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February 2011

## Sample Antitrust Risk-Shifting Provisions in M&A Transactions

This note collects a sample of antitrust risk-shifting provisions that have been used in some deals. Of course, every deal stands on its own, and the language that has been used in one deal may not be appropriate for another deal. Still, this sample will give you a good idea of the types of provisions that can be crafted for allocating risk between buyers and sellers in negotiated transactions.

Dale Collins

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## I. Conditions Precedent

### a. Short form CP (with materiality proviso)

(d) Regulatory Approvals. (i) any applicable waiting period under the HSR Act shall have expired or been terminated; (ii) the European Commission shall have taken a decision (or been deemed to have taken a decision) under Article 6(1)(b) or, if the European Commission has initiated proceedings pursuant to Article 6(1)(c), under Article 8 of the EC Merger Regulation, declaring the Merger compatible with the common market or any national competition authority of any European Union member state with jurisdiction shall have taken a decisions clearing or approving the transaction under any applicable antitrust, competition or fair trade Laws of any European Union member state or any applicable waiting period under such Laws shall have expired, lapsed or been terminated; and (iii) all applicable waiting and other time periods under other applicable foreign, federal or state antitrust, competition or fair trade Laws or applicable Laws having expired, lapsed or been terminated (as appropriate) and all regulatory clearances in any relevant jurisdiction having been obtained, in each case, in respect of the Merger unless otherwise waived by Purchaser (the “Foreign Antitrust Condition”); provided, however, that with respect to the Foreign Antitrust Condition, the failure of such condition shall not relieve either Parent or Purchaser of its obligation to consummate the Merger if the failure of a waiting period to expire or be terminated or the failure to obtain any required approval would not reasonably be expected to result in material limitations on the operation by Parent of the assets of Parent, its subsidiaries or the Company or its subsidiaries or the failure of a waiting period to expire or be terminated or the failure to obtain any required approval would not subject Parent or Purchaser to the payment of a material fine or penalty.

### b. CP with agreed list of jurisdictions in Exhibit to Agreement

(d) Regulatory Approvals/HSR Act. (i) All waiting periods (and extensions thereof) applicable to the consummation of the transactions contemplated by this Agreement and the Ancillary Agreements under the HSR Act and any other applicable Antitrust Laws, as set forth on Schedule 9.1(d), shall have expired or been terminated, and (ii) the clearances, approvals and consents required to be obtained under applicable Antitrust Laws to permit the Parties to consummate the transactions contemplated by this Agreement and the Ancillary Agreements, as set forth on Schedule 9.1(d), shall have been obtained ((i) and (ii) together, the “Antitrust Approvals”).

### c. Detailed CP—US/EU/Canada/other

(A) The applicable waiting period (and any extension thereof) under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and the rules and regulations thereunder (the “HSR Act”), shall have expired or been earlier terminated (and no action to enjoin or restrain the consummation of the Tender Offer, based on US competition law by the US Department of Justice or Federal Trade Commission shall be pending and there



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shall not be in effect an agreement or commitment not to close the Tender Offer), (B) the European Commission shall have issued a decision pursuant to the EC Merger Regulation declaring the transactions contemplated hereby compatible with the common market (or compatibility being deemed under Article 10(6) of the EC Merger Regulation), (C) the applicable waiting period shall have expired or been waived and the Commissioner of the Canadian Competition Bureau shall have advised the Offeror that he does not intend to oppose the consummation of the transactions contemplated by the Agreement or shall have issued an advance ruling certificate in respect of such transactions pursuant to Section 102 of the Competition Act (Canada), (D) the approvals of the other Merger Control Authorities shall have been received and any applicable waiting periods shall have expired or have been terminated or waived.

## II. Covenants

### a. Simple obligation to make filings

Each of the Purchaser and the Sellers agree to make, if applicable, an appropriate filing pursuant to the HSR Act with respect to the transactions contemplated hereby within [ten] Business Days after the date hereof and to supply promptly any additional information and documentary material that may be requested pursuant to the HSR Act. In addition, each party agrees to make, or to cause to be made, any filing that may be required under any other antitrust or competition law or by any other antitrust or competition authority, including any other requirements of the antitrust legislation of any other relevant jurisdiction, if applicable, within 30 days after the date hereof and to supply promptly any additional information and documentary material that may be requested pursuant thereto. Each party shall have responsibility for its respective filing fees associated with the HSR filings and any other similar filings required in any other jurisdictions.

### b. Detailed cooperation covenant

In furtherance and not in limitation of the foregoing, each of Parent and the Company agrees to make an appropriate filing of a Notification and Report Form pursuant to the HSR Act (and to make such other filings as are required under Laws in foreign jurisdictions governing antitrust or merger control matters) with respect to the Merger as promptly as practicable after the date hereof and to supply as promptly as practicable any additional information and documentary material that may be requested pursuant to the HSR Act (or pursuant to such foreign Laws). Each party will consult with counsel for the other parties as to, and will permit such counsel to participate in, any litigation referred to in clause [\*] above. Each party, acting solely through outside counsel, will (x) promptly notify the other party of any written communication to that party from any Governmental Entity located in the U.S. and, to the extent practicable, outside of the U.S. and, subject to applicable Law, if practicable, permit the other party to review in advance any proposed



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written communication to any such Governmental Entity and incorporate the other party's reasonable comments, (y) not agree to participate in any substantive meeting or discussion with any such Governmental Entity in respect of any filing, investigation or inquiry concerning this Agreement or the Merger unless it consults with the other party in advance and, to the extent permitted by such Governmental Entity, gives the other party the opportunity to attend and (z) furnish the other party with copies of all correspondence, filings and written communications between them and their affiliates and their respective representatives on one hand, and any such Governmental Entity or its respective staff on the other hand, with respect to this Agreement and the Merger, except that any materials concerning Parent's valuation of the Company, the Company's valuation of the transaction, internal financial information or competitively sensitive information of Parent may be redacted.

### *Alternative cooperation covenant*

Each party to this Agreement shall promptly notify the other parties of any communication it or any of its Affiliates receives from any Governmental Authority relating to the matters that are the subject of this Agreement and permit the other parties to review in advance, to the extent permitted by Law, any proposed communication by such party to any Governmental Authority. No party to this Agreement shall agree to participate in any meeting with any Governmental Authority in respect of any filings, investigation or other inquiry unless it consults with the other parties in advance and, to the extent permitted by such Governmental Authority, gives the other parties the opportunity to attend and participate at such meeting. [Subject to the Confidentiality Agreement,] the parties to this Agreement will coordinate and cooperate fully and promptly with each other in exchanging such information and providing such assistance as the other parties may reasonably request in connection with the foregoing and in seeking early termination of any applicable waiting periods, including those under the HSR Act. [Subject to the Confidentiality Agreement,] the parties to this Agreement will provide each other with copies of all correspondence, filings or communications between them or any of their representatives, on the one hand, and any Governmental Authority or members of its staff, on the other hand, with respect to this Agreement and the transactions contemplated by this Agreement.

### c. Covenant on timing of Second Request compliance

In the event the Buyer or Seller receives a Second Request in connection with the transactions contemplated by this Agreement, such party will comply with such request as provided by Section 7A(e) of the Hart-Scott-Rodino Act not more than [60] days from the date of service of the request. For purposes of this provision, a party shall be deemed to have complied with any such request by providing a response that the party in good faith believes to be in substantial compliance and by certifying its substantial compliance within the [60] day period. In the event that a party receives a subpoena or civil investigative demand requesting materials and information similar to that usually demanded in a Second



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Request, such Party shall comply with such subpoena or civil investigative demand not more than [60] days from the date of service of the subpoena or civil investigative demand. In the event the Governmental Entity disputes the adequacy of compliance by a party with respect to a Second Request, subpoena, or civil investigative demand, the party shall endeavor to satisfy the Governmental Entity so as to minimize any delay in the conduct or resolution of the investigation.

### III. Risk-Shifting/Sharing Provisions

a. General efforts clause

The Purchaser shall make any necessary filings with respect to, and use [its best efforts/its reasonable best efforts/commercially reasonable efforts] promptly to obtain, all authorizations, consents, orders and approvals of all Governmental Authorities and officials that may be or become necessary for its execution and delivery of, and the performance of its obligations pursuant to, this Agreement and will cooperate fully with the other parties in promptly seeking to obtain all such authorizations, consents, orders and approvals. Each party hereto agrees to make any necessary filings for which it is responsible pursuant to the HSR Act, the EU Merger Regulation, and any other Law that requires a mandatory merger control filing with respect to the transaction contemplated by this Agreement (“Applicable MC Law”), within five (5) Business Days of the date hereof (unless otherwise agreed by the parties) and to supply as promptly as practicable to the appropriate Governmental Authorities any additional information and documentary material that may be requested pursuant to the HSR Act, the EU Merger Regulation and any other Applicable MC Law. The Sellers shall not be required to pay any fees or other payments to any Governmental Authorities in connection with any such authorization, consent, order or approval (other than normal filing fees that are imposed by Law on the Seller).

b. No obligation to make divestitures proviso

Notwithstanding anything in this Agreement to the contrary, in no event will Purchaser be obligated to propose or agree to accept any undertaking or condition, to enter into any consent decree, to make any divestiture, to accept any operational restriction, or take any other action that, in the reasonable judgment of Purchaser, could be expected to limit the right of Purchaser to own or operate all or any portion of their respective businesses or assets. With regard to any Governmental Antitrust Entity, neither the Seller nor any of its respective affiliates shall, without Purchaser’s written consent, in Purchaser’s sole discretion, discuss or commit to any divestiture transaction, or discuss or commit to alter their businesses or commercial practices in any way, or otherwise take or commit to take any action that limits Purchaser’s freedom of action with respect to, or Purchaser’s ability



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to retain any of the businesses, product lines or assets of, the [business to be acquired] or otherwise receive the full benefits of this Agreement

c. Seller model—“Hell or high water” clause (including obligation to litigate)

Purchaser agrees to use its [reasonable] best efforts and to take promptly any and all steps necessary to avoid or eliminate each and every impediment under any antitrust, competition or trade regulation Law that may be asserted by any Governmental Authority or any other Person with respect to the transaction contemplated by this Agreement so as to enable the Closing to occur expeditiously, but in no case later than the Targeted Closing Date, including providing information, proposing, negotiating, committing to and/or effecting, by consent decree, hold separate orders, or otherwise, the sale, divestiture or disposition of, or holding separate (through the establishment of a trust or otherwise) such of its assets, properties or businesses or of the Assets, properties or businesses of the Business to be acquired by it pursuant hereto as are required to be divested in order to avoid the entry of, or to effect the dissolution of, any decree, order, judgment, injunction, temporary restraining order or other order in any suit or proceeding, which would otherwise have the effect of materially delaying or preventing the consummation of the transaction contemplated hereby or that would make the consummation of the acquisition of Business in accordance with the terms of this Agreement unlawful. In addition, the Purchaser shall defend through litigation on the merits any claim asserted in court by any party in order to avoid entry of, or to have vacated or terminated, any decree, order or judgment (whether temporary, preliminary or permanent) that would restrain or prevent the Closing by the Targeted Closing Date.

*Buyer responsible for making settlement offers; obligation to provide information to Seller*

The Buyer shall be responsible for making any settlement offers and negotiating any consent decree or consent order with any Governmental Entity in order to permit the transactions contemplated by this Agreement to be consummated prior to the Termination Date. The Buyer agrees that, at any time in an investigation, if a Governmental Entity suggests or proffers a settlement of the investigation to permit the transactions contemplated by this Agreement to close, the Buyer shall promptly (and in any event within one (1) Business Day) communicate the terms of the offer to the Sellers. The Buyer, in its sole discretion, may accept or reject any settlement of the investigation proposed by any Governmental Entity, provided that the Buyer’s actions permit the transactions contemplated by this Agreement to be consummated prior to the Termination Date.

d. Limitation of obligation to make divestitures

(i) *Capped divestiture obligation proviso*

Nothing in this Agreement will require Parent or Merger Sub to take any action, including entering into any consent decree, hold separate orders or other arrangements, that requires the divestiture of any assets of any of the Company, Parent or Merger Sub, or limits





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Parent's freedom of action with respect to, or its ability to retain the Company and its subsidiaries or any portion thereof or any of Parent's or its affiliates' other assets or businesses, or in Parent's reasonable judgment would be expected to have a material adverse impact on any of its businesses, or the businesses to be acquired by it pursuant to this Agreement, either individually or in the aggregate; provided, however, that Parent shall agree to license or divest those of Parent's assets or businesses or products or product lines that individually or in the aggregate generated total worldwide revenues of up to the equivalent of USD \$ [X] million in the most recent fiscal year if necessary to obtain any required regulatory approval prior to the Termination Date.

(ii) *Divestiture obligation capped by definition of “reasonable best efforts”*

If any objections are asserted with respect to the transactions contemplated by this Agreement under any Antitrust Law (an “Antitrust Objection”) or if any suit, action or proceeding is instituted (or threatened to be instituted) by any Governmental Entity or other Person challenging any of the transactions contemplated by this Agreement as violative of any Antitrust Law (an “Antitrust Challenge”), each of the parties shall use its reasonable best efforts to resolve any such objections or challenges so as to permit consummation of the transactions contemplated by this Agreement. For purposes of this Section [\*\*], “reasonable best efforts” shall include without limitation, Purchaser and/or Seller (and, to the extent required by any Governmental Entity, their Subsidiaries and affiliates) entering into a settlement, undertaking, consent decree, stipulation or other agreement (a “Settlement”) with a Governmental Entity regarding antitrust matters in connection with the transactions contemplated by this Agreement, including without limitation, entering into a Settlement that requires Purchaser and/or Seller to hold separate (including by establishing a trust or otherwise) or to sell or otherwise dispose of particular assets and/or withdraw from doing business in particular geographic areas, to satisfy any Antitrust Objections or to settle any Antitrust Challenges, but, notwithstanding anything else contained in this Agreement, Purchaser and/or Seller shall not be required to enter into any Settlement (i) that requires Purchaser and/or Seller to hold separate (including by establishing a trust or otherwise) or to sell or otherwise dispose of or withdraw from stores of Purchaser and/or Seller (and their Subsidiaries) the aggregate revenues of which (for the most recent fiscal year) exceeded \$500 million (“Antitrust Store Limit”) or (ii) as a result of which the aggregate gross margin attributable to business of [specific business line] to be terminated or otherwise lost pursuant to such Settlement would be greater than [35]% of the total gross margin attributable to such business for the most recently ended fiscal year (“Antitrust [business] Limit”).

(iii) *Divestiture obligation capped by definition of MAC*

Nothing in this Agreement shall require, or be construed to require, Purchaser or Seller or their respective Subsidiaries to take any action or enter into any agreement with respect to any of its assets, business or operations (the sum of the aggregate positive and negative



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economic effects of all such actions and agreements on the value of the assets, business or operations of the Purchaser and their respective Subsidiaries (excluding synergies anticipated to be realized by Purchaser or Seller or their respective Subsidiaries from the Merger) and on the value of the assets, business or operations of Seller or their respective Subsidiaries, as applicable, as of the date of any determination being referred to herein as the “Net Effects”), that would, individually or in the aggregate, reasonably be expected to result in the aggregate negative Net Effects being more than the Material Adverse Amount (as defined in Section [\*] of the Disclosure Letter (a “Material Adverse Condition”)). For purposes of calculating Net Effects with respect to the sale of a market or spectrum it is agreed that [details on calculations].

(iv) *Divestiture obligation capped by materiality*

Upon the terms and subject to the conditions set forth in this Agreement, each of the parties hereto agrees to use its reasonable best efforts to take, or cause to be taken, all actions that are necessary, proper or advisable to consummate and make effective the Offer, the Merger and the other transactions contemplated by this Agreement, including: . . . (ii) using reasonable best efforts to obtain all necessary actions or nonactions, waivers, consents, approvals, orders and authorizations from, and the giving of any necessary notices to, Governmental Entities and other persons and the making of all necessary registrations, declarations and filings (including filings under the HSR Act and other registrations, declarations and filings with, or notices to, Governmental Entities, if any), (iii) coordinating and cooperating with, and giving due consideration to all reasonable additions, deletions or changes suggested by the other party in connection with, making (A) any filing under or with respect to the HSR Act, any other antitrust, competition, merger control or similar Law or any other applicable Laws and (B) any filings, conferences or other submissions related to resolving any investigation or other inquiry by any Governmental Entity, (iv) using reasonable best efforts to provide any supplemental information requested by a Governmental Entity, including participating in meetings with officials of such entity in the course of its review of this Agreement, the Offer, the Merger or the other transactions contemplated by this Agreement, (v) using reasonable best efforts to avoid any suit, claim, action, investigation or proceeding by any Governmental Entity or other person, and (vi) litigating or participating in the litigation of any suit, claim, action, investigation or proceeding, whether judicial or administrative, brought by any Governmental Entity for the purpose of enabling the parties to consummate the transactions contemplated hereby, including the Offer and the Merger, on the terms and conditions set forth herein.

Notwithstanding the foregoing or any other provision of this Agreement to the contrary, in no event shall Parent or Sub be obligated to, and the Company and its Subsidiaries shall not agree with a Governmental Entity without the prior written consent of Parent, to divest or hold separate, or enter into any licensing or similar arrangement with respect to, any material assets (whether tangible or intangible) or any material portion of any business of





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Parent, the Company or any of their respective Subsidiaries (any such action, an “Action of Divestiture”).

(v) *Explicit obligation to offer particular asset*

Notwithstanding anything to the contrary in this Agreement, neither Parent nor any of its Subsidiaries shall be required to dispose of or hold separate, or agree to dispose of or hold separate or restrict its ownership and operation of, all or any portion of the business or assets of the Company and its Subsidiaries or Parent and its Subsidiaries, except that Parent shall be required, if necessary to obtain any regulatory approval from any Governmental Entity necessary for consummation of the Merger, to divest its ALL SPORT beverage brand, without regard to consideration received, no later than the date which is 30 days prior to the date eight months from the date hereof.

e. “Take or pay” covenant

(a) If any competent authority indicates formally or informally that an approval is likely to be granted subject to compliance with certain conditions and/or commitments, the Purchaser shall accept the imposition of such conditions and/or offer such commitments. If the Purchaser is unable to offer or comply with any such conditions or commitments or an approval has not been granted by 15 December 2006, the Purchaser shall be obliged to pay the Closing Payment Amount in accordance with the terms of this Agreement on 15 December 2006 contemporaneously with the transfer of the Target Shares to a party designated by the Purchaser and acceptable to the relevant antitrust authorities (hereinafter the “Third Party Buyer”).

(b) If (i) the Purchaser fails to designate a Third Party Buyer; (ii) the transfer of any Target Shares or to a Third Party Buyer is legally not permissible; (iii) a Third Party Buyer does not accept title to any Target Shares; or (iv) any Target Shares cannot be transferred to a Third Party Buyer, the Purchaser shall be obliged to pay to the Sellers the Closing Payment Amount on [outside date], regardless of whether the conditions set forth in Sections 3.2(A), (B) and (C) have been fulfilled by such date or will be fulfilled at a later date. The Sellers shall as soon as reasonably practicable, but not earlier than [outside date plus 3-6 months], procure the sale to a third party of any Target Shares or assets which the Sellers do not transfer to a Third Party Buyer pursuant to this paragraph and shall promptly pay to the Purchaser an amount equal to any proceeds of such sale, net of any Taxes and fees, costs and expenses. In procuring such sale the Sellers shall act in good faith and in accordance with the advice of their financial advisers but shall not be obliged to accept any obligations in addition to those contained in this Agreement. The Sellers shall have no liability to the Purchaser in relation to the price obtained for such sale (other than to pay the proceeds (net of the items set out above) to the Purchaser) or in relation to any other term or condition of such sale and shall not in any circumstances act as a trustee or fiduciary for the Purchaser.



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f. Business to be put in trust if clearance not obtained

In the event that the Closing shall not have occurred on or before the [31<sup>st</sup>/150<sup>th</sup>] day after the filing of the HSR Form pursuant to the HSR Act with respect to the transactions contemplated hereby,

(i) Buyer shall pay Seller the Purchase Price in the manner set forth in Article [\*\*] hereof and assume the liabilities and indemnity obligations contemplated by this Agreement to be assumed by Buyer,

(ii) the post-closing audit adjustments provided for in Article [\*\*] shall be calculated and paid as if the [31<sup>st</sup>/150<sup>th</sup>] day were the Closing Date,

(iii) all other references in this Agreement to the Closing Date shall be deemed to be references to the [31<sup>st</sup>/150<sup>th</sup>] day, and the covenants and other agreements contained herein shall be operative as if the Closing shall have occurred on the [31<sup>st</sup>/150<sup>th</sup>],

(iv) Seller shall place the shares into a Trust [defined term] pursuant to a Trust Agreement substantially in the form attached hereto which is reasonably acceptable to Buyer.

Seller and Buyer shall agree to any reasonable modifications suggested by a Governmental Antitrust Authority that, in the view of such authorities, are necessary to make the Trust comply with the U.S. antitrust laws. The Trust shall incorporate provisions with respect to the following:

(A) the Trustee shall have the right to appoint the directors of Target,

(B) the Trustee shall have the right to vote the shares on all matters for which shareholders of the Target are entitled to vote,

(C) if the Transaction has not closed within [180] days from the [31<sup>st</sup>/150<sup>th</sup>] day, the Trustee shall use its best efforts to sell the shares to a person not affiliated with either the Buyer or Seller. Proceeds from that sale shall first be used to pay fees and expenses of the Trustee, and then any expenses incurred by the Seller in connection with the transactions contemplated by this Agreement after the [31<sup>st</sup>/150<sup>th</sup>] day. The balance of proceeds shall be paid to Buyer.

## IV. Termination Provisions and Reverse Break-Up Fees

a. Reverse breakup fee for failure to obtain clearance

In the event that either the Company or Purchaser is entitled to terminate, and terminates, this Agreement pursuant to [cross-reference provision requiring competition clearances] and at the time of such termination (i) all of the conditions set forth in Sections [\*] have been satisfied or waived (other than the delivery of certificates and provided that the term



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“Closing Date” shall in any of such sections be deemed to refer to the date of such termination), (ii) neither the Company nor Purchaser is entitled to terminate this Agreement pursuant to Section [\*] and (iii) if a vote to obtain the Company Stockholder Approval has been taken at a Company Stockholder Meeting, Company Stockholder Approval has been obtained, then Purchaser shall pay a termination fee equal to [\$120,000,000] (the “Nonclearance Termination Fee”) on or before the fifth business day following such termination by wire transfer of same day funds to an account designated in writing to Parent by the Company at least two business days after such termination.

- b. Termination and reverse breakup fee provisions with extension of Outside Date for consent decree

### *Termination*

This Agreement may be terminated at any time prior to the Merger Effective Time by written notice delivered by the terminating party to the other parties:

(b) by either Seller or Purchaser if:

(i) (A) any permanent injunction or other order of a court of competent jurisdiction or other competent Governmental Authority preventing the consummation of the Merger, (1) in an action brought by a federal, state or local Governmental Authority under the Antitrust Laws of the United States shall have become final and nonappealable, (2) in an action brought by a foreign Governmental Authority under Antitrust Laws, shall have become final and nonappealable or (3) in an action brought by any other Person (other than a Governmental Authority) under the Antitrust Laws, shall have become final and nonappealable; or (B) any permanent injunction or other order of a court of competent jurisdiction or other competent Governmental Authority preventing the consummation of the Merger, other than in an action brought under the Antitrust Laws, shall have become final and nonappealable;

(ii) the Merger shall not have been consummated before [DATE] (the “Outside Date”), provided that (A) if all conditions to Closing set forth in Article [\*] have been satisfied or waived on or prior to such date and the Department of Justice or Federal Trade Commission has, prior to the Outside Date, agreed with Seller and Purchaser to enter into a consent decree or other settlement permitting the consummation of the Merger, then the Outside Date shall be extended to the Second Business Day immediately following the date such consent decree or other settlement is filed in court (but in no event later than five (5) Business Days following the Outside Date), at which time, the parties shall consummate the Merger in accordance with Section [\*]; or (B) such period shall be extended by the Boards of Directors of both Seller and Purchaser (provided that the right to terminate this Agreement under any provision of this Section [\*](b)(ii) shall not be available to any party whose failure (or whose affiliate's failure) to perform any material



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covenant or obligation under this Agreement has been the cause of or resulted in the failure of the Merger to occur on or before such date); or

### *Breakup fee*

If this Agreement is terminated by Purchaser or Seller pursuant to Section [\*](b)(i)(A)(I), Purchaser shall pay or cause to be paid to Seller, in cash by wire transfer in immediately available funds to an account designated by Seller, no later than one business day following such termination, if terminated by Seller, or concurrently with such termination, if terminated by Purchaser, a termination fee and expense reimbursement in an amount equal to [\$600,000,000.00 (Six Hundred Million Dollars)], which amount shall not be subject to offset or deduction of any kind by Purchaser; provided, that the payment of one-half of the Termination Fee shall not be required concurrently with such termination (and the parties may elect to resolve such dispute in accordance with Section [\*]) if Seller's failure (or the failure of any of its Affiliates) to comply with Section [\*] has been the cause of or resulted in the occurrence or non-occurrence which permitted termination under Section [\*]. Notwithstanding anything to the contrary in this Section [\*], if the parties have available to them, and Purchaser is willing to accept, a settlement, consent decree, stipulation or other agreement or resolution (each a "Settlement") with the Department of Justice, the Federal Trade Commission or any other Governmental Authority, but Seller terminates this Agreement pursuant to Section [\*] hereof, then Purchaser shall not be required to pay Seller the termination fee described in this Section [\*].

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