected in the Company Disclosure Schedules**. Such additional matters **are set forth for informational purposes only and do not necessarily include other matters of a similar nature**. The information contained in this Agreement, the Company Disclosure Schedules and Exhibits is disclosed solely for purposes of this Agreement, and no information contained herein or therein **shall be deemed to be an admission** by any party hereto to any third party of any matter whatsoever (including any violation of applicable Law or breach of contract).

Disclosure
(Buyer Draft)

2.2 Company Disclosure Schedule. Any matter set forth on any of the Company Disclosure Schedules **shall be deemed set forth in all other Company Disclosure Schedules for which a specific cross-reference appears**.

Disclosure
(Negotiated)

2.3 Company Disclosure Schedule. The Company Disclosure Schedule shall be arranged according to specific sections in this Article II and shall provide exceptions to, or otherwise qualify in reasonable detail, the corresponding Sections in this Article II and any other Section hereof to the extent such information is responsive to such other Section; provided that no matter disclosed in one Section of the Company Disclosure Schedule shall be deemed disclosed in another Section of the Company Disclosure Schedule unless it is reasonably apparent on its face without independent knowledge that the matter is responsive to such other representation.

Ability to Update Disclosure Schedules
(Seller Draft)

During the Pre-Closing Period, Seller shall have the right (but not the obligation) to update the Disclosure Schedules to the extent information contained therein or any representation or warranty of Seller becomes untrue, incomplete or inaccurate after the Agreement Date due to events or circumstances after the date hereof. [Buyer shall have the right to terminate this Agreement pursuant to Section [] within five (5) days after receipt of such update if the updated portion or portions of the Disclosure Schedules disclose any facts and circumstances that would cause a failure of the Closing Condition set forth in Section []; provided, however, that if (a) Buyer is not entitled to, or does not timely exercise, such right to terminate this Agreement, or (b) Buyer consummates the Closing,] Buyer shall, in any such case, be deemed to have accepted such updated Disclosure Schedules, **any such update shall be deemed to have amended the Disclosure Schedules, to have qualified the relevant representations and warranties contained in Article [], and to have cured any breach of any representation or warranty that otherwise might have existed hereunder by reason of such event or circumstance.** Nothing in this Agreement, including this Section [], shall be interpreted or construed to imply that Seller is making any representation or warranty as of any date other than as otherwise set forth herein.

Obligation to Update Disclosure Schedules
(Buyer Draft)

From time to time prior to the Closing, Seller shall promptly supplement or amend the Disclosure Schedules hereto with respect to any matter hereafter arising or of which it becomes aware after the date hereof, which, if existing, occurring or known at the date of this Agreement, would have been required to be set forth or described in the Disclosure Schedules (each a "Schedule Supplement"). **Any disclosure in any such Schedule Supplement shall not be deemed to have cured any inaccuracy in or breach of any representation or warranty contained in this Agreement, including for purposes of the indemnification or termination rights contained in this Agreement or of determining whether or not the conditions set forth in Section [Section relating to Buyer's Closing Condition] have been satisfied.**

Corporate Organization Rep

2.1 Organization of the Company. The Company is a corporation **duly organized, validly existing and in good standing** under the laws of the [State of Delaware]. The Company has all requisite corporate power and authority **to own, lease and operate its properties and to carry on its business as currently conducted**. The Company is duly qualified or licensed to do business and is in good standing as a foreign corporation **in each jurisdiction listed on Schedule 2.1**, which constitute all of the jurisdictions in which the conduct of its business or the ownership, leasing, holding or use of its properties makes such qualification necessary, **except such other jurisdictions where the failure to be so qualified or licensed or in good standing would not reasonably be expected to have a Company Material Adverse Effect**. **The Company has delivered to Buyer a true and correct copy of the Certificate of Incorporation and its By-laws, each as amended to date and in full force and effect on the date hereof**. Except as set forth in Schedule 2.1, neither the Company nor its predecessors has conducted any business under or otherwise used for any purpose in any jurisdiction any fictitious name, assumed name, trade name or other name.

Capitalization Rep2.2 Capital Stock.

(a) Immediately prior to the Closing, the authorized capital stock of the Company consists of (a) [_____] shares of Common Stock, of which [_____] shares are issued and outstanding (the "Common Stock"); (b) [_____] shares of the Series A-1 Convertible Preferred Stock, of which [_____] shares are issued and outstanding (the "Series A-1 Preferred"); (c) [_____] shares of the Series A-2 Convertible Preferred Stock, of which [_____] shares are issued and outstanding (the "Series A-2 Preferred"); (d) [_____] shares of the Series B-1 Convertible Preferred Stock, of which [_____] shares are issued and outstanding (the "Series B-1 Preferred"); and (e) [_____] shares of the Series B-2 Preferred, of which [_____] shares are issued and outstanding (the Series A-1 Preferred, the Series A-2 Preferred, the Series B-1 Preferred and the Series B-2 Preferred are collectively referred to herein as the "Preferred Stock"). A complete and accurate list of stockholders, warrant holders and option holders by name, number of shares and percentage ownership (on an as-if converted to Common Stock basis), as of immediately prior to the Closing, is set forth in Schedule 2.2(a). All of the outstanding shares of capital stock of the Company were duly authorized and validly issued and are fully paid and nonassessable.

(b) There are no outstanding subscriptions, options, warrants, shares of restricted stock, calls, contracts, demands, commitments, convertible securities or other agreements or arrangements of any character or nature whatever (collectively, in this Section 2.2(b), "Equity Rights"), other than as provided in this Agreement, under which the Company is obligated to issue any securities of any kind representing an ownership interest in the Company, except as set forth in Schedule 2.2(b). Schedule 2.2(b) includes, for each Equity Right, the name of each holder of such Equity Right, the date and price at which such Equity Right was issued, and any vesting provisions applicable to such Equity Right. Except as set forth on Schedule 2.2(b), all Equity Rights have been issued under the Company's [name of option plan] (collectively, the "Option Plans"). Neither the offer nor the issuance or sale of the Convertible Notes or the Warrants, or the issuance of the Securities or the Conversion Shares, as applicable, constitutes an event, under any anti-dilution provisions of any securities issued (or issuable pursuant to outstanding rights, warrants or options) by the Company or any agreements with respect to the issuance of securities by the Company, which will either increase the number of shares issuable pursuant to such provisions or decrease the consideration per share to be received by the Company pursuant to such provisions.

(c) Except as set forth on Schedule 2.2(c), no holder of any securities of the Company is entitled to any preemptive or similar rights to purchase any securities of the Company from the Company, either as a result of this Agreement or any prior transactions. All outstanding securities of the Company have been issued in full compliance with an exemption or exemptions from the registration and prospectus delivery requirements of the Securities Act of 1933, as amended (the "Securities Act"),

and from the registration and qualification requirements of all applicable state securities laws.

No Conflict Rep

2.3 No Conflict. Except as set forth on Schedule 2.3, the execution and delivery by the Company of this Agreement and the Related Agreements to which the Company is a party, and the consummation of the transactions contemplated hereby and thereby, do not and will not conflict with or result **in any material violation of or material default** under (with or without notice or lapse of time, or both) or give rise to a right of termination, cancellation, modification or acceleration of any material obligation or loss of any material benefit under, or result in the imposition or creation of any material Lien upon any of the Company's or any of its Subsidiaries' properties or assets (tangible or intangible) under (i) any provision of the Company Certificate of Incorporation, the Company's By-laws or any other organizational documents of the Company or any of its Subsidiaries, (ii) any material agreement to which the Company or any of its Subsidiaries is a party or by which they or any of their respective properties or assets is bound, including any agreement set forth or required to be set forth on Schedule 2.3, (iii) any Company Authorization or (iv) any Law applicable to the Company or any of its Subsidiaries or any of their respective properties or assets (whether tangible or intangible).

Consents Rep2.4 Consents.

(a) **No consent, waiver, approval, order or authorization of, or registration, declaration or filing with, or notice to any Governmental Entity is required by,** or with respect to, the Company or any of its Subsidiaries in connection with the execution and delivery of this Agreement and the Related Agreements or the consummation by the Company and its Subsidiaries of the transactions contemplated hereby and thereby, except for (i) such consents, waivers, approvals, orders, authorizations, registrations, declarations, notices and filings as may be required under applicable antitrust Laws (collectively, "Antitrust Laws"), and (ii) the filing of the Certificate of Merger with the Secretary of State of the State of Delaware and notices to Stockholders required by the DGCL and the Company Certificate of Incorporation.

(b) Schedule 2.4(b) sets forth **all notices to, and all necessary consents, waivers and approvals of, parties to any material agreement** (including any agreement set forth or required to be set forth on Schedule [2.5]) to which the Company or any of its Subsidiaries is a party or by which they or their properties are bound that are required thereunder in **connection with the Merger, or for any such material agreement to remain in full force and effect without limitation, modification or alteration** (including payment of any additional amounts or consideration other than ongoing fees, royalties or payments which the Company or any of its Subsidiaries, as the case may be, would otherwise be required to pay pursuant to the terms of such material agreement had the transactions contemplated

by this Agreement not occurred) after the Effective Time so as to preserve all rights of, and benefits to, the Company and its Subsidiaries, as the case may be, under such material agreement from and after the Effective Time.

Financial Statements Rep2.5 Company Financial Statements and Internal Controls.

(a) The Company has provided to Buyer true and correct copies of (i) the **audited consolidated balance sheets** and the related audited consolidated statements of operations, changes in shareholders' equity and cash flow of the Company and its Subsidiaries for the fiscal years ended **[insert date]** and **[insert date]** and the opinion of [_____], the Company's independent auditor, thereon and (ii) the unaudited consolidated balance sheet (the "Company Balance Sheet") of the Company and its Subsidiaries as of **[insert date]** (the "Balance Sheet Date") and the related unaudited consolidated statements of operations, shareholders' equity and cash flow of the Company and its Subsidiaries for the nine-month period then ended (the financial statements referred to in items (i) and (ii), collectively, the "Company Financial Statements"). The Company Financial Statements are accurate and complete in all material respects and have been prepared from the books and records of the Company and **in accordance with generally accepted accounting principles effective in the United States ("GAAP")** applied on a consistent basis throughout the periods indicated and consistent with each other, except for customary year end adjustments and the absence of footnotes in the case of the unaudited Company Financial Statements. Except as disclosed on Schedule 2.5, **the Company Financial Statements fairly present, in all material respects, the consolidated financial position, results of operations and cash flows of the Company and its Subsidiaries as of the dates and for the periods indicated therein**, subject, in the case of the unaudited interim Company Financial Statements, to normal year-end adjustments, which were not material in amount or significance.

(b) **The Company has in place systems and processes that are customary and adequate for a company at the same stage of development, as the Company and that are designed to (i) provide reasonable assurances regarding the reliability of the Company Financial Statements and (ii) in a timely manner accumulate and communicate to each of the Company's principal executive officer and principal financial officer the type of information that is required to be disclosed in the Company Financial Statements.**

(c) Except as disclosed on Schedule 2.5(c), neither the Company nor any of its Subsidiaries nor, to the Company's knowledge, any Employee, auditor, accountant or representative of the Company or any of its Subsidiaries has received or otherwise had or obtained knowledge of any complaint, allegation, assertion or claim, whether written or oral, regarding the accuracy or integrity of the Company Financial Statements. To the Company's knowledge, **there have been no instances of fraud by the Company or any of its Subsidiaries, whether or not material that occurred during any period covered by the Company Financial Statements.**

(d) To the Company's knowledge, no Employee has provided information to any Governmental Entity regarding the commission of any crime or the violation of any Law applicable to the Company, any of its Subsidiaries or any part of their respective operations.

(e) During the periods covered by the Company Financial Statements, the Company's external auditor was independent of the Company and its management. Schedule 2.5(e) lists each written report by the Company's external auditors to the Company's board of directors, or any committee thereof, or the Company's management concerning any period covered by the Company Financial Statements. Except as described in the note to the Company Balance Sheet and the related unaudited consolidated statements of operations, shareholders' equity and cash flow of the Company and its Subsidiaries, the Company's revenue recognition policy is consistent with GAAP.

Undisclosed Liabilities Rep
(Seller Draft)

2.6 **Indebtedness.** Except as set forth on Schedule 2.6 and except for Indebtedness reflected or reserved against in the Most Recent Audited Balance Sheet or incurred pursuant to the Credit Facility of the Company in the ordinary course of business, neither the Company nor any of its Subsidiaries has any Indebtedness outstanding at the date hereof. At the Closing, neither the Company nor any of its Subsidiaries will have any Indebtedness outstanding other than as described on the Certificate of Closing Amounts.

“**Indebtedness**” means all indebtedness of the Company or any of its Subsidiaries **for borrowed money**, whether current or funded, or secured or unsecured, **including** (a) all indebtedness of any such Person for the deferred purchase price of property or services represented by a note, or (b) all the obligations under leases which shall have been or must be, in accordance with GAAP, recorded as capital leases in respect of which Person is liable as a lessee.

Undisclosed Liabilities Rep
(Intermediate Seller Draft)

2.6 **No Undisclosed Liabilities.** The Company has no material liabilities and, to the best of its knowledge no material contingent liabilities, not disclosed in the Financial Statements, except (i) current liabilities incurred in the ordinary course of business which have not been, either in any individual case or in the aggregate, materially adverse and (ii) liabilities of a type not required by U.S. generally accepted accounting principles to be reflected in financial statements.

Undisclosed Liabilities Rep
(Buyer Draft)

2.7 **Liabilities.**

(a) Except **liabilities**: (i) recorded or reserved against on the **Company Balance Sheet**; (ii) incurred since the Balance Sheet Date **in the ordinary course of business, consistent with prior practice**; or (iii) as set forth in Schedule 2.11(a), the Company and its Subsidiaries do not have any **material debts, liabilities, demands or obligations of any nature** (whether known or unknown, accrued or fixed, absolute or contingent, matured or unmatured, determined or determinable, or as a guarantor or otherwise).

(b) Schedule 2.11(b) lists: (i) all accounts payable of the Company and its Subsidiaries as of the Balance Sheet Date and the aging thereof; (ii) any customer deposits or other deposits held by the Company or any of its Subsidiaries as of the date hereof; and (iii) all notes payable and other Indebtedness of the Company and its Subsidiaries as of the date hereof. All accounts payable of the Company and its

Subsidiaries that arose after the Balance Sheet Date have been recorded on the accounting books and records of the Company. All outstanding accounts payable of the Company and its Subsidiaries represent valid obligations arising from bona fide purchases of assets or services, which assets or services have been delivered to the Company or any of its Subsidiaries.

(c) Neither the Company nor any of its Subsidiaries has, at any time: (i) made a general assignment for the benefit of creditors; (ii) filed, or had filed against it, any bankruptcy petition or similar filing; (iii) suffered the attachment or other judicial seizure of all or a substantial portion of its assets; (iv) admitted in writing its inability to pay its debts as they become due; or (v) been convicted of, or pleaded guilty or no contest to, any felony. Neither the Company nor any of its Subsidiaries is insolvent. To the knowledge of the Company, none of its current Employees has been convicted of, or pleaded guilty or no contest to, any felony.

Absence of Certain Changes Rep
(Seller Draft)

2.8 Absence of Certain Changes. **Since the Balance Sheet Date**, except as contemplated by or as **disclosed in this Agreement**, the Company and its subsidiaries have conducted their respective businesses only in the ordinary course of business and in a manner consistent with past practice and, since such date, **there has not been a Company Material Adverse Effect**.

Absence of Certain Change Rep
(Buyer Draft)

2.9 Absence of Certain Changes. Except as set forth in Schedule 2.9, since **the Balance Sheet Date there has not been**, occurred or arisen any:

(a) transaction by the Company or any of its Subsidiaries, except in the ordinary course of business and consistent with past practices;

(b) amendments or changes to the Company Certificate of Incorporation or By-laws of the Company or comparable documents of any of its Subsidiaries;

(c) capital expenditure or capital commitment by the Company or any of its Subsidiaries in any amount in excess of \$[_____] in any individual case or \$[_____] in the aggregate;

(d) payment, discharge or satisfaction, in any amount in excess of \$[_____] in any one case, or \$[_____] in the aggregate, of any claim, liability or obligation (absolute, accrued, asserted or unasserted, contingent or otherwise of the Company or any of its Subsidiaries), other than payments, discharges or satisfactions in the ordinary course of business and consistent with past practices of liabilities reflected or reserved against in the Company Balance Sheet;

(e) destruction of, damage to or loss of any material assets, business or customer of the Company or any of its Subsidiaries (whether or not covered by insurance);

(f) work stoppage, labor strike or other labor trouble, or any action, suit, claim, labor dispute or grievance relating to any labor, employment and/or safety matter involving the Company or any of its Subsidiaries, including charges of wrongful discharge, discrimination, wage and hour violations, or other unlawful labor and/or employment practices or actions;

(g) change in accounting methods or practices (including any change in depreciation or amortization policies or rates) by the Company or any of its Subsidiaries;

(h) revaluation by the Company or any its Subsidiaries of any of their assets, including the writing down of the value of inventory or writing off of notes or accounts receivable;

(i) (x) declaration, setting aside or payment of a dividend or other distribution (whether in cash, stock or property) with respect to any Company Capital Stock or Subsidiary Securities, or any direct or indirect redemption, purchase or other acquisition by the Company or any Subsidiary of any Company Capital Stock or Subsidiary Securities, other than repurchases of Company Common Stock from Employees, consultants or other Persons performing services for the Company pursuant to agreements under which the Company has the option to repurchase such shares at cost upon the termination of employment or other services, (y) any split, combination or reclassification of any Company Capital Stock, or (z) any issuance or authorization of the issuance of any other securities in respect of, in lieu of or in substitution for, any Company Capital Stock or Subsidiary Securities;

(j) increase in the salary or other compensation payable or to become payable by the Company or any of its Subsidiaries to any of their officers, directors, Employees, consultants, contractors, or advisors, including the modification of any existing compensation or equity arrangements with such individuals (including any repricing of any Company Stock Rights or any amendment of any vesting terms related thereto held by such individuals), or the declaration, payment or commitment or obligation of any kind for the payment by the Company or any Subsidiary of a bonus or other additional salary or compensation to any such Person;

(k) employee terminations and/or layoffs, and the Company and its Subsidiaries have preserved intact and kept available the services of its employees, in each case in accordance with past practice, it being understood that termination of employees with poor performance ratings or for cause shall not constitute a violation of this clause (k);

(l) (i) grant of any severance or termination pay to any director, officer or Employee, except payments made pursuant to written agreements outstanding on the date hereof and as disclosed in the Company Disclosure Schedule, (ii) adoption or amendment of any employee benefit plan or severance plan, (iii) entering into any employment contract, extension of any employment offer, payment or agreement to pay any bonus or special remuneration to any director or Employee or (iv) increase in the salaries, wage, rates or other compensation of Employees, other than payments made pursuant to standard written agreements outstanding on the date hereof and disclosed in Schedule 2.9;

(m) entering into of any Company Contract (including any strategic alliance, joint development or joint marketing agreement or any loan agreement or instrument), any termination, extension, amendment or modification of the terms of any Company Contract or any waiver, release or assignment of any material rights or

claims thereunder, except in the ordinary course of business and consistent with past practices;

(n) sale, lease, license or other disposition of any of the assets or properties of the Company or any of its Subsidiaries, or creation of any Lien in such assets or properties, except sales of inventory in the ordinary course of business and consistent with past practices;

(o) loan by the Company or any Subsidiary to any Person, incurrence by the Company or any of its Subsidiaries of any indebtedness, guarantee by the Company or any of its Subsidiaries of any indebtedness, issuance or sale of any debt securities of the Company or any of its Subsidiaries or purchase of or guaranteeing of any debt securities of others, except for advances to Employees for travel and business expenses in the ordinary course of business and consistent with past practices;

(p) waiver or release of any right or claim of the Company or any of its Subsidiaries, including any write-off or other compromise of any account receivable of the Company, except in the ordinary course of business and consistent with past practices;

(q) commencement, or notice or threat of commencement, of any lawsuit or proceeding against or investigation of the Company or any of its Subsidiaries or their affairs, or commencement or settlement of any litigation by the Company or any of its Subsidiaries;

(r) (i) transfer or sale by the Company or any of its Subsidiaries of any rights to the Company Intellectual Property or the entering into of any license agreement (other than non-exclusive end-user license agreements entered into by the Company in the ordinary course of business consistent with past practices that do not include any rights with respect to source code), distribution agreement, reseller agreement, security agreement, assignment or other conveyance or option for the foregoing, with respect to the Company Intellectual Property with any Person, (ii) the purchase or other acquisition of any Intellectual Property or the entering into of any license agreement, distribution agreement, reseller agreement, security agreement, assignment or other conveyance or option for the foregoing, with respect to the Intellectual Property of any Person, (iii) change in pricing or royalties set or charged by the Company or any of its Subsidiaries to its customers or licensees or in pricing or royalties set or charged by Persons who have licensed Intellectual Property to the Company or any of its Subsidiaries or (iv) entering into, or amendment of, any agreement with respect to the development of any Intellectual Property with a third party;

(s) agreement, or modification to any agreement, pursuant to which any Person was granted marketing, distribution, development, manufacturing or similar

rights of any type or scope with respect to any products, services or technology of the Company or any of its Subsidiaries;

(t) except as set forth in Schedule 2.2(b), issuance, grant, delivery or sale (or authorization of the same) by the Company or any Subsidiary of any Company Capital Stock, any Company Options, any Company Warrants, any other Company Stock Right or any Subsidiary Securities;

(u) event, occurrence, change, effect or condition of any character, which individually or in the aggregate, has had or reasonably could be expected to have a Company Material Adverse Effect; or

(v) agreement by the Company or any of its Subsidiaries, or any officer or Employees thereof, to do any of the things described in the preceding clauses (a) through (u) (other than negotiations with Parent and its representatives regarding the transactions contemplated by this Agreement and the Related Agreements).

Contracts Rep
(Seller Draft)

2.10 Contracts. Schedule 2.10 sets forth a list of **all contracts** to which the Company or any of its Subsidiaries is a party or by which any of them is bound or to which the Company or any of its Subsidiaries is subject, **except** (a) any contract that **does not require payment by any party thereto of more than \$[] in any period** of twelve (12) consecutive months, (b) any contract **that is terminable by the Company or any of its Subsidiaries upon ninety (90) days' notice or less without the payment** of any **material penalty or material termination fee**, (c) any contract entered into, after the date hereof and prior to Closing, with the Buyer or with any other Person in connection with any transaction contemplated by this Agreement, (d) any contract entered into in the ordinary course of business after the date hereof and prior to the Closing, and (e) any contract listed in any other Schedule to this Agreement. As used in this Section 2.4, the word "contract" means and includes every written agreement of any kind which is legally enforceable by or against the Company or any of its Subsidiaries. **Each of the contracts listed on Schedule 2.10 or any of the other Schedules hereto is in full force and effect and neither the Company nor any of its Subsidiaries has committed any breach or default thereunder which would have a Material Adverse Effect.**

Contracts Rep
(Buyer Draft)

2.11 Contracts.

(a) Schedule 2.11 sets forth a detailed list of the Company's material contracts, identifying such contracts in accordance with the following subsections:

(i) true and complete description of all real properties owned by the Company;

(ii) each indenture, lease, sublease, license or other instrument under which the Company claims or holds a leasehold interest in real property (including any agreement related to the purchase or sale of such assets);

(iii) each lease of personal property involving payments remaining to or from the Company in excess of \$[];

(iv) each collective bargaining agreement, employment agreement, consulting agreement, noncompetition agreement, nondisclosure agreement, inventions assignment agreement, executive compensation plan, profit sharing plan, bonus plan, restricted stock award agreement, deferred compensation agreement, agreement under which severance payments or other consideration may be due upon termination of employment, employee pension retirement plan, employee benefit stock option, stock awards or stock purchase plan, buy-sell agreement and any

other employee or stockholder agreements or employee benefit plans, entered into or adopted by the Company;

(v) each bank account (or account with other financial institutions) maintained by the Company, together with the persons authorized to make withdrawals from such account;

(vi) the name of each employee of the Company whose salary exceeds \$[_____] per year and the remuneration currently payable (including bonus or commission arrangements) to each such employee;

(vii) the name, amount and vesting schedule of each employee, officer, director or consultant granted stock options or warrants;

(viii) the name of each officer, director and employee who has signed the Company's form of non-disclosure, proprietary information and invention assignment agreement;

(ix) each partnership, joint venture or other similar agreement or arrangement with another entity;

(x) each promissory note, indenture, mortgage, loan agreement, guaranty, security agreement, pledge or similar agreement with any lender;

(xi) each agreement granting voting rights, registration rights, first negotiating rights or preemptive rights to a third party; and

(xii) each material publication, advertising, confidentiality, product development, research, manufacturing, marketing, sales distribution or supply agreement, warranty or indemnification agreement, purchase agreement, royalty agreement, product, software, patent or trademark licensing or assignment agreement and any other material contract entered into by the Company or by which the Company is bound.

(b) Prior to the date hereof, the Company has delivered to legal counsel for the Lenders true and correct copies of each contract referred to on Schedule 2.4. The Company **has in all material respects performed all obligations required to be performed by it to date and is not in default in any material respect under any of the contracts**, agreements, leases, documents, commitments or other arrangements to which it is a party or by which it is otherwise bound, except to the extent such default has no Material Adverse Effect. **All agreements referred to in Schedule 2.11 are in effect and enforceable against the Company according to their respective terms** subject to applicable bankruptcy, insolvency, fraudulent conveyance, moratorium, reorganization and other similar laws affecting the enforcement of creditors' rights generally and to judicial limitations on the enforcement of the remedy of specific performance and other

equitable remedies, and there is not under any of such agreements any existing material default or event which, with notice or lapse of time or both, would constitute a default by the Company, or to the knowledge of the Company, any other party, thereunder. To the Company's knowledge, all parties having material contractual arrangements with the Company are in substantial compliance therewith and none are in material default in any respect thereunder.

Litigation Rep
(Seller Draft)

2.12 Litigation, etc. Except as set forth on Schedule 2.14, [as of the date of this Agreement] **no action, suit, proceeding or investigation is pending** or, to the Company's knowledge, threatened against the Company or any of its Subsidiaries or their officers, directors, employees, and, to the knowledge of the Company no action, suit, proceeding or investigation is pending or threatened against any consultants or independent contractors of the Company (in such capacity), in any case before any arbitrator or court or other governmental entity **that would reasonably be expected to result in a Material Adverse Effect**.

Litigation Rep
(Buyer Draft)

2.13 Litigation. Except as set forth on Schedule 2.15, **there is no action, suit, proceeding or investigation of any nature pending** or, to the Company's knowledge, threatened against the Company or any of its Subsidiaries, any of their respective properties or assets or, to the Company's knowledge, any of their respective Employees, **nor, to the knowledge of the Company, is there any reasonable basis therefor**. None of the Company, its Subsidiaries or their respective properties is subject to any order that **materially impairs the Company's or any of its Subsidiaries' ability to operate**. Schedule 2.15 lists each action, suit or proceeding **that has ever been commenced by or against the Company or any of its Subsidiaries**.

Compliance with Laws Rep

Except as set forth in Schedule 2.14 of the Disclosure Schedules, the Company is in compliance with all Laws applicable to it or its business, properties or assets, **except where the failure to be in compliance would not have a Material Adverse Effect.**

Title to Assets
(Seller Draft)

The Seller has good title to, or have other legal rights to possess and use, all of the material tangible personal property used in the Business, free and clear of all Liens, other than Permitted Liens or Liens created by or through Buyer or any of its Affiliates; provided, however, that the foregoing shall not be deemed to be a representation or warranty of any kind with respect to any ownership, infringement, violation or misappropriation of Intellectual Property or Technology (which representations and warranties are addressed exclusively in Section [] hereof) or the Government Contracts (which representations and warranties are addressed exclusively in Section [] hereof).

Title to and Sufficiency of Assets
(Buyer Draft)

(a) Schedule [] sets forth as of the Agreement Date all equipment, materials, tangible prototypes, tools, supplies, vehicles, furniture, fixtures, improvements and other tangible assets of the Company and the Subsidiaries with an individual book value of greater than \$[], and sets forth the original cost and book value of each such asset. The assets and properties of the Company and the Subsidiaries are adequate and sufficient, in all material respects, for the conduct of the business of the Company and the Subsidiaries as currently conducted and as currently proposed to be conducted.

(b) The Company has good and valid title to, or, in the case of Company Real Property and leased properties and assets, valid leasehold interests in, all of its material tangible properties and assets, real, personal and mixed, used or held for use in its business, free and clear of any Liens, except as reflected in the Company Balance Sheet and except for Permitted Liens.

(c) All facilities, machinery, equipment, fixtures, vehicles, and other personal properties owned, leased or used by Holdings and the Company (i) are adequate for the conduct of the business of Holdings and the Company as currently conducted in all material respects and (ii) are in good operating condition, subject to normal wear and tear, and reasonably fit and usable for the purposes for which they are being used and not in need of replacement.

At Closing the assets owned by the Seller and the Company include all of the material tangible assets that are required to conduct the business of the Company as of the Agreement Date.

Full Disclosure Rep
(Seller Draft)

Disclaimer of Other Representations and Warranties. Except as expressly set forth in this Article II, **the Company makes no representation or warranty, express or implied, at law or in equity,** in respect of the Company or its subsidiaries or any of their respective assets, liabilities or operations, including with respect to merchantability or fitness for any particular purpose, and any such other representations or warranties are hereby expressly disclaimed.

Full Disclosure Rep
(Buyer Draft)

Full Disclosure. None of the Transaction Agreements, including the Disclosure Schedule, **contains any untrue statement of material fact** with respect to the Company, and none of the Transaction Agreements, including the Disclosure Schedule, **omits any material fact** necessary to make any of the representations, warranties or other statements or information with respect to the Company contained therein not misleading, in the light of the circumstances under which they were made. **All of the information set forth in the Disclosure Schedule, and all other information** regarding the Company and the Business, condition (financial or other), Assets, Liabilities, operations, financial performance, net income and prospects **that has been furnished** to Buyer or any Agent of Buyer by or on behalf of any Holder of the Company or any Agent of the Company, **is accurate and complete in all respects.**

Negotiated draft

Representations Complete. **To the Company's knowledge,** none of the representations or warranties made by the Company in this Agreement or any Related Agreement, nor any statement made in the Company Disclosure Schedule or any certificate furnished by the Company pursuant to this Agreement, **when taken together, contains any untrue statement of a material fact, or omits to state any material fact necessary in order to make the statements contained herein or therein, in the light of the circumstances under which they were made, not misleading.**

Sandbagging
(Seller draft Indemnification Provisions)

6.3. Limitations, etc.

(a) **Notwithstanding anything in Section 6.3, no Indemnified Party shall be entitled to indemnification in respect of any breach of any representation, warranty, covenant or obligation of the Company if and to the extent that such Indemnified Party had Knowledge of such breach at the Effective Time.**

Sandbagging
(Buyer draft Indemnification Provisions)

(b) No Prejudice. The representations, warranties, covenants and obligations of the Company, and the rights and remedies that may be exercised by the Indemnified Parties based on such representations, warranties, covenants and obligations, **will not be limited or affected by any investigation conducted by Parent or Merger Sub** or any agent of Parent or Merger Sub with respect to, **or any knowledge acquired (or capable of being acquired) by Parent or Merger Sub or any agent of Parent or Merger Sub** at any time, whether before or after the execution and delivery of this Agreement or the Closing, with respect to the accuracy or inaccuracy of or compliance with or performance of any such representation, warranty, covenant or obligation, **and no Indemnified Party shall be required to show that it relied on any such representation, warranty, covenant or obligation of the Company in order to be entitled to indemnification pursuant to this Article VI.** The waiver by Parent or Merger Sub of any of the conditions set forth in Article V will not affect or limit the provisions of this Article VI.