

Hypothetical Indemnification Scenarios

I. INTRODUCTION

The following hypothetical scenarios illustrate the operation and interaction among:

- Seller’s representations in [Section 3](#) of the Model Asset Purchase Agreement;
- Seller’s pre-closing notification covenant in [Section 5.5](#) of the Model Asset Purchase Agreement (which contemplates the delivery of supplements to Seller’s Disclosure Letter);
- the closing condition in [Section 7.1\(a\)](#) of the Model Asset Purchase Agreement (relating to the accuracy of Seller’s representations); and
- the indemnification provisions in [Section 11](#) of the Model Asset Purchase Agreement.

With respect to each scenario, two key questions are posed:

1. Can Buyer refuse to consummate the asset purchase without liability to Seller (in other words, does Buyer have a “walk right”)?
2. If Buyer proceeds with the asset purchase, will Seller be required to indemnify Buyer with respect to the Blocking Patent?

In addition, in scenarios in which Buyer has a walk right as a result of the Blocking Patent and elects to exercise that walk right (by terminating the asset purchase), it is appropriate to pose a further question—Can Buyer nonetheless recover damages from Seller by reason of the facts assumed (in other words, can Buyer “walk and sue”)?

The answers to these questions are of considerable importance to the parties. Accordingly, it is vital that the parties’ attorneys fully understand the complex interaction among the various provisions of the Model Asset Purchase Agreement bearing on these questions.

For additional discussions of the issues addressed in this Appendix, see the Commentary to [Section 2.7\(a\)\(ix\)](#) of the Model Asset Purchase Agreement under the caption “[Parties’ Closing Certificates](#)”; the [Commentary to Section 5.5](#) of the Model Asset Purchase Agreement; the Commentary to [Section 7.1](#) of the Model Asset Purchase Agreement under the captions “[Time as of Which Accuracy of Representations Is Determined](#),” “[Effect of Dislo-](#)

sure Letter Supplements” and “Supplemental ‘Bring Down’ Representation”; and the Commentary to Sections 11.1 and 11.2 of the Model Asset Purchase Agreement.

II. THE MISSING ASSET

The Fact Pattern for the Model Asset Purchase Agreement contemplates that Seller holds patents for a number of the products it manufactures and that all of the intellectual property rights of Seller are to be conveyed to Buyer.

Each of the following hypothetical scenarios arises out of the reality that many products may be covered by a web of multiple patents and that the right to use all of the patents may be critical to the ability to manufacture a product without being subject to patent infringement claims.

In each scenario, it is assumed that:

- One of the Shareholders was the inventor and obtained patents covering a number of Seller’s products and duly assigned to Seller all of the patents he believed were necessary for Seller to manufacture the products.
- The Shareholder holds, but failed to assign or license to Seller prior to Seller entering into the Asset Purchase Agreement, one broad patent for a basic element of one of Seller’s principal products, and the product cannot be manufactured by Seller without infringing that patent (the “Blocking Patent”).
- Seller has not paid any royalties or other compensation to the Shareholder for the use of the Blocking Patent, and the Shareholder did not make any claim that Seller was infringing the Blocking Patent.
- Seller agreed to transfer to Buyer pursuant to [Section 2.1\(h\)](#) all intellectual property owned or licensed (as licensor or licensee) by Seller, or in which Seller has a proprietary interest (the “Intellectual Property Assets”), including patents, copyrights, trade secrets, etc.
- The Blocking Patent is material and, if not duly disclosed in the Disclosure Letter, may conflict with the following representations and warranties of Seller and the Shareholders:
 - [Section 3.6](#) (the Assets constitute all of assets, tangible or intangible, of any nature whatsoever, necessary to operate Seller’s business in the manner presently operated by Seller);
 - [Section 3.25\(c\)\(i\)](#) (the Intellectual Property Assets are all those necessary for the operation of Seller’s business as presently conducted);
 - [Section 3.25\(d\)\(iv\)](#) (none of the products manufactured or sold by Seller infringes or is alleged to infringe any patent of any other Person);
 - [Section 3.29](#) (no Shareholder owns any interest in any kind of tangible or intangible property used in or pertaining to Seller’s business or has any claim or right against Seller); and
 - [Section 3.33](#) (no representation or warranty contains, or omits to state, any material fact; Seller does not have Knowledge of any undisclosed adverse facts).
- Except for the foregoing inaccuracies relating to the Blocking Patent, there were no inaccuracies in Seller’s representations as of the signing date or as of the scheduled closing date.
- Seller has otherwise complied fully with its pre-closing covenants in the Asset Purchase Agreement.
- All of the conditions to Buyer’s obligation to consummate the asset purchase are satisfied in full as of the scheduled closing date, except to the extent that the Blocking Patent results in a failure to satisfy the closing condition in [Section 7.1\(a\)](#) of the Asset Purchase Agreement.

Scenario 2.1—Material Pre-Signing Condition Disclosed in Original Disclosure Letter.

The following facts are assumed:

- A few days *before* the signing of the Asset Purchase Agreement, Buyer’s counsel does a due diligence examination of Seller’s Intellectual Property Assets and the records of the U.S. Patent and Trademark Office (“PTO”), finds the Blocking Patent (but does not fully appreciate its importance) and calls it to the attention of Seller.
- Seller discloses the Blocking Patent in its Disclosure Letter, which is furnished to Buyer at the time the Asset Purchase Agreement is signed, and drafts of which should have been reviewed (with issues such as the Blocking Patent investigated) by Buyer as negotiation of the Agreement progressed.
- The Blocking Patent is not assigned or licensed to Seller by the scheduled closing date.

1. Can Buyer refuse to consummate the asset purchase (i.e., does Buyer have a walk right)?

No. Because the Blocking Patent was disclosed in the Disclosure Letter at the time of the signing of the Asset Purchase Agreement, Seller’s representations in [Sections 3.6, 3.25, 3.29](#) and [3.33](#) were accurate as of the signing date and remain accurate as of the scheduled closing date. Thus, the condition in each of the two clauses in [Section 7.1\(a\)](#) is satisfied, and Buyer does not have a walk right.

2. Will Seller be required to indemnify Buyer against any damages arising from the Blocking Patent?

No. Because the Blocking Patent was disclosed in the Disclosure Letter, Seller’s representations in [Sections 3.6, 3.25, 3.29](#) and [3.33](#) were accurate as of the signing date, and the representations remain accurate as “brought down” to the closing date. Thus, neither the Agreement nor Seller’s closing certificate contains an inaccurate representation, and Seller will have no indemnification obligation under [Section 11.2\(a\)](#) with respect to the Blocking Patent.

Because Seller has no interest in the Blocking Patent, (x) it is not an Intellectual Property Asset (or otherwise an Asset), (y) Seller is not obligated to transfer it to Buyer pursuant to [Sections 2.1, 2.7](#) or [10.11](#) and (z) Buyer does not have any indemnification right in respect thereof under [Section 11.2\(b\)](#) (breach of covenants and obligations, including obligation to transfer Assets). Buyer may have a claim against the Shareholder for wrongfully failing to transfer the Blocking Patent to Seller, which may be an Asset described under [Section 2.1\(h\)](#) or [\(j\)](#) and which Buyer could enforce against the Shareholder after the closing.

Scenario 2.2—Material Pre-Signing Condition Not Disclosed in Original Disclosure Letter But Disclosed Before Closing in Supplement to Disclosure Letter. The following facts are assumed:

- A few days *after* the signing of the Asset Purchase Agreement, the Blocking Patent is discovered by Buyer’s counsel and brought to the attention of Seller.
- Seller does not disclose the Blocking Patent in its original Disclosure Letter (which is furnished to Buyer at the time the Asset Purchase Agreement is signed). Seller subsequently discloses the Blocking Patent in a supplement delivered to Buyer (pursuant to [Section 5.5](#)) a few days after the signing of the Agreement.
- The Blocking Patent is not assigned or licensed to Seller or Buyer on or before the scheduled closing date.

1. Can Buyer refuse to consummate the asset purchase (i.e., does Buyer have a walk right)?

Yes. Because the Blocking Patent was not disclosed in Seller’s original Disclosure Letter, and because the Blocking Patent is material, Seller’s representations in [Sections 3.6, 3.25, 3.29](#) and [3.33](#) were materially inaccurate as of the signing date. Thus, the condition in the first clause of [Section 7.1\(a\)](#) is not satisfied, and Buyer has a walk right. (Under [Section](#)

7.1(a), no effect is given to the supplement to Seller’s Disclosure Letter for purposes of determining the accuracy of Seller’s representations.)

Note that, if Buyer elects to exercise its walk right in these circumstances, Buyer may also recover damages from Seller for its breach of the representations in [Sections 3.6, 3.25, 3.29](#) and [3.33](#) as of the signing date (in other words, Buyer may walk and sue). Because a Shareholder could have cured the problem by assigning the patent to Seller prior to closing so that Seller could in turn assign it to Buyer, the Shareholder may have breached his covenant in [Section 5.7](#) to use his Best Efforts to cause the conditions in [Article 7](#) to be satisfied. If Seller did not use its Best Efforts to cause the Shareholder to assign the patent, Seller also may have breached its covenant in [Section 5.7](#).

2. If Buyer proceeds with the asset purchase, will Seller be required to indemnify Buyer against any damages arising from the Blocking Patent?

Yes. Under [Section 11.2\(a\)](#), Seller is required to indemnify Buyer against all damages suffered as a result of any inaccuracy in Seller’s representations. Because Seller’s representations in [Sections 3.6, 3.25, 3.29](#) and [3.33](#) were inaccurate as of the signing date, Seller will be required to indemnify Buyer with respect to the Blocking Patent. (Under [Section 11.2\(a\)\(i\)](#), no effect is given to the supplement to Seller’s Disclosure Letter for purposes of determining the accuracy of Seller’s representations.) Buyer may also have a claim against the Shareholder and Seller under [Section 11.2\(b\)](#) for Breach of their covenants in [Section 5.7](#).

Note that, under the terms of [Sections 11.2\(a\)](#) and [\(b\)](#), Buyer retains its post-closing indemnification right even though Buyer was advised of the Blocking Patent before the closing and had the right to refuse to proceed with the asset purchase. In other words, Buyer is expressly permitted to “close and sue.” It is possible, however, that (notwithstanding the unambiguous language in [Sections 11.2\(a\)](#) and [\(b\)](#)) Seller may attempt to argue that some of the cases discussed in the Commentary to [Section 11.1](#) effectively override Buyer’s right to close and sue in this situation.

Claims under [Section 11.2\(a\)](#) are subject to the “basket” described in [Section 11.6](#). Claims in respect of covenant breaches under [Section 11.2\(b\)](#), however, are not subject to that basket or any other materiality qualifier.

Scenario 2.3—Material Pre-Signing Condition Not Disclosed in Original Disclosure Letter But “Cured” Before Closing. The following facts are assumed:

- A few days *after* the signing of the Asset Purchase Agreement, the Blocking Patent is discovered by Buyer’s counsel and brought to the attention of Seller.
- Seller does not disclose the Blocking Patent in its original Disclosure Letter (which is furnished to Buyer at the time the Asset Purchase Agreement is signed). Seller subsequently discloses the Blocking Patent in a supplement delivered to Buyer (pursuant to [Section 5.5](#)) a few days after the signing of the Agreement.
- Before the closing, the Shareholder assigns the Blocking Patent to Seller as a contribution to capital and releases all rights to make any claims for prior patent infringement by Seller, and Seller is prepared to transfer the Blocking Patent to Buyer at closing. ([Section 5.3](#) would not require Seller to obtain Buyer’s consent prior to the Shareholder’s contribution to Seller’s capital).

1. Can Buyer refuse to consummate the asset purchase (i.e., does Buyer have a walk right)?

Yes. Because the Blocking Patent was not disclosed in Seller’s original Disclosure Letter, and because the Blocking Patent is material, Seller’s representations in [Sections 3.6, 3.25, 3.29](#) and [3.33](#) were materially inaccurate as of the signing date. Thus, the condition in the first clause of [Section 7.1\(a\)](#) is not satisfied, and Buyer could claim a walk right. (Under [Section 7.1\(a\)](#), no effect is given to the supplement to Seller’s Disclosure Letter for purposes of determining the accuracy of Seller’s representations).

Note that, although Seller's representations in Sections 3.6, 3.25, 3.29 and 3.33 were accurate *as of the closing date* due to the assignment of the Blocking Patent, Buyer nonetheless has a walk right under the Model Asset Purchase Agreement in this situation. Note also that, if Buyer elects to exercise its walk right in these circumstances, Buyer may also seek to recover damages from Seller for its breach of the representations in Sections 3.6, 3.25, 3.29 and 3.33 as of the signing date (in other words, Buyer may walk and sue). However, in light of the assignment of the Blocking Patent before the closing, there may be some question as to whether Buyer has actually suffered any damages as a result of Seller's initial failure to disclose the Blocking Patent (see below).

Seller might challenge Buyer's claim to a walk right on the basis that the Blocking Patent became an Asset under Section 2.1, which Seller would have an obligation to transfer to Buyer under Sections 2.7 and 10.11 and for which Seller would have indemnification obligations under Section 11.2(b), and thus that the representations in Sections 3.6, 3.25, 3.29 and 3.33 were not materially incorrect (notwithstanding their wording) because Buyer did not have significant loss exposure.

2. If Buyer proceeds with the asset purchase, will Seller be required to indemnify Buyer with respect to the Blocking Patent?

No. Under Sections 11.2(a), Seller is required to indemnify Buyer against all damages suffered as a result of any inaccuracy in Seller's representations in Sections 3.6, 3.25, 3.29 and 3.33. These representations were inaccurate as of the signing date. However, because the Blocking Patent has been assigned to Seller and will be assigned to Buyer under Section 2.7, Buyer will not suffer any damages as a result of the Blocking Patent. Thus, Seller will not be required to make any indemnification payment under Section 11.2 with respect to the Blocking Patent.

Scenario 2.4—Immaterial Pre-Signing Condition Not Disclosed in Original Disclosure Letter But Disclosed Before Closing in Supplement to Disclosure Letter. The following facts are assumed:

- A few days *after* the signing of the Asset Purchase Agreement, the Blocking Patent is discovered by Buyer's counsel and brought to the attention of Seller. The Blocking Patent is not "material"—the affected products are neither strategically significant nor particularly valuable, and no claim is made for infringement of the Blocking Patent.
- Seller does not disclose the Blocking Patent in its original Disclosure Letter (which is furnished to Buyer at the time the Agreement is signed). Seller subsequently discloses the Blocking Patent in a supplement delivered to Buyer (pursuant to Section 5.5) a few days after the signing of the Agreement.
- The Blocking Patent is not assigned to Seller on or before the scheduled closing date.

1. Can Buyer refuse to consummate the asset purchase (i.e., does Buyer have a walk right)?

No. Because the Blocking Patent is not material, Seller's representations in Sections 3.6, 3.25, 3.29 and 3.33 were accurate as of the signing date in all *material* respects and are likewise accurate as of the closing date in all *material* respects. Thus, the condition in each clause of Section 7.1(a) is satisfied, and Buyer must proceed with the closing.

2. Will Seller be required to indemnify Buyer after the closing against any damages arising from the Blocking Patent?

Yes. Under Section 11.2(a), Seller is required to indemnify Buyer against all damages suffered as a result of *any* inaccuracy (even an immaterial inaccuracy) in Seller's representations, subject to any basket in Section 11.6. Because Seller's representations in Sections 3.6, 3.25, 3.29 and 3.33 were inaccurate as of the signing date, Seller will be obligated

under [Section 11.2\(a\)](#) to indemnify Buyer with respect to the Blocking Patent. Under [Section 11.2\(a\)](#), no effect is given to the supplement to Seller's Disclosure Letter for purposes of determining the accuracy of Seller's representations.

Scenario 2.5—Material Post-Signing Condition Disclosed Before Closing in Supplement to Disclosure Letter. The following facts are assumed:

- A few days *after* the signing of the Asset Purchase Agreement, the Blocking Patent is discovered by Buyer's counsel and brought to the attention of Seller.
- Seller discloses the Blocking Patent in a Disclosure Letter supplement delivered to Buyer (pursuant to [Section 5.5](#)) promptly after learning of the Blocking Patent.
- The Blocking Patent is not assigned to Seller on or before the scheduled closing date.
- In the "bring down" certificate delivered by Seller to Buyer on the scheduled closing date (in accordance with [Section 2.7\(a\)\(ix\)](#)), Seller expressly states that the existence of the material Blocking Patent has caused the condition in [Section 7.1\(a\)](#) not to be satisfied.

1. Can Buyer refuse to consummate the asset purchase (i.e., does Buyer have a walk right)?

Yes. Because a material Blocking Patent against Seller was not disclosed in the original Disclosure Letter and the failure has not been cured on or before the scheduled closing date, Seller's representations in [Sections 3.6, 3.25, 3.29](#) and [3.33](#) are inaccurate as brought down to the closing date. Thus, the bring down condition in the second clause of [Section 7.1\(a\)](#) is not satisfied, and Buyer has a walk right. (Under [Section 7.1\(a\)](#), no effect is given to the supplement to Seller's Disclosure Letter for purposes of determining the accuracy of Seller's representations.) Seller has conceded in its bring down certificate that the condition in [Section 7.1\(a\)](#) has not been satisfied and, thus, has effectively eliminated any post-closing indemnification obligations it might otherwise have under [Section 11.2\(a\)](#) with respect to the Blocking Patent (see below). Seller and the Shareholder, however, could have responsibility under [Section 11.2\(b\)](#) for failure to use their Best Efforts to satisfy the closing conditions.

2. If Buyer proceeds with the asset purchase, will Seller be required to indemnify Buyer against any damages arising from the Blocking Patent?

Perhaps. Under [Section 11.2\(a\)\(iv\)](#), Seller is required to indemnify Buyer against any damages resulting from inaccuracies in Seller's representations as brought down to the closing date. However, [Section 11.2\(a\)\(iv\)](#) expressly provides that, for purposes of determining Seller's indemnification obligations thereunder, any matters disclosed in a Disclosure Letter supplement *are* to be taken into account if Seller's bring down certificate (delivered pursuant to [Section 2.7\(a\)\(ix\)](#)) specifically identifies the disclosed matters "as having caused the condition specified in [Section 7.1](#) not to be satisfied." Because the bring down certificate expressly states that the Blocking Patent has caused the condition in [Section 7.1\(a\)](#) not to be satisfied, the disclosure of the Blocking Patent in the Disclosure Letter supplement *is* given effect. Therefore, for purposes of [Section 11.2\(a\)\(iv\)](#), Seller's representations in [Sections 3.6, 3.25, 3.29](#) and [3.33](#) (as qualified by the disclosure of the Blocking Patent in the supplement to the Disclosure Letter) are deemed to be accurate as brought down to the closing date, and Seller will have no indemnification obligation under that clause with respect to the Blocking Patent, although Seller would remain liable therefor under [Section 11\(a\)\(i\)](#) because the breach also existed as of the signing date.

Seller has conceded in its bring down certificate that the condition in [Section 7.1\(a\)](#) has not been satisfied and, thus, has effectively eliminated any post-closing indemnification obligations it might otherwise have under [Section 11.2\(a\)\(iv\)](#) with respect to the Blocking Patent (see below), although Seller would remain liable therefor under [Section 11\(a\)\(i\)](#) because the breach also existed as of the signing date. Seller and the Shareholders, however,

could have responsibility under [Section 11.2\(b\)](#) for failure to use their Best Efforts to satisfy the closing conditions.

Scenario 2.6—Material Post-Signing Condition Not Disclosed in Supplement to Disclosure Letter. The following facts are assumed:

- A few days *after* the signing of the Asset Purchase Agreement, the Blocking Patent is discovered by Buyer’s counsel and brought to the attention of Seller.
- Seller does not disclose the Blocking Patent in a supplement to its Disclosure Letter.
- The Blocking Patent is not assigned to Seller or Buyer on or before the scheduled closing date.

1. Can Buyer refuse to consummate the asset purchase (i.e., does Buyer have a walk right)?

Yes. Because a material Blocking Patent that was not disclosed in the original Disclosure Letter and the failure has not been cured on or before the closing date, Seller’s representations in [Sections 3.6, 3.25, 3.29](#) and [3.33](#) are materially inaccurate as brought down to the closing date. Thus, the bring down condition in the second clause of [Section 7.1\(a\)](#) is not satisfied, and Buyer has a walk right. By neglecting to disclose the material Blocking Patent in a Disclosure Letter supplement, Seller has breached its pre-closing notification covenant in [Section 5.5](#); therefore, Buyer may also have a walk right under [Section 7.2\(a\)](#) and may also be able to recover damages from Seller for its breach of the notification covenant.

2. If Buyer proceeds with the asset purchase, will Seller be required to indemnify Buyer against any damages arising from the Blocking Patent?

Yes. Under [Section 11.2\(a\)\(iv\)](#), Seller is required to indemnify Buyer against all damages suffered as a result of any inaccuracy in Seller’s representations as brought down to the closing date. Because Seller’s representations in [Sections 3.6, 3.25, 3.29](#) and [3.33](#) are inaccurate as of the closing date, Seller will be required under [Section 11.2\(a\)\(iv\)](#) to indemnify Buyer with respect to the Blocking Patent.

Because the Shareholder could have cured the problem by assigning the patent to Seller prior to closing so that Seller could in turn assign it to Buyer, the Shareholder may have breached his covenant in [Section 5.7](#) to use his Best Efforts to cause the conditions in [Article 7](#) to be satisfied. If Seller did not use its Best Efforts to cause the Shareholder to assign the patent, Seller also may have breached its covenant in [Section 5.7](#). Seller and both Shareholders may be obligated, jointly and severally, to indemnify Buyer under [Section 11.2\(b\)](#) against any resulting Damages suffered. There is no basket or other materiality qualifier to Buyer’s indemnity rights under [Section 11.2\(b\)](#).

Scenario 2.7—Immaterial Post-Signing Condition Not Disclosed in Supplement to Disclosure Letter. The following facts are assumed:

- A few days *after* the signing of the Asset Purchase Agreement, the Blocking Patent is discovered by Buyer’s counsel and brought to the attention of Seller. The Blocking Patent is not “material”—the affected Assets are neither strategically significant nor particularly valuable, and no claim is made for infringement of the Blocking Patent.
- Seller does not disclose the Blocking Patent in a supplement to its Disclosure Letter.
- The Blocking Patent is not assigned to Seller or Buyer on or before the scheduled closing date.

1. Can Buyer refuse to consummate the asset purchase (i.e., does Buyer have a walk right)?

No. Because the Blocking Patent is not material, the representations in [Sections 3.6, 3.25, 3.29](#) and [3.33](#) are accurate as of the scheduled closing date in all material respects, and the bring down condition in the second clause of [Section 7.1\(a\)](#) is also satisfied. Therefore, Buyer has no walk right and must proceed with the closing.

The failure to disclose the Blocking Patent in a Disclosure Letter supplement is a breach of the pre-closing notification covenant in [Section 5.5](#). However, because the Blocking

Because the Shareholder could have cured the problem by assigning the patent to Seller prior to closing so that Seller could in turn assign it to Buyer, the Shareholder may have breached his covenant in Section 5.7 to use his Best Efforts to cause the conditions in Article 7 to be satisfied. If Seller did not use its Best Efforts to cause the Shareholder to assign the patent, Seller also may have breached its covenant in Section 5.7. Seller and both Shareholders may be obligated, jointly and severally, to indemnify Buyer under Section 11.2(b) against any resulting Damages suffered. There is no basket or other materiality qualifier to Buyer's indemnity rights under Section 11.2(b).

III. THE UNDISCLOSED LIABILITY

Each of the following hypothetical scenarios is based upon a lawsuit brought by a third party against Seller prior to the scheduled closing date challenging Seller's rights to certain Assets. In scenarios 3.1 through 3.4, it is assumed that the lawsuit is brought *before* the Asset Purchase Agreement is signed, whereas in scenarios 3.5 through 3.9, it is assumed that the lawsuit is brought *after* the Asset Purchase Agreement is signed. Various assumptions are also made about whether the lawsuit is "material" and about when the lawsuit is first disclosed to Buyer.

In each scenario, it is assumed that:

- Seller received no threat of litigation before the lawsuit was brought.
- Buyer did not agree to assume any liability in respect of the lawsuit (as a result, the lawsuit would not be an "Assumed Liability" of Buyer under Section 2.4(a), but instead would be a "Retained Liability" of Seller under Section 2.4(b) of the Model Asset Purchase Agreement).
- Buyer is not brought into the lawsuit prior to closing but, thereafter, is brought in on some successor liability theory.
- Except for inaccuracies resulting from the lawsuit, there were no inaccuracies in Seller's representations as of the signing date or as of the scheduled closing date.
- Seller has used its best efforts to settle the lawsuit prior to the scheduled closing date and has otherwise complied fully with its pre-closing covenants in the Asset Purchase Agreement.
- All of the conditions to Buyer's obligation to consummate the asset purchase are satisfied in full as of the scheduled closing date, except to the extent that the lawsuit results in a failure to satisfy the closing condition in Section 7.1(a) of the Asset Purchase Agreement.

Scenario 3.1—Material Pre-Signing Development Disclosed in Original Disclosure Letter. The following facts are assumed:

- A few days *before* the signing of the Asset Purchase Agreement, a material lawsuit is brought against Seller.
- Seller discloses the lawsuit in its Disclosure Letter, which is furnished to Buyer at the time the Asset Purchase Agreement is signed and drafts of which should have been reviewed (with loss contingencies such as the lawsuit investigated) by Buyer as negotiation of the Agreement progressed.
- The lawsuit is not settled and remains pending on the scheduled closing date.

1. Can Buyer refuse to consummate the asset purchase (i.e., does Buyer have a walk right)?

No. Because the lawsuit was disclosed in the Disclosure Letter at the time of the signing of the Asset Purchase Agreement, Seller's "absence of litigation" representation in Section 3.18(a) was accurate as of the signing date and remains accurate as of the scheduled closing date. Thus, the condition in each of the two clauses in Section 7.1(a) is satisfied and Buyer does not have a walk right.

2. Will Seller be required to indemnify Buyer against any damages arising from the lawsuit?

Yes. Because the lawsuit was disclosed in the Disclosure Letter, Seller's absence of litigation representation was accurate as of the signing date, and the representation remains accurate as brought down to the closing date. Thus, neither the Agreement nor Seller's closing certificate contains an inaccurate representation, and Seller will have no indemnification obligation under Section 11.2(a) with respect to the lawsuit.

Seller, however, will be obligated to indemnify against lawsuit-related liabilities under Seller's agreement in Section 11.2(f) to indemnify against Retained Liabilities.

Scenario 3.2—Material Pre-Signing Development Not Disclosed in Original Disclosure Letter But Disclosed Before Closing in Supplement to Disclosure Letter. The following facts are assumed:

- A few days *before* the signing of the Asset Purchase Agreement, a material lawsuit is brought against Seller.
- Seller neglects to disclose the lawsuit in its original Disclosure Letter (which is furnished to Buyer at the time the Asset Purchase Agreement is signed). Seller subsequently discloses the lawsuit in a supplement delivered to Buyer (pursuant to Section 5.5) a few days after the signing of the Agreement.
- The lawsuit is not settled and remains pending on the scheduled closing date.

1. Can Buyer refuse to consummate the asset purchase (i.e., does Buyer have a walk right)?

Yes. Because the lawsuit was not disclosed in Seller's original Disclosure Letter, and because the lawsuit is material, Seller's absence of litigation representation in Section 3.18(a) was materially inaccurate as of the signing date. Thus, the condition in the first clause of Section 7.1(a) is not satisfied, and Buyer has a walk right. (Under Section 7.1(a), no effect is given to the supplement to Seller's Disclosure Letter for purposes of determining the accuracy of Seller's representations.)

Note that, if Buyer elects to exercise its walk right in these circumstances, Buyer may also recover damages from Seller for its breach of the absence of litigation representation as of the signing date (in other words, Buyer may walk and sue).

2. If Buyer proceeds with the asset purchase, will Seller be required to indemnify Buyer against any damages arising from the lawsuit?

Yes. Under Section 11.2(a)(i), Seller is required to indemnify Buyer against all damages suffered as a result of any inaccuracy in Seller's representations. Because Seller's absence of litigation representation was inaccurate as of the signing date, Seller will be required to indemnify Buyer with respect to the lawsuit. (Under Section 11.2(a)(i), no effect is given to the supplement to Seller's Disclosure Letter for purposes of determining the accuracy of Seller's representations.)

Because Buyer did not assume any liability for the lawsuit and it is a Retained Liability of Seller under Section 11.2(f), Buyer would have an independent right to indemnification in respect of the lawsuit under Section 11.2(f).

Note that, under the terms of Sections 11.2(a)(i) and (f), Buyer retains its post-closing indemnification right even though Buyer was advised of the lawsuit before the closing and had the right to refuse to proceed with the asset purchase. In other words, Buyer is expressly permitted to close and sue. It is possible, however, that (notwithstanding the unambiguous language in Sections 11.2(a)(i) and (f)) Seller may attempt to argue that some of the cases discussed in the Commentary to Section 11.1 effectively override Buyer's right to close and sue in this situation.

Claims under Section 11.2(a)(i) are subject to the basket described in Section 11.6. Claims in respect of Retained Liabilities under Section 11.2(f), however, are not subject to that basket or any other materiality qualifier.

Scenario 3.3—Material Pre-Signing Development Not Disclosed in Original Disclosure Letter But “Cured” Before Closing. The following facts are assumed:

- A few days *before* the signing of the Asset Purchase Agreement, a material lawsuit is brought against Seller.
- Seller neglects to disclose the lawsuit in its original Disclosure Letter (which is furnished to Buyer at the time the Asset Purchase Agreement is signed). Seller subsequently discloses the lawsuit in a supplement delivered to Buyer (pursuant to Section 5.5) a few days after the signing of the Agreement.
- Before the closing, Seller settles the lawsuit by making a cash payment to the plaintiff. The settlement payment will be taken into account in calculating the purchase price adjustment under Section 2.8. (Section 5.3 would require Seller to obtain Buyer’s consent prior to entering into the settlement).

1. Can Buyer refuse to consummate the asset purchase (i.e., does Buyer have a walk right)?

Yes. Because the lawsuit was not disclosed in Seller’s original Disclosure Letter, and because the lawsuit is material, Seller’s absence of litigation representation in Section 3.18(a) was materially inaccurate as of the signing date. Thus, the condition in the first clause of Section 7.1(a) is not satisfied, and Buyer could claim a walk right. (Under Section 7.1(a), no effect is given to the supplement to Seller’s Disclosure Letter for purposes of determining the accuracy of Seller’s representation).

Note that, although Seller’s absence of litigation representation is accurate *as of the closing date* due to the settlement of the lawsuit, Buyer nonetheless has a walk right under the Model Asset Purchase Agreement in this situation. Note also that, if Buyer elects to exercise its walk right in these circumstances, Buyer may also seek to recover damages from Seller for its breach of the absence of litigation representation as of the signing date (in other words, Buyer may walk and sue). However, in light of the settlement of the lawsuit before the closing, there may be some question as to whether Buyer has actually suffered any damages as a result of Seller’s initial failure to disclose the lawsuit (see below).

Seller might challenge Buyer’s claim to a walk right on the basis that the lawsuit would be a Retained Liability under Section 2.4(b), for which Seller has a strict indemnification obligation under Section 11.2(f), and that the Section 3.18 representation was not materially incorrect (notwithstanding its wording) because Buyer did not have significant loss exposure.

2. If Buyer proceeds with the asset purchase, will Seller be required to indemnify Buyer with respect to the lawsuit?

No. Under Sections 11.2(a)(i) and (f), Seller is required to indemnify Buyer against all damages suffered as a result of any inaccuracy in Seller’s absence of litigation representation or any Retained Liabilities. This representation was inaccurate as of the signing date. However, because the lawsuit has been settled, and because under Section 2.8 there will be a reduction in the purchase price to reflect the amount of the settlement payment made by Seller, Buyer will not suffer any damages as a result of the lawsuit. Thus, Seller will not be required to make any indemnification payment under Section 11.2(a)(i) with respect to the lawsuit.

Scenario 3.4—Immaterial Pre-Signing Development Not Disclosed in Original Disclosure Letter But Disclosed Before Closing in Supplement to Disclosure Letter. The following facts are assumed:

- A few days *before* the signing of the Asset Purchase Agreement, a lawsuit is brought against Seller. The lawsuit is not “material”—the affected Assets are neither strategically significant nor particularly valuable, and the anticipated liability in the lawsuit is relatively small.
- Seller neglects to disclose the lawsuit in its original Disclosure Letter (which is furnished to Buyer at the time the Agreement is signed). Seller subsequently discloses the

lawsuit in a supplement delivered to Buyer (pursuant to Section 5.5) a few days after the signing of the Agreement.

- The lawsuit is not settled and remains pending on the scheduled closing date.

1. Can Buyer refuse to consummate the asset purchase (i.e., does Buyer have a walk right)?

No. Because the lawsuit is not material, Seller's absence of litigation representation in Section 3.18(a) was accurate as of the signing date in all *material* respects and is likewise accurate as of the closing date in all *material* respects. Thus, the condition in each clause of Section 7.1(a) is satisfied, and Buyer must proceed with the closing.

2. Will Seller be required to indemnify Buyer after the closing against any damages arising from the lawsuit?

Yes. Under Section 11.2(a)(i), Seller is required to indemnify Buyer against all damages suffered as a result of *any* inaccuracy (even an immaterial inaccuracy) in Seller's representations. Because Seller's absence of litigation representation was inaccurate as of the signing date, Seller will be obligated under Section 11.2(a)(i) to indemnify Buyer with respect to the lawsuit. Under Section 11.2(a)(i), no effect is given to the supplement to Seller's Disclosure Letter for purposes of determining the accuracy of Seller's representations.

Further, Seller would be obligated to indemnify against the lawsuit as a Retained Liability under Section 11.2(f). There is no basket or other materiality qualifier to Buyer's rights under Section 11.2(f).

Scenario 3.5—Material Post-Signing Development Disclosed Before Closing in Supplement to Disclosure Letter. The following facts are assumed:

- A few days *after* the signing of the Asset Purchase Agreement, a material lawsuit is brought against Seller.
- Seller discloses the lawsuit in a Disclosure Letter supplement delivered to Buyer (pursuant to Section 5.5) promptly after the commencement of the lawsuit.
- The lawsuit is not settled and remains pending on the scheduled closing date.
- In the bring down certificate delivered by Seller to Buyer on the scheduled closing date (in accordance with Section 2.7(a)(ix)), Seller expressly states that the commencement of the material lawsuit has caused the condition in Section 7.1(a) not to be satisfied. Note that some counsel might advise Seller not to make that statement because the lawsuit, although material to Seller, would not be material to Buyer because it would be a Retained Liability for which Seller has a strict indemnification obligation under Section 11.2(f).

1. Can Buyer refuse to consummate the asset purchase (i.e., does Buyer have a walk right)?

Yes. Because a material lawsuit against Seller that was not disclosed in the original Disclosure Letter is pending against on the scheduled closing date, Seller's absence of litigation representation in Section 3.18(a) is inaccurate as brought down to the closing date. Thus, the bring down condition in the second clause of Section 7.1(a) is not satisfied, and Buyer has a walk right. (Under Section 7.1(a), no effect is given to the supplement to Seller's Disclosure Letter for purposes of determining the accuracy of Seller's representations.) Seller has conceded in its bring down certificate that the condition in Section 7.1(a) has not been satisfied and, thus, has effectively eliminated any post-closing indemnification obligations it might otherwise have under Section 11.2(a) with respect to the lawsuit (see below). Seller, however, would have responsibility under Section 11.2(f).

2. If Buyer proceeds with the asset purchase, will Seller be required to indemnify Buyer against any damages arising from the lawsuit?

No. Under Section 11.2(a)(i), Seller is required to indemnify Buyer against any damages resulting from inaccuracies in Seller's representations as of the signing date. Seller's absence

of litigation representation in Section 3.18(a) was accurate as of the signing date because the lawsuit was not pending on the signing date. Thus, Seller will have no indemnification obligation under Section 11.2(a)(i) with respect to the lawsuit.

Under Section 11.2(a)(iv), Seller is required to indemnify Buyer against any damages resulting from inaccuracies in Seller's representations as brought down to the closing date. However, Section 11.2(a)(iv) expressly provides that, for purposes of determining Seller's indemnification obligations thereunder, any matters disclosed in a Disclosure Letter supplement *are* to be taken into account if Seller's bring down certificate (delivered pursuant to Section 2.7(a)(ix)) specifically identifies the disclosed matters "as having caused the condition specified in Section 7.1 not to be satisfied." Because the bring down certificate expressly states that the lawsuit has caused the condition in Section 7.1(a) not to be satisfied, the disclosure of the lawsuit in the Disclosure Letter supplement *is* given effect. Therefore, for purposes of Section 11.2(a)(iv), Seller's absence of litigation representation (as qualified by the disclosure of the lawsuit in the supplement to the Disclosure Letter) is deemed to be accurate as brought down to the closing date, and Seller will have no indemnification obligation under that clause with respect to the lawsuit.

Nevertheless, Seller will be obligated to indemnify in respect of the lawsuit under Section 11.2(f) because it was a Retained Liability. Seller also would be obligated to indemnify for it under Section 11.2(e) if it were disclosed in "Part ___ of the Disclosure Letter," and Buyer may require such disclosure and indemnification in return for agreeing to close instead of exercising its walk right.

Scenario 3.6—Material Post-Signing Development "Cured" Before Closing. The following facts are assumed:

- A few days *after* the signing of the Asset Purchase Agreement, a material lawsuit is brought against Seller.
- Seller discloses the lawsuit in a Disclosure Letter supplement delivered to Buyer (pursuant to Section 5.5) promptly after the commencement of the lawsuit.
- Before the closing, Seller settles the lawsuit by making a cash payment to the plaintiff. The settlement payment will be taken into account in calculating the purchase price adjustment under Section 2.8.

1. Can Buyer refuse to consummate the asset purchase (i.e., does Buyer have a walk right)?

No. Because the lawsuit was not pending when the Agreement was signed, Seller's absence of litigation representation in Section 3.18(a) was accurate as of the signing date. Thus, the condition in the first clause of Section 7.1(a) is satisfied. Likewise, because the lawsuit is not pending on the closing date, the absence of litigation representation is accurate as brought down to the closing date. Thus, the bring down condition in the second clause of Section 7.1(a) is also satisfied. Therefore, Buyer has no walk right and must proceed with the closing. (If Seller had neglected to disclose the lawsuit on a timely basis in a Disclosure Letter supplement, it would have breached its pre-closing notification covenant in Section 5.5, and Buyer arguably would have a walk right under Section 7.2(a) as well as a right to recover damages from Seller for its breach of the notification covenant.) Likewise, if Seller settled the litigation without Buyer's consent, Seller would have breached its covenant in Section 5.3, for which Buyer would have similar remedies.

2. Will Seller be required to indemnify Buyer after the closing against any damages arising from the lawsuit?

No. Because the lawsuit was not pending when the Agreement was signed, Seller's absence of litigation representation was accurate as of the signing date. Likewise, because the lawsuit is not pending on the closing date, the absence of litigation representation is accurate as brought down to the closing date. Thus, Seller will have no indemnification obligation under Sections 11.2(a) with respect to the lawsuit. Similarly, because Buyer would not be

subjected to any liability for a Retained Liability in respect of the lawsuit, Buyer would not have an indemnification claim under Section 11.2(f), although it could have claims with respect to any breaches of Seller's covenants in Section 5.3 and 5.5 under Section 11.2(b).

Scenario 3.7—Material Post-Signing Development Not Disclosed in Supplement to Disclosure Letter. The following facts are assumed:

- A few days *after* the signing of the Asset Purchase Agreement, a material lawsuit is brought against Seller.
- Seller neglects to disclose the lawsuit in a supplement to its Disclosure Letter.
- The lawsuit is not settled and remains pending on the scheduled closing date.

1. Can Buyer refuse to consummate the asset purchase (i.e., does Buyer have a walk right)?

Yes. Because a material lawsuit that was not disclosed in the original Disclosure Letter is pending on the closing date, Seller's absence of litigation representation in Section 3.18(a) is materially inaccurate as brought down to the closing date. Thus, the bring down condition in the second clause of Section 7.1(a) is not satisfied, and Buyer has a walk right. By neglecting to disclose the material lawsuit in a Disclosure Letter supplement, Seller has breached its pre-closing notification covenant in Section 5.5; therefore, Buyer may also have a walk right under Section 7.2(a) and may also be able to recover damages from Seller for its breach of the notification covenant.

2. If Buyer proceeds with the asset purchase, will Seller be required to indemnify Buyer against any damages arising from the lawsuit?

Yes. Under Section 11.2(a)(iv), Seller is required to indemnify Buyer against all damages suffered as a result of any inaccuracy in Seller's representations as brought down to the closing date. Because Seller's absence of litigation representation is inaccurate as of the closing date, Seller will be required under Section 11.2(a)(iv) to indemnify Buyer with respect to the lawsuit. Seller would also be obligated to indemnify for the lawsuit as a Retained Liability under Section 11.2(f). However, if Buyer independently learned of the lawsuit before the closing date, then (notwithstanding the unambiguous language in Sections 11.2(a) and (f)) Seller may attempt to argue that some of the cases discussed in the Commentary to Section 11.1 effectively override Buyer's right to close and sue.

Scenario 3.8—Immaterial Post-Signing Development Not Disclosed in Supplement to Disclosure Letter. The following facts are assumed:

- A few days *after* the signing of the Asset Purchase Agreement, a lawsuit is brought against Seller. The lawsuit is not "material"—the affected Assets are neither strategically significant nor particularly valuable, and the anticipated liability in the lawsuit is relatively small.
- Seller neglects to disclose the lawsuit in a supplement to its Disclosure Letter.
- The lawsuit is not settled and remains pending on the scheduled closing date.

1. Can Buyer refuse to consummate the asset purchase (i.e., does Buyer have a walk right)?

No. Because the lawsuit was not pending when the Agreement was signed, Seller's absence of litigation representation in Section 3.18(a) was accurate as of the signing date. Thus, the condition in the first clause of Section 7.1(a) is satisfied. Because the lawsuit is not material, the absence of litigation representation is accurate as of the scheduled closing date in all material respects, and the bring down condition in the second clause of Section 7.1(a) is also satisfied. Therefore, Buyer has no walk right and must proceed with the closing.

Seller's failure to disclose the lawsuit in a Disclosure Letter supplement is a breach of their pre-closing notification covenant in Section 5.5. However, because the lawsuit is not

material, this covenant has been complied with in all material respects. Therefore, Buyer has no walk right under Section 7.2(a).

2. Will Seller be required to indemnify Buyer after the closing against any damages arising from the lawsuit?

Yes. Under Section 11.2(a)(iv), Seller is required to indemnify Buyer against all damages suffered as a result of *any* inaccuracy (even an immaterial inaccuracy) in Seller's representations as brought down to the closing date. Because Seller's absence of litigation representation in the closing certificate is inaccurate as of the closing date, Seller will be required under Section 11.2(a)(iv) to indemnify Buyer with respect to the lawsuit. Seller would also be obligated to indemnify for the lawsuit as a Retained Liability under Section 11.2(f). However, if Buyer independently learned of the lawsuit before the closing date, then (notwithstanding the unambiguous language in Sections 11.2(a)(iv) and (f)) Seller may attempt to argue that the cases discussed in the Commentary to Section 11.1 effectively override Buyer's right to close and sue.

Claims under Section 11.2(a)(iv) are subject to the basket provided under Section 11.6. There is no basket or other materiality qualifier applicable to claims by Buyer in respect to Retained Liability claims under Section 11.2(f).

Scenario 3.9—Immaterial Post-Signing Development Disclosed Before Closing in Supplement to Disclosure Letter. The following facts are assumed:

- A few days *after* the signing of the Asset Purchase Agreement, a lawsuit is brought against Seller. The lawsuit is not "material"—the affected Assets are neither strategically significant nor particularly valuable, and the anticipated liability in the lawsuit is relatively small.
- Seller discloses the lawsuit in a Disclosure Letter supplement delivered to Buyer (pursuant to Section 5.5) promptly after the commencement of the lawsuit.
- The lawsuit is not settled and remains pending on the scheduled closing date.
- Because the lawsuit is not material, Seller does *not* include a statement in its bring down certificate to the effect that the condition specified in Section 7.1 has not been satisfied.

1. Can Buyer refuse to consummate the asset purchase (i.e., does Buyer have a walk right)?

No. Because the lawsuit was not pending when the Agreement was signed, Seller's absence of litigation representation in Section 3.18(a) was accurate as of the signing date. Thus, the condition in the first clause of Section 7.1(a) is satisfied. Because the lawsuit is not material, the absence of litigation representation is accurate as of the closing date in all material respects, and the bring down condition in the second clause of Section 7.1(a) is also satisfied. Therefore, Buyer has no walk right and must proceed with the closing.

2. Will Seller be required to indemnify Buyer after the closing against any damages arising from the lawsuit?

Yes. Under Section 11.2(a)(iv), Seller is required to indemnify Buyer against any damages resulting from *any* inaccuracy (even an immaterial inaccuracy) in Seller's representations as brought down to the closing date. Section 11.2(a)(iv) provides that the determination of the accuracy of Seller's representations as of the closing date is to be made *without giving effect to any supplement to the Disclosure Letter*, unless the bring down certificate delivered pursuant to Section 2.7(a)(ix) expressly states that the matters disclosed in a supplement have caused the condition specified in Section 7.1 not to be satisfied. Because the bring down certificate does not state that the lawsuit has caused the condition in Section 7.1 not to be satisfied, the disclosure of the lawsuit in the Disclosure Letter supplement is not given effect. Therefore, for purposes of Section 11.2(a), the absence of litigation representation is deemed to be inaccurate as brought down to the closing date, and Seller will be required to indemnify

Buyer with respect to the lawsuit. In addition, the lawsuit will remain a Retained Liability for which Seller is obligated to indemnify under Section 11.2(f).

Seller, however, will be obligated to indemnify against lawsuit-related liabilities under Seller's agreement in Section 11.2(f) to indemnify against Retained Liabilities.

Claims under Section 11.2(a)(iv) are subject to the basket provided under Section 11.6. There is no basket or materiality qualifier applicable to claims by Buyer in respect to Retained Liability claims under Section 11.2(f).