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Sample Antitrust-Related Provisions in M&A Transactions

This note collects a small sample of antitrust-related provisions, including risk-shifting provisions, that have been used in actual 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. Inclusion of a provision in this sample does not constitute an endorsement of the language. Rather, the sample is designed to give you a good idea of the types of provisions that parties in fact have used in dealing with antitrust process and risk in negotiated transactions.

Dale Collins

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I. Definitions

a. Antitrust laws

(i) *Includes non-U.S. competition laws (Example 1)*

the HSR Act, the Sherman Act, as amended, the Clayton Act, as amended, the Federal Trade Commission Act, as amended, and any other federal, state or foreign law, regulation or decree designed to prohibit, restrict or regulate actions for the purpose or effect of monopolization or restraint of trade (collectively “Antitrust Laws”),

(ii) *Includes non-U.S. competition laws (Example 2)*

For purposes of this Agreement, “Regulatory Law” means the Sherman Act, as amended, the Clayton Act, as amended, the HSR Act, the Federal Trade Commission Act, as amended, and all other federal, state or foreign statutes, rules, regulations, orders, decrees, administrative and judicial doctrines and other Laws, including without limitation any antitrust, competition or trade regulation Laws, that are designed or intended to prohibit, restrict or regulate actions having the purpose or effect of monopolization or restraint of trade or lessening competition through merger or acquisition.

(iii) *Separate definition for non-U.S. antitrust laws*

For purposes of this Agreement, (A) “Antitrust Law” means the Sherman Act, as amended, the Clayton Act, as amended, the HSR Act, the Federal Trade Commission Act, as amended, Foreign Antitrust Laws and all other federal, state and foreign, if any, statutes, rules, regulations, Orders, decrees, administrative and judicial doctrines and other Laws that are designed or intended to prohibit, restrict or regulate actions having the purpose or effect of monopolization or restraint of trade or lessening of competition through merger or acquisition and (B) “Foreign Antitrust Laws” means the applicable requirements of



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antitrust, competition or other similar Laws, rules, regulations and judicial doctrines of jurisdictions other than the United States.

b. HSR Act

(i) *Example 1*

“HSR Act” means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

(ii) *Example 2*

“HSR Act” means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and the rules and regulations promulgated thereunder, and any successor to such statute, rules or regulations.

c. Governmental authority

(i) *Example 1*

“Governmental Authority” means any federal, national, foreign, supranational, state, provincial, county, local or other government, governmental, regulatory or administrative authority, agency, instrumentality or commission or any court, tribunal, or judicial or arbitral body of competent jurisdiction.

(ii) *Example 2*

“Governmental Entity” means any state, nation or international body or governmental organization, whether federal, state, county, local or foreign, or multinational, including but not limited to any agency, authority, official or instrumentality of any such government or political subdivision or any court, tribunal or arbitrator(s) of competent jurisdiction[, self-regulatory organization] or any statutory authority.

d. Antitrust approvals

“Antitrust Approvals” shall mean the expiration or termination of any waiting period under the HSR Act and the applicable merger control Laws of Austria, Germany, Ukraine, and such other jurisdictions as Buyer Parent reasonably determines are required in connection with the consummation of the Transactions.



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II. Representations and Warranties

a. Antitrust-related consents and approvals

(i) *U.S. and non-U.S. merger control requirements (with materiality out) (Example 1)*

(b) The execution and delivery of this Agreement by the Company do not, and the performance of this Agreement by the Company and the consummation of the Merger will not, require any consent, approval, authorization or permit of, or filing with or notification to, any Governmental Authority, except (i) for applicable requirements, if any, of Blue Sky Laws, any filings required to be made with the SIX, the premerger notification requirements of the HSR Act, the requirements of the EU Merger Regulation or other applicable foreign, federal, state or supranational antitrust, competition, fair trade or similar Laws and the filing and recordation of the Certificate of Merger as required by the DGCL, and (ii) where the failure to obtain such consents, approvals, authorizations or permits, or to make such filings or notifications, would not have a Company Material Adverse Effect.

(ii) *U.S. and non-U.S. merger control requirements (with materiality out) (Example 2)*

Other than in connection with or in compliance with (i) the provisions of the DGCL, (ii) the Exchange Act, (iii) the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and the rules and regulations promulgated thereunder (the “HSR Act”), (iv) any applicable requirements under Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (published in the Official Journal of the European Union on January 29, 2004 at L 24/1) (the “EC Merger Regulation”), (v) any applicable requirements of Laws in other foreign jurisdictions governing antitrust or merger control matters, and (vi) the approvals set forth on Section 3.3(b) of the Disclosure Schedule (collectively, the “Company Approvals”), no authorization, consent or approval of, or filing with, any United States or foreign governmental or regulatory agency, national securities exchange, commission, court, body, entity or authority (each, a “Governmental Entity”) is necessary, under applicable Law, for the consummation by the Company of the transactions contemplated by this Agreement, except for such authorizations, consents, approvals or filings (x) that, if not obtained or made, would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect or (y) as may arise in connection with the Financing or as a result of facts, circumstances relating to Parent or its affiliates (as defined in Section 8.13(a)) or Laws or contracts binding on Parent or its affiliates.



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III. Conditions Precedent

a. HSR Act waiting period

Governmental Approvals. Any waiting period (and any extensions thereof) under the HSR Act shall have expired or have been terminated;

b. HSR Act waiting period plus any voluntary commitment not to close

The waiting period applicable to the consummation of the Merger under the HSR Act shall have expired or been terminated, and there shall not be in effect any voluntary agreement between Parent or the Company and the Federal Trade Commission or the Department of Justice pursuant to which Parent or the Company has agreed not to consummate the Merger for any period of time.

c. HSR “approval”

HSR Approval Condition. The HSR Approval shall have been obtained and shall remain in full force and effect (the “HSR Approval Condition”).

“HSR Approval” means the expiration or early termination of the applicable waiting periods required pursuant to the HSR Act;^[1]

d. All “antitrust approvals”

(b) *Antitrust Approvals.* All Antitrust Approvals shall have been made or obtained, as the case may be.

“Antitrust Approvals” shall mean the expiration or termination of any waiting period under the HSR Act and the applicable merger control Laws of Austria, Germany, Ukraine, and such other jurisdictions as Buyer Parent reasonably determines are required in connection with the consummation of the Transactions.

e. HSR Act and multinational regulatory approvals (with materiality proviso)

(i) *Example 1*

HSR Act. All applicable waiting periods (and any extensions thereof) under the HSR Act and under any similar foreign statutes and regulations applicable to the Merger shall have

^[1] This definition can easily be modified to compass more than the expiration or termination of the applicable waiting period under the HSR Act.



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expired, terminated or where applicable, approvals have been obtained (except where the failure of which to expire, terminate or be obtained would not reasonably be expected to, individually or in the aggregate, materially and adversely affect the Company and Parent, taken as a whole, or would not reasonably be expected to result in criminal liability);

(ii) *Example 2*

Antitrust Waiting Periods. (i) Any waiting period (and any extensions thereof) applicable to consummation of the Merger under the HSR Act and, to the extent material, under any foreign antitrust, competition or pre-merger notification law shall have expired or been terminated, and (ii) all other material foreign antitrust, competition, trade, pre-merger notification or other regulatory approvals as may be required to consummate the Merger shall have been made or obtained, as applicable.

(iii) *Example 3*

(i) Any applicable waiting period under the HSR Act shall have expired or been earlier terminated, (ii) the European Commission shall have issued a decision under the EC Merger Regulation declaring the Merger compatible with the common market, and (iii) all applicable waiting and other time periods under other applicable foreign, federal antitrust, competition or fair trade Laws or applicable Laws, other than the HSR Act and the EC Merger Regulation, shall have expired, lapsed or been terminated (as appropriate) and all regulatory clearances in any relevant jurisdiction shall have been obtained, in each case, in respect of the Merger unless otherwise waived by Parent (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 Merger Sub of its obligation to consummate the Merger unless consummation of the Merger without obtaining any of the regulatory clearances referred to in this subclause (iii) would reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect.

(iv) *Example 4*

(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



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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.

(v) *Example 5 (with provision for timing agreement with DOJ)*

(i) Any applicable waiting period under the HSR Act, Mexico’s Federal Law on Economic Competition, or imposed by any agreement with the Antitrust Division of the U.S. Department of Justice shall have expired or been earlier terminated, and (ii) all applicable waiting and other time periods under other applicable state or foreign antitrust, competition or fair trade Laws or applicable Laws, other than those referred to in the foregoing clause (i), shall have expired, lapsed or been terminated (as appropriate) and all regulatory clearances in any relevant jurisdiction shall have been obtained, in each case, in respect of the Merger unless otherwise waived by Parent; *provided* that with respect to the condition set forth in this clause (ii), the failure of such condition shall not relieve either Parent or Purchaser of its obligation to consummate the Merger unless consummation of the Merger without obtaining any of the regulatory clearances referred to in this clause (ii) would reasonably be expected to have, individually or in the aggregate, a Regulatory Material Adverse Effect or result in criminal liability for any officer or director of Parent, the Company or any of their respective Subsidiaries.

(vi) *Example 6 (with provision for referral to EU Member States)*

(a) *Regulatory Consents.* (i) The waiting period (and any extensions thereof) applicable to the consummation of the Transaction under the HSR Act shall have expired or been earlier terminated; (ii) all Governmental Consents required to be obtained from the FCC for the consummation of the Transaction shall have been obtained; and (iii) the European Commission shall have adopted a decision pursuant to the EC Merger Regulation declaring that the Transaction is compatible with the common market (or such compatibility shall have been deemed to exist under Article 10(6) of the EC Merger Regulation), or, in the event that that the European Commission adopts a decision pursuant to Article 9(3)(b) of the EC Merger Regulation (or is deemed to have done so pursuant to Article 9(5) of the EC



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Merger Regulation) referring the review of all or part of the Transaction to a Governmental Entity of a member state of the European Union, such Governmental Entity (or any other Governmental Entity of such member state) shall have granted approval of the transactions or part thereof that were so referred.

f. Condition precedent with agreed list of jurisdictions in exhibit to Agreement

(i) *Specified list (Example 1)*

Antitrust Consents. (i) Any applicable waiting period under the HSR Act shall have expired or been earlier terminated and (ii) any affirmative approval of a Governmental Authority required under any other Antitrust Law set forth in Section 8.01(b) of the Company Disclosure Schedule shall have been obtained or deemed to have been obtained under such applicable Antitrust Law.

(ii) *Specified list (Example 2)*

(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”).

(iii) *Specified list (Example 3)*

(c) *No Order.* No Governmental Authority shall have enacted, issued, promulgated, enforced or entered any Law or Order, whether temporary, preliminary or permanent, which is then in effect and has the effect of enjoining, restraining, prohibiting or otherwise preventing the consummation of the Transactions (collectively, a “Restraint”); *provided, however,* that any antitrust, competition, fair trade or similar Law or Order (whether temporary, preliminary or permanent) which has such an effect shall constitute a “Restraint” only if it arises in the United States, the European Union or a jurisdiction specified in Section 8.01(d) of the Company Disclosure Schedule.

(d) *Regulatory Approvals.* (i) Any waiting period (and any extension thereof) applicable to the consummation of the Merger under the HSR Act shall have expired or been terminated; (ii) the approval of the European Commission of the Transactions shall have been obtained pursuant to the EU Merger Regulation (or the approval by those national competition authorities in the European Union that have jurisdiction as a result of a referral



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of the Transactions under the EU Merger Regulation); and (iii) any approval or waiting period with respect to those jurisdictions set forth in Section 8.01(d) of the Company Disclosure Schedule shall have been obtained or terminated or shall have expired.

(iv) *Specified list (Example 4)*

(c) Antitrust Laws.

(i) All applicable waiting periods under (A) the HSR Act, and (B) the German Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*), with respect to the transactions contemplated by this Agreement shall have expired or been terminated.

(ii) All applicable approvals and authorizations under the Spanish Defense of Competition Law (*Ley 15/2007, de 3 de julio, de Defensa de la Competencia*) with respect to the transactions contemplated by this Agreement shall have been obtained (whether implicitly through the expiration of any waiting periods or explicitly by resolution).

(v) *Specified list with additional material jurisdictions*

(c) *Antitrust Laws; Consents and Approvals.* Unless the Offer Closing shall have occurred, (i) all applicable waiting periods under the HSR Act with respect to the Merger shall have expired or been terminated, (ii) all consents required under any other Antitrust Law of the jurisdictions set forth on Section 6.01(c) of the Company Disclosure Letter shall have been obtained or any applicable waiting period thereunder shall have expired or been terminated, (iii) all other consents, approvals and authorizations of any Governmental Entity required of Parent, the Company or any of their Subsidiaries to consummate the Merger, the failure of which to be obtained, individually or in the aggregate, would have a Parent Material Adverse Effect or a Material Adverse Effect, shall have been obtained and shall be in full force and effect and (iv) the conditions of any agreement entered into by any Party with any Governmental Entity the effect of which is to prohibit the Merger pending the completion of the Governmental Entity's review or investigation of the Merger shall have been satisfied or waived in accordance with the terms thereof.

g. Condition precedent with list of jurisdictions to be negotiated

(c) *Antitrust Laws.* Any applicable waiting period (or extension thereof) under the HSR Act and any other applicable Antitrust Law that, within fifteen (15) days following the date of this Agreement, the parties identify and agree is applicable to the Merger shall have expired or been terminated and the European Commission shall have issued a decision under the EC Merger Regulation declaring the Merger compatible with the common



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market and all approvals, clearances, filings and notices required under any other applicable Antitrust Law that, within fifteen (15) days following the date of this Agreement, the parties identify and agree is applicable to the Merger shall have been obtained or made

h. Detailed condition precedent—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 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.

i. No law, order or injunction

(i) *Example 1*

No Injunctions or Restraints. No Law, injunction, judgment or ruling enacted, promulgated, issued, entered, amended or enforced by any Governmental Authority (collectively, “Restraints”) shall be in effect enjoining, restraining, preventing or prohibiting consummation of the Transactions or making the consummation of the Transactions illegal;

(ii) *Example 2*

(a) *No Laws.* No Governmental Entity shall have enacted, issued, promulgated, enforced or entered any Applicable Law which is in effect and which has the effect of making any of the material transactions contemplated by this Agreement or any of the Ancillary Agreements illegal or otherwise prohibiting the consummation of any of the material transactions contemplated by this Agreement or any of the Ancillary Agreements.



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(b) *No Injunctions.* No temporary restraining order, preliminary or permanent injunction or other Order issued by any court of competent jurisdiction or other similar legal restraint shall be in effect that has the effect of prohibiting the consummation of any of the material transactions contemplated by this Agreement or any of the Ancillary Agreements.

(iii) *Example 3*

(c) *No Legal Prohibition.* No Governmental Entity of competent jurisdiction shall have (i) enacted, issued, promulgated, entered, enforced or deemed applicable to the Merger any Applicable Law that is in effect and has the effect of making the Merger illegal in any jurisdiction or which has the effect of prohibiting or otherwise preventing the consummation of the Merger in any jurisdiction or (ii) issued or granted any Order (whether temporary, preliminary or permanent) that has the effect of making the Merger illegal in any jurisdiction or which has the effect of prohibiting or otherwise preventing the consummation of the Merger in any jurisdiction.

(iv) *Example 4*

No Injunctions or Restraints. No temporary restraining order, preliminary or permanent injunction or other judgment, Order or decree (a “Restraint”) of any court or agency of competent jurisdiction located in the United States or in any other jurisdiction outside of the United States in which the Company or any of its Subsidiaries, or Parent or any of its Subsidiaries, engage in business activities that prohibits the consummation of the Merger shall have been issued and remain in effect, and no Law shall have been enacted, issued, enforced, entered, or promulgated and remains in effect that prohibits or makes illegal the consummation of any of the transactions contemplated by this Agreement.

j. No pending actions or litigation

(i) *No threatened or pending litigation*

No Threatened or Pending Litigation. There shall be no Proceeding, Order, injunction or final judgment relating thereto, pending before any Governmental Authority in which it is sought to restrain or prohibit or to obtain damages or other relief in connection with this Agreement or the consummation of the transactions contemplated hereby, and to the knowledge of Sellers or Purchaser and Purchaser Ohio Affiliate, there shall be no threatened Proceeding or Order, which Sellers or Purchaser and Purchaser Ohio Affiliate in good faith reasonably believe could result in the consummation of the transactions contemplated hereby being restrained or prohibited or the award of damages or other relief in connection with this Agreement or the consummation of the transactions contemplated hereby.



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(ii) *No threatened or pending litigation by U.S. or Canadian antitrust authorities*

No Litigation. There shall not be instituted or pending any suit, action or proceeding by the United States Federal Trade Commission or the Antitrust Division of the United States Department of Justice under any U.S. Antitrust Law or the Commissioner of Competition appointed pursuant to Section 7 of the Competition Act (Canada) under the Competition Act (Canada) (the “Commissioner”) (i) challenging or seeking to make illegal, to delay materially or otherwise directly or indirectly to prohibit the consummation of the Merger or any of the other transactions contemplated hereby, (ii) seeking to prohibit Parent’s ability to vote, transfer, receive dividends or otherwise exercise full rights of ownership with respect to the stock of the Surviving Entity or (iii) seeking to prohibit, limit, restrain or impair Parent’s ability to own, control, direct, manage, or operate or to retain or change any portion of the assets, licenses, operations, rights, product lines, businesses or interests therein of the Company or its Subsidiaries from and after the Effective Time or any of the assets, licenses, operations, rights, product lines, businesses or interests therein of Parent or its Subsidiaries, except, in each case, where the remedy sought by such Governmental Authority is one that Parent would be required to accept consistent with its obligations under Section 6.03(a).

(iii) *No government actions*

No Governmental Actions. There shall be no Action of any kind or character pending by a Governmental Entity against Micron, the Buyer, the Sellers or the Company, any of their respective properties or assets, or any of their respective Directors or Officers (in their capacities as such) that seeks to prohibit the consummation of any of the material transactions contemplated by this Agreement or any of the Ancillary Agreements

(iv) *No U.S. or EC actions*

No Action. There shall not be pending any Action instituted or initiated by any federal Governmental Authority in the United States or any Governmental Authority in the European Union or any European Union member state seeking a Restraint with respect to the consummation of the Merger which would enjoin, restrain, prohibit or make illegal the consummation of the Merger;

(v) *No pending actions in specified jurisdictions*

No Litigation. There shall not be pending any suit, action or proceeding with respect to any antitrust, competition, fair trade or similar Law by any Governmental Authority in the United States, the European Union or in any jurisdiction specified in Section 8.01(d) of the Company Disclosure Schedule (i) seeking to restrain or prohibit the consummation of the Merger or any other transaction contemplated by this Agreement or seeking to obtain from



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the Company, Parent, Merger Sub or any other Subsidiary or Affiliate of Parent any damages that would meet the materiality standard set forth in the last sentence of Section 7.08(c), (ii) seeking to impose limitations on the ability of Parent or any Subsidiary or Affiliate of Parent to hold, or exercise full rights of ownership of, any shares of capital stock of the Surviving Corporation, including the right to vote such shares on all matters properly presented to the stockholders of the Surviving Corporation,

(vi) *More detailed provision*

No Restraints. There shall not be instituted or pending any suit, action or proceeding in which a Governmental Entity of competent jurisdiction is seeking (i) an Order or (ii) to (A) prohibit, limit, restrain or impair Parent's ability to own or operate or to retain or change all or a material portion of the assets, licenses, operations, rights, product lines, businesses or interest therein of the Company or any of its Subsidiaries or other Affiliates from and after the Effective Time or any of the assets, licenses, operations, rights, product lines, businesses or interest therein of Parent or its Subsidiaries (including by requiring any sale, divestiture, transfer, license, lease, disposition of or encumbrance or hold separate arrangement with respect to any such assets, licenses, operations, rights, product lines, businesses or interest therein) or (B) prohibit or limit in any respect Parent's ability to vote, transfer, receive dividends or otherwise exercise full ownership rights with respect to the stock of the Surviving Corporation, and no Governmental Entity of competent jurisdiction shall have enacted, issued, promulgated, enforced or entered any Law deemed applicable to the Merger individually or in the aggregate resulting in, or that is reasonably likely to result in, any of the foregoing.

(vii) *No pending litigation for a temporary restraining order*

No Restraints. No temporary restraining order, preliminary or permanent injunction or other Order preventing the consummation of the Merger shall have been issued by any court of competent jurisdiction or other Governmental Body in the United States or in any Specified Foreign Jurisdiction and remain in effect, and there shall not be pending any motion for a temporary restraining order brought by a United States Governmental Body under applicable United States Antitrust Law, and there shall not be any Legal Requirement enacted or deemed applicable to the Merger in the United States or in any Specified Foreign Jurisdiction that makes consummation of the Merger illegal.



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IV. General Efforts Covenants

(i) *Example 1*

Subject to the terms and conditions of this Agreement, prior to the Effective Time, each of the Company, Parent and Merger Sub shall use its commercially reasonable efforts to take, or cause to be taken, all other actions and do, or cause to be done, all other things necessary, proper or advisable under applicable Law to consummate the Transactions, including, (i) making all appropriate filings and submissions (and filings and submissions considered by Parent to be advisable) under the HSR Act and with any other Governmental Authority pursuant to any other applicable Antitrust Laws or otherwise as determined by Parent, as promptly as practicable, but in no event later than ten (10) Business Days after the date hereof with respect to filing under the HSR Act, and shall make as promptly as practicable any other appropriate submissions under other applicable Antitrust Laws, (ii) obtaining as promptly as practicable the termination of any waiting period under the HSR Act and any applicable foreign Antitrust Laws, (iii) cooperating and consulting with each other in (A) determining which filings are required to be made prior to the Effective Time with, and which material consents, approvals, permits, notices or authorizations are required to be obtained prior to the Effective Time from, Governmental Authorities in connection with the execution and delivery of this Agreement and related agreements and consummation of the transactions contemplated hereby and thereby and (B) timely making all such filings and timely seeking all such consents, approvals, permits, notices or authorizations.

(ii) *Example 2*

(a) Subject to the terms and conditions of this Agreement (including Section 5.4(d) [regarding proposing and accepting consent agreements]), each of the parties hereto shall cooperate with the other parties and use (and shall cause their respective Subsidiaries to use) their respective best efforts to (i) take, or cause to be taken, all actions, and do, or cause to be done, all things, necessary, proper or advisable to cause the conditions to Closing to be satisfied as promptly as practicable (and in any event no later than the Extended Walk-Away Date) and to consummate and make effective, in the most expeditious manner practicable, the Transactions, including preparing and filing promptly and fully all documentation to effect all necessary filings, notifications, notices, petitions, statements, registrations, submissions of information, applications and other documents (including any required or recommended filings under applicable Antitrust Laws), (ii) obtain promptly (and in any event no later than the Extended Walk-Away Date) all approvals, consents, clearances, expirations or terminations of waiting periods, registrations, permits, authorizations and other confirmations from any Governmental Authority or third party necessary, proper or advisable to consummate the Transactions, (iii) defend any lawsuits or other legal proceedings, whether judicial or administrative, challenging this Agreement or



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the consummation of the Transactions and (iv) obtain all necessary consents, approvals or waivers from third parties. For purposes of this Agreement, “Antitrust Laws” means the Sherman Act, as amended, the Clayton Act, as amended, the HSR Act, the Federal Trade Commission Act, as amended, all applicable Foreign Antitrust Laws and all other applicable Laws issued by a Governmental Authority that are designed or intended to prohibit, restrict or regulate actions having the purpose or effect of monopolization or restraint of trade or lessening of competition through merger or acquisition.

(iii) *Example 3*

The Purchaser shall make any necessary filings with respect to, and use its [best efforts/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).

V. Merger Control Filing Covenants

a. Covenant to make HSR filings and comply with any second request

(i) *Example 1*

In furtherance and not in limitation of the foregoing, each party hereto agrees to (x) make an appropriate filing of a Notification and Report Form pursuant to the HSR Act with respect to the transactions contemplated by this Agreement within ten (10) Business Days of the date of this Agreement, (y) supply as promptly as reasonably practicable any additional information and documentary material that may be requested pursuant to the HSR Act and (z) use its reasonable best efforts to take or cause to be taken all other actions



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necessary, proper or advisable consistent with this Section 7.2 to cause the expiration or termination of the applicable waiting periods, or receipt of required authorizations, as applicable, under the HSR Act as soon as practicable. Without limiting the foregoing, the parties shall request and shall use reasonable best efforts to obtain early termination of the waiting period under the HSR Act.

(ii) *Example 2*

Without limiting the foregoing, each of the Company and Parent shall . . . (iii) as promptly as reasonably practicable following the receipt thereof, respond to (or properly reduce the scope of) any formal or informal request for additional information or documentary material received by the Company, Parent or any of their respective Affiliates from any Governmental Authority whether received prior to or after the date of this Agreement;

b. Covenant to make multinational filings

(i) *Example 1*

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.

(ii) *Example 2*

In furtherance and not in limitation of the foregoing, each party hereto agrees (i) to make an appropriate filing of a Notification and Report Form pursuant to the HSR Act and any other applicable Antitrust Law with respect to the transactions contemplated hereby as promptly as practicable after the date hereof, (ii) to supply as promptly as reasonably practicable any additional information and documentary material that may be requested pursuant to the HSR Act or any other applicable Antitrust Law and (iii) use its best efforts to take or cause to be taken all other actions necessary, proper or advisable to obtain applicable clearances, consents, authorizations, approvals or waivers and to cause the expiration or termination of the applicable waiting periods with respect to the approval of



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the Merger under the HSR Act, the German Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*), the Spanish Defense of Competition Law (*Ley 15/2007, de 3 de julio, de Defensa de la Competencia*) and any other applicable Antitrust Laws so as to enable the Closing to occur no later than the Outside Date.

(iii) *Example 3*

Subject to the terms and conditions herein provided and without limiting the foregoing, the Company and Parent shall (i) promptly, and in any event no later than fifteen (15) business days after the date hereof, make all required filings of Notification and Report Forms pursuant to the HSR Act, (ii) as promptly as practicable make appropriate filings with the European Commission in accordance with the EC Merger Regulation, (iii) use reasonable best efforts to cooperate with each other in (x) determining whether any filings are required to be made with, or actions or nonactions, waivers, authorizations, expirations or terminations of waiting periods, clearances, consents or approvals are required to be obtained from, any other Governmental Entities (including any foreign jurisdiction in which the Company or its Subsidiaries are operating any business) or third parties in connection with the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby and (y) timely making all such filings and timely seeking all such actions or nonactions, waivers, authorizations, expirations or terminations of waiting periods, clearances, consents and approvals, (iv) supply as promptly as practicable such information or documentation that may be requested pursuant to any Regulatory Law (as defined in Section 5.6(f)) by any Governmental Entity, and (v) use reasonable best efforts to take, or cause to be taken, all other actions and do, or cause to be done, all other things necessary, proper or advisable to consummate and make effective the transactions contemplated hereby.

(iv) *Purchaser election for non-mandatory jurisdictions*

Upon the terms and subject to the conditions of this Agreement, each party hereto agrees to make any appropriate filings, if necessary or advisable (in the opinion of Parent), pursuant to the HSR Act, the EU Merger Regulation or other applicable foreign, federal, state or supranational antitrust, competition, fair trade or similar Laws with respect to the Transactions as promptly as practicable and to supply as promptly as practicable and advisable to the appropriate Governmental Authorities any additional information and documentary material that may be requested pursuant to the HSR Act, the EU Merger Regulation or other applicable foreign, federal, state or supranational antitrust, competition, fair trade or similar Laws. All antitrust filings to be made shall be made in substantial compliance with the requirements of the HSR Act, the EU Merger Regulation and other applicable foreign, federal, state or supranational antitrust, competition, fair trade or similar Laws, as applicable.



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c. Pulling/refiling and timing agreements

(i) *Purchaser control*

(e) Each party hereto shall and shall cause its respective Subsidiaries to respond as promptly as reasonably practicable and advisable to any inquiries or requests for information and documentary material received from any Governmental Authority in connection with any antitrust or competition matters related to this Agreement and the Transactions. The Company and its Subsidiaries shall not, but Parent may if in its good faith judgment it determines (after consulting in advance with the Company and in good faith taking the Company's views into account) that the taking of such action would enhance the likelihood of obtaining any necessary antitrust, competition, fair trade or similar clearance by the Outside Date, extend any waiting period or agree to refile under the HSR Act, the EU Merger Regulation or any other applicable state, federal, foreign or supranational antitrust, competition, fair trade or similar Laws.

(ii) *Mutual control (Example 1)*

The parties agree not to extend any waiting period under the HSR Act or enter into any agreement with any Governmental Authority to delay, or otherwise not to consummate as soon as practicable, any of the transactions contemplated by this Agreement except with the prior written consent of the other parties hereto, which consent may be withheld in the sole discretion of the non-requesting party.

(iii) *Mutual control (Example 2)*

(e) Each Buyer and each Seller agrees that, during the term of this Agreement, it will not withdraw its filing under the Hart-Scott-Rodino Act or any other applicable antitrust, competition or trade regulation law without the written consent of the other party.

(f) Each Buyer and each Seller agrees that it will not enter into any timing agreement with any Governmental Entity without the written consent of the other party.

d. Covenant on timing of second request compliance

(i) *Example 1*

(iv) respond as promptly as practicable under the circumstances to any inquiries received from any Governmental Entity or any other authority enforcing applicable antitrust, competition, trade regulation or similar Laws for additional information or documentation in connection with antitrust, competition, trade regulation or similar matters;



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(v) without limiting the generality of Section 6.3(d)(iv), (A) use its reasonable best efforts to achieve Substantial Compliance as promptly as practicable with any request for additional information or documentary material issued by a Governmental Entity under 15 U.S.C. Sect. 18a(e) and in conjunction with the transactions contemplated by this Agreement (a “Second Request”), (B) certify Substantial Compliance with any Second Request as promptly as practicable after the date of such Second Request, but in no event later than September 30, 2010, (C) take all actions necessary to assert, defend and support its certification of Substantial Compliance with such Second Request;

(ii) *Example 2*

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 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.

VI. Cooperation Covenants

a. Detailed cooperation covenant

(i) *Example 1*

Without limiting, and subject to, Section 5.04(b)(ii) the parties agree to use good faith efforts to (A) give each other reasonable advance notice of all meetings with any Governmental Entity relating to the Antitrust Laws, (B) to the extent not prohibited by such Governmental Entity, not participate independently in any such meeting without first giving the other party (or the other party’s outside counsel) an opportunity to attend and participate in such meeting, (C) to the extent practicable, give the other party reasonable advance notice of all oral communications with any Governmental Entity relating to Antitrust Laws, (D) if any Governmental Entity initiates an oral communication regarding



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the Antitrust Laws, promptly notify the other party of the substance of such communication, (E) provide each other with a reasonable advance opportunity to review and comment upon and consider in good faith the views of the other in connection with all written communications (including any analyses, presentations, memoranda, briefs, arguments, opinions and proposals made or submitted by or on behalf of any party hereto relating to proceedings under the Antitrust Laws) with a Governmental Entity regarding the Antitrust Laws and (F) promptly provide each other with copies of all written communications to or from any Governmental Entity relating to the Antitrust Laws. The parties may, as they deem advisable and necessary, designate any competitively sensitive materials provided to the other under this Section 5.04 as “outside counsel only.” Such materials and the information contained therein shall be given only to outside counsel and previously-agreed outside economic consultants of the recipient and will not be disclosed by such outside counsel or outside economic consultants to employees, officers, or directors of the recipient without the advance written consent of the party providing such materials.

(ii) *Example 2*

Each of the Company and Parent shall, in connection with the Offer, the Merger and the transactions contemplated hereby, with respect to actions taken on or after the date of this Agreement, without limitation: (1) promptly notify the other of, and if in writing, furnish the other with copies of (or, in the case of oral communications, advise the other of) any communications from or with any Governmental Authority with respect to the Offer, the Merger or the other transactions contemplated hereby, (2) permit the other to review and discuss in advance, and consider in good faith the view of the other in connection with, any proposed written or oral communication with any Governmental Authority, (3) not participate in any substantive meeting or have any substantive communication with any Governmental Authority unless it has given the other party a reasonable opportunity to consult with it in advance and, to the extent permitted by such Governmental Authority, gives the other the opportunity to attend and participate therein, (4) furnish the other party’s outside legal counsel with copies of all filings and communications between it and any such Governmental Authority with respect to the Merger and the other transactions contemplated hereby; *provided* that such material may be redacted as necessary (I) to comply with contractual arrangements, (II) to address good faith legal privilege or confidentiality concerns and (III) to comply with applicable Law and (5) furnish the other party’s outside legal counsel with such necessary information and reasonable assistance as the other party’s outside legal counsel may reasonably request in connection with its preparation of necessary submissions of information to any such Governmental Authority.



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b. Provision for the exchange of filings and submissions

Within five (5) business days after the date hereof, to the extent legally permitted, each of the Company and Parent shall provide to counsel for the other party all filings and written submissions, including attachments thereto, made by the Company to any Governmental Entity regarding the Transactions, *provided* that each party shall be entitled to redact competitively sensitive information and any information relating to Company valuation and similar matters relating to the Transactions.

c. Seller cooperation in Purchaser filings

(i) *Example 1*

The parties hereto shall cooperate and assist one another in connection with all actions to be taken pursuant to Section 7.08(a), including the preparation and making of the filings referred to therein and, if requested, amending or furnishing additional information hereunder. The Company shall use its reasonable best efforts to provide or cause to be provided promptly to Parent all necessary information and assistance as any Governmental Authority may from time to time require in connection with obtaining the relevant waivers, permits, consents, approvals, authorizations, qualifications, Orders or expiration of waiting periods in relation to these filings or in connection with any other review or investigation of the Transactions by a Governmental Authority. The Company shall use its reasonable best efforts to provide or cause to be provided promptly all assistance and cooperation to allow Parent to prepare and submit any filings or submissions under the HSR Act, the EU Merger Regulation or other applicable foreign, federal, state or supranational antitrust, competition, fair trade or similar Laws, including providing to Parent any information that Parent may from time to time require for the purpose of any filing, notification, application or request for further information made in respect of any such filing.

(ii) *Example 2*

(iv) respond as promptly as practicable under the circumstances to any inquiries received from any Governmental Entity or any other authority enforcing applicable antitrust, competition, trade regulation or similar Laws for additional information or documentation in connection with antitrust, competition, trade regulation or similar matters;

(v) without limiting the generality of Section 6.3(d)(iv), (A) use its reasonable best efforts to achieve Substantial Compliance as promptly as practicable with any request for additional information or documentary material issued by a Governmental Entity under 15 U.S.C. Sect. 18a(e) and in conjunction with the transactions contemplated by this Agreement (a “Second Request”), (B) certify Substantial Compliance with any Second Request as promptly as practicable after the date of such Second Request, but in no event



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later than September 30, 2010 [approximately 5 months from the date of the agreement], (C) take all actions necessary to assert, defend and support its certification of Substantial Compliance with such Second Request and (D) not extend any waiting period under the HSR Act or enter into any agreement with such Governmental Entities or other authorities to delay, or otherwise not to consummate as soon as practicable, any of the transactions contemplated by this Agreement except with the prior written consent of the other parties hereto, which consent may be withheld in the sole discretion of the non-requesting party;

d. Buyer control of strategy and tactics

(i) *Simple provision (Example 1)*

Notwithstanding anything in this Agreement to the contrary: . . . (ii) Parent shall, on behalf of the parties, control and lead all communications and strategy relating to the Antitrust Laws and litigation matters relating to the Antitrust Laws (provided that the Company is not prohibited from complying with applicable Law), subject to good faith consultations with the Company and the inclusion of the Company at meetings with Governmental Entities with respect to any discussion related to the Merger under the Antitrust Laws.

(ii) *Simple provision (Example 2)*

Each party shall consult with the other party and consider in good faith the views of the other party prior to entering into any agreement, arrangement, undertaking or understanding (oral or written) with any Governmental Authority relating to any Antitrust Law with respect to the Merger or the other transactions contemplated hereby; *provided*, that subject to its undertakings in Section 6.03(c), the final determination as to the appropriate course of action shall be made by Parent.

(iii) *Simple provision (Example 3)*

The parties hereto shall cooperate fully with each other in connection with (y) assessing whether any action by or in respect of, or filing with, any Governmental Entity is required, in connection with the consummation of the Transactions and (z) seeking any such Consents or making any such filings; *provided, however*, that Buyer shall make the ultimate determination about which actions or filings, if any, are necessary.

(iv) *Expanded provision (with buyer control proviso)*

Each party hereto will consult and cooperate with the other parties and will consider in good faith the views of the other parties in connection with any filing, analysis, appearance, presentation, memorandum, brief, argument, opinion, or proposal made or submitted in



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connection with the Transactions, *provided, however*, that Buyer shall have responsibility for determining the strategy for dealing with the FTC, the DOJ, and any other Governmental Authority regarding antitrust matters. In addition, except as may be prohibited by any Governmental Entity or by any applicable Law, in connection with any such request or Legal Proceeding, to the extent reasonably practicable, each party hereto will permit authorized Representatives of the other parties to be present at each substantive meeting or conference relating to such request or Legal Proceeding and to have access to and be consulted in connection with any substantive document, opinion or proposal made or submitted to any Governmental Entity in connection with such request or Legal Proceeding.

(v) *Best efforts to cooperate but with buyer control*

(b) To the fullest extent permitted by applicable Law, each of Parent and HoldCo, on the one hand, and the Company, on the other hand, shall, in connection with the efforts referenced in Section 6.04(a), use its best efforts to (i) cooperate in all respects with each other in connection with any filing or submission and in connection with any investigation or other inquiry, including any proceeding initiated by a private party; (ii) seek the Company's review and comments on strategy and submissions in a timely manner; (iii) consider in good faith the views of the other party and keep the other party reasonably informed of the status of matters related to the transactions contemplated by this Agreement, including furnishing the other with any written notices or other communications received by such party from, or given by such party to, the Federal Trade Commission (the "FTC"), the Antitrust Division of the Department of Justice (the "DOJ") or any other U.S. or foreign Governmental Entity or Self-Regulatory Organization and of any communication received or given in connection with any proceeding by a private party, in each case regarding any of the transactions contemplated hereby; and (iii) permit the other party to review in draft any communication to be submitted by it to, give reasonable consideration to the other party's comments thereon, and consult with each other in advance of any in-person or telephonic meeting or conference with, the FTC, the DOJ or any other Governmental Entity or Self-Regulatory Organization or, in connection with any proceeding by a private party, with any other Person, and to the extent permitted by the FTC, the DOJ or such other applicable Governmental Entity or Self-Regulatory Organization or other Person, give the other party or its Representatives the opportunity to attend and participate in such meetings and conferences in accordance with Antitrust Law; *provided, however*, that in the event of any disagreement concerning any such filing, submission, investigation, inquiry, proceeding, communication or meeting, the determination of Parent shall be final and conclusive; *provided, further*, that nothing in this Agreement shall prevent a party from responding to or complying with a subpoena or other legal process required by Law or submitting documents or factual information in response to a request therefor.



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(vi) *Buyer control of appeals, consent decree negotiations, and general strategy*

Parent shall have the right, but not the obligation, to (i) appeal an adverse decision on the merits, (ii) propose, negotiate, offer to commit and effect, by consent decree, hold separate order or otherwise, the divestiture of such assets of Parent, the Surviving Corporation, or either's respective Subsidiaries as may resolve such objections, suits, orders, decrees, decisions, determinations or judgments and (iii) determine and direct the strategy and process by which the Parties will seek required approvals under the Antitrust Laws. In furtherance (but not limitation) of the foregoing, the Company shall not, without the prior written consent of Parent, enter into any Contract with any Governmental Agency relating to such Governmental Agency's review or investigation of the Offer or the Merger under the Antitrust Laws.

(vii) *Buyer control (but with special consultation provisions for certain jurisdictions)*

Parent shall have the principal responsibility for devising and implementing the strategy for obtaining any necessary antitrust or competition clearances and shall take the lead in all meetings and communications with any Governmental Authority in connection with obtaining any necessary antitrust or competition clearances; *provided, however*, that, with respect to the jurisdictions referenced in Section 8.01(d) [jurisdictions in which antitrust clearance is a condition precedent], Parent shall consult in advance with the Company and in good faith take the Company's views into account regarding the overall strategic direction of obtaining antitrust or competition clearance in those jurisdictions and consult with the Company prior to taking any material substantive position in any written submissions or, to the extent practicable, discussions with Governmental Agencies in those jurisdictions. The Company shall consult with Parent prior to taking any material substantive position with respect to the filings under the HSR Act, the EU Merger Regulation or other applicable foreign, federal, state or supranational antitrust, competition, fair trade or similar Laws, in any written submission to, or, to the extent practicable, in any discussions with, any Governmental Authority. With respect to the jurisdictions referenced in Section 8.01(d), each party shall permit the other party to review and discuss in advance, and shall consider in good faith the views of the other party in connection with, any analyses, presentations, memoranda, briefs, written arguments, opinions, written proposals or other materials to be submitted to the Governmental Authorities in those jurisdictions with respect to such filings. Each party shall keep the other apprised of the material content and status of any material communications with, and material communications from, any Governmental Authority with respect to the Transactions, including promptly notifying the other of any material communication it receives from any Governmental Authority relating to any review or investigation of the Transactions under the HSR Act, the EU Merger Regulation or other applicable foreign, federal, state or supranational antitrust, competition, fair trade or similar Laws. The parties to this Agreement shall, and shall cause their respective Affiliates to use their reasonable best efforts to, provide each other with copies



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of all material, substantive correspondence, filings or communications between them or any of their respective 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; *provided, however*, that materials may be redacted (i) to remove references concerning the valuation of the Company and its Subsidiaries; (ii) as necessary to comply with contractual arrangements or applicable Laws; and (iii) as necessary to address reasonable attorney-client or other privilege or confidentiality concerns.

(viii) *Buyer control (with litigation exception)*

For the avoidance of doubt, Parent shall direct and fully control any lawsuits or other legal proceedings described in this Section 6.04(c); *provided, however*, that, subject to Parent's overall direction and control, if the Company is a party to any such lawsuit or other legal proceeding, it shall have the right to act independently in a reasonable manner with respect to any matter to the extent that such matter would reasonably be expected to result in an Order that would have an adverse effect on the Company as a separate company if the Merger were not consummated (*provided* that in such circumstance the Company shall consult with Parent and consider Parent's views and comments in good faith).

(ix) *Mutual notice*

Neither party shall initiate, or participate in any meeting or discussion with any Governmental Entity with respect to any filings, applications, investigation, or other inquiry regarding the Merger or filings under any Premerger Notification Rules without giving the other party reasonable prior notice of the meeting or discussion and, to the extent permitted by the relevant Governmental Entity, the opportunity to attend and participate (which, at the request of either party, shall be limited to outside antitrust counsel only); *provided, however*, that neither the Company nor Parent shall engage in any substantive communication with any Governmental Entity with respect to any proposed Divestiture Action without the consent of the other party.

e. Buyer ability to exclude seller from agency meetings

(d) With respect to the jurisdictions referenced in Section 8.01(d) [jurisdictions in which antitrust approval is a condition precedent], Parent shall, to the extent practicable and permitted by the relevant Governmental Authority, give the Company (through its counsel) the opportunity to attend and participate in all substantive meetings, telephone calls or discussions in respect of any filings, investigation (including settlement of the investigation), litigation or other inquiry; *provided* that, Parent or its representatives may conduct such a meeting, telephone call or discussion without the Company or its representatives present if Parent determines in good faith, taking into account the relevant



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facts and circumstances at the time (including the nature of the jurisdiction and the relevant Governmental Authority in question), that the taking of such action would enhance the likelihood of obtaining any necessary antitrust, competition, fair trade or similar clearance by the Outside Date; and *provided further* that to the extent practicable, Parent shall consult with the Company in advance and consider in good faith the view of the Company in making any such determination.

f. Covenant to avoid actions that would increase antitrust risk

(i) *Example 1*

Neither party shall, and each party shall cause its Affiliates not to, enter into any transaction, or any agreement to effect any transaction (including any merger or acquisition), that might reasonably be expected to make it more difficult, or to increase the time required, to (i) obtain the expiration or termination of the waiting period under the HSR Act or any other applicable Antitrust Law applicable to the Transactions or (ii) obtain all other authorizations, consents, orders, and approvals of Governmental Authorities necessary for the consummation of the Transactions.

(ii) *Example 2*

The Company, Parent and Merger Sub and any of their respective Affiliates shall not take any action with the intention to or that could reasonably be expected to hinder or delay the obtaining of clearance or any necessary approval of any Antitrust Authority under an Premerger Notification Rule or Antitrust Law or the expiration of the required waiting period under the Premerger Notification Rules or any other Antitrust Laws; *provided, however*, that Parent may take any reasonable action to resist or reduce the scope of a Divestiture Action, even if it delays such expiration to a date not beyond the Termination Date.

(iii) *Example 3*

Neither party shall, nor shall it permit any of its Subsidiaries to, acquire or agree to acquire any business, Person or division thereof, or otherwise acquire or agree to acquire any assets if the entering into of a definitive agreement relating to or the consummation of such acquisition would be reasonably likely to result in the material delay or impairment of (i) the ability of the parties to obtain the applicable clearance, approval or waiver from a Governmental Entity or Self-Regulatory Organization charged with the enforcement of any Antitrust Law with respect to the transactions contemplated by this Agreement or (ii) the expiration or termination of any applicable waiting period.



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(iv) *Example 4*

Neither the Company nor Parent shall, nor shall they permit their respective Subsidiaries or Affiliates to, acquire or agree to acquire any business, person or division thereof, or otherwise acquire or agree to acquire any assets, if, upon advice of such party's outside legal counsel, the entering into of a definitive agreement relating to or the consummation of such acquisition, (i) would reasonably be expected to delay or to increase the likelihood of not obtaining the applicable action, nonaction, waiver, clearance, consent or approval under the HSR Act or applicable requirements of the Competition Act (Canada) (including the regulations thereunder, as each may be amended from time to time, the "Competition Act") in connection with the Merger and the other transactions contemplated hereby prior to the Outside Date or (ii) would reasonably be expected to require any action, nonaction, waiver, clearance, consent or approval of any other Governmental Authority with respect to the transactions contemplated hereby.

VII. Litigation Covenants

a. Simple covenants

(i) *Example 1*

Subject to the terms and conditions of this Agreement and Section 5.04(b) and Section 5.04(d) below and except with regard to matters related to the Antitrust Laws and clearances and litigation thereunder, each of the parties hereto shall cooperate with the other parties and use (and shall cause their respective Subsidiaries to use) their respective reasonable best efforts to promptly . . . (vi) defend or contest any claim, suit, action or other proceeding brought by a third party that would otherwise prevent or materially impede, interfere with, hinder or delay the consummation of the transactions described herein.

(ii) *Example 2*

In furtherance and not in limitation of the covenants of the parties contained in this Section 5.4, if any administrative or judicial action or proceeding, including any proceeding by a private party, is instituted (or threatened to be instituted) challenging any transaction contemplated by this Agreement as violative of any Antitrust Law, each of the Company and Parent shall use best efforts to contest and resist any such action or proceeding and to have vacated, lifted, reversed or overturned any decree, judgment, injunction or other order, whether temporary, preliminary or permanent, that is in effect and that prohibits, prevents or restricts consummation of the Transactions.



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b. Detailed obligation (with reasonable best efforts defined)

(d) In the event that any investigation or administrative or judicial action or proceeding is instituted (or threatened to be instituted) by a Governmental Entity or private party challenging the Offer, the Merger or any other transaction contemplated by this Agreement, or any other agreement contemplated hereby, each of Parent, Merger Sub and the Company shall cooperate with each other and use its respective reasonable best efforts to respond to and contest and resist any such investigation, action or proceeding and to have vacated, lifted, reversed or overturned any decree, judgment, injunction or other Order, whether temporary, preliminary or permanent, that is in effect and that prohibits, prevents or restricts consummation of the transactions contemplated by this Agreement. For the purposes of this Section 6.03(d), reasonable best efforts shall include, without limitation, the defense through litigation on the merits of any claim asserted in any court, agency or other proceeding by any person, entity or Governmental Entity, seeking to delay, restrain, prevent, enjoin or otherwise prohibit consummation of such transactions, however, in no event shall any of Parent, Merger Sub or the Company be required to make or agree to any divestiture, hold separate agreement, sale or other disposition of the assets or businesses of the Parent, its subsidiaries, Merger Sub or the Company or its subsidiaries to meet their respective obligations under this Agreement.

c. Obligation (with buyer control of strategy)

(i) *Example 1*

(d) In the event that any administrative or judicial action or proceeding is instituted (or threatened to be instituted) by a Governmental Authority or private party challenging the Merger or any other Transaction, each of Parent, Merger Sub and the Company shall cooperate in all respects with each other and use its respective commercially reasonable efforts to contest and resist any such action or proceeding and to have vacated, lifted, reversed or overturned any decree, judgment, injunction or other order, whether temporary, preliminary or permanent, that is in effect and that prohibits, prevents or restricts consummation of the Transactions. Parent shall be entitled to direct the antitrust defense of the Merger or any other Transactions, or negotiations with, any Governmental Authority or other Person relating to the Merger or regulatory filings under applicable Antitrust Law, subject to the provisions of Sections 7.07(a), (b), (c) and (e). The Company shall not make any offer, acceptance or counter-offer to or otherwise engage in negotiations or discussions with any Governmental Authority with respect to any proposed settlement, consent decree, commitment or remedy, or, in the event of litigation, discovery, admissibility of evidence, timing or scheduling, except as specifically requested by or agreed with Parent. The Company shall use its commercially reasonable efforts to provide full and effective support



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of Parent in all material respects in all such negotiations and discussions to the extent requested by Parent.

(ii) *Example 2*

In the event that any permanent or preliminary injunction or other order is entered or becomes reasonably foreseeable to be entered in any proceeding that would make consummation of the transactions contemplated hereby in accordance with the terms of this Agreement unlawful or that would restrain, enjoin or otherwise prevent or materially delay the consummation of the transactions contemplated by this Agreement, Parent shall take promptly any and all steps necessary to vacate, modify or suspend such injunction or order so as to permit such consummation prior to the Termination Date. The Company shall cooperate with Parent and shall use its reasonable best efforts to assist Parent in resisting and reducing any Divestiture Action. The parties shall take reasonable efforts to share information protected from disclosure under the attorney-client privilege, work product doctrine, joint defense privilege or any other privilege pursuant to this section so as to preserve any applicable privilege.

(iii) *Example 3 (with carve-out for settlements prior to Outside Date)*

In furtherance and not in limitation of the covenants of the parties contained in this Section 6.3, if any administrative or judicial action or proceeding, including any proceeding by a Governmental Entity or any other person is instituted (or threatened to be instituted) challenging any of the Transactions as violative of any Law, each of the Company and Parent shall use reasonable best efforts to contest and resist any such action or proceeding and to have vacated, lifted, reversed or overturned any decree, judgment, injunction or other order, whether temporary, preliminary or permanent, that is in effect and that prohibits, prevents or restricts consummation of the Transactions. Subject to the terms of this Agreement, Parent shall be entitled to direct the defense of the Transaction in any investigation or litigation by, or negotiations with, any Governmental Entity or other Person relating to the Merger or regulatory filings under applicable Regulatory Law. Nothing in this Agreement shall restrict Parent from (if it so chooses) opposing by refusing to consent to, through litigation or otherwise, any request, attempt or demand by any Governmental Entity or other person for any divestiture, hold separate condition or any other restriction with respect to any assets, businesses or product lines of either Parent or the Company, in each case, to the extent doing so would not and would not reasonably be expected to prevent the Closing from occurring by the Outside Date.



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(iv) *Example 4*

If any objections are asserted with respect to the transactions contemplated hereby under any Regulatory Law or if any suit or proceeding, whether judicial or administrative, is instituted by any Governmental Entity or any private party challenging any of the transactions contemplated hereby as violative of any Regulatory Law, each of Parent and the Company shall use its reasonable best efforts to: (i) oppose or defend against any action to prevent or enjoin consummation of this Agreement (and the transactions contemplated herein), and/or (ii) take such action as reasonably necessary to overturn any regulatory action by any Governmental Entity to block consummation of this Agreement (and the transactions contemplated herein), including by defending any suit, action, or other legal proceeding brought by any Governmental Entity in order to avoid entry of, or to have vacated, overturned or terminated, including by appeal if necessary, in order to resolve any such objections or challenge as such Governmental Entity or private party may have to such transactions under such Regulatory Law so as to permit consummation of the transactions contemplated by this Agreement, *provided* that Parent and Company shall cooperate with one another in connection with all proceedings related to the foregoing and Parent shall have final decision-making authority on any action or decision required to insure that Parent can meet its obligations in this Section 6.3 and its ability to consummate the transaction.

(v) *Example 5*

Parent and the Company shall, and shall cause each of their respective Subsidiaries to, defend through litigation on the merits any claim asserted in court or administrative or other tribunal by any Person (including any Governmental Authority) in order to avoid entry of, or to have vacated or terminated, any decree, order or judgment (whether temporary, preliminary or permanent) that would prevent the Closing prior to the Outside Date; *provided, however*, that such litigation in no way limits the obligations of the parties to comply with their reasonable best efforts obligations under the terms of this Section 7.08. Parent shall have the sole and exclusive right to direct and control any litigation, negotiation or other action, with counsel of its own choosing, and the Company agrees to cooperate with Parent with respect thereto; *provided, however*, that, with respect to the jurisdictions referenced in Section 8.01(d) [jurisdictions in which antitrust approval is a condition precedent], Parent shall consult in advance with the Company and in good faith take the Company's views into account regarding the overall strategic direction of the defense of any such litigation and consult with the Company prior to taking any material substantive positions, making dispositive motions or other material substantive filings or entering into any negotiations concerning such litigation.



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d. Buyer option to litigate

Notwithstanding anything in this Agreement to the contrary: (i) Subject to Section 5.04(b), Parent shall have the unilateral right to determine whether or not the parties will litigate with any Governmental Entities to oppose any enforcement action or remove any court or regulatory orders impeding the ability to consummate the Merger.

VIII. Risk-Shifting Covenants

a. No obligation to make divestitures proviso

(i) *Simple proviso*

Notwithstanding the foregoing, nothing in this Section 7.5 or otherwise in this Agreement shall require Purchaser or any Purchaser Affiliate to propose, negotiate, effect or agree to, the sale, divestiture, license or other disposition of any assets or businesses of Purchaser or any Purchaser Affiliate (including the Purchased Assets) or otherwise take any action that limits the freedom of action with respect to, or its ability to retain any of the businesses, product lines or assets of Purchaser or any Purchaser Affiliate (including the Purchased Assets).

(ii) *More detailed 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 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

(iii) *No obligation to litigate or divest*

Notwithstanding anything in this Agreement to the contrary, it is expressly understood and agreed that: (i) neither Parent nor Merger Sub shall have any obligation to litigate or contest any administrative or judicial action or proceeding or any decree, judgment,



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injunction or other order, whether temporary, preliminary or permanent; and (ii) neither Parent nor Merger Sub shall be under any obligation to make proposals, execute or carry out agreements, enter into consent decrees or submit to orders providing for (A) the sale, divestiture, license or other disposition or holding separate (through the establishment of a trust or otherwise) of any assets or categories of assets of Parent or any of its Affiliates or the Company or any of its Subsidiaries, (B) the imposition of any limitation or regulation on the ability of Parent or any of its Affiliates to freely conduct their business or own such assets, or (C) the holding separate of the shares of Company Common Stock or any limitation or regulation on the ability of Parent or any of its Affiliates to exercise full rights of ownership of the shares of Company Common Stock, other than, in the case of clauses (A), (B) or (C) above, for any such sale, divestiture, license, disposition, holding separate, limitation or regulation that would be immaterial to the Parent and/or the Company and their respective Subsidiaries, taken as a whole (any of the foregoing, an “Antitrust Restraint”).

b. Unconditional obligation to propose and accept settlements (“Hell or high water” obligation)

(i) *Example 1*

Without limiting the generality of the Buyers’ undertaking pursuant to Section 4.2(a), each Buyer agrees to use its best efforts, and to take any and all steps necessary, to eliminate each and every impediment under any antitrust, competition or trade regulation law that is asserted by any Governmental Entity (through the Head of the Governmental Entity or Division thereof) or any other party so as to enable the Parties hereto to close the transactions contemplated hereby, prior to the Termination Date, including but not limited to (i) negotiating, committing to and effecting by consent decree, hold separate orders, or otherwise, the sale, divestiture or disposition of such of the Buyers’ assets, properties or businesses or of the Company’s properties or businesses to be acquired by it pursuant hereto, and the entrance into such other arrangements, as are necessary in order to effect the dissolution of any injunction, temporary restraining order or other order in any suit or proceeding, which would otherwise have the effect of preventing the consummation of the transactions contemplated by this Agreement prior to the Termination Date and (ii) defending 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 prevent the Closing from occurring prior to the Termination Date; *provided, however*, that such litigation in no way limits the obligation of each Buyer to use its best efforts, and to take any and all steps necessary, to eliminate each and every impediment under any antitrust, competition or trade regulation law to close the transactions contemplated hereby prior to the Termination Date.



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(ii) *Example 2*

Notwithstanding anything herein to the contrary, Parent shall take any and all action necessary, including but not limited to (i) selling or otherwise disposing of, or holding separate and agreeing to sell or otherwise dispose of, assets, categories of assets or businesses of the Company or Parent or their respective Subsidiaries; (ii) terminating existing relationships, contractual rights or obligations of the Company or Parent or their respective Subsidiaries; (iii) terminating any venture or other arrangement; (iv) creating any relationship, contractual rights or obligations of the Company or Parent or their respective Subsidiaries or (v) effectuating any other change or restructuring of the Company or Parent or their respective Subsidiaries (and, in each case, to enter into agreements or stipulate to the entry of an order or decree or file appropriate applications with any Antitrust Authority in connection with any of the foregoing and in the case of actions by or with respect to the Company or its Subsidiaries or its or their businesses or assets; by consenting to such action by the Company and provided, that any such action may, at the discretion of the Company, be conditioned upon consummation of the Merger) (each a “Divestiture Action”) to ensure that no Governmental Entity enters any order, decision, judgment, decree, ruling, injunction (preliminary or permanent), or establishes any law, rule, regulation or other action preliminarily or permanently restraining, enjoining or prohibiting the consummation of the Merger, (“Antitrust Prohibition”) or to ensure that no Antitrust Authority with the authority to clear, authorize or otherwise approve the consummation of the Merger, fails to do so by the Termination Date. In the event that any action is threatened or instituted challenging the Merger as violative of any Premerger Notification Rule or other Antitrust Law, Parent shall take all action necessary, including but not limited to any Divestiture Action to avoid or resolve such action.

(iii) *Example 3*

Notwithstanding any other provision of this Agreement to the contrary, Parent shall and, shall cause its Subsidiaries to, propose, negotiate, offer to commit and effect (and if such offer is accepted, commit to and effect), by consent decree, hold separate order, or otherwise, the sale, divestiture or disposition of such assets or businesses of Parent or any of its Subsidiaries, or effective as of the Effective Time, the Surviving Corporation or its Subsidiaries, or otherwise offer to take or offer to commit to take any action (including any action that limits its freedom of action, ownership or control with respect to, or its ability to retain or hold, any of the businesses, assets, product lines, properties or services of Parent, the Surviving Corporation, or any of their respective Subsidiaries) which it is lawfully capable of taking and if the offer is accepted, take or commit to take such action, in each case, as may be required in order to avoid the commencement of any Action to prohibit the Merger or any other transaction contemplated by this Agreement, or if already commenced, to avoid the entry of, or to effect the dissolution of, any injunction, temporary restraining order or other order in any Action so as to enable the Closing to occur as soon as



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reasonably possible (and in any event, not later than the Outside Date). Company shall not, without the written consent of Parent, publicly or before any Governmental Entity or other third party, offer, suggest, propose or negotiate, and shall not commit to or effect, by consent decree, hold separate order or otherwise, any sale, divestiture, disposition, prohibition or limitation or other action of a type described in this Section 5.5(b).

(iv) *Example 4*

Parent (including by its Subsidiaries) agrees to take, or cause to be taken (including by its Subsidiaries), any and all steps and to make, or cause to be made (including by its Subsidiaries), any and all undertakings necessary to resolve such objections, if any, that a Governmental Authority may assert under any Antitrust Law with respect to the Transactions, and to avoid or eliminate each and every impediment under any Antitrust Law that may be asserted by any Governmental Authority with respect to the Transactions, in each case, so as to enable the Closing to occur as promptly as practicable and in any event no later than the Extended Walk-Away Date, including, without limitation, (x) proposing, negotiating, committing to and effecting, by consent decree, hold separate order, or otherwise, the sale, divestiture or disposition of any businesses, assets, equity interests, product lines or properties of Parent or the Company (or any of their respective Subsidiaries) or any equity interest in any joint venture held by Parent or the Company (or any of their respective Subsidiaries), (y) creating, terminating, or divesting relationships, ventures, contractual rights or obligations of the Company or Parent or their respective Subsidiaries and (z) otherwise taking or committing to take any action that would limit Parent's freedom of action with respect to, or its ability to retain or hold, directly or indirectly, any businesses, assets, equity interests, product lines or properties of Parent or the Company (including any of their respective Subsidiaries) or any equity interest in any joint venture held by Parent or the Company (or any of their respective Subsidiaries), in each case as may be required in order to obtain all approvals, consents, clearances, expirations or terminations of waiting periods, registrations, permits, authorizations and other confirmations required directly or indirectly under any Antitrust Law or to avoid the commencement of any action to prohibit the Transactions under any Antitrust Law, or, in the alternative, to avoid the entry of, or to effect the dissolution of, any injunction, temporary restraining order or other order in any action or proceeding seeking to prohibit the Transactions or delay the Closing beyond the Extended Walk-Away Date. To assist Parent in complying with its obligations set forth in this Section 5.4, the Company shall, and shall cause its Subsidiaries to, enter into one or more agreements requested by Parent to be entered into by any of them prior to the Closing with respect to any transaction to divest, hold separate or otherwise take any action that limits the Company's or its Subsidiaries' freedom of action, ownership or control with respect to, or their ability to retain or hold, directly or indirectly, any of the businesses, assets, equity interests, product lines or properties of the Company or any of its Subsidiaries or any equity interest in any



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joint venture held by the Company or any of its Subsidiaries (each, a “Divestiture Action”); *provided, however*, that (i) the consummation of the transactions provided for in any such agreement for a Divestiture Action (a “Divestiture Agreement”) shall be conditioned upon the Closing or satisfaction of all of the conditions to Closing in a case where the Closing will occur immediately following such Divestiture Action (and where Parent has irrevocably committed to effect the Closing immediately following such Divestiture Action) and (ii) Parent shall indemnify for and hold the Company and its Subsidiaries harmless from all costs, expenses and liabilities incurred by the Company or its Subsidiaries arising from or relating to such Divestiture Agreement (other than any of the foregoing arising from the breach by the Company or any applicable Subsidiary of such Divestiture Agreement).

(v) *Example 5*

Parent shall determine, direct and have full control over the strategy and process by which the parties will seek required approvals under Antitrust Laws, including the sole right to make all determinations with respect to the matters described in the next sentence. In furtherance of, and not in limitation of, the covenants of the parties contained in Section 6.04(a), Section 6.04(b), Section 6.04(c) and Section 6.04(d), Parent shall use its best efforts to take, or cause to be taken, all such further actions as may be necessary to resolve such objections, if any, as the FTC, the DOJ, state antitrust enforcement authorities or competition authorities of any other nation or other jurisdiction or any other Person may assert under any Law with respect to the Merger and the other transactions contemplated hereby, and shall use its best efforts to avoid or eliminate each and every impediment under any Law that may be asserted by any Governmental Entity or Self-Regulatory Organization with respect to the Merger so as to enable the Closing to occur no later than the Outside Date, including (x) proposing, negotiating, committing to and effecting, by consent decree, hold separate order or otherwise, regardless of the consideration, the sale, divestiture, license or disposition of any assets or businesses of the Company or its Subsidiaries or controlled Affiliates or of Parent or its Subsidiaries or controlled Affiliates, and (y) otherwise taking or committing to take any actions that after the Closing Date would limit the freedom of Parent, the Company or their Subsidiaries’ or controlled Affiliates’ freedom of action with respect to, or its ability to retain, one or more of its or its Subsidiaries’ businesses, product lines or assets, in each case as may be required in order to effect the satisfaction of the conditions to the Merger set forth in Article VII prior to the Outside Date and to avoid the entry of, or to effect the dissolution of, any injunction, temporary restraining order or other Order in any suit or proceeding that would otherwise have the effect of preventing the Closing or delaying the Closing beyond the Outside Date; *provided, however*, that neither the Company nor any of its Subsidiaries shall be required to become subject to, or consent or agree to or otherwise take any action with respect to, any Order, requirement, condition, understanding or agreement of or with a Governmental Entity or



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Self-Regulatory Organization to sell, to license, to hold separate or otherwise dispose of, or to conduct, restrict, operate, invest or otherwise change the assets or business of the Company or any of its Affiliates, unless such Order, requirement, condition, understanding or agreement is binding on the Company only in the event that the Closing occurs.

c. Limitation of obligation to make divestitures

(i) *Divestiture obligation capped by revenues (Example 1)*

(e) Nothing contained in this Agreement requires Parent or Merger Sub to take, or cause to be taken, and neither Parent nor Merger Sub shall be required to take, or cause to be taken, any Divestiture Action with respect to any of the assets, businesses or product lines of the Company or any of its Subsidiaries, or of Parent or any of its Subsidiaries, or any combination thereof, if the overlapping assets, businesses or product lines required to be divested in order to obtain a Company Approval under any Regulatory Law represented in the aggregate in excess of \$1.3 billion of revenue for the 12 months ending December 31, 2007 (excluding from such calculation any non-merchant revenues and any revenue of any non-overlapping assets, businesses or product lines which may be divested as part of the applicable Divestiture Action); *provided, however*, that other than in the case of the Company's assets, businesses and product lines of or marketed or otherwise conducted through the entity identified on Schedule 5.6(e), Parent shall not be required to divest any assets, businesses or product lines of the Company or any of its Subsidiaries. The parties agree that the calculation of revenue shall (x) be measured by reference to the lowest such revenue (excluding any non-merchant revenue) of Parent or the Company for each such overlapping asset, business or product line so required to be divested to obtain such Company Approval, regardless of which asset, business or product line Parent actually divests and (y) in the case of the entity identified on Schedule 5.6(e), only include the Company's portion of the revenue generated from or through such entity.

(ii) *Divestiture obligation capped by revenues (Example 2)*

(d) Notwithstanding the foregoing, and subject to the remainder of this Section 6.3(d) and Section 6.3(e), Parent shall and, shall cause its Subsidiaries to, propose, negotiate, offer to commit and effect (and if such offer is accepted, commit to and effect), by consent decree, hold separate order, or otherwise, the sale, divestiture or disposition of such assets or businesses of Parent or any of its Subsidiaries, or effective as of the Effective Time, the Company or its Subsidiaries, or otherwise offer to take or offer to commit to take any action (including any action that limits its freedom of action, ownership or control with respect to, or its ability to retain or hold, any of the businesses, assets, product lines, properties or services of Parent, any of its Subsidiaries, the Surviving Corporation or its Subsidiaries) which it is lawfully capable of taking and if the offer is accepted, take or



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commit to take such action, in each case, as may be required in order to avoid the commencement of any Action to prohibit the Merger or any other transaction contemplated by this Agreement, or if already commenced, to avoid the entry of, or to effect the dissolution of, any injunction, temporary restraining order or other order in any Action so as to enable the Closing to occur as soon as reasonably possible (and in any event, not later than the Initial Termination Date, or if such date is extended pursuant to the terms of Section 8.1(b), the Termination Date). Notwithstanding the foregoing, neither Parent nor any of its Subsidiaries shall be required to propose, negotiate, commit to or effect any such sale, divestiture or disposition of assets or business of Parent or the Company, or any of their respective Subsidiaries, or offer to take or offer to commit to take any such action where such action, sale, divestiture or disposition, individually or in the aggregate, would be of assets or a business of the Company or its Subsidiaries or Parent or any of its Subsidiaries, and such action, sale, divestiture or disposition would result in the one year loss of net sales revenues (as measured by net 2008 sales revenue) in excess of \$3,000,000,000. For purposes of calculating the loss of net sales revenue in the preceding sentence, the least amount of lost revenues (as measured by net 2008 sales revenue) as may be required to avoid the commencement of any Action to prohibit the Merger or any other transaction contemplated by this Agreement, or if already commenced, to avoid the entry of, or to effect the dissolution of, any injunction, temporary restraining order or other order in any Action, shall be used in the event that Parent elects to offer any action, sale, divestiture or disposition that would result in a higher loss of net sales revenue (as measured by net 2008 sales revenue) than reasonably required to achieve such result.

(iii) *Divestiture obligation limited to acquiring company's assets and capped by revenues*

Nothing in this Section 6.7 or 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 (i) requires the divestiture of any assets of any of the Company, Parent or Merger Sub or any of their Subsidiaries, (ii) limits Parent's or its Subsidiaries' freedom of action with respect to, or its or their 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 (iii) in Parent's reasonable judgment would be expected to have a material adverse impact on any of its or its Subsidiaries' 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 \$12,000,000 in the aggregate in 2003 if necessary to obtain any required regulatory approval prior to the Termination Date.



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(iv) *Divestiture obligation proviso capped by multiple criteria*

provided, however, that, Aristotle shall agree, consistent with the terms hereof, conditioned on the Closing, to the extent necessary to ensure satisfaction of the conditions set forth in Sections 6.1(c), 6.1(e) and 6.2(d) on or prior to the Outside Date (as the same may be extended) to (1) the divestiture or disposition of one mail order dispensing facility of Aristotle, Plato or any of their respective Subsidiaries, *provided* it shall not be the Aristotle facility located in St. Louis, Missouri, (2) the divestiture or disposition of property, plant and equipment associated with specialty pharmacy dispensing or infusion facilities of Aristotle, Plato or any of their respective Subsidiaries having a net book value not in excess of \$30 million in the aggregate, *provided* it shall not include any property, plant or equipment at the Aristotle facility located in Indianapolis, Indiana, (3) the divestiture, disposition, termination, expiration, assignment, delegation, novation or transfer of Contracts of Aristotle, Plato or their respective Subsidiaries which generated, collectively, EBITDA not in excess of \$115 million during the most recently available twelve (12) calendar month period ending on the applicable date of such agreement relating to such divestiture, disposition, termination, expiration, assignment, delegation, novation or transfer; *provided, however*, with respect to this subclause (3), in no event shall, in the case of pharmacy benefits management customer Contracts of Aristotle, Plato or their respective Subsidiaries, the aggregate annual number of adjusted prescription drug claims subject to the foregoing obligation exceed 35 million (where “adjusted prescription drug claims” means (x) retail prescription drug claims, plus the product of (y)(i) mail prescription drug claims multiplied by (ii) three (3), such calculation to be performed using claims made during the preceding twelve (12) calendar month period); *provided, further*, as between Aristotle and Plato, the determination of how any of the actions specified in (1)-(3) above will be implemented shall be made by Aristotle. For purposes of this Section 5.8, “EBITDA” means EBITDA as calculated by Aristotle in a manner consistent with the methodology utilized in the earnings releases Aristotle has publicly filed with SEC.

(v) *Divestiture obligation capped by revenues and material adverse impact*

(d) Notwithstanding anything to the contrary contained in this Section 5.6 or elsewhere in this Agreement, neither Parent nor Merger Sub shall have any obligation under this Agreement to: (i) dispose of, transfer or exclusively license or cause any of its Subsidiaries to dispose of, transfer or exclusively license any assets (including any technology, Software or other Intellectual Property or Intellectual Property Right) to any Person, or to commit to cause any of the Acquired Corporations to dispose of, transfer or exclusively license any assets (including any technology, Software or other Intellectual Property or Intellectual Property Right) to any Person; (ii) discontinue or cause any of its Subsidiaries to discontinue, or commit to cause any of the Acquired Corporations to discontinue, offering any product or service; (iii) non-exclusively license or otherwise make available, or cause any of its Subsidiaries to non-exclusively license or otherwise make available, to



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any Person any technology, Software or other Intellectual Property or Intellectual Property Right, or to commit to cause any of the Acquired Corporations to non-exclusively license or otherwise make available to any Person any technology, Software or other Intellectual Property or Intellectual Property Right; (iv) hold separate or cause any of its Subsidiaries to hold separate any assets or operations (either before or after the Closing Date), or to commit to cause any of the Acquired Corporations to hold separate any assets or operations; or (v) make or cause any of its Subsidiaries to make any commitment, or to commit to cause any of the Acquired Corporations to make any commitment (to any Governmental Body or otherwise), regarding its future operations or the future operations of any of the Acquired Corporations; *provided, however*, that Parent shall be required to take the actions set forth in clauses (i) through (v) of this Section 5.6(d) if, but only if: (A) the parties are informed by the management of the Bureau of Competition of the FTC (“Bureau Management”) that such actions are demanded and required as a condition to providing the Required Regulatory Approval; and (B) such actions, considered collectively, would not result in a Detriment. For purposes of this Section 5.6(d), an action so demanded and required by Bureau Management would be deemed to result in a “Detriment” if such action, considered together with all other actions so demanded and required by Bureau Management: (1) would have resulted in a reduction of the combined annual consolidated revenues of Parent, the Company and their respective Subsidiaries of at least \$5,000,000 for the twelve-month period ended October 31, 2011 (any such reduction of at least \$5,000,000, a “Specified Revenue Reduction”) if such action had been taken immediately before such twelve-month period; or (2) would otherwise have an adverse impact that is material to the business of Parent or the business of the Acquired Corporations, taken as a whole. It is understood that, if the only actions so demanded and required by Bureau Management are actions of the type set forth in clause (i) or clause (ii) of the first sentence of this Section 5.6(d) (“Demanded Divestiture Actions”), then for purposes of clause (2) of the proviso to the preceding sentence, such Demanded Divestiture Actions will not be deemed to have an adverse impact that is material to the business of Parent or the business of the Acquired Corporations, unless such Demanded Divestiture Actions, considered collectively, would have resulted in a Specified Revenue Reduction had such Demanded Divestiture Actions been taken immediately before such 12-month period; *provided, however*, that it is also understood that (A) for purposes of determining whether a Detriment would occur, Demanded Divestiture Actions must be considered together with actions of the type set forth in clause (iii), clause (iv) and clause (v) of the first sentence of this Section 5.6(d), and (B) even if the Demanded Divestiture Actions would not themselves have resulted in a Specified Revenue Reduction, such Demanded Divestiture Actions may nonetheless be deemed to result in a Detriment when considered together with any actions of the type set forth in clause (iii), clause (iv) or clause (v) of the first sentence of this Section 5.6(d) that are demanded and required by Bureau Management.



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

(d) 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 4.05(d), “reasonable best efforts” by CVS shall include without limitation, CVS and/or the Purchaser (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 CVS or the Purchaser 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, CVS or the Purchaser shall not be required to enter into any Settlement (i) that requires CVS or the Purchaser to hold separate (including by establishing a trust or otherwise) or to sell or otherwise dispose of or withdraw from stores of CVS or the Purchaser (and their Subsidiaries) or Southern Stores 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 Pharmicare or PBM Business 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 PBM Limit”).

(vii) *Divestiture obligation capped by a named business plus other assets capped by revenue*

(c) For purposes of Section 6.03(a) and (b), Parent’s “reasonable best efforts” shall include an obligation of Parent and its Subsidiaries to license, franchise, divest or hold separate any business locations or business lines of the Company, Parent or their respective Subsidiaries (including the Advantage business locations and business line owned by Parent and its Subsidiaries (“Advantage”)), or to take any similar measure, reasonably necessary to secure HSR Approval or CBC Approval (a “Divestiture Action”). Notwithstanding the immediately preceding sentence, “reasonable best efforts” shall not require Parent or its Subsidiaries to license, franchise, divest or hold separate any business locations or business lines of the Company, Parent or their respective Subsidiaries other than (i) Advantage and (ii) in addition to Advantage, business locations or business lines that produced aggregate gross revenues in an amount not in excess of \$175 million (“Divested Revenues”) for Parent, the Company and their respective Subsidiaries during the 2009 calendar year,



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calculated in accordance with GAAP, on a basis consistent with the accounting principles used in preparing their respective 2009 financial statements included in the Company SEC Reports or Parent SEC Reports, as applicable. For the avoidance of doubt, in calculating Divested Revenues, only the business locations (or in the case of an entire business line, the business locations within such business line) for which a Divestiture Action is taken, shall be included. For example, if a Divestiture Action is required at an airport where the Parent and the Company each have a business location (or multiple business locations), only the business location at such airport that is divested shall be included in the calculation of Divested Revenues.

(viii) Divestiture obligation capped by materiality (Example 1)

Notwithstanding anything herein to the contrary, Parent shall not be required to take or agree or commit to take any action, including any Divestiture Action, or to limit or agree to limit its freedom of action or that of the Company or of any Subsidiary, division or affiliate of either in any respect that would, in the reasonable good faith judgment of Parent, be reasonably likely to (1) give rise to a Parent Material Adverse Effect, (2) materially impair the benefits or advantages it expects to receive from the Merger and the transactions contemplated hereby, or (3) give rise to a material adverse effect on the business plan or business strategy of the combined company.

(ix) Divestiture obligation capped by materiality (Example 2)

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

(x) Divestiture obligation capped by materiality (Example 3)

(i) Without limiting Section 6.2(b)(i), Buyer shall take such actions as may be reasonably necessary to avoid or eliminate each and every impediment under any Antitrust Laws so as to enable the Closing to occur as soon as reasonably possible (and in any event no later than the Outside Date) by (i) proposing negotiating, committing to and effecting, by consent decree, hold separate order, or otherwise, the sale, divestiture or disposition of such businesses, product lines or assets of the Company that would not, in the aggregate, be material to the Company’s business, and (ii) otherwise taking or committing to take actions that after the Closing Date would limit Buyer’s or its subsidiaries’ freedom of action with



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respect to, or its or their ability to retain, one or more of the businesses, product lines or assets of the Company that would not, in the aggregate, be material to the Company's business, in each case as may be required in order to avoid the entry of, or to effect the dissolution of, any preliminary or permanent injunction, in any Action under any Antitrust Laws, which would otherwise have the effect of preventing the Closing, and in that regard Buyer shall agree to divest, sell, dispose of, hold separate, or otherwise take or commit to take any action that limits its freedom of action with respect to, or Buyer's or its subsidiaries' ability to retain, any of the businesses, product lines or assets of the Company that would not, in the aggregate, be material to the Company's business.

(xi) *Divestiture obligation capped by materiality (Example 4)*

Notwithstanding anything else contained herein, the provisions of this Section 6.3 shall not be construed to require United or any United Subsidiary or Continental or any Continental Subsidiary to undertake any efforts or to take any action if the taking of such efforts or action is or would reasonably be expected to result (after giving effect to any reasonably expected proceeds of any divestiture or sale of assets) in a Material Adverse Effect on either United or Continental, as applicable.

(xii) *Divestiture obligation capped by materiality (Example 5)*

Without limiting any of its other obligations hereunder, Parent and Purchaser shall take all such further action as may be necessary to resolve such objections, if any, as the United States Federal Trade Commission, the Antitrust Division of the United States Department of Justice, state antitrust enforcement authorities or competition authorities of any other nation or other jurisdiction (including multinational or supranational), or any other person,^[1] may assert under Regulatory Law with respect to the transactions contemplated hereby in order to assure satisfaction of the conditions to the Transactions, and to avoid or eliminate, and minimize the impact of, each and every impediment under any Law that may be asserted by any Governmental Entity with respect to the Merger, in each case so as to enable the Merger and the Transactions to occur no later than the Outside Date (any such action, a "Settlement Action"), including, without limitation by proposing, negotiating, committing to and effecting, by agreement, consent decree, hold separate order, trust or otherwise, (x) the sale, divestiture or disposition of such assets, businesses, services, products or product lines of Parent or the Company (or any of their respective Subsidiaries or affiliates) or behavioral limitations, conduct restrictions or commitments with respect to any such assets, businesses, services, products or product lines of Parent or the Company (or any of their respective Subsidiaries or affiliates), (y) the creation or termination of relationships, ventures, contractual rights or obligations of the Company or Parent or their

¹ NB: Not limited to Governmental Entities.



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respective Subsidiaries or affiliates and (z) any other actions that after the Closing would limit the freedom of Parent, the Company or any of their respective Subsidiaries' or affiliates' freedom of action with respect to, or its ability to retain, one or more of its or its Subsidiaries' (including the Company's or the Surviving Corporation's) or affiliates' assets, businesses, services, products or product lines, in each case as may be required under or in connection with Regulatory Laws in order to obtain all required Governmental Consents (including expirations or terminations of waiting periods whether imposed by Law or agreement) and to avoid the entry of, or to effect the dissolution of, any order in any suit or proceeding, which would otherwise have the effect of preventing the consummation of the Merger by the Outside Date; *provided* that, notwithstanding anything in this Agreement to the contrary, neither Parent nor Purchaser shall be required to take, or cause to be taken, any Settlement Action that, individually or in the aggregate, would reasonably be expected to have a material adverse effect on (i) the Company and its Subsidiaries, taken as a whole, (ii) Parent and its subsidiaries, taken as a whole, but deemed for this purpose to be the same size as the Company and its Subsidiaries, taken as a whole, or (iii) the Company, Parent and their respective Subsidiaries, taken as a whole, but deemed for this purpose to be the same size as the Company and its Subsidiaries, taken as a whole (any of the foregoing, a "Regulatory Material Adverse Effect"). The Company and its Subsidiaries shall not, without Parent's prior written consent discuss or commit to any extension of any waiting period under any Law or to any agreement not to consummate the Merger. If requested by Parent, the Company shall take any action or make any agreement required by any Governmental Entity under any Regulatory Law; *provided* that any such action or agreement is conditioned on the consummation of the Merger. The Company shall not take any action or make any agreement required by any Governmental Entity under any Regulatory Law without the written consent of Parent, in its sole discretion.

(xiii) *Divestiture obligation capped by materiality (with carve-out for specified business)*

Notwithstanding anything to the contrary in this Agreement, in connection with any filing or submission required or action to be taken by either Parent or the Company to consummate the Offer and the Merger, in no event shall Parent or any of its Subsidiaries or Affiliates be obligated to propose or agree to accept any undertaking or condition, to enter into any consent decree, to make any divestiture or accept any operational restriction or take or commit to take any action related to (i) the Company or its Subsidiaries (A) the effectiveness or consummation of which is not conditional on the consummation of the Merger or (B) that individually or in the aggregate is or would reasonably be expected to be materially adverse (either before or after giving effect to the Offer or the Merger) to the business of the Company and its subsidiaries (taken as a whole) (with materiality, for purposes of this provision, being measured in relation to size of the Company and its Subsidiaries taken as a whole) or (ii) Parent or its Subsidiaries (A) the effectiveness or consummation of which is not conditional on the consummation of the Merger or (B) that



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individually or in the aggregate is or would reasonably be expected to be materially adverse (either before or after giving effect to the Offer or the Merger) to the business of Parent and its subsidiaries (taken as a whole) (with materiality, for purposes of this provision, being measured in relation to size of the Company and its Subsidiaries taken as a whole, *provided* that an undertaking, condition, consent decree, divestiture, restriction or other action involving gross revenue of \$37,500,000 or less per year, individually or in the aggregate, shall not, in and of itself, be deemed materially adverse, solely for this purpose) (a “Materially Burdensome Condition”); *provided, however*, that an undertaking, condition, consent decree, divestiture, restriction or other action related to the Company’s endoscopic vessel harvesting business (the “Company’s EVH Business”) shall not, in and of itself, be deemed a Materially Burdensome Condition. Any expenses incurred by the Company, Parent and Purchaser in connection with this Section 5.6(b) shall be borne by Parent and Purchaser.

(xiv) *Divestiture obligation capped by definition of MAC defined in a disclosure letter*

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 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].

(xv) *Divestiture obligation capped by a “Substantial Detriment”*

Notwithstanding the foregoing or anything otherwise contained in this Agreement that may be to the contrary, (1) neither Parent nor the Company shall be required to take any Divestiture Action that is not conditioned upon consummation of the Merger, (2) the Company shall not agree to take any Divestiture Action without the consent of Parent, (3) none of Parent or any of its Affiliates shall be required to take or accept (or commit to take or accept) any action, condition, restriction, obligation or requirement (collectively, for purposes of this Section, “actions”) in order to obtain any approval, exemption or other authorization of a Governmental Authority involving any business or asset of Parent or its Affiliates that would otherwise be required by Section 8.01 or this Section 8.02 unless



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there is no action (including a Divestiture Action) that would permit such approval, exemption or other authorization of a Governmental Authority to be obtained that involves solely businesses or assets of the Company and its Subsidiaries and to which Parent is required by Section 8.01 or this Section 8.02, or is otherwise willing in Parent's sole discretion, to agree, and (4) Parent shall not be required to take (pursuant to Section 8.01, this Section 8.02(b) or any other provision of this Agreement) any action (including a Divestiture Action) to the extent such action (including a Divestiture Action), individually or in the aggregate with all other actions (including Divestiture Actions), would reasonably be expected to result in a Substantial Detriment. "Substantial Detriment" means (i) any material limitation, restriction or prohibition on the ability of Parent or any of its Subsidiaries effectively to acquire, hold or exercise full rights of ownership (including with respect to voting) of the Shares or shares of the Surviving Corporation to be acquired or owned pursuant to the Merger or the assets of the Company and its Subsidiaries, (ii) a loss by Parent and its Affiliates of a material benefit or material benefits (including, without limitation, revenue or cost synergies), after taking into account the adverse effect of the proposed actions on Parent and its Affiliates (including, for these purposes, the Surviving Company and its Subsidiaries), arising from or relating to the Merger and the other transactions contemplated by this Agreement, (iii) an impact that is materially adverse to the assets, business, results of operation or financial condition of the Surviving Corporation and its Subsidiaries, or (iv) an impact that is materially adverse to the assets, business, results of operation or financial condition of the Parent and its Subsidiaries, assuming for purposes of this determination that the Parent and its Subsidiaries are of equivalent size to the Surviving Corporation and its Subsidiaries, taken as a whole.

(xvi) *No obligation to divest with carveouts (Example 1)*

Nothing in this Agreement shall require, or be deemed to require, the Buyer (1) to agree to any limitation on its rights under this Agreement or any of the Ancillary Agreements or (2) to propose, negotiate, offer to commit or to effect (i) any sale, divestiture, license, hold separate or other disposition of assets or business of the Buyer or the Sellers, or their respective Subsidiaries or Affiliates, or (ii) any restrictions on the control or conduct of the Business or Buyer's other businesses; *except that*, to the extent necessary to obtain such Consents from any Governmental Entities, Buyer will agree to do the following and no more than the following: (1) license certain template trademarks as set forth in Exhibit J; (2) license certain intellectual property as set forth in Exhibit K; (3) divest certain production assets as set forth in Exhibit L; and (4) license and/or divest such other rights and/or assets of the Business (and not of the Buyer or any of its Subsidiaries or Affiliates) that are not material in the aggregate.



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(xvii) No obligation to divest with carveouts (Example 2)

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.

(xviii) Proviso excluding buyer's assets from divestiture obligation

Notwithstanding anything in this Agreement to the contrary, in no event shall Parent or its Affiliates be required to become subject, consent or agree to, or otherwise take any action with respect to, any Divestiture of assets or a business of Parent or its Subsidiaries.

(xix) Divestiture obligation with protected business

Without limiting this Section 8.7, but subject to the next sentence of this Section 8.7(b), each of the parties agrees to take, or to cause to be taken, any and all steps and to make any and all undertakings necessary to avoid or eliminate each and every impediment under any antitrust, merger control, competition or trade regulation Law that may be asserted by any Governmental Authority with respect to the Merger so as to enable the Closing to occur as soon as reasonably possible, including proposing, negotiating, committing to, and effecting, by consent decree, hold separate order, or otherwise, the sale, divestiture, licensing or disposition of such assets or businesses of Spinco (or the Spinco Subsidiaries) or Grizzly (or the Grizzly Subsidiaries), as applicable, or otherwise taking or committing to take actions that limit Spinco's or the Spinco Subsidiaries' or Grizzly's or the Grizzly Subsidiaries', as applicable, freedom of action with respect to, or their ability to retain, any of the businesses, product lines or assets of Spinco (or the Spinco Subsidiaries) or Grizzly (or the Grizzly Subsidiaries), in each case, as may be required in order to avoid the entry of, or to effect the dissolution of, any injunction, temporary restraining order, or other order in any suit or proceeding, which would otherwise have the effect of preventing the Closing; *provided* that the effectiveness of any such sale, divestiture, license or disposition or action or commitment shall be contingent on consummation of the Merger. Notwithstanding the foregoing, the obligations of this Section 8.7(b) (i) shall not apply to each of the parties if compliance with this Section 8.7(b) would result in, or would reasonably be expected to result in, a Material Adverse Effect on the Eagle Business and (ii) for the avoidance of doubt, shall not require Burgundy to agree to any sale, divestiture, licensing or disposition of any assets or businesses, or restriction or change in the ownership, conduct or operations of any assets or businesses, that are not included in the Eagle Business.



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(xx) *Divestiture obligation as provided in a draft consent decree*

SECTION 4.10 [Representations and Warranties]. *Consent Agreement*. Parent has provided to the Company a true and correct copy of the proposed consent agreement (the “Proposed Consent Agreement”) currently under discussion between Parent and the staff of the United States Federal Trade Commission (the “FTC”).

[SECTION 6.03](c) For purposes of Section 6.03(a) and (b), Parent’s “reasonable best efforts” shall include an obligation of Parent and its Subsidiaries to take any and all actions required of Parent and its Subsidiaries pursuant to the Proposed Consent Agreement (each, a “Consent Agreement Action”); *provided* that each Consent Agreement Action shall be conditioned upon the consummation of the Merger. Notwithstanding the immediately preceding sentence, “reasonable best efforts” shall not require Parent or its Subsidiaries to (i) sell, license, franchise, divest or otherwise dispose of, or hold separate and agree to sell or otherwise dispose of, any assets, categories of assets, business locations, business lines or businesses of the Company or Parent or their respective Subsidiaries; (ii) terminate any existing relationships, contractual rights or obligations of the Company or Parent or their respective Subsidiaries; (iii) terminate any venture or other arrangement; (iv) create any new relationships, contractual rights or obligations of the Company or Parent or their respective Subsidiaries or (v) effectuate any other change or restructuring of the Company or Parent or their respective Subsidiaries; other than, in each case, (A) such actions required of Parent and its Subsidiaries by the Proposed Consent Agreement and (B) other such actions which, individually or in the aggregate, are of a de minimis nature.

d. Buyer responsible for making settlement offers

Each 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. Each 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 each Buyer’s actions permit the transactions contemplated by this Agreement to be consummated prior to the Termination Date.



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e. Seller responsible for settlement negotiations

(i) *Example 1*

Divestitures. In furtherance of the covenants set forth in Section 5.6(a) [commercially reasonable efforts], if any objections are asserted with respect to the transactions contemplated hereby under any domestic or foreign antitrust or competition Law or if any Action is instituted (or threatened to be instituted) by the Federal Trade Commission, the Department of Justice or any other applicable Governmental Authority challenging any of the transactions contemplated hereby or which would otherwise prohibit or materially impair or delay the consummation of the transactions contemplated hereby, the Company shall take all actions necessary to resolve any such objections or Actions (or threatened Actions) so as to permit consummation of the transactions contemplated hereby to close as soon as reasonably practicable, including, becoming subject to, consenting to or agreeing to, or otherwise taking any action with respect to, any requirement, condition, understanding, agreement or order to sell, to hold separate or otherwise dispose of, or to conduct, restrict, operate, invest or otherwise change its respective assets or business (including that of its Affiliates) in any manner (collectively, “Divestitures”); *provided*, that the obligations of the Company under this Section 5.6(c) shall be conditioned upon the occurrence of the Closing and *provided, further*, that the Company shall not take any of the foregoing actions without the prior written consent of Parent, other than Divestitures related to assets or a business of the Company or its Subsidiaries that are, individually or in the aggregate, immaterial to the Company. Notwithstanding anything in this Agreement to the contrary, in no event shall Parent or its Affiliates be required to become subject, consent or agree to, or otherwise take any action with respect to, any Divestiture of assets or a business of Parent or its Subsidiaries.

(ii) *Example 2*

Parent shall be entitled to direct any proceedings or negotiations with any Antitrust Authority or other Person relating to the Merger or filings under any Premerger Notification Rules, including any communications with any Antitrust Authority relating to any contemplated or proposed Divestiture Action, *provided*, that it shall afford the Company a reasonable opportunity to participate therein.

f. Timing for entering into consent settlement

(i) *Delay to minimize scope of relief*

Unless otherwise agreed and without limiting the obligations stated in this Section 5.4(b), Parent and the Company shall each use its reasonable best efforts to ensure the prompt



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expiration of any applicable waiting period under any Premerger Notification Rules and approval by any relevant Antitrust Authority; *provided*, that any reasonable action by Parent to resist or reduce the scope of a Divestiture Action (as defined below) shall be deemed consistent with such reasonable best effort, even if it delays such expiration to a date not beyond the Termination Date.

IX. Antitrust Reverse Termination Fees

a. Reverse termination fee for failure to obtain clearance

(i) *Example 1*

If this Agreement is terminated by: (i) Parent or the Company pursuant to Section 8.1(b) [failure of the antitrust conditions]; (ii) at the time of the termination of this Agreement, any Antitrust Condition was not satisfied, or waived by Parent; (iii) the failure of such Antitrust Condition to be satisfied did not result from any breach by the Company of any covenant or obligation set forth in this Agreement; (iv) at the time of the termination of this Agreement, each of the conditions in Section 6, other than the Antitrust Conditions in Section 6 and the condition set forth in Section 6.4, was satisfied; and (v) the condition in Section 6.4 [receipt of a closing certificate] would be satisfied if the Closing were to occur on the End Date, then Parent shall pay to the Company a non-refundable fee in the amount of \$30,000,000 (the “**Parent Termination Fee**”).

(ii) *Example 2*

In the event that (i) this Agreement has been terminated by either the Company or Parent pursuant to Section 8.01(b)(i) [election after Outside Date], Section 8.01(b)(ii) [final antitrust order] or, as a result of a material breach under Section 6.03 [antitrust efforts obligation], Section 8.01(d)[inaccuracies in reps and warranties] , and (ii) the condition set forth in the first sentence of Section 7.01(d) [regulatory approvals and waiting period], Section 7.01(f) (in the case of any Restraint arising out of any suit, action or proceeding brought by any person or Governmental Authority in respect of or under any Antitrust Law) or Section 7.02(d) [threatened or pending antitrust litigation] has not been satisfied as of the date of such termination but all other conditions to Closing set forth in Section 7.01 and Section 7.02 shall otherwise have been satisfied (other than those conditions that by their nature are to be satisfied at Closing, but which conditions would have been satisfied if the Closing Date were the date of such termination), then concurrently with such termination (in the case of a termination by Parent) or within three business days following such termination (in the case of a termination by the Company), Parent shall pay to the



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Company a fee equal to \$44,600,000 (the “Parent Termination Fee”) by wire transfer of immediately available funds to a bank account provided to Parent by the Company.

(iii) *Example 3*

(c) If this Agreement is terminated by EchoStar pursuant to Section 7.1(b)(i)(A)(1) or by Hughes pursuant to Section 7.1(b)(i)(A)(1) or Section 7.1(c)(iv), EchoStar shall pay or cause to be paid to Hughes, in cash by wire transfer in immediately available funds to an account designated by Hughes, no later than one business day following such termination, if terminated by Hughes, or concurrently with such termination, if terminated by EchoStar, 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 EchoStar; 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 8.9) if Hughes’ failure (or the failure of any of its Affiliates) to comply with Section 5.1(b) has been the cause of or resulted in the occurrence or non-occurrence which permitted termination under Section 7.1(b)(i)(A)(1) or 7.1(c)(iv). Notwithstanding anything to the contrary in this Section 7.2(c), if the parties have available to them, and EchoStar 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 Hughes terminates this Agreement pursuant to Section 7.1(b)(i)(A)(1) or Section 7.1(c)(iv) hereof then EchoStar shall not be required to pay Hughes the termination fee described in this Section 7.2(c).

b. Antitrust reverse termination fee with recoupment

(c) DigitalGlobe shall pay to GeoEye a fee of \$20,000,000 (the “DigitalGlobe Reverse Termination Fee”) if:

(i) this Agreement is terminated by either DigitalGlobe or GeoEye (A)(1) pursuant to Section 8.01(b)(ii), only in connection with a Final Order obtained or issued by a Governmental Entity with respect to Section 7 of the Clayton Antitrust Act of 1914, the Communications Act or any other applicable U.S. antitrust or competition Laws, or (2) pursuant to Section 8.01(b)(i) and, in the case of this clause (2), at the time of such termination, the conditions set forth in Section 7.01(c)(i) or (c)(iii) or, solely with respect to U.S. antitrust or competition laws or the Communications Act, Section 7.01(d) shall not have been satisfied and (B) all other conditions to the obligations of DigitalGlobe, Merger Sub and Merger Sub 2 to consummate the Merger set forth in Section 7.01 and Section 7.03 have been satisfied or waived (and, in the case of those conditions that by their terms are to be satisfied at the Closing, such conditions would be satisfied if the Closing were to occur); *provided* that if DigitalGlobe pays the Reverse DigitalGlobe



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Termination Fee in accordance with this Section 6.06(c) and, prior to July 1, 2014, GeoEye enters into a definitive Contract to consummate a GeoEye Takeover Proposal or any GeoEye Takeover Proposal is consummated, GeoEye shall pay to DigitalGlobe a payment of \$10,000,000 (the “Recoupment Payment”).

c. Antitrust reverse termination fee equal to transaction costs (with cap)

(b) In the event that this Agreement is terminated by (i) either Parent or the Company pursuant to Section 8.01(b) and the only Offer Condition not satisfied or waived on or prior to the Outside Date is (x) the HSR Approval Condition and/or (y) clause (d)(ii) of Annex I as a result of any Restraint arising under the HSR Act or any other Antitrust Law applicable to the Offer or the Merger, (ii) either Parent or the Company pursuant to Section 8.01(b)(iii) [including failure to successfully negotiate consent order with FTC]; or (iii) the Company pursuant to Section 8.01(d) as a result of Parent’s material breach of its obligation to use its reasonable best efforts (as defined in Section 6.03) to obtain the HSR Approval, Parent shall pay to the Company an amount equal to the sum of the Company’s documented Transaction Expenses by wire transfer of immediately available funds to a bank account designated to Parent by the Company, as promptly as reasonably practicable (and, in any event, within three business days after the Company provides Parent with an invoice for such amount and related documentation); *provided*, that in no event shall Parent be required to reimburse any Transaction Expenses incurred prior to August 2, 2012; and *provided, further*, that in no event shall Parent be required to reimburse the Company’s Transaction Expenses in excess of \$5,000,000 in the aggregate.

X. “Take Or Pay” Provisions

a. “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 [date], the Purchaser shall be obliged to pay the Closing Payment Amount in accordance with the terms of this Agreement on [date] 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



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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.

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

In the event that the Closing shall not have occurred on or before the [31st/150th] 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 [31st/150th] day were the Closing Date,

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

(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,



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(C) if the Transaction has not closed within [180] days from the [31st/150th] 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 [31st/150th] day. The balance of proceeds shall be paid to Buyer.

X. Termination Provisions

a. Failure to close by End Date or due to final prohibition order

(i) Example 1

Notwithstanding any provision in this Agreement to the contrary, if . . . (d) this Agreement is terminated by Parent or the Company pursuant to either Section 7.1(b) [failure to close by End Date for any reason] or Section 7.1(c) [probation order] (in the case of Section 7.1(c) to the extent arising in connection with any Regulatory Law) and, at the time of either such termination, all of the conditions to closing set forth in Sections 6.1 and 6.3 have been satisfied or waived in writing (or, if the Closing were to have taken place on the date of termination, such conditions would have been satisfied), other than the conditions set forth in Section 6.1(b)(if the injunction, restraint or prohibition relates to any Regulatory Law) or Section 6.1(c), then Parent shall pay to the Company an amount in cash equal to \$750,000,000 (the “Reverse Termination Fee”) within two (2) Business Days of such termination.

(ii) Example 2

Termination. This Agreement may be terminated and the Transaction abandoned at any time prior to the Second Effective Time:

- (a) by the mutual written consent of the Company and Parent duly authorized by each of their respective Boards of Directors.
- (b) by either of the Company or Parent:
 - (i) if the Transaction shall not have been consummated on or before June 30, 2012 (the “Walk-Away Date”);
 - (ii) if any Restraint having the effect set forth in Section 6.1(c) [order or injunction] shall be in effect and shall have become final and nonappealable; *provided, however,* that the right to terminate this Agreement under this



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Section 7.1(b)(ii) shall not be available to a party if such Restraint was due to the failure of such party to perform any of its obligations under this Agreement; or

[Other termination provisions]

b. Termination if FTC has not acted

Termination. This Agreement may be terminated . . . (b) by either Parent or the Company:

(i) at any time after the Outside Date, if the Acceptance Time shall not have occurred on or prior to the Outside Date; provided, however, that the right to terminate this Agreement under this Section 8.01(b)(i) shall not be available to any party whose failure to fulfill in any material respect any covenants or agreements of such party set forth in this Agreement has been a proximate cause of or materially contributed to the failure of the Acceptance Time to have occurred on or prior to the Outside Date;

(ii) if any Restraint having the effect of permanently restraining, enjoining, or otherwise prohibiting any of the Transactions shall be in effect and shall have become final and nonappealable; *provided* that the right to terminate this Agreement under this Section 8.01(b)(ii) shall not be available to any party that has not used its reasonable best efforts to contest, appeal and remove such Restraint; or

(iii) at any time after the Outside Date, if, (A) the FTC shall not have preliminarily accepted a consent agreement pursuant to Rule 2.34 of its Rules of Practice and (B) the FTC shall not have effected the early termination of the applicable waiting period under the HSR Act, and (C) the waiting period under the HSR Act (and any extensions thereof as reasonably agreed in writing by Parent and the Company) shall not have expired;

c. Termination following prohibition of the transaction

(i) *Example 1*

Termination. This Agreement may be terminated and the transactions contemplated by this Agreement may be abandoned at any time prior to the Effective Time, as follows:

...

(b) by either Parent or the Company if:

...

(ii) any Restraint having the effect set forth in Section 8.01(c) [order] hereof shall have become final and nonappealable; *provided, however*, that the party seeking to terminate this Agreement shall have complied in all material respects with its obligations under Section 7.08 [efforts obligation]; or



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(ii) *Example 2*

This Agreement may be terminated and the Merger may be abandoned at any time (notwithstanding adoption of the agreement of merger (as such term is used in Section 251 of the Corporation Law) contained in this Agreement by the Requisite Stockholder Approval) prior to the Effective Time (with any termination by Parent also being an effective termination by Merger Sub): . . .

(b) by either the Company or Parent, if any court of competent jurisdiction or other Governmental Entity shall have issued an Order, or taken any other action restraining, enjoining or otherwise prohibiting the transactions contemplated by this Agreement and such Order or other action shall have become final and non-appealable; *provided*, that the party seeking to terminate this Agreement pursuant to this Section 7.01(b) shall have used its reasonable best efforts to contest, appeal and remove such Order or action and shall not be in violation of Section 5.04 or otherwise in material violation of this Agreement;

d. Extension if antitrust conditions have not been satisfied

(i) *Extension at election of Buyer*

This Agreement may be terminated and the Merger may be abandoned at any time (notwithstanding adoption of the agreement of merger (as such term is used in Section 251 of the Corporation Law) contained in this Agreement by the Requisite Stockholder Approval) prior to the Effective Time (with any termination by Parent also being an effective termination by Merger Sub): . . .

(c) by either the Company or Parent, if the Effective Time shall not have occurred on or before August 15, 2012 (the “Outside Date”); *provided, however*, that if on the Outside Date at least one of the conditions set forth in Section 6.01(b) (as a result of an Order or Law under the Antitrust Laws) or Section 6.01(c) shall not have been satisfied, then, subject to the last paragraph of this Section 7.01, at the written election of Parent or the Company, the Outside Date may be extended no more than three (3) times in the aggregate, each time by a period of two (2) months (and in the case of such extension, any reference to the Outside Date in any other provision of this Agreement shall be a reference to the Outside Date, as extended); *provided, further, however*, that the Outside Date shall under no circumstance be extended beyond February 15, 2013; *provided, further*, that the right to terminate this Agreement under this Section 7.01(c) shall not be available to any party whose failure to fulfill in any material respect any covenants and agreements of such party set forth in this Agreement was the primary cause of the failure of the Effective Time to occur on or before the Outside Date;



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(ii) *Extension at election of either buyer or seller (Example 1)*

“End Date” means June 27, 2011; *provided, however*, that if on June 27, 2011, the conditions to Closing set forth in Section 6.01(b) [expiration of antitrust waiting periods] or 6.01(c) (in the case of Section 6.01(c), as a result of any Restraint or any pending or threatened suit, action or proceeding by any Governmental Entity, in each case arising under any competition, merger control, antitrust or similar law or regulation) shall not have been satisfied or waived but all other conditions to Closing shall have been satisfied or waived (or, in the case of conditions that by their nature are to be satisfied at the Closing, shall be capable of being satisfied on such date), then the End Date may be extended by either Parent or the Company to September 27, 2011;

(iii) *Extension at election of either buyer or seller (Example 2)*

Termination. This Agreement may be terminated and the Transactions abandoned at any time prior to the Second Effective Time:

- (a) by the mutual written consent of the Company and Parent duly authorized by each of their respective Boards of Directors.
- (b) by either of the Company or Parent:
 - (i) if the Second Merger shall not have been consummated on or before June 30, 2012 (the “Walk-Away Date”); *provided, however*, that if, as of such date, the condition set forth in Section 6.1(b) [regulatory approval] or Section 6.1(c) [no order or injunction] shall not have been satisfied or duly waived by all parties entitled to the benefit of such condition, either the Company or Parent may, by written notice delivered to the other party, elect to extend the Walk-Away Date to December 31, 2012 (the “Extended Walk-Away Date”); *provided, further*, that the right to terminate this Agreement under this Section 7.1(b)(i) shall not be available (x) to a party if the inability to satisfy such condition was due to the failure of such party to perform any of its obligations under this Agreement or (y) to a party if the other party has filed (and is then pursuing) an action seeking specific performance as permitted by Section 8.8 or (z) to the Company if Parent or Merger Sub is pursuing an action in good faith to enforce, including against anticipatory breach, the obligations of the lenders to fund the Debt Financing under the Debt Commitment Letters or the definitive documents relating to the Debt Financing.



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(iv) *Extension on reasonable belief of extending party*

(b) by either of the Company or Parent:

- (i) the Merger shall not have been consummated by on or before May 31, 2010 (the “Outside Date”); *provided*, that the Outside Date may be extended (A) for a period not to exceed ninety (90) days by either party by written notice to the other party if the Merger shall not have been consummated as a result of the condition set forth in Section 6.1(b) [antitrust waiting periods and approvals] failing to have been satisfied but (1) the extending party reasonably believes that the relevant approvals will be obtained during such extension period and (2) each of the other conditions to the consummation of the Merger set forth in Article VI has been satisfied or waived or remains reasonably capable of satisfaction;

(v) *Extension where regulatory condition “reasonably capable of being satisfied”*

Termination Events. This Agreement may be terminated at any time prior to the Closing:

...

(b) by either Buyer Parent or Parent if the Closing has not occurred on or before September 21, 2012 (the “Outside Date”); *provided, however*, that the Outside Date will automatically be extended up to and including December 21, 2012, in the event that all conditions to Closing other than those set forth in Sections 6.1(b) (the “Regulatory Conditions”) have been or are capable of being satisfied at the time of such extension and the Regulatory Conditions have been or are reasonably capable of being satisfied on or prior to December 21, 2012; *provided, further* that neither Buyer Parent nor Parent shall be entitled to terminate this Agreement pursuant to this Section 10.1(b) if such Person’s breach of this Agreement has prevented the consummation of the Transactions;

e. Accelerated termination

The Buyer agrees to promptly notify the Company in writing (such notification, an “Antitrust Notification”) if at any time the Buyer determines in its sole reasonable judgment (after consultation with Buyer’s antitrust counsel) that there is no reasonable likelihood that Buyer will, by the Outside Date, agree to or satisfy conditions or requirements of the United States Federal Trade Commission and/or Antitrust Division of the United States Department of Justice or of any court to the receipt of any clearance required under the HSR Act or other Applicable Law for the consummation of the transactions contemplated by the terms of this Agreement; *provided, however*, that the foregoing shall in no way diminish or modify the Buyer’s obligations pursuant to the other portions of this Section 4.3(a) [commercially reasonable efforts to obtain antitrust clearance]. The Buyer and the Company agree, within 15 days after the Company’s receipt



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of an Antitrust Notification, to engage in discussions regarding the reasons for such Antitrust Notification and any appropriate course of action in light thereof. In the event the Buyer and the Company are unable to agree upon a mutually-acceptable course of action in such 15-day period, the Company may terminate this Agreement pursuant to Section 7.3(e) by notifying the Buyer in writing of such termination within seven days following the expiration of such 15-day period.

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