

# Noncompetition, Nondisclosure and Nonsolicitation Agreement

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**This Noncompetition, Nondisclosure and Nonsolicitation Agreement (this “Agreement”) is made as of \_\_\_\_\_, 20\_\_\_\_, by and between \_\_\_\_\_, a \_\_\_\_\_ corporation (“Buyer”), on the one hand, and \_\_\_\_\_ (“Seller”) and \_\_\_\_\_ and \_\_\_\_\_ (the “Shareholders”), on the other hand.**

## COMMENT

Enforceability of noncompetition agreements is limited by the laws of many states (see the [Commentary to Sections 4 and 9](#) of this Noncompetition, Nondisclosure and Nonsolicitation Agreement).

The buyer should request noncompetition agreements from the seller and its active shareholders. In addition, except in jurisdictions where such an agreement would clearly be unenforceable, the buyer would normally consider obtaining noncompetition agreements from nonowner employees of the seller. The permissible scope, if any, of a noncompetition agreement under the applicable state law may be different for the seller, its shareholders and nonowner employees and, hence, consideration should be given to using separate forms of noncompetition agreements, or separate terms within one agreement, for these different parties. In considering whether to seek noncompetition agreements from nonowner employees, the buyer also needs to consider the demand for such employees and the possibility that they will refuse to sign such an agreement and seek employment elsewhere. Securing noncompetition agreements from entirely passive shareholders, such as the eight shareholders described in the [Fact Pattern](#) of the Model Asset Purchase Agreement, is ordinarily of no importance to the buyer and would often not be undertaken.

[Section 10.8](#) of the Model Asset Purchase Agreement contains a form of Covenant Not to Compete from Seller. If an appropriate Seller noncompete is included in the Asset Purchase Agreement, there is no need to have the seller execute a separate noncompete at the closing. This form of Noncompetition, Nondisclosure and Nonsolicitation Agreement is set up for execution by both the seller and its active share-

holders, but the references to execution by the seller may be deleted if a Seller noncompete has already been executed. Alternatively, the provisions of this Noncompetition, Nondisclosure and Nonsolicitation Agreement, which are more detailed than those included in Section 10.8 of the Model Asset Purchase Agreement, could be inserted into the Asset Purchase Agreement itself.

If one of the shareholders will be entering into an Employment Agreement with the buyer, as assumed in the [Fact Pattern](#) to the Model Asset Purchase Agreement, there is also the possibility of putting a noncompetition covenant into the Employment Agreement in addition to the one in the Asset Purchase Agreement or the separate Noncompetition, Nondisclosure and Nonsolicitation Agreement. To maximize the possibility of taking advantage of the relatively more favorable regard in which courts hold noncompetes given by business sellers as compared to those given by nonemployee owners, it is a good idea to include noncompetes from the employee shareholders in the Asset Purchase Agreement or a separate Noncompetition, Nondisclosure and Nonsolicitation Agreement that refers to the sale of the business, regardless of whether one is also included in the Employment Agreement. In a transaction involving multiple jurisdictions with varying standards for enforceability of noncompetes, consideration should also be given to using different forms of agreement for parties in different states.

## RECITALS

- A. Shareholders own \_\_\_\_\_ percent (\_\_\_%) of all the issued and outstanding capital stock of the Seller.
- B. Concurrently with the execution and delivery of this Agreement, Buyer is purchasing from Seller substantially all the assets of Seller, including without limitation its good will pursuant to the terms and conditions of an asset purchase agreement made as of \_\_\_\_\_ 20\_\_\_ (the “Asset Purchase Agreement”). Section 2.7(a)(vii)\_\_\_ of the Asset Purchase Agreement requires that noncompetition agreements be executed and delivered by [Seller and] each Shareholder at the Closing.

## AGREEMENT

The parties, intending to be legally bound, agree as follows:

### 1. DEFINITIONS

“Confidential Information” is defined in Section 2.

Capitalized terms not expressly defined in this Agreement shall have the meanings ascribed to them in the Asset Purchase Agreement.

### 2. ACKNOWLEDGMENTS BY SELLER AND SHAREHOLDERS

Each Shareholder acknowledges that such Shareholder has occupied a position of trust and confidence with Seller prior to the date hereof and has had access to and has become familiar with the following, any and all of which constitute confi-

dential information of Seller (collectively the “Confidential Information”): (a) any and all trade secrets concerning the business and affairs of Seller, product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current and planned research and development, current and planned manufacturing and distribution methods and processes, customer lists, current and anticipated customer requirements, price lists, market studies, business plans, computer software and programs (including object code and source code), database technologies, systems, structures architectures processes, improvements, devices, know-how, discoveries, concepts, methods, information and \_\_\_\_\_ [consider inserting here other items that Buyer may want to protect in light of the particular characteristics of Seller’s business] of Seller and any other information, however documented, of Seller that is a trade secret within the meaning of \_\_\_\_\_ § \_\_\_\_ [applicable state trade secret law] or under other applicable law; (b) any and all information concerning the business and affairs of Seller (which includes historical financial statements, financial projections and budgets, historical and projected sales, capital spending budgets and plans, the names and backgrounds of key personnel, contractors, agents, suppliers and potential suppliers, personnel training and techniques and materials, purchasing methods and techniques and \_\_\_\_\_) [consider inserting here other items that Buyer may want to protect in light of the particular characteristics of Seller’s business], however documented; and (c) any and all notes, analysis, compilations, studies, summaries and other material prepared by or for Seller containing or based, in whole or in part, upon any information included in the foregoing.

Seller and each Shareholder each acknowledges that (a) the business of Seller relating to the use and operation of the **Assets** by Seller prior to **Closing** is [national] [international] in scope; (b) its products and services related to such business are marketed throughout the [United States] [world]; (c) Seller’s business prior to Closing competes with other businesses that are or could be located in any part of the [United States] [world]; (d) Buyer has required that Seller and each Shareholder make the covenants set forth in Sections 3 and 4 of this Agreement as a condition to Buyer’s purchase of the Assets; (e) the provisions of Sections 3 and 4 of this Agreement are reasonable and necessary to protect and preserve Buyer’s interests in and right to the use and operation of the Assets from and after Closing; and (f) Buyer would be irreparably damaged if Seller or either Shareholder were to breach the covenants set forth in Sections 3 and 4 of this Agreement.

#### COMMENT

The recitals in clauses (a) through (f) of the second paragraph of Section 2 are intended to support a national or international scope of the noncompete. These provisions may be modified if the covenant is more limited in geographic scope, either because the seller or shareholders bargained for a narrower scope or because a broader scope would not be enforceable under the applicable law.

### 3. CONFIDENTIAL INFORMATION

Seller and each Shareholder each acknowledges and agrees that the protection of the Confidential Information is necessary to protect and preserve the value of the

**Assets.** Therefore, Seller and each Shareholder hereby agrees not to disclose to any unauthorized Persons or use for his or its own account or for the benefit of any third party any Confidential Information, whether or not such information is embodied in writing or other physical form or is retained in the memory of any Shareholder, without Buyer's written consent, unless and to the extent that the Confidential Information is or becomes generally known to and available for use by the public other than as a result of Seller's or any Shareholder's fault or the fault of any other Person bound by a duty of confidentiality to Buyer or Seller. Seller and each Shareholder agrees to deliver to Buyer at the time of execution of this Agreement, and at any other time Buyer may request, all documents, memoranda, notes, plans, records, reports and other documentation, models, components, devices or computer software, whether embodied in a disk or in other form (and all copies of all of the foregoing), that contain Confidential Information and any other Confidential Information that Seller or the Shareholders may then possess or have under their control.

#### COMMENT

The nondisclosure covenant is just as important in protecting the buyer as the non-competition covenant. Although the seller or shareholders may have a common law and statutory obligation not to disclose the seller's trade secrets and other confidential information, a written agreement can clearly define the matters for which protection is sought and has an in terrorem effect. The buyer should therefore exercise care in identifying trade secrets that may be particularly sensitive to the use and operation of the **Assets**. Such trade secrets may include customer preferences and pricing information, customer lists, customer contacts, supplier identities or other information. Identifying and including specific trade secrets within the written agreement makes the courts more apt to enforce the nondisclosure covenant. See *Leo Silfen, Inc. v. Cream*, 278 N.E.2d 636 (N.Y. 1972) (finding the absence of an express nondisclosure agreement was relevant in not protecting a customer list); *Webcraft Technologies, Inc. v. McCaw*, 674 F. Supp. 1039, 1045–6 (S.D.N.Y. 1987).

## 4. NONCOMPETITION AND NONSOLICITATION

As an inducement for Buyer to enter into the Asset Purchase Agreement and as additional consideration for the consideration to be paid to Seller under the Asset Purchase Agreement [and the consideration to be paid under this Agreement,] Seller and each Shareholder each agrees that:

- (a) For a period of [five] years after the **Closing**:
  - (i) Neither Seller nor any Shareholder will, directly or indirectly, engage or invest in, own, manage, operate, finance, control or participate in the ownership, management, operation, financing or control of, be employed by, associated with or in any manner connected with, or render services or advice or other aid to, or guarantee any obligation of, any Person engaged in or planning to become engaged in the \_\_\_\_\_ industry or any other business whose products or activities compete in whole or in part with the business in which the **Assets** were used prior to the Closing or may be used thereafter, [anywhere within the United States] [world], provided, however, that any Shareholder may

- purchase or otherwise acquire up to (but not more than) one percent of any class of securities of any enterprise (but without otherwise participating in the activities of such enterprise) if such securities are listed on any national or regional securities exchange or have been registered under Section 12(g) of the Securities Exchange Act of 1934. Seller and each Shareholder agree that this covenant is reasonable with respect to its duration, geographical area and scope.
- (ii) Seller and each Shareholder agree not to, directly or indirectly, (A) induce or attempt to induce any employee of Seller who becomes an employee of Buyer in connection with the purchase of the Assets to leave the employ of Buyer; (B) in any way interfere with the relationship between Buyer and any such employee of Buyer; (C) employ or otherwise engage as an employee, independent contractor or otherwise any such employee of Buyer; or (D) induce or attempt to induce any customer, supplier, licensee or other Person to cease doing business with Buyer or in any way interfere with the relationship between any such customer, supplier, licensee or other business entity and the Buyer.
  - (iii) Seller and each Shareholder agree that he (or it) will not, directly or indirectly, solicit the business of any Person known to Seller or such Shareholder to be a customer of the Buyer, whether or not such Shareholder had personal contact with such Person, with respect to products or activities which compete in whole or in part with the business operated by Buyer using the Assets;
  - (b) In the event of a breach by Seller or a Shareholder of any covenant set forth in Subsection 4(a) of this Agreement, the term of such covenant will be extended by the period of the duration of such breach;
  - (c) Neither Seller nor either Shareholder will, at any time during or after the [five] year period, disparage Buyer, the Assets, the business formerly conducted by Seller, the business conducted by Buyer using the Assets or any shareholder, director, officer, employee or agent of Buyer; and
  - (d) Each Shareholder will, for a period of [five] years after the Closing, within ten days after accepting any employment, consulting engagement, engagement as an independent contractor, partnership or other association, advise Buyer of the identity of the new employer, client, partner or other Person with whom Shareholder has become associated. Buyer may serve notice upon each such Person that such Shareholder is bound by this Agreement and furnish each such Person with a copy of this Agreement or relevant portions thereof.

## COMMENT

Agreements not to compete are agreements in restraint of trade and historically have not been favored by the courts. The courts are more prone, however, to enforce such agreements if they are reasonable in geographic scope and duration and are necessary to protect important business interests such as trade secrets and goodwill. See *Wilson v. Electro Marine Sys., Inc.*, 915 F.2d 1110, 1115 (7th Cir. 1990) (New York and Illinois law).

Some states have statutes that deal specifically with the subject. Some states without a statute on point have extensive caselaw. Statutory provisions include: ALA. CODE § 8-1-1 (1984); CAL. BUS. & PROF. CODE §§ 16601–16602 (West 1987); COLO. REV. STAT. § 8-2-113 (1973); FLA. STAT. ANN. §§ 542.12, 542.33 (West 1988); GA. CODE ANN. §§ 13-8-2, -2.1 (Michie 1990); HAW. REV. STAT. § 480-4 (1985); MICH. STAT. ANN. §§ 28.61–.70 (Callahan 1990); MONT. REV. CODE ANN. § 28-2-703 (1989); N.C. GEN. STAT. § 75-2 (1988); N.D. CENT. CODE § 9-08-06 (1985); OKLA. STAT. tit. 15, §§ 217–219 (Supp. 1991); OR. REV. STAT. § 653.295 (1989); S.D. CODIFIED LAWS ANN. §§ 53-9-8 to -11 (1990); TEX. BUS. & COM. CODE ANN. §§ 15.03, 15.05 (West Supp 1990); WIS. STAT. ANN. § 103.465 (West 1988).

In California, for example, an agreement not to compete given by an employee is generally not enforceable after termination of employment, and, hence, buyers should be advised that they will be unable to restrict competition by departing employees of the acquired business. If, however, the employee was also an owner of the business and enters into the noncompetition agreement in connection with the sale of the goodwill of the business or a disposition of shares of a corporation, the covenant may be enforceable but only if certain other requirements are met. The acquirer must acquire all of the shares or substantially all of the assets of the business, and the geographic scope of the agreement must be limited to specified cities and counties in which the acquired business was conducted as of the time of the acquisition. See CAL. BUS. & PROF. CODE §§ 16600–16602.

Even in states that do not absolutely prohibit post-employment noncompetition agreements outside the context of sales of business, agreements not to compete given in connection with the sale of a business are more likely to be enforced than those given by a nonowner employee. This is because a covenant not to compete made to a purchaser serves to preserve the value of the goodwill that the purchaser has bought. Courts also may be more disposed to enforcement of agreements in the sale of business context because the seller of a business usually has more bargaining power than an employee and is receiving consideration other than wages for the covenant. See Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 646–647 (1960); Note, *The Validity of Covenants Not to Compete: Common Law Rules in Illinois Law*, 1978 Ill. L. Forum 249, 253; O’Sullivan v. Conrad, 358 N.E.2d 926, 929 (1976); Business Records Corp. v. Lueth, 981 F.2d 957 (7th Cir. 1992).

Most (but not all) states allow “blue penciling” of covenants ancillary to the sale of a business. Covenants will be enforced only to the extent necessary to protect the interests of the buyer and may be narrowed by judicial ruling. Wells v. Wells, 400 N.E.2d 1317 (1980). (Covenant with an unlimited duration is unreasonable but the court narrowed the covenant to a fifty-two month limitation). Drafting strategy for the buyer will obviously be different in a state that does not allow blue penciling (such as Indiana) because excessive zeal may result in complete rejection of the covenant where a more modest covenant might have survived.

Although paragraph (a) specifies the duration of the covenant as five years, actual duration will vary depending both upon negotiating leverage and upon what is more likely to be enforceable in the jurisdiction in question. In those cases where the covenant is being given by someone who is a shareholder but also will serve as an employee after the acquisition, the period requested by the Buyer frequently is the longer of x years after the closing of the sale or y years after termination of employment.

The question of enforceability is a local one, and the laws of each relevant jurisdiction must be examined. Examples of cases from many jurisdictions are cited below to give the practitioner a point of entry into the authorities. There is much more law regarding covenants not to compete than can be described in this commentary. There is no substitute for researching the law of the relevant state or states at the time of

drafting a noncompetition agreement. This is essential both to advise the client regarding whether a noncompetition agreement is likely to be upheld and also in order to structure the agreement in such a way as to maximize its chances of being upheld (which, depending upon the applicable law of the state in question, may require revisions to the model form presented here).

**Arizona:** *Gann v. Morris*, 596 P.2d 43 (Ct. App. 1979) (ten-year, 100 mile covenant in the sale of a silk screening business is not unreasonable).

**California:** *Monogram Indus., Inc. v. Sar Indus.*, 64 Cal. App. 3d 692 (1976) (five-year covenant covering the territory of United States, Puerto Rico, Virgin Islands and Canada is reasonable in the sale of a business context).

**Colorado:** *Flower Haven, Inc. v. Palmer*, 502 P.2d 424 (Colo. Ct. App. 1972) (five-year covenant not to compete within the city of Boulder is reasonable in the sale of a business context).

**Connecticut:** *Mattis v. Lally*, 82 A.2d 155 (1951) (five-year citywide covenant is reasonable in the sale of a business context); *Domurat v. Mazzaccoli*, 84 A.2d 271 (1951) (ten-year covenant not to compete within a five-mile radius is unreasonable in the sale of a business context).

**Delaware:** *Turek v. Tull*, 139 A.2d 368 (1958) (ten-year restrictive covenant within the state of Delaware is reasonable in the sale of a business context).

**District of Columbia:** *Meeker v. Stuart*, 188 F. Supp. 272 (D.D.C. 1960) (two-year covenant in the sale of air-conditioning business is reasonable).

**Florida:** *Florida Pest Control & Chem. Co. v. Thomas*, 520 So. 2d 669 (Fla. Dist. Ct. App. 1988) (restrictive covenant in employment agreement, not ancillary to a sale of a business, prohibiting competition for two years following the termination of employment is reasonable); *MedX v. Ranger*, 788 F. Supp. 288 (E.D. Louisiana 1992).

**Georgia:** *Dalrymple v. Hagood*, 271 S.E.2d 149 (1980) (thirty-six-month covenant ancillary to the sale of a business within a specified county is reasonable); *Farmer v. Airco, Inc.*, 204 S.E.2d 581 (1974) (five-year covenant ancillary to the sale of a business within 150 miles of the office is reasonable).

**Illinois:** *Verson, Wilkins, Ltd. v. Allied Prod. Corp.*, 723 F. Supp. 1 (N.D. Ill. 1989) (five-year restrictive covenant with a scope of the entire world excluding the U.S. and Canada is unreasonably broad, but when the territorial scope is narrowed to Europe, the covenant is reasonable).

**Kansas:** *Rent-A Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597 (9th Cir. 1991) (three-year covenant ancillary to sale of a business within the Phoenix area is reasonable).

**Maryland:** *Chocket-Columbia Co. v. Lipman*, 94 A.2d 433 (1953) (ten-year restrictive covenant within a radius of ten city blocks is reasonable when covenant is ancillary to the sale of a business).

**Massachusetts:** *Alexander & Alexander, Inc. v. Danahy*, 488 N.E.2d 22 (1986) (five-year restrictive covenant is reasonable in the sale of a business context).

**New Jersey:** *Schuhalter v. Salerno*, 653 A.2d 596 (1995) (two-year restrictive covenant given in a partnership dissolution agreement is reasonable and enforceable).

**New York:** *Datatype Int'l, Inc. v. Puzia*, 797 F. Supp. 274 (S.D.N.Y. 1992) (two-year covenant prohibiting competition within 125 miles of the employer is reasonable in the context of a sale of a business); *Chevron U.S.A., Inc. v. Roxen Serv., Inc.*, 813 F.2d 26 (2d Cir. N.Y. 1987) (five-year noncompetition covenant is reasonable in the sale of a business context).

**North Carolina:** *Bicycle Transit Auth., Inc. v. Bell*, 333 S.E.2d 299 (1985) (seven-year covenant prohibiting competition within Durham and Orange counties is reasonable in the sale of a business context).

**Oregon:** *Eldridge v. Johnston*, 245 P.2d 239 (1952) (ten-year covenant ancillary to the sale of a business in Oregon and Washington was enforced).

**Pennsylvania:** *Alabama Binder & Chem. Corp. v. Pennsylvania Indus. Chem. Corp.*, 189 A.2d 180 (1963) (five-year covenant prohibiting competition in the floor tile business following the sale of a business is not unreasonable) *On-Line Sys. v. Staib*, 479 F.2d 308 (8th Cir. 1973).

**Rhode Island:** *Mento v. Lanni*, 262 A.2d 839 (1970) (covenant prohibiting competition within a two-mile radius for an unlimited time period is unenforceable in the sale of a business context).

**South Carolina:** *Sermons v. Caine & Estes Ins. Agency, Inc.*, 275 S.C. 506, 273 S.E.2d 338, 1980 S.C. LEXIS 506 (1980) (covenant prohibiting competition anywhere within South Carolina for three years following the termination of employment is unreasonable when employee provided services in a narrower area; prohibition against employee-shareholder selling his stock from soliciting company customers “at any time” also too extensive).

**Texas:** *Frederick v. Hallum*, 570 S.W.2d 87 (Tex. Civ. App. 1978) (five-year restrictive covenant within a specified county is reasonable when covenant is ancillary to the sale of a business).

**Virginia:** *Foti v. Cook*, 263 S.E.2d 430 (1980) (twenty-four-month restrictive covenant ancillary to a partnership agreement is reasonable).

**Washington:** *Organon, Inc. v. Hepler*, 595 P.2d 1314 (1979) (covenant prohibiting employee from engaging in outside business while employed by the company is reasonable).

**Wisconsin:** *Reiman Assoc., Inc. v. R/A Advertising, Inc.*, 306 N.W.2d 292 (Ct. App. 1981) (six-year covenant prohibiting competition in the production of a specified publication is reasonable in the sale of a business context).

## 5. COMPENSATION

As additional consideration for the covenants in Section 4 of this Agreement, Buyer will pay Seller [and each Shareholder] the sum of \_\_\_\_\_ dollars (\$\_\_\_\_\_) payable [with the execution of this Agreement.] [as follows:

- (a) The sum of \_\_\_\_\_ dollars (\$\_\_\_\_\_) simultaneously with the execution of this Agreement; and
- (b) The sum of \_\_\_\_\_ dollars (\$\_\_\_\_\_) on each of the first [five] anniversary dates of the Closing.]

### COMMENT

This optional provision provides for payment of separate consideration for the covenant not to compete. This clause will affect the tax impact of the noncompete. Whether or not separately provided for in the Noncompetition, Nondisclosure and Nonsolicitation Agreement, the amount of the purchase price allocated to a covenant not to compete is amortizable for federal tax purposes by the buyer over a fifteen-year period. The same amount is includible in the income of the shareholders as ordinary income in accordance with their tax accounting methods. Because goodwill is now amortizable over a fifteen-year period, as are payments for a noncompete, the incentive under prior law for the buyer to insist that part of the purchase price be allocated to the covenant not to compete is reduced. The shareholders’ preference for allocation between purchase price and covenant not to compete will depend upon several fac-

tors, including one level of tax versus two in the case of C corporations, ordinary income versus capital gain and the possible deferral of payment and taxation.

Various nontax issues come up in connection with attempting to assign a value to the noncompetition agreements. If some active shareholders are asked to execute noncompetition agreements and other passive shareholders are not, the active shareholders may feel that the amounts allocated to the noncompetes should be paid to them and not split pursuant to equity ownership. Buyers may also be concerned that the value assigned to the noncompete could be used to cap the liability of shareholders in the event of a breach.

## 6. REMEDIES

**If Seller or either Shareholder breaches the covenants set forth in Sections 3 or 4 of this Agreement, Buyer will be entitled to the following remedies:**

- (a) **Damages from Seller or such Shareholder, as the case may be;**
- [(b) **To offset against any and all amounts owing to Seller under the Asset Purchase Agreement [and/or under Subsection 5(b) of this Agreement] any and all amounts that Buyer claims under Subsection 6(a) of this Agreement;] and**
- (c) **In addition to its right to damages and any other rights it may have, to obtain injunctive or other equitable relief to restrain any breach or threatened breach or otherwise to specifically enforce the provisions of Sections 3 and 4 of this Agreement, it being agreed that money damages alone would be inadequate to compensate Buyer and would be an inadequate remedy for such breach.**
- (d) **The rights and remedies of the parties to this Agreement are cumulative and not alternative.**

### COMMENT

Provisions for forfeiture of the unpaid amount of the consideration for a covenant not to compete if the covenant is breached may be enforceable in some states even though the covenant may not be enforceable. In such states, such a provision may also provide a floor for the award of monetary damages to the buyer. Inclusion of a provision for a monetary award may affect the ability to obtain injunctive relief, however, because it may weaken the argument that monetary damages are inadequate. The seller will resist the right to offset in Subsection 6(b). It is included in a form most favorable to the buyer because this is a buyer's reasonable first draft. (However, such a provision may be unenforceable in some states.) The buyer may have to compromise by agreeing to an escrow arrangement pending resolution of the buyer's claims. Some agreements provide for liquidated damages on a per diem basis as an alternative to the measure of damages in Subsection 6(a).

## 7. SUCCESSORS AND ASSIGNS

**This Agreement will be binding upon Buyer, Seller and each Shareholder and will inure to the benefit of Buyer and its affiliates, successors and assigns.**

## 8. WAIVER

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

## 9. GOVERNING LAW

This Agreement will be governed by the laws applied by courts of the State of \_\_\_\_\_ to contracts entered into within that state by parties residing within that state and having no connection to any other state.

### COMMENT

Conflicts of law issues relevant to contracts for a sale of a business are addressed generally in the [Comment to Section 13.13](#) of the Model Asset Purchase Agreement. Some additional remarks will be set forth here because conflict of law issues are particularly significant in connection with covenants not to compete, as courts are particularly likely in this area to depart from the contractual choice of law.

Although the law of most states places some restriction on enforceability of covenants not to compete, the degree of hostility to noncompetition agreements and the nature of the limitations vary from state to state. Hence, the question of what law applies to the noncompetition covenant is often of great importance. Under the *Restatement (Second) of Conflict of Laws* § 187(2) (1971), the law chosen by the parties to govern their contractual rights and duties will be respected unless (a) the chosen state has no substantial relationship to the parties or the transaction, or (b) the application of law of the chosen state would be contrary to a fundamental public policy of a state, which has a materially greater interest than the chosen state in the determination of the particular issue. Because a number of states have very strong public policies regarding noncompetition agreements, application of this standard may well lead a court to deny enforcement of a contractual choice of another state's law and to deny enforcement of a noncompetition agreement, even in circumstances in which the contractual choice of law would be upheld for purposes of the asset purchase agreement or other documents. See, e.g., *Scott v. Snelling and Snelling, Inc.*, 732 F. Supp. 1034 (N.D. Cal. 1990) (California law governs enforceability of covenants restricting competition in franchise agreements despite a contractual choice of Pennsylvania law because of strong public policy embodied in § 16600 of the California Business and Professions Code); *Davis v. Ebsco Indus., Inc.*, 150 So. 2d 460 (Fla. Dist.

Ct. App. 1963) (noncompetition covenant given in connection with sale of a magazine subscription business, although valid under New York law, which was the law chosen in the contract, will not be enforced as to sales within Florida because of the public policy of the forum, as outlined in § 542.12, Fla. Stat.); *Shiple Company v. Kozlowski*, 926 F. Supp. 28 (D. Mass. 1996) (court upholds Massachusetts choice-of-law provision in employment agreement executed in Massachusetts when employer's business is based there and employee worked there for two years ); *MedX v. Ranger*, 780 F. Supp. 398 (E.D. Louisiana 1991) (federal court applying Louisiana law in diversity case upholds contractual choice of Florida law in noncompetition covenant given in connection with sale of a business, reasoning that, although Louisiana had a strong public policy against noncompetes, the Louisiana exception for noncompetes given in connection with sale of a business effective for up to two years from closing showed that there was no strong public policy against noncompetes in the sale of business context, thus permitting application of Florida law even after the two year Louisiana limit); *Desantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990) (Florida choice-of-law provision in a noncompetition agreement between employer and employee not followed where Texas had a more significant relationship to the transaction and parties because the services were to be provided in Texas, the Texas law governing noncompetition agreements represented a fundamental policy of that state, and the agreement was regarded as unreasonable); *Webcraft Technologies*, 674 F. Supp. at 1039 (New York courts would likely uphold New Jersey choice of law in noncompetition agreement by employee because New York and New Jersey policies not so seriously in conflict).

## 10. JURISDICTION; SERVICE OF PROCESS

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

### COMMENT

State laws regarding consent to venue provisions should also be consulted.

## 11. SEVERABILITY

**Whenever possible, each provision and term of this Agreement will be interpreted in a manner to be effective and valid, but if any provision or term of this Agreement is held to be prohibited or invalid, then such provision or term will be ineffective only to the extent of such prohibition or invalidity, without invalidating or affecting in any manner whatsoever the remainder of such provision or term or the remaining provisions or terms of this Agreement. If any of the covenants set forth in Section 4 of this Agreement are held to be unreasonable, arbitrary or against public policy, such covenants will be considered divisible with respect to scope, time and geographic**

area, and in such lesser scope, time and geographic area, will be effective, binding and enforceable against Seller and Shareholders to the greatest extent permissible.

**COMMENT**

This provision may enable a court to “blue line,” even though the court would not tailor the covenant on its own initiative, if the covenant is regarded as unreasonable in its length, geographic scope or industry scope or, if not so regarded as applied to Seller, it is nonetheless regarded as too restrictive when applied to an individual Shareholder.

**12. COUNTERPARTS**

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

**13. SECTION HEADINGS, CONSTRUCTION**

The headings of sections in this Agreement are provided for convenience only and will not affect its construction or interpretation. All references to “Section” or “Sections” refer to the corresponding Section or Sections of this Agreement unless otherwise specified. All words used in this Agreement will be construed to be of such gender or number as the circumstances require. Unless otherwise expressly provided, the word “Including” does not limit the preceding words or terms.

**14. NOTICES**

All notices, consents, waivers and other communications under this Agreement must be in writing and will be deemed to have been duly given when (a) delivered by hand (with written confirmation of receipt); (b) sent by facsimile (with written confirmation of receipt), provided that a copy is also promptly mailed by registered mail, return receipt requested; or (c) when received by the addressee, if sent by a nationally recognized overnight delivery service (receipt requested), in each case to the appropriate addresses and facsimile numbers set forth below (or to such other addresses and facsimile numbers as a party may designate by notice to the other parties):

Shareholder:\_\_\_\_\_

Attention:\_\_\_\_\_

Facsimile No.:\_\_\_\_\_

with a copy to:\_\_\_\_\_

Attention:\_\_\_\_\_

Facsimile No.:\_\_\_\_\_

Seller:\_\_\_\_\_

Attention:\_\_\_\_\_

Facsimile No.:\_\_\_\_\_

with a copy to:\_\_\_\_\_

Attention:\_\_\_\_\_

Facsimile No.:\_\_\_\_\_

Buyer:\_\_\_\_\_

Attention:\_\_\_\_\_

Facsimile No.:\_\_\_\_\_

with a copy to:\_\_\_\_\_

Attention:\_\_\_\_\_

Facsimile No.:\_\_\_\_\_

**15. ENTIRE AGREEMENT**

This Agreement[, the Employment Agreement] and the Asset Purchase Agreement constitute the entire agreement between the parties with respect to the subject matter of this Agreement and supersede all prior written and oral agreements and understandings between the parties with respect to the subject matter of this Agreement. This Agreement may not be amended except by a written agreement executed by the party to be charged with the amendment.

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

**BUYER:**

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

**SHAREHOLDERS:**

\_\_\_\_\_  
[Name]

\_\_\_\_\_  
[Name]

**SELLER:**

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



# Escrow Agreement

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## PRELIMINARY NOTE

The buyer may seek to have a fund available from which it can satisfy claims that it may have against the seller and the shareholders following the closing, particularly where the satisfaction involves more than one person. One technique is to retain a portion of the purchase price in an escrow account for a specified period following the closing. This provides a source of recovery that is not dependent upon the solvency of the seller or the shareholders or the buyer's ability to find them (or their assets) for purposes of commencing litigation or executing any judgment that may be obtained. It does have limitations, however. A buyer's proposal of an escrow will, if accepted by the seller and the shareholders, often lead to a proposal by the seller and the shareholders that recourse to the funds held in escrow be the buyer's exclusive post-closing remedy and that the liability of the seller and the shareholders therefore be "capped" at the amount held in escrow. In addition, the buyer must recognize that the existence of an escrow fund does not mean that those funds will be immediately available to the buyer in the event of a claim. Institutional escrow agents are generally unwilling to submit themselves to any risk resulting from the conflicting demands by the buyer, the seller and the shareholders. Accordingly, the typical institutional escrow agreement provides that the escrow agent may "freeze" and retain the funds at issue until conflicting demands are resolved by agreement of the parties or a nonappealable court order. If the buyer wishes to ensure that it will have access to funds pending resolution of a disputed claim, it should consider retaining a portion of the purchase price or requiring that the indemnification and other monetary obligations of the seller and the shareholders be secured by a letter of credit that may be drawn in the event of a claim. The buyer should be aware that, in some circumstances, the interests of the seller and the shareholder in an escrow fund may constitute securities for purposes of federal and state securities laws. See KLING & NUGENT SIMON, *NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS*, § 1.604 (1992).

The institutional escrow agent takes the view that its duties are purely ministerial in nature and that it is not being paid to accept any duty to exercise judgment or liability for anything but the most egregious of its errors. Counsel will normally find that negotiation of the escrow agreement is expedited if the escrow agent is invited to supply its own preferred version of the exculpatory provisions to be included in the escrow agreement. The provisions appearing in [Sections 5](#) and [6](#) of the Escrow Agreement are based upon the exculpatory provisions

preferred by one major New York City institution; the substance of these provisions tends to be fairly consistent, although the style varies widely.

The escrow agreement contemplates an institutional escrow agent. Occasionally, a party may propose that its counsel act as escrow agent. In most cases, that is a role counsel should avoid.

The reasons that clients often articulate support of counsel acting as escrow agent are avoidance of delay and the institutional escrow agent's fees. The party proposing that its counsel act as escrow agent may also have an unarticulated reason for doing so (as well as a desire to avoid having the other party's counsel act as escrow agent)—a belief that its counsel will perform its function as escrow agent in a manner that favors its client. In most cases, these benefits are illusory. Negotiation of the escrow agreement with an institutional escrow agent need not be a lengthy process if counsel is sensitive to the needs of the escrow agent to play a purely mechanical role and to be protected from liability. The institutional escrow agent's fees may quickly be surpassed by the time charges of a law firm that acts as escrow agent. A party that expects its counsel to favor it while acting as escrow agent is likely to be disappointed; a law firm that is willing to act as escrow agent will normally seek the same protective provisions in the agreement as an institutional escrow agent, including the ability to freeze in the face of conflicting demands.

If counsel is to act as escrow agent, it will normally wish to add a provision in which the parties acknowledge its dual role and consent to its continuing to act as counsel to its client in matters relating to the acquisition and the escrow (including disputes over the disposition of the funds held in escrow). The expense reimbursement and indemnification provisions could be modified to include as a reimbursable expense the time charges of partners and employees of the escrow agent.

Counsel acting as escrow agent should also be careful to consider the ethical implications of negotiating the escrow agreement with its client. It may be appropriate to suggest that the client be represented by other counsel in that negotiation, an approach that neither the client nor its counsel is likely to desire unless the client has inside counsel who is involved in the transaction.

**This Escrow Agreement, dated as of \_\_\_\_\_, 20\_\_ (the "Closing Date"), among \_\_\_\_\_, a \_\_\_\_\_ corporation ("Buyer"), \_\_\_\_\_, a \_\_\_\_\_ corporation ("Seller") and \_\_\_\_\_, a [national banking association] [bank organized under the laws of \_\_\_\_\_], as escrow agent ("Escrow Agent").**

**This is the Escrow Agreement referred to in the Asset Purchase Agreement dated \_\_\_\_\_, 20\_\_ (the "Purchase Agreement"), among Buyer, Seller, \_\_\_\_\_ ("A") and \_\_\_\_\_ ("B"). Capitalized terms used in this Agreement without definition shall have the respective meanings given to them in the Purchase Agreement.**

**The parties, intending to be legally bound, hereby agree as follows:**

## **1. ESTABLISHMENT OF ESCROW**

- (a) Buyer is depositing with Escrow Agent an amount equal to \_\_\_ dollars (\$\_\_\_\_\_) in immediately available funds (as increased by any earnings thereon and as reduced by any disbursements, amounts withdrawn under Section 5(j), or losses on investments, the "Escrow Fund"). Escrow Agent acknowledges receipt thereof.**
- (b) Escrow Agent hereby agrees to act as escrow agent and to hold, safeguard and disburse the Escrow Fund pursuant to the terms and conditions hereof.**

## COMMENT

Interest and other earnings on the funds held in escrow are retained by the Escrow Agent and are thus available to satisfy claims. Occasionally, the seller will seek to provide that these amounts are to be paid to it currently.

## 2. INVESTMENT OF FUNDS

Except as Buyer and Seller may from time to time jointly instruct Escrow Agent in writing, the Escrow Fund shall be invested from time to time, to the extent possible, in United States Treasury bills having a remaining maturity of ninety (90) days or less and repurchase obligations secured by such United States Treasury bills, with any remainder being deposited and maintained in a money market deposit account with Escrow Agent until disbursement of the entire Escrow Fund. Escrow Agent is authorized to liquidate in accordance with its customary procedures any portion of the Escrow Fund consisting of investments to provide for payments required to be made under this Agreement.

## COMMENT

It is customary for the Escrow Agreement to require that funds held in escrow be invested only in highly liquid, short-term investments. The nature of those investments often depends upon the size of the fund. If the amount is modest, a deposit account at the Escrow Agent may be appropriate. If the amounts are larger, investment in short-term U.S. Treasury securities may be preferable in order to avoid exposure to the credit risks inherent in uninsured deposits with the Escrow Agent.

## 3. CLAIMS

- (a) From time to time on or before \_\_\_\_\_, Buyer may give notice (a “Notice”) to Seller and Escrow Agent specifying in reasonable detail the nature and dollar amount of any claim (a “Claim”) it may have under Article 11 of the Purchase Agreement; Buyer may make more than one claim with respect to any underlying state of facts. If Seller gives notice to Buyer and Escrow Agent disputing any Claim (a “Counter Notice”) within thirty (30) days following receipt by Escrow Agent of the Notice regarding such Claim, such Claim shall be resolved as provided in Section 3(b). If no Counter Notice is received by Escrow Agent within such thirty-day (30-day) period, then the dollar amount of damages claimed by Buyer as set forth in its Notice shall be deemed established for purposes of this Agreement and the Purchase Agreement and, at the end of such thirty-day (30-day) period, Escrow Agent shall pay to Buyer the dollar amount claimed in the Notice from (and only to the extent of) the Escrow Fund. Escrow Agent shall not inquire into or consider whether a Claim complies with the requirements of the Purchase Agreement.
- (b) If a Counter Notice is given with respect to a Claim, Escrow Agent shall make payment with respect thereto only in accordance with (i) joint written instructions of Buyer and Seller or (ii) a final, nonappealable order of a court of competent jurisdiction. Any court order shall be accompanied by a legal opinion by counsel for the presenting party satisfactory to Escrow Agent to the effect that

**the order is final and nonappealable. Escrow Agent shall act on such court order and legal opinion without further question.**

#### **COMMENT**

Section 3 provides the procedures for making claims against the escrow fund. If a claim for indemnification is made and not disputed within thirty days, it is treated as admitted and paid by the Escrow Agent. If disputed, the funds are held until ultimate resolution of the claim by the parties or litigation. If the Model Asset Purchase Agreement provides for resolution of claims through arbitration or other forms of alternative dispute resolution, the Escrow Agreement should be modified to provide for release of funds on the basis of the arbitral award.

### **4. TERMINATION OF ESCROW**

**On \_\_\_\_\_, Escrow Agent shall pay and distribute the then amount of the Escrow Fund to Seller, unless (a) any Claims are then pending, in which case an amount equal to the aggregate dollar amount of such Claims (as shown in the Notices of such Claims) shall be retained by Escrow Agent in the Escrow Fund (and the balance paid to Seller), or (b) Buyer has given notice to Seller and Escrow Agent specifying in reasonable detail the nature of any other claim it may have under Article 11 of the Purchase Agreement with respect to which it is unable to specify the amount of Damages, in which case the entire Escrow Fund shall be retained by Escrow Agent, in either case until it receives joint written instructions of Buyer and Seller or a final, nonappealable order of a court of competent jurisdiction as contemplated by Section 3(b).**

#### **COMMENT**

Funds held by the Escrow Agent are generally released to the seller after a specified period of time, which is often the same as the general time limit provided for the assertion of claims in the acquisition agreement (see [Section 11.7](#) of the Model Asset Purchase Agreement). Funds that are the subject of a disputed claim continue to be held until resolution of the claim; if the amount of the disputed claim is unknown, all of the funds will continue to be held until resolution of the claim.

### **5. DUTIES OF ESCROW AGENT**

- (a) Escrow Agent shall not be under any duty to give the Escrow Fund held by it hereunder any greater degree of care than it gives its own similar property and shall not be required to invest any funds held hereunder except as directed in this Agreement. Uninvested funds held hereunder shall not earn or accrue interest.**
- (b) Escrow Agent shall not be liable for actions or omissions hereunder, except for its own gross negligence or willful misconduct and, except with respect to claims based upon such gross negligence or willful misconduct that are successfully asserted against Escrow Agent, the other parties hereto shall jointly and severally indemnify and hold harmless Escrow Agent (and any successor Escrow Agent) from and against any and all losses, liabilities, claims, actions, damages and**

expenses, including reasonable attorneys' fees and disbursements, arising out of and in connection with this Agreement. Without limiting the foregoing, Escrow Agent shall in no event be liable in connection with its investment or reinvestment of any cash held by it hereunder in good faith, in accordance with the terms hereof, including, without limitation, any liability for any delays (not resulting from its gross negligence or willful misconduct) in the investment or reinvestment of the Escrow Fund or any loss of interest incident to any such delays.

- (c) Escrow Agent shall be entitled to rely upon any order, judgment, certification, demand, notice, instrument or other writing delivered to it hereunder without being required to determine the authenticity or the correctness of any fact stated therein or the propriety or validity of the service thereof. Escrow Agent may act in reliance upon any instrument or signature believed by it to be genuine and may assume that the person purporting to give receipt or advice or make any statement or execute any document in connection with the provisions hereof has been duly authorized to do so. Escrow Agent may conclusively presume that the undersigned representative of any party hereto which is an entity other than a natural person has full power and authority to instruct Escrow Agent on behalf of that party unless written notice to the contrary is delivered to Escrow Agent.
- (d) Escrow Agent may act pursuant to the advice of counsel with respect to any matter relating to this Agreement and shall not be liable for any action taken or omitted by it in good faith in accordance with such advice.
- (e) Escrow Agent does not have any interest in the Escrow Fund deposited hereunder but is serving as escrow holder only and has only possession thereof. Any payments of income from the Escrow Fund shall be subject to withholding regulations then in force with respect to United States taxes. The parties hereto will provide Escrow Agent with appropriate Internal Revenue Service Forms W-9 for tax identification number certification, or nonresident alien certifications. This Section 5(e) and Section 5(b) shall survive notwithstanding any termination of this Agreement or the resignation of Escrow Agent.
- (f) Escrow Agent makes no representation as to the validity, value, genuineness or collectability of any security or other document or instrument held by or delivered to it.
- (g) Escrow Agent shall not be called upon to advise any party as to the wisdom in selling or retaining or taking or refraining from any action with respect to any securities or other property deposited hereunder.
- (h) Escrow Agent (and any successor Escrow Agent) may at any time resign as such by delivering the Escrow Fund to any successor Escrow Agent jointly designated by the other parties hereto in writing, or to any court of competent jurisdiction, whereupon Escrow Agent shall be discharged of and from any and all further obligations arising in connection with this Agreement. The resignation of Escrow Agent will take effect on the earlier of (i) the appointment of a successor (including a court of competent jurisdiction) or (ii) the day which is thirty (30) days after the date of delivery of its written notice of resignation to the other parties hereto. If, at that time, Escrow Agent has not received a designation of a successor Escrow Agent, Escrow Agent's sole responsibility after that time shall be to retain and safeguard the Escrow Fund until receipt of a designation of successor Escrow Agent or a joint written disposition instruction by the

other parties hereto or a final, nonappealable order of a court of competent jurisdiction.

#### COMMENT

The parties may wish to include a provision permitting them to replace the Escrow Agent.

- (i) In the event of any disagreement between the other parties hereto resulting in adverse claims or demands being made in connection with the Escrow Fund or in the event that Escrow Agent is in doubt as to what action it should take hereunder, Escrow Agent shall be entitled to retain the Escrow Fund until Escrow Agent shall have received (i) a final, nonappealable order of a court of competent jurisdiction directing delivery of the Escrow Fund or (ii) a written agreement executed by the other parties hereto directing delivery of the Escrow Fund, in which event Escrow Agent shall disburse the Escrow Fund in accordance with such order or agreement. Any court order shall be accompanied by a legal opinion by counsel for the presenting party satisfactory to Escrow Agent to the effect that the order is final and nonappealable. Escrow Agent shall act on such court order and legal opinion without further question.
- (j) Buyer and Seller shall pay Escrow Agent compensation (as payment in full) for the services to be rendered by Escrow Agent hereunder in the amount of \_\_\_\_\_ dollars (\$\_\_\_\_\_) at the time of execution of this Agreement and \_\_\_\_\_ dollars (\$\_\_\_\_\_) annually thereafter and agree to reimburse Escrow Agent for all reasonable expenses, disbursements and advances incurred or made by Escrow Agent in performance of its duties hereunder (including reasonable fees, expenses and disbursements of its counsel). Any such compensation and reimbursement to which Escrow Agent is entitled shall be borne [fifty percent (50%) by Seller]. Any fees or expenses of Escrow Agent or its counsel that are not paid as provided for herein may be taken from any property held by Escrow Agent hereunder.

#### COMMENT

The allocation of responsibility for the Escrow Agent's fees and expenses is often the subject of negotiation.

- (k) No printed or other matter in any language (including, without limitation, prospectuses, notices, reports and promotional material) that mentions Escrow Agent's name or the rights, powers or duties of Escrow Agent shall be issued by the other parties hereto or on such parties' behalf unless Escrow Agent shall first have given its specific written consent thereto.
- (l) The other parties hereto authorize Escrow Agent, for any securities held hereunder, to use the services of any United States central securities depository it reasonably deems appropriate, including, without limitation, the Depository Trust Company and the Federal Reserve Book Entry System.

**6. LIMITED RESPONSIBILITY**

This Agreement expressly sets forth all the duties of Escrow Agent with respect to any and all matters pertinent hereto. No implied duties or obligations shall be read into this Agreement against Escrow Agent. Escrow Agent shall not be bound by the provisions of any agreement among the other parties hereto except this Agreement.

**7. OWNERSHIP FOR TAX PURPOSES**

Seller agrees that, for purposes of federal and other taxes based on income, Seller will be treated as the owner of the Escrow Fund and that Seller will report all income, if any, that is earned on, or derived from, the Escrow Fund as its income in the taxable year or years in which such income is properly includible and pay any taxes attributable thereto.

**8. NOTICES**

All notices, **Consents**, waivers and other communications required or permitted under this Agreement shall be in writing and shall be deemed given to a party when (a) delivered to the appropriate address by hand or by a nationally recognized overnight courier service (costs prepaid); (b) sent by facsimile or e-mail (with confirmation by the transmitting equipment); or (c) received by the addressee, if sent by certified mail, return receipt requested, in each case to the following addresses and facsimile numbers and marked to the attention of the person (by name or title) designated below (or to such other address, facsimile number or person as a party may designate by notice to the other parties):

**Seller:** \_\_\_\_\_  
Attention: \_\_\_\_\_  
Facsimile No.: \_\_\_\_\_  
E-Mail address: \_\_\_\_\_

with a mandatory copy to: \_\_\_\_\_  
Attention: \_\_\_\_\_  
Facsimile No.: \_\_\_\_\_  
E-Mail address: \_\_\_\_\_

**Buyer:** \_\_\_\_\_  
Attention: \_\_\_\_\_  
Facsimile No.: \_\_\_\_\_  
E-Mail address: \_\_\_\_\_

with a mandatory copy to: \_\_\_\_\_  
Attention: \_\_\_\_\_  
Facsimile No.: \_\_\_\_\_  
E-Mail address: \_\_\_\_\_

Escrow Agent:

\_\_\_\_\_

Attention:\_\_\_\_\_

Facsimile No.:\_\_\_\_\_

E-Mail address:\_\_\_\_\_

with a mandatory copy to:

\_\_\_\_\_

Attention:\_\_\_\_\_

Facsimile No.:\_\_\_\_\_

E-Mail address:\_\_\_\_\_

## 9. JURISDICTION; SERVICE OF PROCESS

Any **Proceeding** arising out of or relating to this Agreement may be brought in the courts of the State of \_\_\_\_\_, County of \_\_\_\_\_, or, if it has or can acquire jurisdiction, in the United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_, and each of the parties irrevocably submits to the exclusive jurisdiction of each such court in any such Proceeding and waives any objection it may now or hereafter have to venue or to convenience of forum, agrees that all claims in respect of the Proceeding shall be heard and determined only in any such court and agrees not to bring any Proceeding arising out of or relating to this Agreement in any other court. Process in any Proceeding referred to in the preceding sentence may be served on any party anywhere in the world.

## 10. EXECUTION OF AGREEMENT

This Agreement may be executed in one or more counterparts, each of which will be deemed to be an original copy of this Agreement and all of which, when taken together, will be deemed to constitute one and the same agreement. The exchange of copies of this Agreement and of signature pages by facsimile transmission shall constitute effective execution and delivery of this Agreement as to the parties and may be used in lieu of the original Agreement for all purposes. Signatures of the parties transmitted by facsimile shall be deemed to be their original signatures for any purposes whatsoever.

## 11. SECTION HEADINGS, CONSTRUCTION

The headings of sections in this Agreement are provided for convenience only and will not affect its construction or interpretation.

## 12. WAIVER

The rights and remedies of the parties to this Agreement are cumulative and not alternative. Neither the failure nor any delay by any party in exercising any right, power or privilege under this Agreement or the documents referred to in this Agreement will operate as a waiver of such right, power or privilege, and no single or

partial exercise of any such right, power or privilege will preclude any other or further exercise of such right, power or privilege or the exercise of any other right, power or privilege. To the maximum extent permitted by applicable law, (a) no claim or right arising out of this Agreement or the documents referred to in this Agreement can be discharged by one party, in whole or in part, by a waiver or renunciation of the claim or right unless in writing signed by the other party; (b) no waiver that may be given by a party will be applicable except in the specific instance for which it is given; and (c) no notice to or demand on one party will be deemed to be a waiver of any obligation of such party or of the right of the party giving such notice or demand to take further action without notice or demand as provided in this Agreement or the documents referred to in this Agreement.

### 13. ENTIRE AGREEMENT AND MODIFICATION

This Agreement supersedes all prior agreements among the parties with respect to its subject matter and constitutes (along with the documents referred to in this Agreement) a complete and exclusive statement of the terms of the agreement between the parties with respect to its subject matter. This Agreement may not be amended except by a written agreement executed by Buyer, Seller and Escrow Agent.

### 14. GOVERNING LAW

This Agreement shall be governed by the laws of the State of \_\_\_\_\_ without regard to conflicts of law principles that would require the application of any other Law.

#### COMMENT

The Escrow Agent will often require that the governing law of the state in which its office is located be chosen and that the forum specified in [Section 9](#) be in the same state, even if different from the governing law and forum specified by the Model Asset Purchase Agreement.

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

[Buyer]  
By: \_\_\_\_\_

[Seller]  
By: \_\_\_\_\_

[Escrow Agent]  
By: \_\_\_\_\_



# Nonnegotiable Promissory Note

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## PRELIMINARY NOTE

The [Commentary to Section 2.7](#) of the Model Asset Purchase Agreement briefly describes the form of Buyer’s [Promissory Note](#) to be delivered to Seller. It includes a discussion of the principal reason that Buyer will desire that the note be in nonnegotiable form: the protection of Buyer’s setoff rights. A nonnegotiable note would enable Buyer to exercise its right to setoff provided in the Model Asset Purchase Agreement by withholding payments due under the note in the event that circumstances arise that entitle Buyer to make a claim against Seller under the Model Asset Purchase Agreement. Buyer’s right to setoff contained in the Promissory Note is a particularly potent remedy because, in addition to having control over the funds, a good-faith exercise of the right will not constitute an Event of Default under Section 2.1(a), regardless of the fact that such exercise may ultimately be determined to be unjustified.

\$ \_\_\_\_\_, 20\_\_

FOR VALUE RECEIVED, \_\_\_\_\_, a \_\_\_\_\_ corporation (“Maker”), promises to pay to \_\_\_\_\_, a \_\_\_\_\_ corporation (“Payee”), in lawful money of the United States of America, the principal sum of \_\_\_\_\_ dollars (\$ \_\_\_\_\_), together with interest in arrears on the unpaid principal balance at an annual rate equal to \_\_\_ percent (\_\_\_%), in the manner provided below. Interest shall be calculated on the basis of a year of 365 or 366 days, as applicable, and charged for the actual number of days elapsed.

This Note has been executed and delivered pursuant to and in accordance with the terms and conditions of the Asset Purchase Agreement, dated \_\_\_\_\_, 20\_\_, by and between Maker, Payee and the shareholders of Payee (the “Shareholders”) (the “Agreement”) and is subject to the terms and conditions of the Agreement, which are, by this reference, incorporated herein and made a part hereof. Capitalized terms

used in this Note without definition shall have the respective meanings set forth in the Agreement.

## 1. PAYMENTS

### 1.1 PRINCIPAL AND INTEREST

The principal amount of this Note shall be due and payable in \_\_\_\_\_ (—) equal consecutive [annual] [quarterly] installments commencing on \_\_\_\_\_, 20\_\_\_\_, [and on \_\_\_\_\_ of each year thereafter] [and on \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ of each year thereafter] until paid in full. Interest on the unpaid principal balance of this Note shall be due and payable [annually] [quarterly], together with each payment of principal.

### 1.2 MANNER OF PAYMENT

All payments of principal and interest on this Note shall be made by [certified or bank cashier's] check at \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, or at such other place in the United States of America as Payee shall designate to Maker in writing [or by wire transfer of immediately available funds to an account designated by Payee in writing]. If any payment of principal or interest on this Note is due on a day that is not a Business Day, such payment shall be due on the next succeeding Business Day, and such extension of time shall be taken into account in calculating the amount of interest payable under this Note. "Business Day" means any day other than a Saturday, Sunday or legal holiday in the State of \_\_\_\_\_.

### 1.3 PREPAYMENT

Maker may, without premium or penalty, at any time and from time to time, prepay all or any portion of the outstanding principal balance due under this Note, provided that each such prepayment is accompanied by accrued interest on the amount of principal prepaid calculated to the date of such prepayment. Any partial prepayments shall be applied to installments of principal in inverse order of their maturity.

### 1.4 RIGHT OF SETOFF

Maker shall have the right to withhold and set off against any amount due hereunder the amount of any claim for indemnification or payment of damages to which Maker may be entitled under the Agreement, as provided in Section 11.8 thereof.

## 2. DEFAULTS

### 2.1 EVENTS OF DEFAULT

The occurrence of any one or more of the following events with respect to Maker shall constitute an event of default hereunder ("Event of Default"):

- (a) If Maker shall fail to pay when due any payment of principal or interest on this Note [and such failure continues for fifteen (15) days after Payee notifies Maker thereof in writing], *provided, however*, that the exercise by Maker in good faith

of its right of setoff pursuant to Section 1.4 above, whether or not ultimately determined to be justified, shall not constitute an Event of Default.

- (b) If, pursuant to or within the meaning of the United States Bankruptcy Code or any other federal or state law relating to insolvency or relief of debtors (a “Bankruptcy Law”), Maker shall (i) commence a voluntary case or proceeding; (ii) consent to the entry of an order for relief against it in an involuntary case; (iii) consent to the appointment of a trustee, receiver, assignee, liquidator or similar official; (iv) make an assignment for the benefit of its creditors; or (v) admit in writing its inability to pay its debts as they become due.
- (c) If a court of competent jurisdiction enters an order or decree under any Bankruptcy Law that (i) is for relief against Maker in an involuntary case; (ii) appoints a trustee, receiver, assignee, liquidator or similar official for Maker or substantially all of Maker’s properties; or (iii) orders the liquidation of Maker, and in each case the order or decree is not dismissed within [60] days.

## 2.2 NOTICE BY MAKER

Maker shall notify Payee in writing within [five] days after the occurrence of any Event of Default of which Maker acquires [Knowledge](#).

## 2.3 REMEDIES

Upon the occurrence of an Event of Default hereunder (unless all Events of Default have been cured or waived by Payee), Payee may, at its option, (i) by written notice to Maker, declare the entire unpaid principal balance of this Note, together with all accrued interest thereon, immediately due and payable regardless of any prior forbearance and (ii) exercise any and all rights and remedies available to it under applicable law, including, without limitation, the right to collect from Maker all sums due under this Note. Maker shall pay all reasonable costs and expenses incurred by or on behalf of Payee in connection with Payee’s exercise of any or all of its rights and remedies under this Note, including, without limitation, reasonable attorneys’ fees.

## 3. MISCELLANEOUS

### 3.1 WAIVER

The rights and remedies of Payee under this Note shall be cumulative and not alternative. No waiver by Payee of any right or remedy under this Note shall be effective unless in a writing signed by Payee. Neither the failure nor any delay in exercising any right, power or privilege under this Note will operate as a waiver of such right, power or privilege, and no single or partial exercise of any such right, power or privilege by Payee will preclude any other or further exercise of such right, power or privilege or the exercise of any other right, power or privilege. To the maximum extent permitted by applicable law, (a) no claim or right of Payee arising out of this Note can be discharged by Payee, in whole or in part, by a waiver or renunciation of the claim or right unless in a writing signed by Payee; (b) no waiver that may be given by Payee will be applicable except in the specific instance for which it is given; and (c) no notice to or demand on Maker will be deemed to be a waiver of

any obligation of Maker or of the right of Payee to take further action without notice or demand as provided in this Note. Maker hereby waives presentment, demand, protest and notice of dishonor and protest.

### 3.2 NOTICES

Any notice required or permitted to be given hereunder shall be given in accordance with Section 13.3 of the Agreement.

### 3.3 SEVERABILITY

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

### 3.4 GOVERNING LAW

This Note will be governed by and construed under the laws of the State of \_\_\_\_\_ without regard to conflicts-of-laws principles that would require the application of any other law.

### 3.5 PARTIES IN INTEREST

This Note shall not be assigned or transferred by Payee without the express prior written consent of Maker, except that Payee may assign this Note to the Shareholders. Subject to the preceding sentence, this Note will be binding in all respects upon Maker and inure to the benefit of Payee and its successors and assigns.

### 3.6 SECTION HEADINGS; CONSTRUCTION

The headings of Sections in this Note are provided for convenience only and will not affect its construction or interpretation. All references to “Section” or “Sections” refer to the corresponding Section or Sections of this Note unless otherwise specified. All words used in this Note will be construed to be of such gender or number as the circumstances require. Unless otherwise expressly provided, the words “hereof” and “hereunder” and similar references refer to this Note in its entirety and not to any specific section or subsection hereof, the words “including” or “includes” do limit the preceding words or terms and the word “or” is used in the inclusive sense.

IN WITNESS WHEREOF, Maker has executed and delivered this Note as of the date first stated above.

[MAKER]

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

Name:

Title:

### COMMENT

The requirements for a negotiable instrument are set out in Section 3-104 of the Uniform Commercial Code. The “magic words” needed for negotiability are missing in at least two respects: the Promissory Note designates Seller as the sole payee, thereby

failing to meet the requirement of UCC Section 3-104(1)(d) of being “payable to order or to bearer,” and, in the second paragraph, the Promissory Note states that it is subject to the terms and conditions of the Model Asset Purchase Agreement, thereby rendering Buyer’s promise conditional and making the Promissory Note nonnegotiable. See UCC §§ 3-104(1)(b) and 3-105(2)(a).

The terms of the Promissory Note to be taken by the seller, however, will be negotiated based upon the relative bargaining powers of the principals to the transaction. The seller usually wants the Promissory Note to be negotiable so that it might be sold or pledged to a bank or financial institution to obtain immediate liquidity. If the Promissory Note is nonnegotiable, by definition, there cannot be a holder in due course. See UCC § 3-302. If the Promissory Note is negotiable and the seller negotiates the note to a holder in due course, however, the buyer would be unable to make any claims against the note arising out of a breach of warranty by the seller. See UCC § 3-305. One potential solution to the competing interests of the parties may be a parallel series of negotiable and nonnegotiable notes, pursuant to which the deferred portion of the purchase price payable to the seller would be split between negotiable and nonnegotiable notes in such amounts and with such maturity dates as reflect the relative bargaining power of the parties.

In addition to the question of negotiability, issues that are likely to be raised by the seller include whether the Promissory Note will be secured, the availability of a guarantor and the priority of the buyer’s obligation relative to the buyer’s other indebtedness. The question of security depends upon the creditworthiness of the buyer and the availability of unencumbered assets. Potential collateral might include a pledge by the buyer of certain of the assets acquired in the transaction or the shares of buyer if buyer is a newly formed subsidiary, although the seller might insist upon additional collateral to protect against the possibility of diminished value in the event the seller has to take back the stock which has diminished in value. The buyer, on the other hand, will be reluctant to secure a note for only part of the purchase price with collateral worth, on the date of closing, more than the principal amount of the Promissory Note. Where the buyer is a subsidiary, the seller may require that the buyer’s parent guaranty the Promissory Note. If the Promissory Note is secured, the seller may seek covenants regarding the assets securing the Promissory Note and/or the conduct of the buyer’s business. For example, the seller may require that, until the Promissory Note is repaid, the buyer will maintain the assets in a certain condition and insure the assets at replacement cost. If the buyer is a newly formed subsidiary and the shares of the buyer are pledged, the seller may seek to impose upon the buyer restrictions on distributions or limitations on the sale of assets other than in the [Ordinary Course of Business](#). In addition, whether or not the Note is secured, the seller may seek various covenants limiting the buyer’s ability to take various actions outside of the ordinary course of business until the Promissory Note is paid.

The nature and scope of the buyer’s obligation to the seller will often be dictated by factors arising under its credit agreements or debt instruments. For example, such instruments may limit the buyer’s ability to incur debt or grant liens, contain negative or affirmative covenants restricting the type of debt the buyer may incur and require that the buyer’s obligation to the seller be subordinate to its obligation to senior lenders.

Other terms of the Promissory Note that typically will depend upon the transaction include the interest rate, the amortization schedule, the manner of payment (the buyer’s company check if the seller will accept it; possibly wire transfer if the amount warrants it), events of default (note, however, that nonpayment as a result of the buyer’s exercise of its setoff rights is specially excluded from the definition of “Event of Default”) and remedies. It should be noted that [Section 3.5](#) of the Promissory Note contains limitations on assignment or transfer by Seller. In this regard, assignment and

transfer (essentially the transfer of title to an instrument, with the transferee getting no more than the rights of the transferor) should be distinguished from negotiation, which ordinarily involves endorsement and transfer to a holder. In jurisdictions where usury may be an issue, a usury savings provision should be included in the note. Such a provision would provide that, in the event the rate of interest provided for in the Promissory Note is determined to exceed the maximum rate of interest permitted by the applicable usury or similar law, the application of such rate will be suspended and there will be charged instead the maximum rate of interest permitted by such law.

## EXHIBIT 7.4(a)

# Opinion of Counsel to Seller

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### PRELIMINARY NOTE

**Context of the Legal Opinions.** Asset purchase agreements frequently call for the delivery at the closing of one or more legal opinion letters, in which counsel for a party provides opinions to the other party to the transaction concerning the [Acquired Assets](#) (in the case of counsel to the selling company) and the validity of actions taken by its client in connection with the transaction. It is customary and appropriate for the buyer in a typical business acquisition to request that counsel for the selling company provide opinions as to matters that involve legal conclusions based upon matters known to the opining lawyer or capable of verification with reasonable diligence (e.g., due incorporation and good standing of the selling company; validity, binding effect and enforceability of the agreements executed by the selling company in connection with the acquisition; and effect of the acquisition on certain agreements to which the selling company is party).

It is inappropriate to request opinions as to matters that counsel cannot know or investigate on a reasonable basis (e.g., compliance by the selling company with all applicable laws), as to factual matters unrelated to the lawyer's expertise (e.g., accuracy of all of Seller's representations and warranties in the acquisition agreement) or that express a certain conclusion as to uncertain legal issues (e.g., compliance with the antitrust laws of an acquisition of the assets of a company that is a competitor of the buyer). It is also not appropriate to request an opinion that has the effect of imposing some of the business risks of the transaction on the opining lawyer.

Delivery of the specified legal opinions by a party's counsel is often a condition to the other party's obligation to close the acquisition, as provided in [Sections 7.4\(a\)](#) and [8.4\(a\)](#) of the Model Asset Purchase Agreement. This might have the effect of making the underlying matters as to which the lawyer is to opine conditions to those obligations as well, typically without the materiality standard that would apply to the same matter if tested under other closing conditions provided in the Model Asset Purchase Agreement. Accordingly, counsel for both the buyer and the seller should take care in framing their requests for opinions and in agreeing to deliver particular opinions and be sensitive to the interplay with the representations and warranties and the conditions to closing in the acquisition agreement. See the [Comment to paragraph 3](#) of the model opinion for an example of this interplay.

Unlike the Model Asset Purchase Agreement itself, which is drafted from the perspective of a reasonable buyer's first draft, the model opinion letters set forth below are designed to serve as opinion letters which a reasonable opinion recipient may be willing to accept and which a reasonable opinion giver may be willing to give, subject to qualifications appropriate to the circumstances.

**Accord and Nonaccord Opinions; Opinion Resources.** Despite the frequency with which third-party legal opinions are delivered, there is relatively little court authority governing their interpretation. The principal source of guidance to opining lawyers and opinion recipients is a series of local bar reports, many of which are collected in FITZGIBBON AND GLAZER, FITZGIBBON AND GLAZER ON LEGAL OPINIONS (Little, Brown & Company, 1992).

In 1991, the Section of Business Law of the American Bar Association published the *Third-Party Legal Opinion Report*, which includes the *Legal Opinion Accord* (the "Accord"), 47 BUS. LAW. 167. The Accord represents a different approach to establishing the meaning of legal opinions. Instead of attempting to describe customary opinion practice and the customarily understood meaning of opinions, it is designed to be adopted by the opining lawyer (referred to as an "Opinion Giver" in the Accord) and, thus, become a part of those legal opinions that adopt it. The Accord consists of an introduction, a glossary of defined terms and twenty-two statements of position. These are accompanied by a Commentary and Technical Notes, which, although not part of the Accord, "provide guidance as to its interpretation and organization." The Opinion Giver adopts the Accord by including in the opinion letter a declaration substantially in the form in the Accord opinion letter set forth below.

The Accord addresses four specific types of opinions (remedies, no breach or default, no violation of law and legal proceedings). It also provides a framework applicable to both these specific opinions and other aspects of third-party legal opinions—jurisdictions whose law is covered, methods of establishing facts (including rules for defining the knowledge of the Opinion Giver), opinions by implication, a list of legal issues not covered unless expressly addressed and limitations on use of Accord opinions.

In a few states, the local bar reports are published as supplements to the Accord. In most states, however, the reports stand alone from the Accord. In several states, the reports contemplate that counsel incorporate or refer to the applicable state reports in the opinion. *Fitzgibbon and Glazer* compiles many of these state reports and supplements.

The Accord has been accepted slowly in many parts of the United States, with acceptance particularly light on the East and West Coasts. Lenders in particular have been resistant to accepting the Accord as recipients. Some of the aspects of the Accord most troublesome to lenders (e.g., the remedies opinion) may not raise the same issues in acquisitions as in loan transactions, although others apply equally to both.

Because of the inconsistent acceptance of the Accord, the Model Asset Purchase Agreement provides both a model Accord Opinion and a model non-Accord Opinion.

The Guidelines contained in the ABA Report and, even if not incorporated in the opinion, the Accord are valuable resources on opinion practice. *Fitzgibbon and Glazer* is also a valuable resource on third-party legal opinion practice. The TriBar Committee (consisting of representatives of the New York County Lawyers' Association, Association of the Bar of the City of New York, the New York State Bar Association and several other bar associations) has published a series of reports which are very helpful in opinion practice and are collected in a publication of the Section of Business Law of the American Bar Association entitled THE COLLECTED TRIBAR LEGAL OPINION REPORTS 1979–1998. The TriBar Committee has recently published at 53 BUS. LAW. 591 (February 1998) an updated report on Third-Party Closing Opinions ("TriBar II"). The ABA Committee on Legal Opinions has approved a statement of common Legal Opinion Principles generally accepted by opinion givers and recipients ("ABA Principles"). These Principles, which are published at 53 BUS. LAW. 831 (May 1998), apply to opinion letters whether or not they adopt the Accord or expressly incorporate the Principles.

[Date]

[Name and Address of Buyer]

Ladies and Gentlemen:

We have acted as counsel to \_\_\_\_\_, a \_\_\_\_\_ corporation (“Seller”), in connection with the Asset Purchase Agreement dated \_\_\_\_\_, 20\_\_ (the “Agreement”), among Seller, \_\_\_\_\_, an individual resident in \_\_\_\_\_ (“A”), \_\_\_\_\_, an individual resident in \_\_\_\_\_ (“B”) and \_\_\_\_\_, a \_\_\_\_\_ corporation (“Buyer”). This is the Opinion Letter contemplated by [Section 7.4\(a\)](#) of the Agreement. All capitalized terms used in this Opinion Letter without definition have the respective meanings given to them in the Agreement or the Accord referred to below.

This Opinion Letter is governed by, and shall be interpreted in accordance with, the Legal Opinion Accord (the “Accord”) of the ABA Section of Business Law (1991). As a consequence, it is subject to a number of qualifications, exceptions, definitions, limitations on coverage and other limitations, all as more particularly described in the Accord, and this Opinion Letter should be read in conjunction therewith. The law covered by the opinions expressed herein is limited to the Federal Law of the United States and the law of the State(s) of \_\_\_\_\_ and the General Corporation Law of (State of Delaware).

#### COMMENT

In some states, local bar groups have published supplements to the Accord. Consideration should also be given to incorporating an applicable state supplement in the opinion.

The opinion should identify the law that the opinion letter covers. Generally, this will be the Federal Law, the law of the state in which the Company opinion giver practices and, if different, the corporate statute of the state of incorporation of the Company. Section 1 of the Accord addresses this issue. Given the large number of corporations formed in Delaware, it is common practice in acquisition opinions for counsel in states other than Delaware to opine upon the Delaware General Corporation Law where applicable even if such law firm does not practice in Delaware. Reference to the Delaware General Corporation Law includes applicable provisions of the Delaware Constitutions and reported cases interpreting these cases. This may also be so with respect to corporate statutes in states other than Delaware. The issue is principally one of competence with regard to the corporate laws of the state of incorporation of the Company. For further discussion of the practice of opining on the law of other states, see the [last paragraph of the Comment to the no-breach-or-default opinion at paragraph 3 of this Opinion Letter](#) and first [Comment to the Nonaccord form of Opinion of Counsel to Seller](#) below.

**We note that certain opinions concerning intellectual property matters are addressed in the opinion letter of the \_\_\_\_\_ Law Firm and certain opinions concerning real estate matters are addressed in the opinion letter of the \_\_\_\_\_ Law Firm. These opinion letters are provided separately to you, and we express no opinion with respect to those matters.**

#### COMMENT

The law firm representing the Company generally and in the sale of assets may not

be in a position to opine as to matters involving specialized legal issues in which the firm is not experienced or as to state and local law issues (such as laws regarding real estate) in states in which the Company has operations but in which the law firm does not practice. For example, the Company may have plants in distant states, and the law firm is not qualified to opine as to real property issues with respect to those states. In these circumstances, the counsel giving the opinion for the Company generally may choose to retain counsel in these states to give an opinion addressing those specific issues. Section 8 of the Accord addresses this practice and the degree of responsibility, which the opinion giver assumes for the opinions of the other firms. In the language above, the opinion giver assumes no responsibility for the competence of the other law firm or the substance or form of the opinion given by the firm. Buyer's and Seller's counsel should consider the cost effectiveness of requiring these other opinions and the extent to which the firm giving the primary opinion should be asked to assume responsibility for the other firm's opinions.

**Based upon the foregoing, our opinion is as follows:**

- 1. The Agreement, the Escrow Agreement, the Bill of Sale and Assignment and [identify other ancillary documents to be executed by Seller as part of the **Contemplated Transactions**] are enforceable against Seller. The Agreement is enforceable against A and B.**

#### **COMMENT**

This is the Accord form of remedies opinion; the traditional nonaccord equivalent is much longer.

Under Section 10 of the Accord, a remedies opinion includes an opinion that "a remedy will be available with respect to each agreement of the Client in the contract or such agreement will otherwise be given effect." The opinion is based upon facts established through assumptions (Accord, Section 4) and information provided by others (Accord, Section 3). In the case of the individual shareholders of the seller who sign the Agreement, the Accord in Section 4(a) provides an assumption that natural persons have sufficient legal capacity to enter into the Agreement and carry out their role in it.

This remedies opinion is subject to the General Qualifications (Accord, Section 11), which consist of the Bankruptcy and Insolvency Exception (Accord, Section 12), the Equitable Principles Limitation (Accord, Section 13) and the Other Common Qualifications (Accord, Section 14). It addresses only the law of contracts and such "other laws of [the relevant jurisdiction] as a lawyer in [that jurisdiction] exercising customary professional diligence would recognize to be directly applicable to the Client, the Transaction, or both," but does not address the matters excluded by Section 18 (Opinions by Implication) or Section 19 (Specific Legal Issues).

- 2. Seller is a corporation [duly incorporated] [duly organized], validly existing and in good standing under the laws of [its state of incorporation] with corporate power and authority to execute and deliver the Agreement and consummate the **Contemplated Transactions** and is duly qualified and in good standing as a foreign corporation in each other jurisdiction in which it is authorized to do business as set forth in Part \_\_\_ of the Disclosure Letter.**

#### **COMMENT**

Seller's counsel may argue that an opinion as to due incorporation or due organi-

zation, valid existence and good standing is inappropriate in an asset sale because the selling company itself is not being sold. This opinion is commonly given in a variety of transactions other than the sale of a company, however, and the buyer would be justifiably concerned about the effectiveness of the transfer of the Assets if the seller was not validly existing as a corporation. Buyers often accept a more limited corporate status opinion, such as “is a corporation validly existing,” rather than the broader “duly incorporated” or “duly organized” opinion more appropriate in a stock purchase agreement.

In addition to the opinion that Seller has the “corporate power and authority to execute and deliver the Agreement and consummate the Contemplated Transaction,” buyers sometimes ask for an opinion that the selling corporation has the corporate power and authority “to own its properties and engage in its business as presently conducted . . .” Although this opinion is usually relatively easy to give, it technically is not necessary in asset sales and often is omitted at the request of the seller’s counsel.

Buyers sometime request an opinion from the seller’s counsel that the selling company is qualified to do business as a foreign corporation in all jurisdictions where the nature of its business or the location of its assets would require such qualification. Giving this opinion is strongly discouraged because it is time consuming, difficult and largely fact driven. *Certain Guidelines for the Negotiation and Preparation of Third-Party Legal Opinions*, published in the Third-Party Legal Opinion Report along with the Accord, concluded that a comprehensive foreign qualification opinion will “generally not be cost-effective” and may be an inappropriate request. Sometimes the formulation that the selling company is qualified in all jurisdictions “where the failure to so qualify would have a material adverse effect on Seller and its operations” is requested as a compromise, but it is inappropriate for lawyers to make materiality judgments, and this opinion is also discouraged. The preferred alternative is to address qualification in specifically identified jurisdictions as in the form opinion above.

3. **Neither the execution and delivery of the Agreement nor the consummation of any or all of the [Contemplated Transactions](#) (a) violates any provision of the certificate of incorporation or bylaws (or other governing instrument) of Seller; (b) breaches or constitutes a default (or an event that, with notice or lapse of time or both, would constitute a default) under, or results in the termination of, or accelerates the performance required by, or excuses performance by any [Person](#) of any of its obligations under, or causes the acceleration of the maturity of any debt or obligation pursuant to, or results in the creation or imposition of any [Encumbrance](#) upon any property or assets of Seller under, any agreements or commitments listed in Part \_\_\_ of the Disclosure Letter [or other identified list of agreements and commitments]; or (c) violates any statute, law, regulation, or rule or any judgment, decree or order of any court or other [Governmental Body](#) applicable to Seller.**

#### COMMENT

The no-breach-or-default opinions given in paragraph three are discussed in Section 15 of the Accord and the related Commentary.

This opinion is designed to be limited to breaches or defaults related to performance of the Agreement through the closing when the Opinion Letter is delivered. Some buyers may seek to broaden the opinion to include required post-closing performance, in which event the Opinion should cover “execution, delivery and performance . . . .”

The most troublesome aspect of these opinions is identification of the agreements and commitments described in paragraph 3(b) of the opinion. It is not unusual, at least in the case of opinions not covered by the Accord, for the buyer to request that the opinion cover “any agreement or commitment *known to us* to which Seller is a party or by which its property or assets is bound.” Use of “known to us” introduces the uncertainties inherent in a knowledge standard and may result in an overly broad reference.

The Accord and the model form of Accord opinion take a different approach and favor identifying the agreements and commitments to which this opinion is to apply (e.g., a list of agreements, a schedule to the acquisition agreement or a list of exhibits to an SEC filing). The opining lawyer should then review the agreements and commitments listed and give the opinion based upon that review. It is inappropriate to define the selection criteria for this Opinion in terms of the ultimate conclusion to be reached by the opining lawyer (e.g., all agreements and commitments that prohibit a change of control of the seller). This approach of utilizing a specific list requires that the parties define the agreements or commitments in a way that satisfies the buyer’s legitimate interest in having company counsel review those agreements and commitments likely to present significant issues while simultaneously limiting the scope of that review to one that is feasible and does not involve disproportionate cost in the context of the transaction.

Counsel should take care in agreeing to opine to a very detailed list of insignificant agreements; the failure to obtain a consent to one immaterial agreement does not create an unintended failure of a condition to closing. If consummation of the acquisition would result in a default under one of the agreements covered in paragraph 3(b) of the opinion letter, company counsel could not deliver the opinion letter in the form required. Although the default would also constitute an inaccuracy in the representation and warranty in [Section 3.20](#) of the Model Asset Purchase Agreement, that inaccuracy would not necessarily cause the condition in [Section 7.3](#) of the Model Asset Purchase Agreement to fail to be satisfied if consent to the particular agreement was not a “[Material Consent](#)” listed on Exhibit 7.3. If by reason of that same default company counsel could not deliver the opinion letter in the form required by Section 7.4(a), however, that condition to Buyer’s obligation to close would not be satisfied.

Companies typically are parties to agreements or court orders controlled by the laws of a variety of states not covered by the Opinion Letter. The Accord (at ¶ 15.6) recognizes that it would be impractical to require each agreement or court order to be reviewed by a lawyer from the controlling state and essentially permits the opinion-giver to assume that these documents would be enforced as written and that no legal issues are present which would not be present under the law of the opining jurisdiction.

Similarly, in giving the no-breach-or-default opinion above, TriBar II would permit the Opinion Giver “to assume, without so stating in the opinion letter, that those contracts would be interpreted in accordance with their plain meaning (unless the . . . [Opinion Giver] identif(ies) a possible problem, in which event they may want to obtain an opinion from local counsel).” Further, “[i]n the case of technical terms, their meaning would be what lawyers generally understand them to mean in the jurisdiction (or principal jurisdiction if more than one) in which law is specified for coverage in the opinion letter.”

In an asset sale, this opinion is customarily given by company counsel only with respect to the selling company and not with respect to shareholders of the company, even though they may be parties to the agreement. In many instances counsel to the company will not be counsel to the individual shareholders and the agreements are fundamentally performed by the company as seller of the assets, with the shareholders joining the agreement principally to join in the indemnifications.

4. **Except for requirements of the [HSR Act](#) or as disclosed in Part 3.2(b) of the Disclosure Letter, no consent, approval or authorization of, or declaration, filing or registration with, any [Governmental Body](#) is required by Seller in connection with the execution and delivery of the Agreement or the consummation of the [Contemplated Transactions](#).**

#### COMMENT

This opinion is designed to be limited to consents related to performance of the agreement through the closing when the opinion letter is being delivered. Some buyers may seek to broaden the opinion to include required post-closing performance, in which event the opinion should cover “execution, delivery and performance of the Agreement.”

5. **The instruments of conveyance, transfer and assignment to be delivered by Seller to Buyer are in form legally sufficient to convey to Buyer all right, title and interest of Seller in and to the [Assets](#). Such instruments are in form sufficient for recordation or filing where such is necessary in order to effect such conveyance, transfer and assignment as against third parties.**

#### COMMENT

In an asset sale, counsel for a seller is sometimes asked to opine that the various instruments and documents drafted to transfer the assets are in sufficient legal form to effect the contemplated transfers. In order to give this opinion, counsel must be familiar with the specific requirements of transfer for the type of assets in question. Assets such as real estate, personal property, motor vehicles and intellectual property each require particular forms of transfer documentation, and this opinion entails a determination by the counsel for the seller that the transfer documents used are legally sufficient in form to accomplish the desired transfer under applicable law.

Because it is normally inappropriate for a buyer to request the seller’s counsel to opine that the seller will deliver good title to the assets, this opinion is drafted carefully to be limited to an opinion on the sufficiency of the form of the transfer documents and not an opinion as to the seller’s actual title to the assets in question. The opinion is designed to state only that the transfer documents are adequate to transfer to Buyer whatever title Seller happens to have in such assets and is not an opinion that Seller actually owns the [Assets](#) as defined in the Agreement.

**We hereby confirm to you that, except as set forth in Part 3.18 of the Disclosure Letter, there is no [Proceeding](#) by or before any court or [Governmental Body](#) pending or overtly threatened against or involving Seller that questions or challenges the validity of the Agreement or any action taken or to be taken by Seller pursuant to the Agreement or in connection with the [Contemplated Transactions](#).**

#### COMMENT

This confirmation is discussed in Section 17 of the Accord and the related Commentary. It is stated in the form of a factual confirmation rather than as an opinion. The Accord automatically qualifies the confirmation to mean that it is limited to the knowledge of the Opinion-Giver. See the [discussion in the nonaccord Opinion of “Knowledge.”](#)

The Accord is changed for purposes of this Opinion Letter pursuant to § 21 of the Accord as follows:

- (a) The Primary Lawyer Group shall consist of the lawyer in our firm who has principal legal responsibility for our representation of Seller, the lawyers in our firm who have participated in the representation of Seller in preparation of the Agreement and the **Contemplated Transactions** and, with regard to the foregoing confirmation regarding Proceedings, the lawyer in our firm who oversees our representation of Seller in connection with legal proceedings.
- (b) Accord § 19(e) and § 19(j) are deleted.

**COMMENT**

Section 10 of the Accord invites modification and private ordering by the parties. The buyer may seek to expand the Primary Lawyer Group, which defines the lawyers whose knowledge is imputed to the firm rendering the opinion, to include those who, although not involved in the preparation of the legal opinion, are likely to have knowledge that may be relevant to the buyer (e.g., litigators who may be aware of pending litigation and lawyers working on the **Contemplated Transaction**).

The deletion of Accord § 19(e) and § 19(j) is designed to require counsel to consider the environmental laws in effect in some states that require notifications and proceedings in connection with acquisitions in giving the opinion in paragraph 6.

There is no standard as to the provisions of the Accord, if any, that the buyer should seek to have modified; that determination is negotiable and should be made in the context of the specific transaction taking into account a cost-benefit analysis on the value and difficulty of the particular modification.

**We understand that you are delivering a copy of this Opinion Letter to [identify lenders to Buyer] in connection with the financing of the transactions contemplated by the Agreement, and we agree that [those lenders] may rely on this Opinion Letter as if it were addressed to them.**

**COMMENT**

If the acquisition is being financed, a buyer's lenders will often seek to have the benefit of the opinion letter delivered by the seller's counsel. Absent a consent in the opinion letter (or separately given by the seller's counsel), Section 20 of the Accord would deny the lenders the right to rely on the opinion letter.

**Very truly yours,  
[LAW FIRM]**

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

# Opinion of Counsel to Seller (Non-Accord Form)

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[Date]

[Name and Address of Buyer]

Gentlemen:

We have acted as counsel to \_\_\_\_\_ (“Seller”), a \_\_\_\_\_ corporation, in connection with the Asset Purchase Agreement, dated \_\_\_\_\_, 20\_\_ (the “Agreement”), among Seller, \_\_\_\_\_, an individual resident in \_\_\_\_\_ (“A”), \_\_\_\_\_, an individual resident in \_\_\_\_\_ (“B”) and \_\_\_\_\_, a \_\_\_\_\_ corporation (“Buyer”). This is the opinion letter contemplated by Section \_\_\_ of the Agreement. All capitalized terms used in this opinion letter without definition have the respective meanings given to them in the Agreement.

Our opinions are limited in all respects to the substantive law of the State of \_\_\_\_ [and the General Corporation Law of the State of Delaware], and the federal law of the United States, and we assume no responsibility as to the applicability thereto, or the effect thereon, of the laws of any other jurisdiction.

## COMMENT

The opinion letter should identify the law that it covers. This will generally be the federal law, the law of the state in which the opinion giver practices and, if different, the corporate law of the state of incorporation of the seller. Additionally, counsel in a multistate transaction may be requested to furnish an opinion on matters governed by the laws of a jurisdiction other than the jurisdiction in which such counsel practices.

Given the large number of corporations incorporated in Delaware, it is common practice in acquisition opinions for counsel in states other than Delaware to opine on corporate legal issues governed by the Delaware General Corporation Law where applicable, even if the opinion-giver does not practice in Delaware. Reference to the Delaware General Corporation Law includes applicable provisions of the Delaware constitution and reported cases interpreting these laws. Often this may also be so with respect to the corporate legal issues in states other than Delaware. As in other cases where counsel are opining on the laws of another jurisdiction, the issue is principally

one of competence with regard to the laws with respect to which the opinion is rendered.

Because the opinion-giver is held to the same standard as lawyers who practice in the other jurisdiction if it gives an opinion with respect to the law of that other jurisdiction, it will often obtain an opinion of local counsel with respect to the law of that other jurisdiction, except in special situations in which the opining counsel is competent. The opinion-giver may then rely expressly upon the opinion of local counsel with respect to matters covered by the law of the other jurisdiction.

A preferred approach to opinions of local counsel is to “isolate” the opinion of the selling company counsel from the opinion of local counsel. Under this approach, the seller’s counsel excludes from the scope of the opinion matters covered by the opinion of the local counsel, and no other reference to the local counsel’s opinion is made in the opinion-giver’s opinion letter. The opinion of local counsel may be addressed to the buyer to clarify further the relationship between local counsel and the seller’s counsel.

Unless otherwise stated, the opinion should not be deemed to cover local law or regulations (such as city, county, or special political subdivisions).

**We note that certain opinions concerning real estate matters under the law of the State of \_\_\_\_\_ are addressed in the opinion letter of the \_\_\_\_\_ Law Firm. That opinion letter is provided separately to you, and we express no opinion with respect to those matters.**

#### **COMMENT**

The law firm representing the seller generally and in the sale may not be in a position to opine as to matters involving specialized legal issues in which the firm is not experienced or as to state and local law issues (such as laws relating to real estate) in states in which the seller has operations but in which the law firm does not practice. For example, the seller may have plants in distant states, and the law firm is not qualified to opine as to real property issues with respect to those states. In these circumstances, the counsel delivering the opinion letter for the seller generally will choose to retain counsel in those states to give an opinion addressing those specific issues. In the language above, the opinion-giver assumes no responsibility for the competence of the other law firm or the substance or form of the opinion given by the firm. Counsel to the buyer and to the seller should consider the cost effectiveness of requiring these other opinions and the extent to which the firm giving the primary opinion should be asked to assume responsibility for the other firm’s opinions.

For a further discussion of the practice of opining on “no breach or default” where the agreements are governed by multiple states, see the [last paragraph of the Comment on the opinion at paragraph 3 of this Opinion](#).

### **1. DOCUMENTS REVIEWED**

- (a) ***Documents Reviewed—Transaction Documents.*** As counsel to Seller, we have reviewed the following documents and instruments (collectively, the “Transaction Documents”):
- (i) **the Agreement;**
  - (ii) **the Bill of Sale and Assignment;**
  - (iii) **the Assignment and Assumption Agreement;**

- (iv) the deeds, lease assignments and purchase option assignments required by **Section 2.7** of the Agreement;
  - (v) the Employment Agreements;
  - (vi) the Assignment of Intellectual Property Assets;
  - (vii) the Noncompetition Agreements;
  - (viii) the Nondisclosure Agreement;
  - (ix) the Earnout Agreement; and
  - (x) [list other Transaction Documents].
- (b) *Documents Reviewed—Other Documents Examined.* In addition to the Transaction Documents, other documents we have examined in rendering this Opinion Letter, and upon which we have relied, include the following:
- (i) the Articles [Certificate] of Incorporation of Seller, certified by the Secretary of State of [specify state];
  - (ii) the Bylaws of Seller, certified to be true and correct by the Secretary of Seller;
  - (iii) certificates from the Secretary of State of [specify state] indicating that Seller is in good standing in the State of [specify state];
  - (iv) copies of resolutions adopted by the Board of Directors of Seller authorizing the execution, delivery and performance of the Transaction Documents and certified by its Secretary;
  - (v) certificate of [title of officer] of Seller, dated the date hereof certifying as to certain factual matters, [including litigation and other proceedings, etc.] and identifying [certain material agreements] [and court orders] to which Seller is a party (the “Seller Certificate”);
  - (vi) documents listed in the Seller Certificate;
  - (vii) [list other documents reviewed]; and
  - (viii) such other documents as we have deemed necessary in order to render the opinions expressed below.

#### COMMENT

Many firms prefer to make, and buyers may require, a general statement that counsel has reviewed such documents as it has deemed necessary in order to render the opinion. Unless expressly negated, this point is implicit whether or not stated in the opinion letter.

## 2. QUALIFICATIONS TO FACTUAL EXAMINATION

We have been furnished with and examined originals or copies, certified or otherwise identified to our satisfaction, of all such records of Seller, agreements and other instruments, certificates of officers and representatives of Seller, certificates of public officials and other documents, [and we have had discussions with appropriate officers of Seller] as we have deemed necessary or desirable as a basis for the opinions hereinafter expressed. As to questions of fact material to such opinions, we have, where relevant facts were not independently verified or established, relied upon certificates of [and discussions with] officers of Seller.

### 3. ASSUMPTIONS

For purposes of this Opinion Letter, we have assumed: (a) the genuineness of all signatures on all documents (other than those of [Seller] on the Transaction Documents); (b) the authenticity of all documents submitted to us as originals; (c) the conformity to the originals of all documents submitted to us as copies; (d) the correctness and accuracy of all facts set forth in all certificates and reports; (e) the due authorization, execution and delivery of and the validity and binding effect of the Transaction Documents with regard to the parties to the Transaction Documents other than Seller; and (f) A and B have sufficient legal capacity to enter into and perform the Transaction Documents.

#### COMMENT

If counsel is not to be present when the Transaction Documents are signed by the seller, company counsel may insist that the parenthesis in (a) be deleted and assume the genuineness of all signatures. TriBar II and the ABA Legal Principles takes the position that these assumptions are implicit whether or not stated expressly.

TriBar II takes the position that the assumptions set forth above and other assumptions that were in the past often stated expressly are implicit whether or not stated expressly, and omitting even the assumptions set forth above is developing into common practice.

### 4. OPINIONS

Based upon and subject to the foregoing and the other qualifications and limitations stated in this Opinion Letter, we are of the opinion that:

1. **The Agreement, the Bill of Sale and Assignment, the Assignment and Assumption Agreement and [the other Transaction Documents] have been duly authorized, executed and delivered by Seller and constitute valid and binding obligations of Seller, enforceable against Seller in accordance with their terms. The Agreement has been duly executed and delivered by A and B and constitutes the valid and binding obligation of A and B, enforceable against A and B in accordance with its terms. This opinion is subject to bankruptcy, reorganization, insolvency and other similar laws affecting the enforcement of creditors' rights in general and to general principles of equity (regardless of whether considered in a proceeding in equity or an action of law).**

#### COMMENT

The opinion that the Transaction Documents "constitute valid and binding obligations of Seller, enforceable against Seller in accordance with their terms" is frequently referred to as the "remedies opinion." The purpose of the remedies opinion is to give comfort to the Buyer, as recipient of the opinion, that a valid contract is being formed under the laws of the applicable jurisdiction and that, if the seller defaults in the performance of its obligations under the Transaction Documents, the buyer will be entitled to a remedy for a breach, subject to certain exceptions that might be made by a court applying these remedies.

It is generally accepted that there will always be certain fact patterns which could occur or positions that could be taken by the courts that could prevent or delay the buyer obtaining the particular remedies provided in the Transaction Documents upon a breach of the sellers' obligations. The two areas in which the courts have been the

most active in frustrating enforcement of the specific agreement of the parties have been (a) in bankruptcy and insolvency situations and (b) where equitable principles are applied by the courts. The opinion will generally be qualified by exceptions for bankruptcy, insolvency and application of equitable principles. These exceptions and limitations have become so generally accepted that they should not be a matter of controversy, and TriBar II is of the view that they are implicit whether or not spelled out.

Commentators have discussed the independent meaning of the words “valid,” “binding,” and “enforceable” and the need to include any one or more of these words in a remedies opinion. In the past, the word “legal” was also often used in the formulation. It has been customary for many lawyers to use all or a combination of these words to express the remedies opinion. Today, however, the words “binding” or “enforceable” in themselves are considered synonymous by most counsel, and either word is sufficient for purposes of the remedies opinion. The word “legal” adds nothing and need not be used.

2. **Seller is a corporation [duly incorporated] [duly organized], validly existing and in good standing under the laws [of its state of incorporation], with corporate power and authority to execute and deliver the Agreement and consummate the [Contemplated Transactions](#), and is duly qualified and in good standing as a foreign corporation in the jurisdictions set forth in Part \_\_\_ of the Disclosure Letter.**

#### COMMENT

See the [Comment to paragraph 2 of the Accord Opinion, above](#).

3. **Neither the execution and delivery of the Agreement nor the consummation of any or all of the [Contemplated Transactions](#) (a) violates any provision of the articles [certificate] of incorporation or bylaws (or other governing instrument) of Seller; (b) breaches or constitutes a default (or an event that, with notice or lapse of time or both, would constitute a default) under, or results in the termination of, or accelerates the performance required by, or excuses performance by any [Person](#) of any of its obligations under, or causes the acceleration of the maturity or any debt or obligation pursuant to, or results in the creation or imposition of any [Encumbrance](#) upon any property or assets of Seller under, any agreements or commitments identified on Part \_\_\_ of the Disclosure Letter [or other identified list of agreements or commitments]; or (c) violates any statute, law, regulation or rule, or any judgment, decree or order known to us of any court or other [Governmental Body](#) applicable to Seller. For purposes of this opinion, we have relied upon a certificate of an officer of Seller as to the existence and identity of judgments, decrees or orders of court covered by this paragraph.**

#### COMMENT

See the [second paragraph of the Comment to paragraph 3 of the Accord Opinion](#) as to requests by Buyer’s counsel that this opinion include performance of the agreement.

The most troublesome aspect of these opinions is identification of the agreements and commitments described in paragraph 3(b) of the opinion. It is not unusual for the seller’s counsel to limit the opinion to cover only “any agreement or commitment

known to us to which Seller is a party or by which any of its assets are bound.” Use of “known to us,” however, introduces the uncertainties inherent in a knowledge standard and may result in an overly broad reference.

In order to avoid confusion, the form of opinion contemplates identifying the agreements and commitments to which this opinion is to apply (e.g., a list of agreements or schedule to the Agreement or a list of exhibits to an SEC filing). The opining lawyer should then review the agreements and commitments listed on the certificate and give the opinion based upon that review. This approach of utilizing a specific list requires that the parties define the selection criteria in a way that satisfies the buyer’s legitimate interest in having the seller’s counsel review those agreements and commitments of the seller likely to present significant issues while simultaneously limiting the scope of that review to one that is feasible and does not involve disproportionate cost in the context of the transaction. Counsel should take care in agreeing to opine to a very detailed list of immaterial agreements; the failure to obtain a consent to one immaterial agreement does not create an unintended failure of a condition to closing if counsel cannot deliver the opinion letter exactly as provided in the Exhibit.

Counsel should also take care in agreeing to opine to a very detailed list of insignificant agreements that the failure to obtain a consent to one immaterial agreement does not create an unintended failure of a condition to closing. If consummation of the acquisition would result in a default under one of the agreements covered in paragraph 3(b) of the opinion letter, company counsel could not deliver the opinion letter in the form required. Although the default would also constitute an inaccuracy in the representation and warranty in [Section 3.20](#) of the Model Asset Purchase Agreement, that inaccuracy would not necessarily cause the condition in [Section 7.3](#) of the Model Asset Purchase Agreement to fail to be satisfied if consent to the particular agreement was not a “[Material Consent](#)” listed on Exhibit 7.3. If, by reason of that same default company counsel could not deliver the opinion letter in the form required by [Section 7.4\(a\)](#), however, that condition to Buyer’s obligation to close would not be satisfied.

Companies typically are parties to agreements controlled by the laws of a variety of states not covered by the Opinion Letter. In giving the no-breach-or-default opinion above, TriBar II would permit the opining lawyer “to assume, without so stating in the opinion letter, that those contracts would be interpreted in accordance with their plain meaning (unless the . . . [opining lawyer] identif(ies) a possible problem, in which event they may want to obtain an opinion from local counsel).” Further, “[i]n the case of technical terms, their meaning would be what lawyers generally understand them to mean in the jurisdiction (or principal jurisdiction if more than one) whose law is specified for coverage in the opinion letter.”

See the [last paragraph of the Comment to paragraph 3 of the Accord Opinion](#).

4. **Except for requirements of the [HSR Act](#) or as disclosed in [Part 3.2\(b\)](#) of the [Disclosure Letter](#), no consent, approval or authorization of, or declaration, filing or registration with, any [Governmental Body](#) is required by Seller in connection with the execution and delivery of the Agreement or the consummation of the [Contemplated Transactions](#).**

#### COMMENT

This opinion is designed to be limited to consents related to performance through the closing when the opinion letter is being delivered. Some buyers may seek to broaden the opinion to include required, post-closing performance, in which event the opinion should cover “execution, delivery and performance of the Agreement.”

5. The instruments of conveyance, transfer and assignment to be delivered by Seller to Buyer are in form legally sufficient to convey to Buyer all right, title and interest of Seller in and to the **Assets**. Such instruments are in form sufficient for recordation or filing where such is necessary in order to effect such conveyance, transfer and assignment as against third parties.

#### COMMENT

See the [Comment to paragraph 5 of the Accord Opinion](#), above.

We hereby confirm to you that, except as set forth in Part 3.18 of the Disclosure Letter, to our knowledge there is no **Proceeding** by or before any court or **Governmental Body** pending or overtly threatened against or involving Company that questions or challenges the validity of the Agreement or any action taken or to be taken by Seller pursuant to the Agreement or in connection with the **Contemplated Transactions**.

The qualification of any opinion or statement herein by the use of the words “to our knowledge” or “known to us” means that, during the course of representation as described in this opinion letter, no information has come to the attention of the lawyers in this firm involved in the transactions described or the lawyer in our firm who has principal legal responsibility for our representation of Seller, which would give such lawyers current actual knowledge of the existence of the facts so qualified. Except as set forth herein, we have not undertaken any investigation to determine the existence of such facts, and no inference as to our knowledge thereof shall be drawn from the fact of our representation of any party or otherwise.

#### COMMENT

Under traditional nonaccord opinion practice, if an opinion includes a statement as to factual matters, it may be qualified by the use of the words “to our knowledge,” “known to us,” “to the best of our knowledge,” “to our current actual knowledge” or the like. The Accord automatically provides these qualifications. These phrases are customarily understood to mean that the lawyer has not engaged in any comprehensive factual or legal investigation as to the issue qualified. Further, any fact assumed should not be questionable on its face and cannot be inconsistent with a fact known by the opinion giver, provided, however, that TriBar II would permit stated assumptions to be inconsistent. TriBar II also states that reference to “Knowledge” is not necessary (but may be used for emphasis) because factual matters are always “to knowledge.”

Lawyers often define “knowledge” in the Opinion Letter so as to specify the degree of investigation and the categories of lawyers to be queried within the firm or legal department. Although the definition in the model opinion is frequently given, there are a variety of formulations. The following is an alternative:

**References herein to “our knowledge” or “known to us” or similar expressions mean the actual knowledge of the lawyers in this firm responsible for preparing this opinion letter after inquiry of such lawyers in this firm and review of such firm files as they have identified as being reasonably likely to have or contain information needed to support an opinion herein.**

This Opinion Letter (a) has been furnished to you at your request, and we consider it to be a confidential communication, which may not be furnished, reproduced, distributed or disclosed to anyone without our prior written consent; (b) is rendered solely for your information and assistance in connection with the above transaction and may not be relied upon by any other person or for any other purpose without our prior written consent[, except that we understand that you are delivering a copy of this opinion to [identify lenders to Buyer] in connection with the financing of the transaction contemplated by the Agreement and agree that [those lenders] may rely on this opinion as if it were addressed to them]; (c) is rendered as of the date hereof, and we undertake no, and hereby disclaim any, obligation to advise you of any changes or any new developments which might affect any matters or opinions set forth herein; and (d) is limited to the matters stated herein and no opinions may be inferred or implied beyond the matters expressly stated herein.

**COMMENT**

If the acquisition is being financed, a buyer's lenders will often seek to have the benefit of the legal opinion letter delivered by company counsel. Absent a consent in the opinion (or separately given by company counsel), the lenders may not have the right to rely on the opinion letter.

The qualifications contained in (c) and (d) are often included in opinion letters but are unnecessary and implicit even if not stated according to TriBar II and the ABA Principles.

Very truly yours,  
[LAW FIRM]

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

EXHIBIT 8.4(a)

# Opinion of Counsel to Buyer

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## PRELIMINARY NOTE

As is the case with Buyer's representations in the Model Asset Purchase Agreement, the scope of the opinion required to be delivered to the seller by the buyer's counsel is often limited to matters affecting the validity of the transaction documents. Where, as here, the buyer is delivering a promissory note for a significant portion of the purchase price, however, the seller may require additional representations from the buyer and, correspondingly, additional opinions from the buyer's counsel. See the [Commentary to Article 4](#) of the Model Asset Purchase Agreement.

It may be appropriate in some acquisitions for the seller to request the buyer's counsel also to opine as to corporate status, power and authority, no consent or approval and no litigation affecting the Agreement. The appropriateness of these additional requests should turn on the nature and size of the buyer, the cost-effectiveness of opinion and whether consideration other than cash is being paid.

[Date]

Gentlemen:

We have acted as counsel to \_\_\_\_\_, a \_\_\_\_\_ corporation ("Buyer"), in connection with the Asset Purchase Agreement dated \_\_\_\_\_, 20\_\_ (the "Agreement"), among \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ and Buyer. This is the Opinion Letter contemplated by [Section 8.4\(a\)](#) of the Agreement. All capitalized terms used in this Opinion Letter without definition have the respective meanings given to them in the Agreement or the Accord referred to below.

This Opinion Letter is governed by, and shall be interpreted in accordance with, the Legal Opinion Accord (the "Accord") of the ABA Section of Business Law (1991). Consequently, it is subject to a number of qualifications, exceptions, definitions, limitations on coverage and other limitations, all as more particularly described in the Accord, and this Opinion Letter should be read in conjunction therewith. The law covered by the opinions expressed herein is limited to the Federal Law of the United States and the Law of the State(s) of \_\_\_\_\_.

Based upon the foregoing, our opinion is as follows:

1. The Agreement, the Escrow Agreement, the Promissory Note and [include other specified ancillary documents to be executed by Buyer] are enforceable against Buyer.

**COMMENT**

See the [Comment to opinion paragraph 1](#) of the Opinion of Counsel to Seller in the Accord form.

2. Neither the execution and delivery of the Agreement, the Escrow Agreement and the Promissory Note nor the consummation of the Contemplated Transactions (a) violates any provision of the articles [certificate] of incorporation or bylaws (or other governing instrument) of Buyer; (b) breaches or constitutes a default (or an event that, with notice or lapse of time or both, would constitute a default) under any agreement or commitment [describe selection criteria;] to which Buyer is party; or (c) violates any statute, law, regulation or rule or any judgment, decree or order of any court or **Governmental Body** applicable to Buyer.

**COMMENT**

See the [Comment to opinion paragraph 3](#) of the Opinion of Counsel to Seller in the Accord form.

Very truly yours,  
[LAW FIRM]

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

# Opinion of Counsel to Buyer (Non-Accord Form)

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[Date]

Gentlemen:

We have acted as counsel to \_\_\_\_\_, a \_\_\_\_\_ corporation (“Buyer”), in connection with the Asset Purchase Agreement dated \_\_\_\_\_, 20\_\_ (the “Agreement”), among \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ and Buyer. This is the Opinion Letter contemplated by Section \_\_\_ of the Agreement. All capitalized terms used in this Opinion Letter without definition have the respective meanings given to them in the Agreement.

Our opinions are limited in all respects to the substantive law of the State of \_\_\_\_ [and the General Corporation Law of the State of Delaware] and the federal law of the United States, and we assume no responsibility as to the applicability thereto, or the effect thereof, of the laws of any other jurisdiction.

## 1. DOCUMENTS REVIEWED

- (a) *Documents Reviewed—Transaction Documents.* As counsel to Buyer, we have reviewed the following documents and instruments (collectively, the “Transaction Documents”):
  - (i) the Agreement;
  - (ii) the Escrow Agreement;
  - (iii) the Promissory Note;
  - (iv) [list other Transaction Documents].
- (b) *Documents Reviewed—Other Documents Examined.* In addition to the Transaction Documents, other documents we have examined in rendering this Opinion Letter, and upon which we have relied, include the following:
  - (i) the Articles [Certificate] of Incorporation of Buyer, certified by the Secretary of State of [specify state];

- (ii) the Bylaws of Buyer, certified to be true and correct by the Secretary of Buyer;
- (iii) certificate from the Secretary of State of [specify state] indicating that Buyer is in good standing in the state of [specify state];
- (iv) copies of resolutions adopted by the Board of Directors of Buyer authorizing the execution, delivery and performance of the Transaction Documents and certified by its Secretary;
- (v) certificates of [title of officer] of Buyer, dated the date hereof certifying as to certain factual matters, and identifying [certain material agreements] [and court orders] to which Buyer is a party (the “Buyer Certificate”);
- (vi) documents listed in the Buyer Certificate;
- (vii) [list other documents reviewed]; and
- (viii) such other documents as we have deemed necessary in order to render the opinions expressed below.

#### COMMENT

Many firms prefer to make, and the seller may insist upon, a general statement that counsel has reviewed such documents as it has deemed necessary in order to render the opinion.

## 2. QUALIFICATIONS TO FACTUAL EXAMINATION

We have been furnished with and examined originals or copies, certified or otherwise identified to our satisfaction, of all such records of Buyer, agreements and other instruments, certificates of officers and representatives of Buyer, certificates of public officials and other documents, [and we have had such discussions with appropriate officers of Buyer] as we have deemed necessary or desirable as a basis for the opinions hereinafter expressed. As to questions of fact material to such opinions, we have, where relevant facts were not independently verified or established, relied upon certificates of [and discussions with] officers of Buyer.

## 3. ASSUMPTIONS

For purposes of this Opinion Letter, we have assumed: (a) the genuineness of all signatures on all documents (other than those of Buyer on the Transaction Documents); (b) the authenticity of all documents submitted to us as originals; (c) the conformity to the originals of all documents submitted to us as copies; (d) the correctness and accuracy of all facts set forth in all certificates and reports; and (e) the due authorization, execution and delivery of and the validity and binding effect of the Transaction Documents with regard to the parties to the Transaction Documents other than Buyer.

#### COMMENT

See [Comment to paragraph 3](#) of the Non-Accord opinion letter of Seller’s counsel.

#### 4. OPINIONS

Based upon and subject to the foregoing and the other qualifications and limitations stated in this opinion letter, we are of the opinion that:

1. The Agreement, the Escrow Agreement, the Promissory Note to be executed by Buyer and [other ancillary documents] have been duly authorized, executed and delivered by Buyer and constitute valid and binding obligations of Buyer, enforceable against Buyer in accordance with their terms, subject to bankruptcy, reorganization, insolvency and other similar laws affecting the enforcement of creditors' rights in general and to general principles of equity (regardless of whether considered in a proceeding in equity or an action of law).

#### COMMENT

See the [Comment to opinion paragraph 1](#) of the Opinion Letter of Counsel to Seller in the Non-Accord form.

2. Neither the execution and delivery of the Agreement, the Escrow Agreement and the Promissory Notes nor the consummation of the Contemplated Transactions (a) violates any provision of the articles [certificate] of incorporation or bylaws (or other governing instrument) of Buyer; (b) breaches or constitutes a default (or an event that, with notice or lapse of time or both, would constitute a default) under any agreement or commitment to which Buyer is party and identified on \_\_\_\_\_; or (c) violates any statute, law, regulation or rule, or any judgment, decree or order of any court or **Governmental Body** applicable to Buyer.

#### COMMENT

See the [Comment to opinion paragraph 3](#) of the Opinion Letter of Counsel to Seller in the Non-Accord form.

The qualification of any opinion or statement herein by the use of the words "to our knowledge" or "known to us" means that, during the course of representation as described in this opinion letter, no information has come to the attention of the lawyers in this firm involved in the transactions described or the lawyers in our firm who has principal legal responsibility for our representation of Sellers that would give such lawyers current actual knowledge of the existence of the facts so qualified. Except as set forth herein, we have not undertaken any investigation to determine the existence of such facts, and no inference as to our knowledge thereof shall be drawn from the fact of our representation of any party or otherwise.

This Opinion Letter (a) has been furnished to you at your request, and we consider it to be a confidential communication which may not be furnished, reproduced, distributed or disclosed to anyone without our prior written consent; (b) is rendered solely for your information and assistance in connection with the above transaction and may not be relied upon by any other person or for any other purpose without our prior written consent; (c) is rendered as of the date hereof, and we undertake no,

and hereby disclaim any, obligation to advise you of any changes or any new developments which might affect any matters or opinions set forth herein; and (d) is limited to the matters stated herein and no opinions may be inferred or implied beyond the matters expressly stated herein.

Very truly yours,  
[LAW FIRM]

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