

**Morgan Lewis**

**M&A ACADEMY**

**REPRESENTATIONS AND WARRANTIES TRAINING**

**SUPPLEMENTAL MATERIALS**

**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.*

## Knowledge

### Deemed knowledge

"Knowledge" means, with respect to the Company, the actual knowledge of any Key Employee and with respect to any other party hereto, **actual or deemed knowledge** of the directors, officers, or legal or financial personnel of such party **and such knowledge that would be imputed to such persons upon reasonable inquiry or due investigation**. An individual will be deemed to have knowledge of a particular fact, circumstance, event, or other matter if such fact, circumstance, event, or other matter **is reflected in one or more documents, written or electronic, that are or have been in such individual's possession**.

### Reasonable inquiry

"Knowledge of the Company" shall mean the **actual knowledge** of any of the directors and officers of the Company in their capacities as directors and officers of the Company or otherwise, **after reasonable inquiry**.

### Actual knowledge

"Knowledge" (including any derivation thereof such as "known" or "knowing") shall mean the **actual knowledge (without any requirement of investigation other than reviewing this Agreement and the Company Disclosure Schedule)** of any Key Employee.

Disclosure  
**(Seller Draft)**

2.1 Company Disclosure Schedules. 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 the 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 Schedules. 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 Schedules. The Company Disclosure Schedules 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 Schedules shall be deemed disclosed in another Section of the Company Disclosure Schedules unless it is reasonably apparent on its face without independent knowledge that the matter is responsive to such other representation.

Ability to Update Company Disclosure Schedules  
**(Seller Draft)**

During the Pre-Closing Period, Seller shall have the right (but not the obligation) to update the Company 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 Company 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, and **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 the conditions set forth in Section [Section relating to Buyer's Closing Condition] have been satisfied.**

Corporate Organization Representations

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 have conducted any business under or otherwise used for any purpose in any jurisdiction any fictitious name, assumed name, trade name, or other name.

Capitalization Representations2.2 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 Stock, 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 antidilution 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 that 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, as a result of either 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 Representations

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 Representations

#### 2.4 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 that 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 Representations2.5 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 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 or 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 to 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 auditor 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 Representations  
**(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 as of 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 that shall have been or must be, in accordance with GAAP, recorded as capital leases in respect of which any such Person is liable as a lessee.

Undisclosed Liabilities Representations  
**(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 that 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. GAAP to be reflected in financial statements.

Undisclosed Liabilities Representations  
**(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 Representations  
**(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 Changes Representations  
**(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** 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 of its Subsidiaries 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, or 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 of its Subsidiaries 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 nonexclusive 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 of its Subsidiaries 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 that 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 Representations  
**(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 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 Closing, and (e) any contract listed in any other Schedule to this Agreement. As used in this Section 2.10, the word "contract" means and includes every written agreement of any kind that 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 that would have a Material Adverse Effect.**

Contracts Representations  
**(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 award 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 nondisclosure, 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 that, 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.

Intellectual Property Representations  
**(Seller Draft (partial))**

2.12 Intellectual Property.

(a) The Company owns or is licensed for, **and in any event possesses sufficient and legally enforceable rights with respect to**, all Company Intellectual Property (as defined below) relevant to its business, as previously and presently conducted, **or reasonably necessary to conduct** any such business without any conflict with or infringement or misappropriation of any rights or property of any person ("**Infringement**"), **except to the extent that the failure to have such rights has not had and which the Company does not reasonably expect to have a Company Material Adverse Effect** and except for such items that the Company reasonably expects to be available for licensing on reasonable terms from third parties. "Intellectual Property" means (i) inventions (whether or not patentable); trade names, trademarks and service marks, logos, domains, URLs, websites, addresses and other designations ("**Marks**"); works of authorship; mask works; data; technology, know-how, trade secrets, ideas, and information; designs; formulas; algorithms; processes; methods; schematics; computer software (in source code and/or object code form); and all other intellectual property of any sort ("**Inventions**") and (ii) patent rights; Mark rights; copyrights; mask work rights; *sui generis* database rights; trade secret rights; moral rights; and all other intellectual and industrial property rights of any sort throughout the world, and all applications, registrations, issuances, and the like with respect thereto ("**IP Rights**"). "Company Intellectual Property" means all Intellectual Property that was or is used, exercised, or exploited ("**Used**") in any business of the Company, or that may be necessary to conduct any such business as previously or presently conducted. All copyrightable matter within Company Intellectual Property **that is relevant to the Company** has been created by persons who were employees of the Company or such Subsidiary at the time of creation and no third party has or will have "moral rights" or rights to terminate any assignment or license with respect thereto. With respect to patent rights, moral rights and Mark rights, the representations and warranties of this Section 2.12(a) are made only to the Company's knowledge and without having conducted any special investigation or patent or trademark search.

(b) **To the extent included in Company Intellectual Property** (but excluding Intellectual Property licensed to the Company only on a nonexclusive basis), Section 2.12(b) of the Company Disclosure Schedule lists all patents and patent applications; all registered and unregistered Marks; and all registered copyrights and mask works. All of the foregoing (i) are valid, enforceable, and subsisting to the extent such concepts are applicable, and (ii) along with all related filings, registrations, and correspondence, have been provided to the Acquiror. No cancellation, termination, expiration, or

abandonment of any of the foregoing (except natural expiration or termination at the end of the full possible term, including extensions and renewals) is anticipated by the Company, except where the Company does not reasonably expect such event to have a Company Material Adverse Effect.



Intellectual Property Representations  
**(Buyer Draft (partial))**

2.13 Intellectual Property.

(a) Schedule 2.13(a) **lists and separately identifies** (x) all Company Registered Intellectual Property (setting forth, for each item, the full legal name of the owner of record, the applicable jurisdiction, status, application or registration number, and date of application, registration, or issuance, as applicable); and (y) all hardware products and tools, software and firmware products and tools, and services that are currently sold, published, offered for sale, or under development by the Company or any of its Subsidiaries. There are no patents or patent applications included in the Company Registered Intellectual Property.

(b) Each item of Company Intellectual Property is either (i) owned solely by the Company or one of its Subsidiaries free and clear of any Liens, or (ii) rightfully used and authorized for use by the Company and its Subsidiaries and their permitted successors pursuant to a valid and enforceable written license.

(c) The Company and its Subsidiaries have and have had all rights in the Company Intellectual Property necessary to carry out the Company's and its Subsidiaries' former activities, current activities, and activities currently contemplated by the Company to be conducted by the Company and its Subsidiaries with respect to the Company Products (except for any activities contemplated by the Company solely in response to a request or inquiry by Parent), including any of the Company Products currently in development, including in each case rights to make, use, exclude others from using, reproduce, modify, adapt, create derivative works based on, translate, distribute (directly and indirectly), transmit, display and perform publicly, license, sublicense, rent, lease, assign, and sell the Company Intellectual Property in all geographic locations and fields of use in which the Company currently conducts business or currently contemplates business to be conducted.

(d) The Company and each of its Subsidiaries are in compliance with and have not breached, violated, or defaulted under, or received written notice that they have breached, violated or defaulted under, any of the terms or conditions of any license, sublicense, or other agreement to which the Company or any of its Subsidiaries is a party or is otherwise bound relating to any of the Company Intellectual Property, nor does the Company have knowledge of any event or occurrence that would reasonably be expected to constitute such a breach, violation, or default (with or without the lapse of time, giving of notice or both). Each such agreement is in full force and effect, and neither the Company nor any of its Subsidiaries is in default thereunder, nor to the knowledge of the Company is any party obligated to the Company or any of its Subsidiaries pursuant to any such agreement in default thereunder. Immediately following the Closing Date, the Surviving Corporation will be permitted to exercise all of the Company's and its Subsidiaries' rights under such contracts, licenses, and

agreements to the same extent the Company and each of its Subsidiaries would have been able to had the transactions contemplated by this Agreement not occurred and without the payment of any additional amounts or consideration other than fees, royalties, or payments which the Company or any of its Subsidiaries would otherwise have been required to pay had the transactions contemplated by this Agreement not occurred. Neither the Company nor any of its Subsidiaries is obligated to provide any consideration (whether financial or otherwise) to any third party, nor is any third party otherwise entitled to any consideration, with respect to any exercise of rights by the Company or any of its Subsidiaries or the Surviving Corporation, as successor to the Company or any of its Subsidiaries, in the Company Intellectual Property.

(e) The use of the Company Intellectual Property by the Company and its Subsidiaries as previously used, as currently used and, with respect to Company Products currently in development, as currently contemplated by the Company to be used by the Company (except as contemplated by the Company solely in response to a request or inquiry by Parent) has not infringed and does not and will not infringe any other Person's copyrights, trade secret rights, right of privacy, right in personal data, moral right, patent, trademark, service mark, trade name, firm name, logo, trade dress, mask work, or other intellectual property right, or give rise to any claim of unfair competition under any applicable Law. No claims (i) challenging the validity, enforceability, effectiveness, or ownership by the Company or any of its Subsidiaries of any of the Company Intellectual Property, or (ii) to the effect that the use, reproduction, modification, manufacture, distribution, licensing, sublicensing, sale, or any other exercise of rights in any Company Intellectual Property by the Company and its Subsidiaries or by any licensee of the Company or any of its Subsidiaries infringes or will infringe on any intellectual property or other proprietary or personal right of any Person have been asserted against the Company or any of its Subsidiaries or, to the Company's knowledge, are threatened by any Person nor, to the Company's knowledge, does there exist any valid basis for such a claim. There are no legal or governmental proceedings, including interference, reexamination, reissue, opposition, nullity, or cancellation proceedings pending that relate to any of the Company Intellectual Property, other than review of pending patent and trademark applications, and to the knowledge of the Company no such proceedings are threatened or contemplated by any Governmental Entity or any other Person. All Company Intellectual Property is valid and subsisting. To the Company's knowledge, there is no unauthorized use, infringement, or misappropriation of any Company-owned Company Intellectual Property by any third party or Employee.

(f) Except as set forth on Schedule 2.13, the Company and its Subsidiaries have obtained from all parties (including Employees and current or former consultants and subcontractors) who have created any portion of, or otherwise who would have any rights in or to, the Company Intellectual Property owned by the Company or any of its Subsidiaries valid and enforceable written assignments of any such work, invention, improvement, or other rights to the Company and its Subsidiaries and have delivered true and complete copies of such assignments to Parent. No

Employee, former employee, consultant or former consultant of the Company or any of its Subsidiaries has ever excluded any Intellectual Property from any written assignment executed by any such Person in connection with work performed for or on behalf of the Company or any of its Subsidiaries. All amounts payable by the Company or any of its Subsidiaries to consultants and former consultants have been paid in full.

Litigation Representations  
***(Seller Draft)***

2.14 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, or 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 Representations  
***(Buyer Draft)***

2.15 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 Representations

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.**

Tax Representations  
***(Seller Draft (partial))***

All material Tax Returns required to have been filed by each Acquired Company has been filed, and each such Tax Return reflects the liability for Taxes in all material respects. All Taxes shown on such Tax Returns as due have been paid.

Tax Representations  
***(Buyer Draft (partial))***

Each Acquired Company has duly and timely filed with the appropriate Governmental Authorities all Tax Returns required to be filed by any of them, and each such Tax Return has been prepared in compliance with all applicable Laws. All Taxes that have become due and payable by any Acquired Company have been timely paid, and none of the Acquired Companies are or will be Liable for any additional Taxes in respect of any taxable period or any portion thereof ending on or before the date hereof in an amount that exceeds the reserve set forth in Section 5.18(a) of the Disclosure Schedule. Any Taxes of any Acquired Company arising after such date and at or before the Effective Time have been or will be incurred in the Ordinary Course of Business of the Acquired Companies. The Acquired Companies have delivered to Parent complete and accurate copies of all Tax Returns with respect to income Taxes filed by or with respect to it for the previous three (3) Tax years (the "Delivered Tax Returns"), and have delivered to Parent or Merger Sub all relevant documents and information with respect thereto, including work papers, records, examination reports, and statements of deficiencies proposed, assessed against, or agreed to by any Acquired Company.

Title to Assets  
**(Seller Draft)**

The Seller has good title to, or has 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.

Employees and Benefit Plans Representations  
**(Seller Draft)**

**Definitions:**

“Benefit Plan” means any “employee benefit plan” within the meaning of section 3(3) of ERISA (whether or not subject to ERISA) that is maintained or contributed to by the Company for the benefit of Employees. *(Very Seller-favorable version)*

“Benefit Plan” means each material employee benefit plan, program, or policy providing benefits to any current or former employee, officer or director of the Company and its Subsidiaries or any beneficiary or dependent thereof, including any material employee welfare benefit plan within the meaning of section 3(1) of ERISA, any employee pension benefit plan within the meaning of section 3(2) of ERISA, and any material bonus, incentive, deferred compensation, equity, severance arrangement, plan, program, or policy. *(More middle-of-the-road)*

“Code” means the United States Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder.

“ERISA” means the Employee Retirement Income Security Act of 1974, as amended.

“Employee” means any current employee of the Company or of any of its Subsidiaries.

**Representations:**

(a) Schedule [\_\_] lists all Benefit Plans, documentation for which has been made available to Purchaser. Except as set forth in Schedule [\_\_], and except where a failure to do so would not be reasonably likely to have a Material Adverse Effect, each Benefit Plan (other than any Multiemployer Plan (as defined in section 3(37) of ERISA)) has been established and administered in accordance with its terms and in compliance with the applicable provisions of ERISA, the Code, and other applicable laws, and each Benefit Plan (other than any Multiemployer Plan) intended to qualify under section 401(a) of the Code is the subject of a favorable determination from the U.S. Internal Revenue Service (“IRS”) or a favorable opinion letter from the IRS as to its qualified status and, to the Knowledge of the Company, no event has occurred and no condition exists which would be reasonably likely to result in the revocation of any such determination. Neither the Company nor any of its Subsidiaries participates, maintains, or contributes to any single employer or multiemployer pension plan subject to Title IV of ERISA.

*(Inclusion of paragraphs below is more middle-of-the-road)*

(b) [The Company and the Subsidiaries do not maintain, sponsor, contribute to, or have any liability under or with respect to any plan that is or was subject to section 302 or Title IV of ERISA or section 412 of the Code. Neither the



Company nor any of its Subsidiaries has any obligation to pay postretirement health or welfare benefits to its current or former Employees, other than as required by the provisions of Sections 601 through 608 of ERISA and Section 4980B of the Code.

(c) With respect to the Benefit Plans, (i) there are no actions, suits or claims pending or, to the Company's Knowledge, threatened, other than routine claims for benefits, (ii) to the Company's Knowledge, there have been no "prohibited transactions" (as that term is defined in section 406 of ERISA or section 4975 of the Code), and (iii) all material reports, returns, and similar documents required to be filed with any [Governmental Body] or distributed to any Plan participant have been filed or distributed.

(d) Each Benefit Plan that is a "nonqualified deferred compensation plan" (within the meaning of section 409A(d)(1) of the Code) is in documentary compliance with section 409A of the Code, and to the Knowledge of the Company, no additional tax under section 409A(a)(1)(B) of the Code has been or is reasonably expected to be incurred by a participant in any such Benefit Plan.]

Employees and Benefit Plans Representations  
***(Buyer Draft)***

**Definitions:**

"Employee Benefit Plan" means (i) any pension plan, 401(k) plan, profit-sharing plan, health or welfare plan, and any other employee benefit plan (within the meaning of section 3(3) of ERISA or any comparable provision of any other applicable Law) that is maintained or sponsored by the Company or any of its Subsidiaries or any of their respective ERISA Affiliates or to which the Company or any of its Subsidiaries or any of their respective ERISA Affiliates contributes or for which the Company or any of its Subsidiaries or any of their respective ERISA Affiliates otherwise has or may have any Liability, contingent or otherwise, and (ii) any other arrangement, obligation, plan, program or practice, whether or not legally enforceable, to provide benefits or compensation, other than currently paid salary, as compensation for services rendered, to one or more present or former employees, directors, agents, or independent contractors, that is maintained or sponsored by the Company or any of its Subsidiaries or any of their respective ERISA Affiliates or to which the Company or any of its Subsidiaries or any of their respective ERISA Affiliates contributes or for which the Company or any of its Subsidiaries or any of their respective ERISA Affiliates otherwise has or may have any Liability, contingent or otherwise, including employment agreements, offer letters, severance policies, programs or agreements, postemployment arrangements, change in control agreements, executive compensation arrangements, deferred compensation arrangements, incentive arrangements, consulting or other compensation arrangements, bonus plans, stock option, stock grant or stock purchase

plans, tuition reimbursement programs or scholarship programs, section 529 plans, health or medical benefits, insurance (including self-insurance), disability or sick leave, any plans subject to Section 125 of the Code or any comparable provision of any other applicable Law, any plans providing benefits or payments in the event of a change of ownership or control, and each other employee benefit plan, fund, program, agreement, or arrangement.

“ERISA Affiliate” means any person that, together with the Company, is or was at any time treated as a single employer under section 414 of the Code or section 4001 of ERISA and any general partnership of which the Company is or has been a general partner.

## **Representations**

### 1.1. Employee Benefit Plans.

(a) Schedule 1.1(a) contains a complete and accurate list of all Employee Benefit Plans. True, correct, and complete copies of all of the following documents with respect to each Employee Benefit Plan, to the extent applicable, have been made available to Purchaser: (i) all documents constituting the Employee Benefit Plans, including trust agreements, insurance policies, service agreements, and formal and informal amendments thereto; (ii) the three (3) most recently filed Forms 5500 or 5500C/R (and any similar forms filed with any other Governmental Entity) and any financial statements attached thereto; (iii) all Internal Revenue Service (“IRS”) determination letters for the Employee Benefit Plans; (iv) the most recent summary plan description and any amendments or modifications thereof; (v) all reports submitted within the preceding three (3) years by third-party administrators, actuaries, investment managers, consultants, or other independent contractors; (vi) all notices that were issued within the preceding three (3) years by the IRS, Department of Labor, or any other governmental entity with respect to the Employee Benefit Plans; and (vii) all employee manuals or handbooks containing personnel or employee relations policies. With respect to Sections 1.1 and 1.2 hereof, the term “Seller” includes any ERISA Affiliate of a Seller.

(b) Schedule 1.1(b) contains a list of all Liabilities with respect to all Employee Benefit Plans. Except as set forth on Schedule 1.1(b), no Seller has any Liability with respect to any benefit or compensation plans or arrangements other than the Employee Benefit Plans. All Employee Benefit Plans are in compliance and conform (and at all times conformed) with all applicable provisions of ERISA, the Code and the regulations issued thereunder, as well as with all other applicable Laws, and have been administered, operated, and maintained in accordance with their governing documents. All reports and other documents required to be filed with any governmental agency or distributed to Employee Benefit Plan participants or beneficiaries (including summary plan descriptions, annual reports, summary annual reports, actuarial reports, audits, or Tax Returns) have been timely filed or distributed.

(c) The Employee Benefit Plans marked on Schedule 1.1(c) as “Qualified Plans” are the only Employee Benefit Plans that are intended to meet the requirements of Section 401(a) of the Code (a “Qualified Plan”). No Seller has ever maintained or contributed to any other Qualified Plan. Each of the Qualified Plans has been determined by the IRS to be qualified under section 401(a) of the Code and exempt from tax under section 501(a) of the Code, and each such determination remains in effect and has not been revoked. Nothing has occurred with respect to the design or operation of any Qualified Plan that could reasonably be expected to cause the loss of such qualification or exemption or the imposition of any material Liability or Lien, penalty, or Tax under ERISA or the Code or any other applicable Law, and the Qualified Plans have been timely amended to comply with current Law.

(d) With respect to each Employee Benefit Plan, there has occurred no nonexempt “prohibited transaction” (within the meaning of section 4975 of the Code or section 406 of ERISA) or breach of any fiduciary duty described in section 404 of ERISA that could result in any Liability for any Seller or any stockholder, officer, director or employee of any Seller. There are no claims pending or threatened or that have ever been made, by or with respect to any Person claiming benefit payments or entitlement to benefits under any Employee Benefit Plan, other than those made in the ordinary operation of such plans, nor is there any basis for any such claim. No Employee Benefit Plan is presently under audit or examination (nor has notice been received of a potential audit or examination) by the IRS, the Department of Labor, or any other Governmental Entity, and no matters are pending with respect to any Employee Benefit Plan under any IRS correction program. No Seller has incurred any material Liability for any excise, income or other taxes or penalties with respect to any Employee Benefit Plan, and no event has occurred and no circumstance exists or has existed that could reasonably be expected to give rise to any such Liability.

(e) No Seller sponsors, maintains, or contributes to, or has ever sponsored, maintained, or contributed to, or had any Liability with respect to, any employee benefit plan subject to section 302 of ERISA, section 412 of the Code or Title IV of ERISA or any comparable provisions of any other applicable Law. None of the Employee Benefit Plans is a multiemployer plan (as defined in section 3(37) of ERISA). No Seller contributes to, or has ever contributed to or had any Liability with respect to, a multiemployer plan. None of the Employee Benefit Plans is a multiple employer plan and no Seller has participated in or been obligated to contribute to a multiple employer plan.

(f) Except as set forth on Schedule 1.1(f), no Employee Benefit Plan contains any provision or is subject to any Law that would prohibit the Transactions or that would give rise to any vesting or payment of benefits, severance, termination, bonuses, or other payments, the enhancement of any benefits or payments, or any other Liabilities as a result of the Transactions or the Transactions taken together with any other event (such as a termination of employment). As of the Closing, the Company and its Subsidiaries shall have satisfied all obligations and liabilities with

respect to any payments or benefits due under any Employee Benefit Plan solely as a result of the Transactions. No payments or benefits under any Employee Benefit Plan or Contract will be considered "excess parachute payments" under section 280G of the Code. No Seller has any obligation to indemnify, hold harmless or gross-up any individual with respect to any excise tax imposed under section 4999 of the Code. Except as set forth on Schedule 1.1(f), no Seller has either declared or paid any bonus compensation in contemplation of the Transactions. Except as set forth on Schedule 1.1(f), no Employee Benefit Plan or Contract is a deferred compensation plan subject to the requirements of section 409A of the Code. Any deferred compensation plan has been maintained and operated in accordance with the requirements of section 409A of the Code. No Seller has entered into any agreement or arrangement to, and does not otherwise have any obligation to, indemnify or hold harmless any individual for any Liability that results from the failure to comply with the requirements of section 409A of the Code, and does not have any liability for nonreporting or underreporting of income subject to section 409A of the Code.

(g) With respect to any Employee Benefit Plan that is an employee welfare benefit plan (within the meaning of section 3(1) of ERISA), (i) each such plan for which contributions are claimed as deductions under any provision of the Code is in compliance with all applicable requirements pertaining to such deduction, (ii) with respect to any welfare benefit fund (within the meaning of section 419 of the Code) there is no disqualified benefit (within the meaning of section 4976(b) of the Code) that would result in the imposition of a Tax under section 4976(a) of the Code, (iii) any Employee Benefit Plan that is a group health plan (within the meaning of section 4980B(g)(2) of the Code) complies with all of the applicable requirements of section 4980B of the Code, ERISA, Title XXII of the Public Health Service Act, the applicable provisions of the Social Security Act, the Health Insurance Portability and Accountability Act of 1996, and other applicable Laws, and (iv) no welfare benefit plan provides health or other benefits after an Employee's or former employee's retirement, or other termination of employment except as required by section 4980B of the Code. Each of the Employee Benefit Plans is in compliance with the Patient Protection and Affordable Care Act and its companion bill, the Health Care and Education Reconciliation Act of 2010, to the extent applicable.

(h) Except as set forth on Schedule 1.1(h), no Seller has made any plan or commitment, whether or not legally binding, to create any additional Employee Benefit Plan or to modify or change any existing Employee Benefit Plan. Except as set forth on Schedule 1.1(h), all Employee Benefit Plans may be amended or terminated without penalty by the Company at any time on or after Closing.

(i) Each Seller has paid all amounts that it is required to pay as contributions to the Employee Benefit Plans as of the last day of the most recent fiscal year of each of the Employee Benefit Plans, and as required in accordance with applicable Law. All compensation, commissions, and benefits accrued under any Employee Benefit Plan will have been paid, accrued, or otherwise adequately reserved

for in accordance with GAAP as of the Balance Sheet Date and as of the Effective Time, and all monies withheld from employee paychecks with respect to Employee Benefit Plans have been transferred to the appropriate Employee Benefit Plan in a timely manner as required by applicable Law. The Company and its Subsidiaries have satisfied all obligations to their respective employees, consultants and directors with respect to overtime pay, vacation pay and any other amounts that are due to such employees, consultants, or directors or with respect to which the Company or any of its Subsidiaries may have any Liability. The Company Financial Statements, as of the Balance Sheet Date, reflect, in accordance with GAAP, the estimated total pension, medical, and other benefit expenses for all Employee Benefit Plans as of the date thereof.

(j) No Seller employs, nor has it ever employed, any person outside the United States, and there are no Employee Benefit Plans outside the United States.

### **Employees/Independent Contractors.**

Schedule 1.2(a)(i) sets forth the name, title, current annual salary rate or current hourly wage and bonuses of each present Employee of the Seller. Each Seller has complied with all Laws that could require overtime to be paid to any Employee set forth on Schedule 1.2(a)(i) (and any other Employee of such Seller, at any time), and no employee has ever brought or, to the Seller's knowledge, threatened to bring a claim for unpaid compensation or employee benefits, including overtime amounts. Schedule 1.2(a)(ii) sets forth the name of all former employees of the Seller that have terminated employment with the Seller over the last two (2) years. No present Employee set forth on Schedule 1.2(a)(i) has provided notice (whether verbal or written) of his or her intent to terminate employment with the Seller.

Schedule 1.2(b) sets forth the name and current rate of compensation of each current independent contractor retained by each Seller. All independent contractors of each Seller set forth on Schedule 1.2(b) (and any other independent contractor who previously rendered services for such Seller, at any time) have been, and currently are, properly classified and treated by such Seller as independent contractors and not as Employees. All such independent contractors have in the past been and continue to be properly and appropriately treated as nonemployees for all federal, state, local, and foreign Tax purposes, each Seller has fully and accurately reported its compensation on IRS Forms 1099 (or otherwise in accordance with applicable Law) when required to do so, and such Seller does not have, nor has it ever had, any Liability to provide benefits with respect to such Persons under the Employee Benefit Plans or otherwise. Each Seller has complied with all Laws that could require overtime to be paid to any independent contractor set forth on Schedule 1.2(b) (and any other independent contractor who previously rendered services for such Seller, at any time), and no independent contractor has ever brought or, to the Seller's knowledge, threatened to bring a claim for unpaid compensation or employee benefits, including overtime amounts. There has been no determination, inquiry, or audit by any Governmental or Regulatory Authority that any such independent contractor of any

Seller (or any other independent contractor who has previously rendered services to such Seller, at any time) constitutes an Employee of such Seller. At no time has any independent contractor brought a claim against any Seller, whether formally or informally, challenging his or her status as an independent contractor or made a claim for additional compensation or any benefits under any Employee Benefit Plan or otherwise. Except as set forth on Schedule 1.2(b), no Persons are currently providing, or have ever provided, services to any Seller pursuant to a leasing agreement or similar type of arrangement, nor has any Seller entered into any agreement whereby services will be provided by such individuals.

Schedule 1.2(c) sets forth the name and current rate of compensation of each person who is employed by Company or performing services for each Seller under a visa, and lists the type of visa in effect for such individual, the period of time remaining under such visa, the average number of hours worked per week, the date of commencement of services for such Seller, the \_\_\_\_ earnings for such Person for the \_\_\_\_ calendar year, and a summary of total compensation paid or payable to such Person for or in respect of the \_\_\_\_ and \_\_\_\_ calendar years. Each Seller has met all requirements required by Law or regulation relating to the employment of foreign citizens, including all requirements of I-9. No Seller currently employs, nor has it ever employed, any Person who was not permitted to work in the jurisdiction in which such Person was employed.

Except as set forth on Schedule 1.2(d), each current or past employee and contractor of each Seller has entered into a valid and enforceable noncompetition, confidentiality, nonsolicitation and intellectual property agreement with such Seller that will remain enforceable and in effect after the Closing Date, except as the enforcement thereof may be limited by applicable Law with respect to such agreements, bankruptcy, insolvency, fraudulent conveyances, moratorium, reorganization, or similar Laws relating to or affecting the enforcement of creditor's rights generally and by principles of equity regarding the availability of remedies.

Full Disclosure Representations  
**(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 Representations  
**(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, or 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.