Figure 1 INTERATIVE & EVERCHANGING

Introductory Remarks

Audience Focus.

This CLE presentation addresses three likely audiences. One group is "New Lawyers" as part of their post law school requirements who may not have had much direct experience with transactions involving mergers and acquisitions, or the myriad of lawsuits that impact mergers and acquisitions. A second group are company and corporate attorneys, both in house and outside counsel, who may or may not have direct responsibilities for mergers and acquisitions. The final group are the attorneys who often do not get involved in the traditional M&A field that is largely serviced by specialized large law firms, the mergers and acquisition industry that consists of consultants, public relations, financial planning servicing the transactions and anti-trust litigation and which is deeply studied by government and academics interested in learning from the positive and negative effects of mergers and acquisitions.

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Materials.

While the materials are designed to be more inclusive of details the time allotted allow to be covered fully, we will be focused on the Power Point presentation with the written materials following along and going more deeply into the sources for further study when your time or circumstances enable and demand that attention.

Attorneys on all sides impacted.

Lastly, the exposure to the art of mergers and acquisitions has significance for both, the transactional and litigation attorney, even if they start by merely creating a company or non-profit enterprise in anticipation that "start-ups of all kinds", and existing companies that see opportunities, need be aware of, to journey down and follow the prudent pathways, that real world experiences create and to help guide attorneys in the many roles that the clients of today demand.

Observations

"**M&A contracts are shaped by regulation of M&A, by corporate law, finance, accounting and the business environment, and by fundamental economics of corporations, especially trade-offs between control and liquidity that influence patterns of ownership**."

John C. Coates IV,
The John F. Cogan Professor of Law and Economics,
Harvard Law School.

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We propose that firms acquiring other organizations experience what we call "fuzzy acquisition boundaries" due to legitimate strategic deception, legal disputation power and low minority stakeholder salience. Fuzzy acquisition boundaries are legally nebulous arrangements (among two or more organizations) primarily based on agreements that control the resources, products, services, and technologies of participating firms. While members of an acquired firm (sellers) may not know what will happen to them, they do know that the organization will change. Some acquired firms are shuttered completely (Santos & Eisenhardt, 2009) while others simply experience unwelcome practices and strategies (Jemison & Sitkin, 1986). The potential to "rip out their technology" (Graebner, 2009) exists, however, thereby de-motivating seller stakeholders about plans. Acquired firms experience a lack of stable boundaries and their stakeholders have little knowledge about how or if firms will integrate resources. Thus, fuzzy acquisition boundaries fulfill the interests of buyers because as Graebner (2009, p. 446) states, "in the course of the acquisition, sellers lose power while buyers gain power."

Terry R. Adler, Ph.D., Associate Professor, Management Department, College of Business, New Mexico State University & Thomas G. Pittz, Ph.D., Assistant Professor, Management Department, College of Business, East Carolina University; Fuzzy Acquisition Boundaries: A Success Model of Regulatory Stakeholder Interests.

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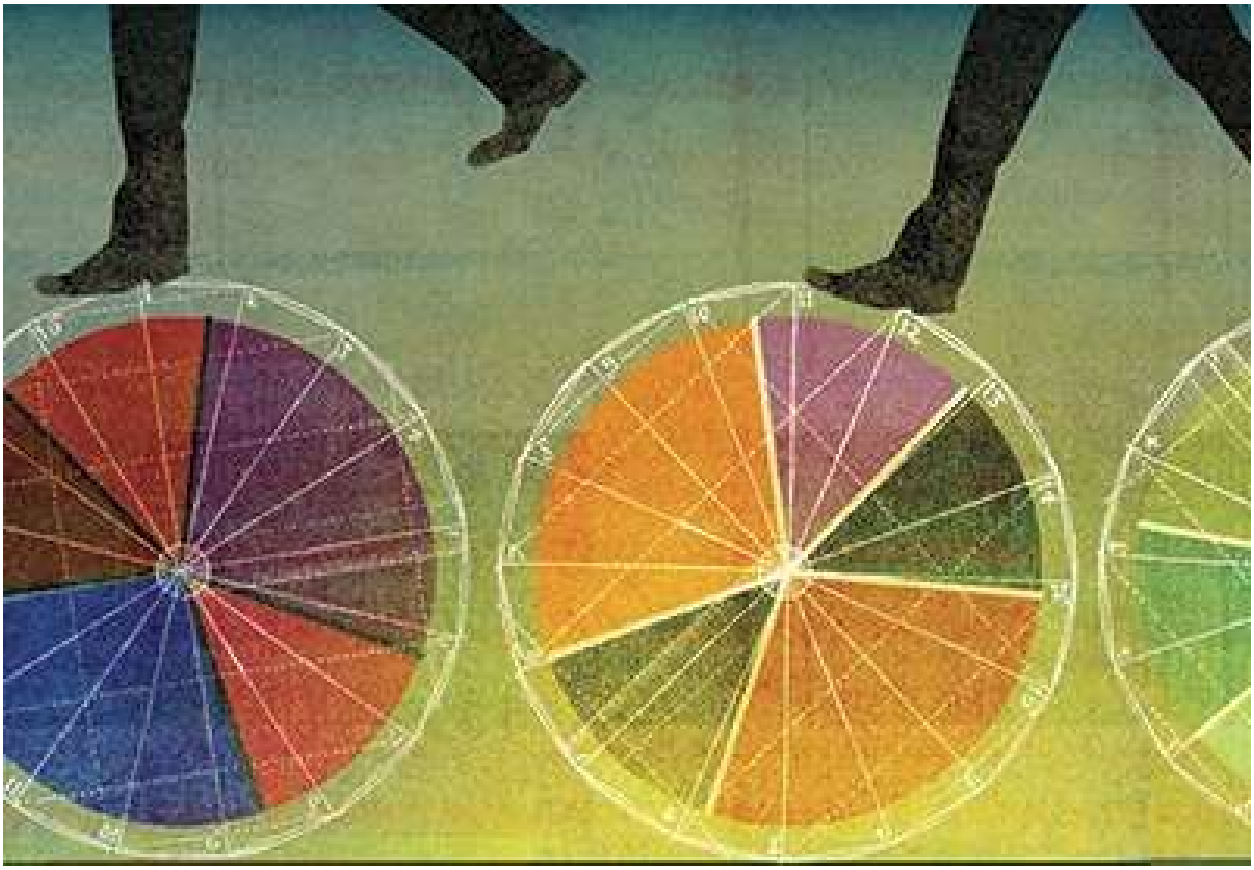

TOPICS

I. MERGERS & ACQUSITIONS

A. Generally

i. Public Companies
ii. Private Companies
iii. Hybrid Public, Private & Non-Profit
iv. State-0wned
v. Multi-Jurisdictional
vi. Internet Borderless?

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B. Elements & Definitions

C. F.A.T. Considerations for Attorneys

i. Financial Standards & Viewpoint

ii. Accounting Standards & Viewpoints

iii. Taxation Matters & Interconnectedness

II. Why Mergers? The Scientific Business Management Theories & Discourse

III. Transactional Considerations & Direct & Indirect Parties

IV. Jurisdictional & Regulatory Oversight plus issue anticipation

V. Cases

VI. Termination

VII. Upended Mergers

i. Global, political, business, antitrust, competitors, financing etc. a merger:

a. Laches (delay in bringing suit).

b. Plaintiff is estopped.

c. Plaintiff has unclean hands (plaintiff has committed contract breaches or violations of a material nature

d. The mergers' purpose is against public policy.

VIII. Conclusions

IX. Appendix Materials

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Figure 2 Global business and interconnectedness of commerce

As the business world tends to work the law and the actual ways in which synergies re realized manifest at speeds in competition with legal rules. Many people do not understand that state laws control and that once interstate commerce is affected the federal rules come into play. As a result, business has its own geography and the "legal" considerations often appear as unnecessary obstacles rather than thoughtful and required realities for success. As such the company in a neighboring state likely already has cross border relationships which may be governed by different law and unknowingly the businesspeople do not wait for "Legal" to clear

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the transactions. However, in mergers and acquisitions these can have material impacts on the success or failure of the combined business. A current example that illustrates this is the cannabis industry, its markets, federal and state drug classifications and more demonstrate how numerous jurisdictions that effect a merger create business and legal problems. Even the sourcing and sale of its products can be affected by the global and black-market upending assumptions of businesspeople and the effects of mergers and acquisitions. This has significant impacts that need be evaluated. Attorneys who are not licensed in jurisdictions can easily run foul of these realities even well intentioned as they are. Courts however tend to ignore the fact that the cost to have an attorney in every possible jurisdiction in the US alone means that businesses will likely not focus on the specifics and ASS-U-ME that the counsel they consult has no boundary.

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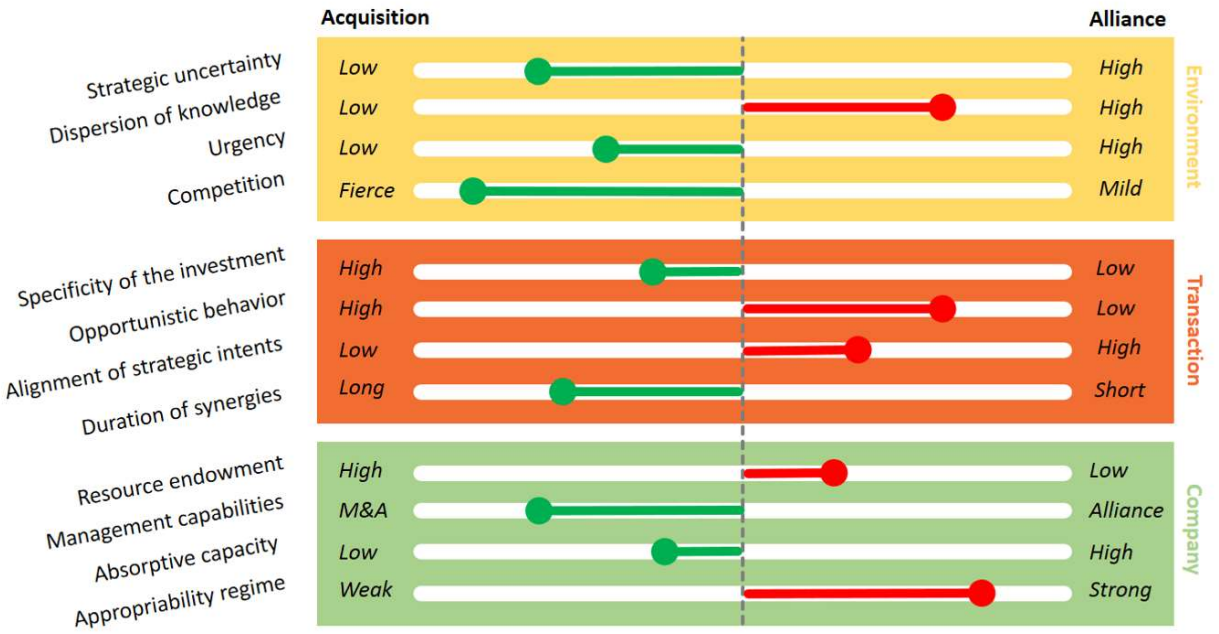

Figure 3 Acquisition or Alliance

As John T. Coates of Harvard law School observes and sees it,

[t]he core goal of corporate law and governance is to improve outcomes for participants in businesses organized as corporations, and for society, relative to what could be achieved through contract, property and other, less "regulatory" bodies of law. One way that corporate law and governance achieves that goal is to regulate significant transactions – particularly mergers, acquisitions, and restructuring, with an eye towards the two core values served by fiduciary duty doctrines: to ensure care and loyalty on the part of corporate decision-makers. This chapter of the Oxford Handbook on Corporate Law and Governance considers ways in

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which M&A – which will be the chapter's short-hand for the general class of significant corporate transactions, including restructuring – is specially ***regulated, both within the formal body of corporate law and as that law interacts with other bodies of law, particularly securities (including listing standards), antitrust, industry-specific regulation, and regulations of cross-border transactions.*** *The chapter proceeds as follows. First, the concepts of "M&A" and "restructuring" are defined, and they are distinguished from other corporate transactions or activities. Second, major types of M&A transactions are briefly reviewed, using recent examples to illustrate the choices M&A participants have for effecting an M&A transaction. Third, the core goals of regulation are sketched: 2 1. To clarify authority and control over M&A by corporate decision-makers; 2. To reduce transaction costs and overcome collective action problems; 3. To constrain and improve outcomes of conflict-of-interest transactions; 4. To protect dispersed owners of public companies; 5. To deter or mitigate looting, asset-stripping and excessive M&A-related leverage; and 6. To cope with the side effects of other regulations.* ***** *The emphasis here is on how* ***corporate law and governance go beyond background contract, tort and property law in the M&A context. Important practical regularities in how those bodies of law are deployed in M&A – for example, contract clauses allocating risk, managing disputes, or redressing fraud – are neglected in this chapter, even though they are as important as the topics covered here****. For more on those topics, see John C. Coates IV, Managing Disputes Through Contract: Evidence from M&A, 2 Harv. Bus. Rev. 301 (2012); Evidence-based M&A: Less Can Be More When Allocating Risk in Deal Contracts, 27 Journal*

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of International Banking, Finance and Law 708 (2012); and Contracting to Lie: A Discussion of Abry Partners v. F & W Acquisition (Del.Ch. 2006), Legalworks 22nd Annual Mergers & Acquisitions Institute (May 17, 2006), available at http://bit.ly/Ut7dum (last visited June 2, 2014). Also not addressed are insolvency and bankruptcy laws, which often have important effects on restructuring transactions, and M&A conducted by insolvent companies. Electronic copy available at: http://ssrn.com/abstract=2463251 2

In addition to these corporate law or governance related goals, ***M&A transactions face special treatment under other bodies of law (antitrust, industry-based regulation, regulation of foreign ownership of business, and tax) that sometimes interact with corporate law and governance, and the goals of these laws as applied to M&A are also briefly reviewed.*** *Fourth, the modes of regulation are summarized, dividing laws or regulations into those that constrain M&A transactions and those that facilitate them. Fifth and finally, empirical research is summarized to present the different types of transactions that are actually chosen and (where available) what effects the laws that apply to them have in the* ***world's two largest M&A markets (the US and the UK)*** *and (as a contrasting example, and more selectively, given data limitations) in a developing nation (India), which now accounts for ~4% of global M&A. Throughout, the chapter notes similarities and differences of the choices and modes of regulation across transaction types and countries. The chapter concludes with more general observations about what these variations in types and modes imply. Some differences, for example, seem to reflect long-standing differences in deep structural features of the markets (such as ownership structure). But*

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other differences seem to reflect the way that (as in chaotic systems) seemingly small differences in starting conditions can ramify and persist in the face of otherwise generally similar conditions and strong market pressures. Minor variations in similar laws with similar goals in similar legal systems, in other words, can have real effects on the amount and nature of economic activity.

I. ***Terminology and scope: what are M&A and restructuring transactions? The concepts "mergers and acquisitions" (M&A) and "restructuring" are primarily used as business terms, not as legal terms of art. They are not sharply defined, instead referring to fuzzy sets of similar transactions. As commonly understood by practitioners and used in this chapter, the core of M&A is a deliberate transfer of control and ownership of a business organized in one or more corporations.***

"Restructuring" is a deliberate, significant and unusual alteration in the organization and operations of a business, commonly in times of financial or operational distress, typically accompanied by changes in ownership or finance, as when a company merges two divisions, or sells off a business unit. M&A and restructuring commonly occur together, and can bleed into one another, as well as other, unusual but less dramatic business decisions: bulk sales of inventory, organic growth through advertising campaigns, office closures, layoffs, and so on. M&A differs from those events, and from restructuring, in that M&A typically refers to the transfer of control of a business as an entirety, even if the buyer may consequently choose to restructure the target or itself.

Restructuring differs from ordinary business events in that it is more significant,

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disruptive of prior operations and strategy, and not part of ongoing or routine business 3 Throughout, the chapter refers to "corporations" as a stand-in for the various types of corporate entities, including partnerships. *activity.*

M&A and restructuring are commonly accompanied by changes or transactions in capital (borrowing, buybacks, stock sales, etc.), either as part of the transactions or in parallel, but differ in that they change fundamental business operations and not purely finance. M&A and restructuring are the most important transactions an incorporated business can undertake, rivaled only by initial organization or liquidation. *The combination of change on multiple dimensions with deliberation and importance gives these transactions their characteristic drama and complexity. Their importance and complexity also makes them challenging for corporate law and governance.* ***Characteristically, M&A transactions involve a purchaser or buyer and a seller. The business being transferred is commonly called the "target," which may be separately incorporated, or may consist of an operating unit or division – a collection of assets, employees, relationships, etc. – owned along with other businesses by a single entity****. In some M&A transactions, however, there is no clear purchaser or seller – two companies combine their assets in what is commonly called a "merger of equals."*

II. What are the major types of M&A transactions? M&A transactions fall into a variety of types. A standard typology focuses on the legal nature of the transaction, dividing ***M&A into asset purchases, stock purchases, and mergers (or schemes of arrangement).*** *The most*

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primitive M&A transaction consists simply of the ***purchase of all of the assets used in (and so control over) a business. Where the target sells all of its assets, it typically then liquidates or otherwise distributes the price paid to its owners.*** *(Something must also be done about the target's liabilities, of course; the buyer may assume them, or they may be paid in the target's liquidation, or they may be maintained in force if the target retains the price paid for its assets, or some combination.) In May 2007, for example, iStar Financial purchased Freemont Investment's commercial real estate mortgage lending business of, and the parties structured their deal as a purchase of assets for $1.9 billion in cash, with liabilities of the target divided between the buyer and seller.*

Where target assets are extensive, complex, or hard to specify, or their transfer is subject to regulatory requirements, or contract consents – think of the purchase of the individual assets of a company such as Barclays or Citigroup – asset purchases can be cumbersome, time consuming and lengthy.

The corporate form creates a simple, and often vastly simpler, alternative: a buyer can purchase all of the stock (and thus control) of the corporation that owns a business, rather than its assets. AT&T's attempted acquisition of T-Mobile from Deutsche Telekom in 2011 was structured as a stock purchase.6 In India, stock purchases represent the dominant type of M&A transaction, followed by asset purchases, because ownership is typically concentrated in the hands of a single or small number of related shareholders, even when a target company is listed. In the five-year period ending 2008, for example, the average stake transferred in a domestic Indian M&A deal

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was only 53%, and in cross-border deals, involving a foreign bidder, only 16% of deals involved a 100% acquisition – a feature of the Indian M&A market partly explained by India's extensive regulation of foreign ownership of Indian companies, discussed more below.

Examples of partial in-bound acquisitions include Vodafone's acquisition of 67% of Hutchison and Vedanta's acquisition of 59% of Cairn India. ***When a target corporation has more than a small number of shareholders and the goal of the buyer is to obtain 100% ownership, stock purchases begin to increase transaction costs, making a simpler method of purchasing ownership more attractive.***

In the US, this is accomplished through the use of statutorily authorized mergers. Other statutory mechanisms exist in the US – consolidations, mandatory share exchanges, etc. – but mergers are the most straightforward and by operation of law result in the transfer of assets of one corporation to another, without the need to specify or purchase individual assets, and through which all owners have their stock converted into an agreed-upon form of "currency" or deal consideration (cash, stock of the buyer, etc.).

Commonly, it is desirable for purchasers to create new subsidiary corporations to carry out an acquisition. If done by merger, the resulting "triangle" of companies (parent/buyer, acquisition subsidiary, and target company) are described as having engaged in a ***"triangular" merger (target into subsidiary being called "forward" and the reverse being called "reverse").*** *AT&T's May 2014 agreement to buy DirecTV is structured as a forward triangular merger; Comcast's February 2014 agreement to buy Time Warner Cable is structured as a reverse*

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triangular merger.8 In the UK and India, a similar result can be obtained through what is termed a "scheme of arrangement." Vodafone's April 2012 offer for Cable & Wireless was effected as a scheme of arrangement; an example from India is the combination of Centurion Bank with HDFC Bank in 2008. More commonly in the UK (and to a lesser extent in the US), a purchaser can achieve a similar result by making a public "bid" (or "tender offer") for the target's stock – that is, to use the tools of mass communication to offer to buy stock of multiple shares simultaneously, at a set price with a specified currency. This enables the stock purchase to occur more cheaply than could be done through individual shareholder-by-shareholder purchases. Kraft's January 2010 acquisition for Cadbury was structured as a bid.

In a bid or tender offer, some shareholders may not tender, either because they (sincerely or strategically) choose to "hold out" for a higher price, or because they may not be aware of the offer (despite the bidder's best efforts at publicity) or even that they own the relevant stock (suppose the shareholder has a diversified portfolio and is traveling or busy and has failed to delegate authority over her stock dealings to a responsible agent). In that case, some statutorily authorized transaction – a "freeze out" or "squeeze out," as they are often called – amounting economically to the equivalent of a call option on the stock may be necessary to convey 100% ownership of the target (and its businesses). *The transaction thus consists of two formal steps – bid plus squeeze-out – that produce the same result as a reverse triangular merger or scheme of arrangement.*

Another step that might precede or fall between those steps is an initial stock purchase by

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the buyer from the target, or from selling shareholders of the target. Freeze-outs also sometimes occur outside the context of an arm's-length acquisition, as when a controlling shareholder or parent company freezes-out a minority stake in a controlled public subsidiary, generally pursuant to a single-step merger.

The freeze-out of public investors in Levi-Strauss in 1996 by the Haas family is an example.

In addition to these basic types of M&A transactions, there are other types, less common but not uncommon. ***In a "spin-off," ownership interests in one business are distributed to shareholders of a company that retains other businesses, resulting in a transfer of effective control to a newly constituted board and management of the "spinco," and transfer of ownership to the shareholders of the spinning corporation – followed typically by a divergence over time in the ownership of the two companies. Alternatively, a company can place one business in a corporation and sell its stock to the public for cash. Or these can be combined, with an initial "carve-out" followed by a spin-off. More complexity is possible and not uncommon. A new company can be created, along with two subsidiaries, and each of two separate companies can merge with each subsidiary (a "top-hat" or "double dummy"*** *11 http://bit.ly/1klM36a (last visited June 8, 2014). 12 Id. ("Kraft Foods is today commencing the procedure under Chapter 3 of Part 28 of the 2006 Act to acquire compulsorily all of the outstanding Cadbury Shares ... which it does not already hold or has not already acquired contracted to acquire or in respect of which it has not already received valid acceptances");*

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http://1.usa.gov/1nwPtYF (Amgen tender offer document dated September 3, 2013 describing agreement with target Onyx Pharmaceuticals, Inc. pursuant to which Amgen would acquire 50% of Onyx's shares in the tender offer, followed by a freeze-out merger to acquire the remaining shares). E.g., http://1.usa.gov/1pjcRfi (Form 8-K filed by PepsiCo. announcing freeze-out mergers between it and two controlled public subsidiaries) (last visited June 9, 2014). 14 http://1.usa.gov/SkxYiM (May 30, 2104) (SEC filing describing Levi-Strauss transaction). 6 structure).

It is possible to combine three separate businesses at once in a new single enterprise, through a combination of the above simple legal types, or to transfer control and ownership of one company followed immediately by a further resale, spin-off or carve-out (or both) of one of that company's businesses. Larger businesses are not typically organized as single companies, but as holding companies with multiple subsidiaries in multiple layers. (Morgan Stanley has ~2,800 subsidiaries, for example, and is not the most complex financial institution in the world.) ***As a result, it is common for the buyer in an M&A transaction to want – after the initial "main" transaction – to want to move pieces of the target's business (often in multiple subsidiaries) into multiple subsidiaries of the purchaser, so as to achieve economies, avoid or reduce the costs of regulation, or for other reasons***.

As a result, the overall M&A transaction may take many steps. ***In Bank of America's acquisition of Countrywide, it used an initial forward triangular merger, followed by at least three sets of major stock or asset purchases at the subsidiary level, taking place over more***

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than a year.

M&A transactions also ***use a variety of types of "currencies" or forms of consideration. Cash is common, as is stock of the buyer. Buyers can also "pay" the target's owners with their own debt, i.e., promise to pay cash later – something commonly referred to as "seller financing," or by exchanging assets for assets, or by assuming debt of the target or the seller. Forms of currency can be mixed, as in a one-step fixed blend (e.g., 50% cash, 50% stock), or by using all cash in one step, followed by all stock in a second step, or by offering target shareholders a choice, perhaps constrained by specified limits. If non-cash is used and the transaction involves delay between the moment the parties agree upon a price and the completion of the transaction, the value of the non-cash currency can fluctuate or can be fixed by contract. Deal currency is a separate choice from the legal form of the transaction – so asset purchases can be for cash or stock, as can stock purchases, mergers, and bids.***

A final way to break down M&A transactions by type is by the nature of the parties or financing for the deal. Targets and buyers alike can have a single or small set of shareholders – "private" companies – or dispersed owners with stock listed on an exchange – "public.

In the acquisition of NYSE Euronext by Intercontinental Exchange in 2013, such a structure was provided for as an alternative to the initial structure, to be used if certain conditions were not met. http://1.usa.gov/1pESZjA (last visited May 30, 2014). DAFNA AVRAHAM, PATRICIA SELVAGGI, AND JAMES VICKERY, FEDERAL RESERVE BANK OF NEW YORK, A STRUCTURAL VIEW OF U.S. BANK HOLDING COMPANIES (2012),

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available at http://nyfed.org/1jk9VHJ (last visited June 11, 2014). MBIA Ins. Corp. v. Countrywide Home Loans, Inc., et al., 936 N.Y.S.2d 513 (N.Y. Sup. Ct. 2012). Readers should be aware that the author was a testifying witness on behalf of MBIA in the MBIA case. E.g. http://1.usa.gov/1pjcRfi (PepsiCo. freeze-out merger agreements offering controlled public subsidiary shareholders choice of stock or cash subject to aggregate limits); see Wachtell, Lipton, Rosen & Katz, Takeover Law and Practice, 1-156, 77-81 (Mar. 2014), available at http://bit.ly/1u4P8wY (last visited June 11, 2014) (discussing mixed consideration alternatives). 7 companies.

Buyers can have existing businesses – "strategic" buyers – or may be newly formed solely to carry out the transaction, typically raising the price of the deal by issuing equity to a "sponsor" (such as a private equity fund) and debt to banks or investors in the leveraged loan market, sometimes combined with sales of bonds or preferred stock – "financial" buyers. Acquisitions by financial buyers are commonly called "buyouts," and where newly issued debt is used to generate the currency used in the deal, the buyouts are called "leveraged buyouts" or LBOs. Where the seller is also a private equity fund, the deal is commonly referred to as a "secondary buyout"; where the seller is a company with other businesses, a buyout of one its divisions or subsidiaries is commonly referred to as a "divisional buyout."

A final observation about deal types: many economically identical (or highly similar) M&A transactions can be accomplished through more than one combination of legal

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components. ***One-step mergers are similar to tender offers followed by freeze-outs. A cash bid can achieve much the same effect as a stock-for-stock merger coupled with a buyback of shares. A leveraged buyout is similar to a buyout funded with cash on hand, followed by new borrowings to replace the cash. A purchase of all assets plus target liquidation can produce economically equivalent results as a merger.*** *And so on. This fact can make it hard to regulate M&A transaction effectively through simple, clear rules. Coupled with differences in legal treatment of different forms of M&A transaction, the economic similarity of different transaction forms can also make it hard for conventional doctrinal analysis to rationalize fully, or even to identify adequately the goals served by, every feature of M&A law and regulation.*

http://nrs.harvard.edu/urn-3:HUL.InstRepos:20213003

II. Why Mergers? The Scientific Business Management Theories & Discourse.

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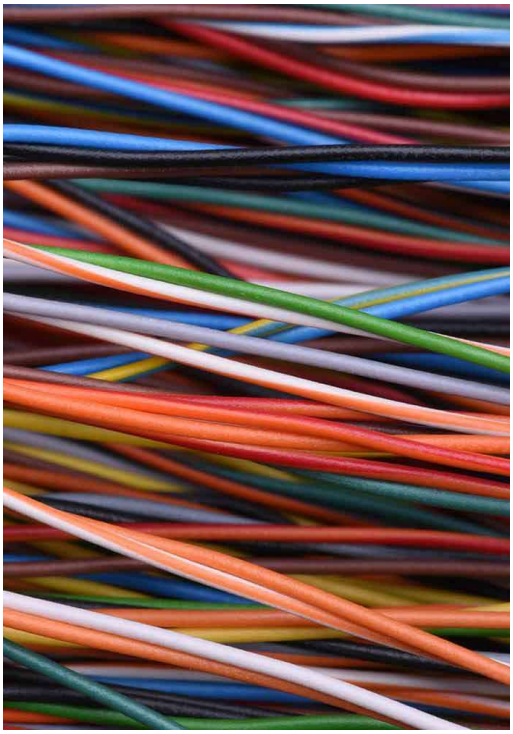
Why mergers? The scientific discourse.



Most scholars agree upon that mergers and other strategic management decisions are driven by a **complex pattern of motives** and that no single theoretical approach can render full account (e.g. Steiner, 1975, Ravenshaft and Sherer, 1987, Melin and Hellgren, 1994).

When classifying explanations for mergers, we will follow Trautwein's (1990) review of the literature. In total, he identifies **seven different theoretical approaches and explanations to mergers in the scientific literature.**

These can be organised into **three categories: mergers as rational choice, mergers as process outcome, and mergers as macroeconomic phenomenon.**

2.1 M**ergers as rational choice.**

In this category, a majority of **theories focus on shareholders' interests (i.e. efficiency theory, monopoly theory, raider theory, and valuation theory**) while a **smaller group of theories focuses on managers' interests and their deviations from shareholders' interests in value maximisation (empire-building theory).** Efficiency theory views mergers as being planned and undertaken to achieve net gains through synergies.

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> Financial synergies result in lower cost of capital while operational synergies are achieved from combining operations of separate units (e.g. sales force, R&D) or from knowledge transfer (Porter, 1985). **Managerial synergies occur when the bidder's managers possess superior planning and monitoring abilities that will benefit the target's competitiveness. Monopoly theory interprets mergers as planned strategic action to achieve market power that creates a wealth transfer from customers to the owners.** This explanation holds for horizontal acquisitions and its advantages have been referred to as 'collusive synergies' (Chatterjee, 1986) or 'competitor interrelationship' (Porter, 1985). Advantages from horizontal (conglomerate) acquisition can be obtained by strategically cross-subsidising products (profits from one market used to sustain a fight for share in another market) or by simultaneously limiting competition in more than one market by e.g. building a foothold in a competitors main market who in turn offers the same in its main market (Porter, 1985). Finally, **advantages can be obtained by threatening potential competitors by concentric acquisitions by the market leader.** www.ccsenet.org/ijbm International Journal of Business and Management Vol. 6, No. 5; May 2011 18 ISSN 1833-3850 E-ISSN 1833-8119.

Also **Valuation theory regards mergers as planned and executed by managers**. But the main argument is that the **managers have better information about the target's value than the stock market – net gains are achieved through private information.** The bidder's managers may **have unique information** about possible advantages from combining the target's business

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with their own or may have detected an undervalued company just waiting to be acquired.

Empire-building theory does not, as the other three rational choice theories, have the benefits of the bidder's shareholders in mind. On the contrary, empire-building theories **describe mergers as planned and executed by managers trying to maximise their own utility instead of their shareholders'**. In this approach, managerial goals are the explanatory factor behind a merger. Although, as Trautwein (1990) points out, it is not easy to find examples where managerial goals are cited to justify a merger, the empire-building theory enjoys popularity in the business press that seems to grow in proportion with the size of a merger. Trautwein (1990) further uses the label **Raider theory** for a possible merger motive discussed especially in the business press. This **motive focuses on wealth transfer from the target's shareholders. The transfer includes greenmail or excessive compensation to the raider after a successful take-over.**

2.2 **Mergers as process outcome.**

While in the above theories, mergers are assumed to be the outcome of rational decisions, a second set of theories conceptualizes mergers as the outcome of developmental processes. This, as Trautwein (1990) claims, rudimentary developed process theory has its background in the literature on strategic decision processes. It describes **strategic decisions as outcomes of processes characterised by several 'non-rational' influences. Individual's limited information processing capabilities (Simon 1957) lead to abridged search for information and alternatives, incomplete evaluations, and use of cognitive simplifications.**

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Another influence in this tradition is the **use and importance of routines in organizational decision making** (Allison, 1971, Cyert and March, 1963). Old solutions for similar situations are used on new problems and new solutions are only an alternative when the old ones fail. Routines can be seen as the outcome of what the organisation has learned over time to be appropriate steps to take to meet different problems.

A final influence in process theory is the struggle for power inherent in strategic decisions processes captured in e.g. Allison's 'political process paradigm' and Pettigrew's (1977) analysis of strategy formulation. **Strategic decisions, such as mergers, are seen as the outcome of political games between different internal and external stakeholders, there tactical considerations and the mutual adjustments they make throughout the process.** According to Trautwein (1990), the evidence on process theory can best be described as ambiguous. Some observations from recent Swedish mergers support the process theory. ***(Berggren, 2003).***

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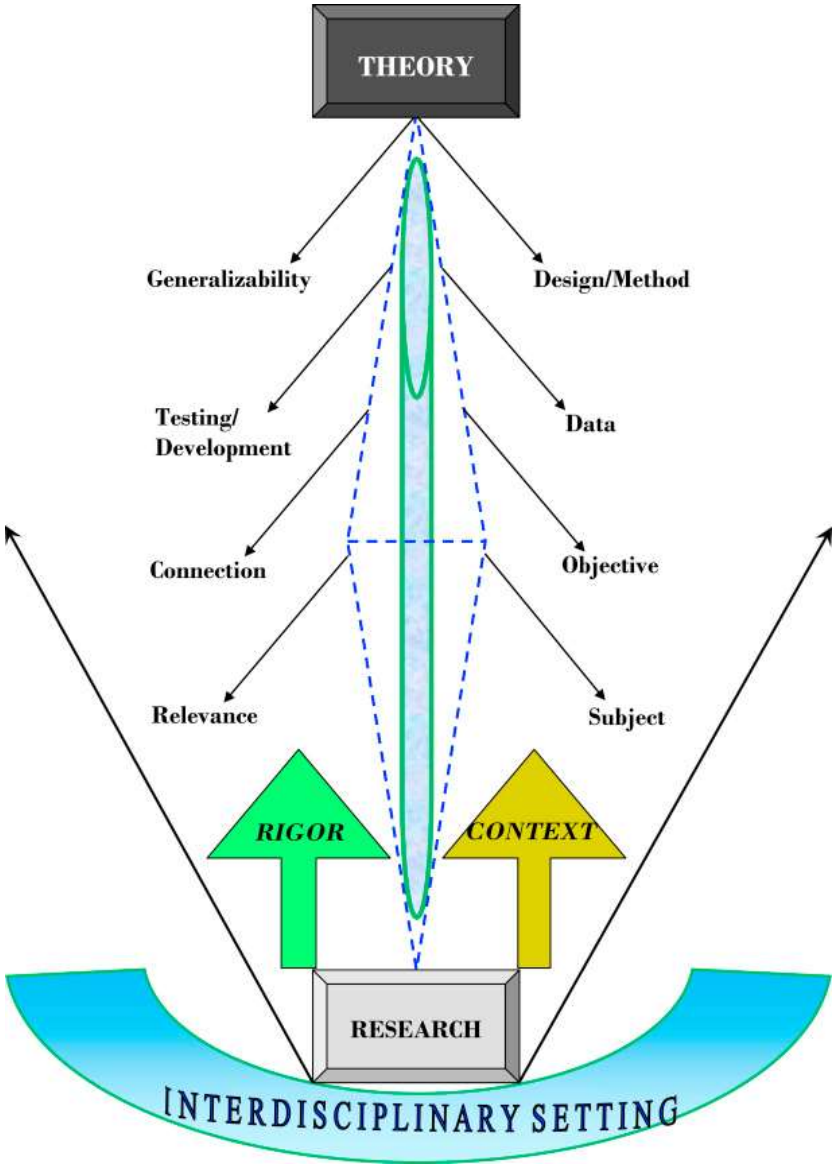

2.3 **Mergers as macroeconomic phenomena** Trautwein (1990), distinguish a final set of motives linking mergers to macroeconomic phenomena, which is applied especially in relation to understanding waves of mergers.

In Disturbance theory, merger waves are caused by economic disturbance on a macro

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level causing changes in individual expectations and increasing the level of uncertainty. Previous non-owners of assets, as a result of the uncertain situation, place higher value on these assets than their owners, and vice-versa, resulting in a merger-wave. ***

4.2 **Temporal evolution**. The media discourse on Astra and its potential merger with another pharmaceutical company has quite a long history that dates back at least until the beginning of 1996. However, the main activity is concentrated to a two year period between 1998 and 2000 (see Figure 2). ***

4.3.1 **Environment and Institutional forces**

4.3.2 **Product portfolio and R&D**

4.3.3 **Marketing and sales**

4.3.4 **Cost savings**

4.3.5 **Financial aspects**

4.3.6 **Stock value and terms of the merger**

4.3.7 The Merck agreement [**PRIOR STRATEGIC AGREEMENTS**]

Astra's Agreement with Merck concerning the US market plays an important role in the argumentation related to the AstraZeneca merger. The agreement gives Astra access to Merck's sales organisation within the US in return for 50% of the revenues generated by Astra on the US market. This construction is in the argumentation viewed as an efficient obstacle to all kinds of mergers involving Astra.

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However, in the **summer of 1998**, the contract is renegotiated, making it possible for Astra to cancel it under special circumstances. This **renegotiation not only made a merger possible, but actually demanded one, as a merger was claimed to be the only way to terminate the agreement before its expiry in 2008.** The conclusion is that Astra can break the agreement with Merck before year 2008 only by a merger or an acquisition of some kind. The reason why Astra concluded a new agreement with Merck by midsummer last year was the possibility to merge with another company. Without a merger the new agreement is a bad construction for Astra. **The Merck agreement thus played an important role in the argumentation related to the AstraZeneca merger.** From being viewed as an obstacle to a merger it is reinterpreted as a strong force towards a merger.

4.3.8 **Implementation**

While most of the categories of arguments discussed so far were mainly in favour of a merger, the arguments in the category "implementation" were dominated by negatives ones. Mergers in the pharmaceutical industry are regarded as defensive measures, which clearly signal, that the merging companies cannot survive on their own. Several reports, among others one published by the consulting company A.T. Kearney, are referred to, showing that the most profitable and successful firms in the industry have grown organically, and that most mergers in the industry did not lead to increased profitability.

The realisation of mergers is presented as difficult, and the study of past mergers

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shows, that most mergers fail in realising the promised benefits: Several different reports have shown that companies that mainly have developed organically have had faster growth both in turn-over and profits than companies that had merged with others. Large problems seem to arise from mergers of equals where the search for balance between the two parties obstructs large and small decisions. This is a factor that probably is even more obvious when the companies come from different countries with different company cultures and different national interests to protect. A major problem area in realising the benefits of mergers is their implementation, i.e. the accomplishment of real change within the merging organisations without creating negative effects that outweigh the potential positive ones. Among the **potential negative effects are e.g. the risk, that key personnel, especially within R&D leave the companies and that the pressure on the market is reduced, as energy is focused on the merger rather than the market**. However, some also argue, that the AstraZeneca merger might be one of the few that really has potential of creating increased shareholder value: The AstraZeneca merger is according to the report one of the few mergers that has potential to create value for its shareholders. Many mergers during the recent years like Glaxo-Wellcome, CIBA-Sandoz and Pharmacia-Upjohn have on the contrary failed to create such a value.

4.3.9 **Management's individual motives**

5. Discussion

As a common, but according to scientific evaluations, risky strategic intervention, mergers of large, public organizations are **generally under public scrutiny**. One of the

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major arenas for this scrutiny, with a strong influence on the public discourse is the business press.

As argued by Vaara and Monin (2010) "the media, in their capacity as gatekeepers and editors of information flows, could exercise significant power in promoting (legitimizing) as well as downplaying (delegitimizing) arguments..."

Against this background, the focus of the current paper has been to investigate **how the business press fulfils this scrutinizing role and to what extent it is based on and takes into account the results of the extensive scientific research on mergers and acquisitions.** More specifically, three aspects of the discourse on the merger between Astra and Zeneca were discussed – the actors involved, the temporal development of the discourse and the arguments pursued in favour and against the merger.

The current case points at **three key actors shaping the merger discourse** – journalists, management of the merging firms and financial analysts which together generated over 75% of the arguments. Most dominating were the **journalists.** Slightly less than 50% of the arguments were put forward as editorial text or signed by individual journalists. While there was a general majority of arguments in favour of the merger, the relation of positive and negative arguments differed between these key actors, with managers, and analysts, not surprisingly, being mostly in favour and journalists displaying a more balanced view**. Academics with expertise on mergers and acquisitions were not represented** as independent voices in the discourse.

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The **importance of management in shaping the merger discourse** is further illustrated in relation to the second interest of this study – **the temporal evolution of the merger discourse**. This was to a large extent **driven by managerial actions, such as formal announcements and reports.** These actions then triggered the journalists' activities and also led to the involvement of other actors, such as financial analysts and shareholders as commentators in the discourse. Independent initiatives by journalists uncovering new information were rare in the reporting on the AstraZeneca case.

The third interest of the current study concerned the **arguments brought forward in the public discourse and its relation to the scientific discourse.** The investigation into the discourse on the AstraZeneca merger illustrates a broad range of arguments focusing on a number of subject areas and issues ranging from environmental pressures via R&D capabilities to implementation issues. Despite this seeming variation of arguments, the large majority of them were cast in a narrow rational reasoning in what, based on Trautwein (1990), was label efficiency theory.

Citation: Article & Authors
The Reproduction of Efficiency Theory: The Construction of the AstraZeneca Merger in the Public Discourse, Bo Hellgren, Dept. of Management and Engineering, Linköping University Stockholm SE-581 83 Linköping, Sweden Tel: 46-13-281-535 E-mail: Bo.Hellgren@liu.se; Jan Löwstedt, (Corresponding author) School of Business, Stockholm University SE- 10691 Stockholm, Sweden Tel: 46-8-674-7438 E-mail: jlo@fek.su.se ;Andreas Werr Stockholm, School of Economics PO Box 6501, SE- 113 83 Stockholm, Sweden Tel: 46-8-736-9742 E-mail: Andreas.werr@hhs.se Received: December 14, 2010 Accepted: January 15, 2011 doi:10.5539/ijbm.v6n5p16 Published in www.ccsenet.org/ijbm, International Journal of Business and Management,t

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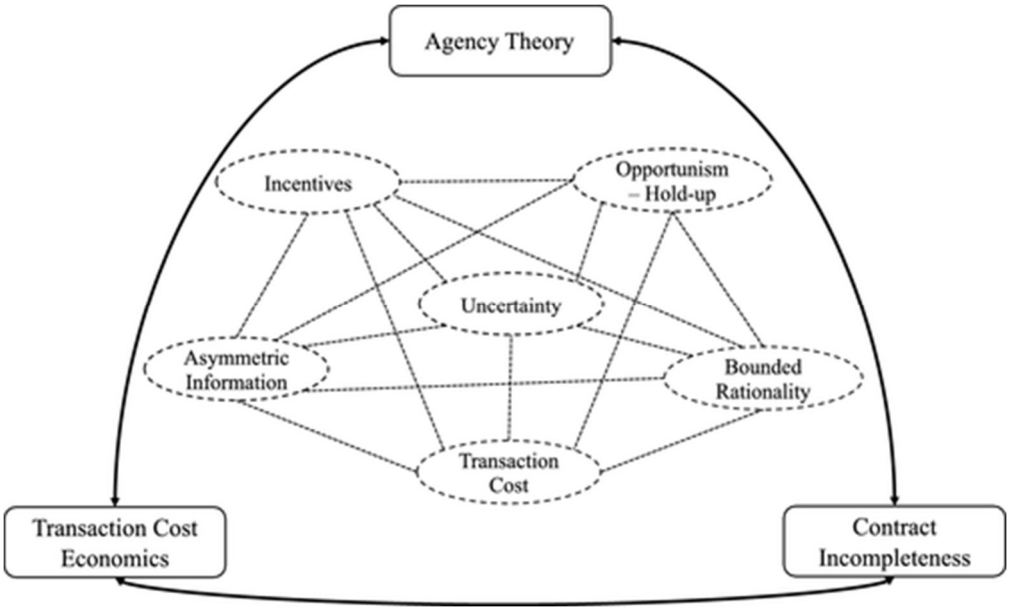
Vol. 6, No. 5; May 2011

E. General Scheme Doctrine

B. Terminology:



MERGER defined.

THELAW.COM LAW DICTIONARY & BLACK'S LAW DICTIONARY 2ND ED.

https://dictionary.thelaw.com/merger/

(1) **Business when two companies merge or join together to become one entity.**

(2) (A) Where a greater and lesser thing meet, and the latter loses its separate existence and sinks into the former. It is applied to estates, rights, crimes, and torts.

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(B) estates. When a greater estate and less coincide and meet in one and the same person, without any intermediate estate, the less is immediately merged, that is, sunk or drowned in the latter; example, if there be a tenant for years, and the reversion in fee simple descends to, or is purchased by him, the term of years is merged in the inheritance, and no longer exists; but they must be to one and the same person, at one and the same time, in one and the same right.

2. The estate in which the merger takes place, is not enlarged by the accession of the preceding estate; and the greater, or only subsisting estate, continues, after the merger, precisely of the same quantity and extent of ownership, as it was before the accession of the estate which is merged, and the lesser estate is extinguished. Prest. on Conv. 7. As a general rule, equal estates will not drown in each other.

3. The merger is produced, either from the meeting of an estate of higher degree, with an estate of inferior degree; or from the meeting of the particular estate and the immediate reversion, in the same person. 4 Kent, Com. 98. Vide 3 Prest. on Conv. which is devoted to this subject. (C) crim. law. When a man commits a great crime which includes a lesser, the latter is merged in the former. 2. Murder, when committed by blows, necessarily includes an assault and battery; a battery, an assault; a burglary, when accompanied with a felonious taking of personal property, a larceny in all these, and similar cases, the lesser crime is merged in the greater. 3. But when one offence is of the same character with the other, there is no merger; as in the case of a conspiracy to commit a misdemeanor, and the misdemeanor is afterwards committed in pursuance of the conspiracy. The two crimes being of equal degree, there can be no legal merger. 4 Wend. R. 265. Vide Civil Remedy. (D) rights. Rights are said to be merged when the same person who is bound to pay is also entitled to receive. This is more properly called a confusion of rights, or extinguishment. 2. When there is a confusion of rights, and the debtor and creditor become the same person, there can be no right to put in execution; but there is an immediate merger. 2 Ves. jr. 264. Example: a man becomes indebted to a woman in a sum of money, and afterwards marries her, there is immediately a confusion of rights, and the debt is merged or extinguished. (E) torts. Where a person in committing a felony also commits a tort against a private person; in this case, the wrong is sunk in the felony, at least, until after the felon's conviction. 2. The old maxim that a trespass is merged in a felony, has sometimes been supposed to mean that there is no redress by civil action for an injury which amounts to a felony. But it is now established that the defendant is liable to the party injured either after his conviction; If the civil action be commenced before, the plaintiff will be nonsuited.

Law Dictionary – Alternative Legal Definition

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The fusion or absorption of one thing or right into another; generally spoken of a case where one of the subjects is of less dignity or importance than the other. Here the less important ceases to have an independent existence.

In real property law. It is a general principle of law that where a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated, or, in the law phrase, is said to be merged, that is, sunk or drowned, in the greater. Thus, if there be tenant for years, and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. 2 Bl. Comm. 177; 1 Steph. Comm. 293; 4 Kent, Comm. 99. James v. Morey, 2 Cow. (N. Y.) 300, 14 Am. Dec. 475; Duncan v. Smith, 31 N. J. Law, 327. Of rights. This term, as applied to rights, is equivalent to "confusio" in the Roman law, and indicates that where the qualities of debtor and creditor become united in the same individual, there arises a confusion of rights which extinguishes both qualities; whence, also, merger is often called "extinguishment." Brown. Rights of action. In the law relating to rights of action, when a person takes or acquires a remedy or security of a higher nature, 4n legal estimation, than the one which he already possesses for the same right, then his remedies in respect of the minor right or security merge in those attaching to the higher one. Leake, Cont. 506; 10 O. B. 561. As where a claim is merged in the judgment recovered upon it. In criminal law. When a man commits a great crime which includes a lesser, or commits a felony which includes a fort against a private person, the latter is merged in the former. 1 East, P. C. 411. Of corporations. A merger of corporations consist in the uniting of two or more corporations by the transfer of property of all to one of them, which continues in existence, the others being swallowed up or merged therein. In regard to the survivorship of one of the constituent corporations, it differs from a "consolidation," wherein all the consolidating companies surrender their separate existence and become parts of a new corporation.

Acquisition Defined.

ACQUISITION

THELAW.COM LAW DICTIONARY & BLACK'S LAW DICTIONARY 2ND ED.

https://dictionary.thelaw.com/acquisition/

The act of becoming the owner of certain property; the act by which one acquires or procures the property in anything. Used also of the thing acquired. Original acquisition is where the title to the thing accrues through occupancy or accession, (q. v.,) or by the creative labor of the individual, as in the case of patents and copyrights. Derivative acquisition is where property in a thing passes from one person to another. It may occur by

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the act of the law, as in cases of forfeiture, insolvency, intestacy, judgment, marriage, or succession, or by the act of the parties, as in cases of gift, sale, or exchange.

Related Legal Terms & Definitions

- PERSONAL PROPERTY Property that is not real property and owned by a person. (A) Property that is…
- DERIVATIVE Coming from another; taken from something preceding, secondary; as derivative title, which is that acquired…
- ACQUIRE In the law of contracts and of descents; to become the owner of property ;…
- STEPPED UP BASIS Property transferred through inheritance can receive special treatment for tax purposes. The basis or the…
- APPREHENSION In practice. The seizure, taking, or arrest of a person on a criminal charge. The…
- TANGIBLE PROPERTY That which may be felt or touched; it must necessarily be corporeal, but it may…
- PROVISIONAL SEIZURE A term used in Louisiana, which signifies nearly the same as attachment of property. 2.…
- OCCUPANT OR OCCUPIER One who has the actual use or possession of a thing. 2. He derives his…

BLACKS LAW DICTIONARY DEFINITION MERGER & ACQUISITION or M&A.

BURDEN OF PROOF IN CASES in lawsuit of M&A …, the proponent of the deal bears the burden of proving the existence of the merger and the acquisition closing. These are general contract burdens met by a preponderance of the evidence in certain situations but also may have specific statutory or interpretative standards that have become part of precedent or could be based on changes instituted by the executive branch that controls the functions and personnel doing the actual work in reviewing the transaction. Thus, in litigation if the assumptions are wrong and the government officials are usually deferred to as a judicial restraint knowing the

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change and interpretative basis may support the position needed to overcome the exercise of institutional discretion. Typically, the burden to show the arbitrary nature of the decision is very high so the leg work and homework fr appreciating the enforcement history is extremely valuable.

Ohio Revised Code Section 1331.10 Evidence.

In prosecutions under sections 1331.01to1331.14 of the Revised Code, **it is sufficient to prove that a trust or combination exists, and that the defendant belonged to it, or acted for or in connection with it**, without proving all the members belonging to it, or proving or producing an article of agreement, or a written instrument on which it may have been based; or that it was evidenced by a written instrument.

15 U.S. Code CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

- U.S. Code
- Notes

1. § 1. Trusts, etc., in restraint of trade illegal; penalty
2. § 2. Monopolizing trade a felony; penalty
3. § 3. Trusts in Territories or District of Columbia illegal; combination a felony
4. § 4. Jurisdiction of courts; duty of United States attorneys; procedure
5. § 5. Bringing in additional parties
6. § 6. Forfeiture of property in transit
7. § 6a. Conduct involving trade or commerce with foreign nations
8. § 7. "Person" or "persons" defined
9. § 8. Trusts in restraint of import trade illegal; penalty
10. § 9. Jurisdiction of courts; duty of United States attorneys; procedure
11. § 10. Bringing in additional parties

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12. § 11. Forfeiture of property in transit
13. § 12. Definitions; short title
14. § 13. Discrimination in price, services, or facilities
15. § 13a. Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties
16. § 13b. Cooperative association; return of net earnings or surplus
17. § 13c. Exemption of non-profit institutions from price discrimination provisions
18. § 14. Sale, etc., on agreement not to use goods of competitor
19. § 15. Suits by persons injured
20. § 15a. Suits by United States; amount of recovery; prejudgment interest
21. § 15b. Limitation of actions
22. § 15c. Actions by State attorneys general
23. § 15d. Measurement of damages
24. § 15e. Distribution of damages
25. § 15f. Actions by Attorney General
26. § 15g. Definitions
27. § 15h. Applicability of parens patriae actions
28. § 16. Judgments
29. § 17. Antitrust laws not applicable to labor organizations
30. § 18. Acquisition by one corporation of stock of another
31. § 18a. Premerger notification and waiting period
32. § 19. Interlocking directorates and officers
33. § 19a. Repealed. Aug. 23, 1935, ch. 614, § 329, 49 Stat. 717
34. § 20. Repealed. Pub. L. 101–588, § 3, Nov. 16, 1990, 104 Stat. 2880
35. § 21. Enforcement provisions
36. § 21a. Actions and proceedings pending prior to June 19, 1936; additional and continuing violations
37. § 22. District in which to sue corporation
38. § 23. Suits by United States; subpoenas for witnesses
39. § 24. Liability of directors and agents of corporation
40. § 25. Restraining violations; procedure
41. § 26. Injunctive relief for private parties; exception; costs
42. § 26a. Restrictions on the purchase of gasohol and synthetic motor fuel
43. § 26b. Application of antitrust laws to professional major league baseball
44. § 27. Effect of partial invalidity
45. § 27a. Transferred

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46. § 28. Repealed. Pub. L. 98–620, title IV, § 402(11), Nov. 8, 1984, 98 Stat. 3358
47. § 29. Appeals
48. § 30. Repealed. Pub. L. 107–273, div. C, title IV, § 14102(f), Nov. 2, 2002, 116 Stat. 1922
49. § 31. Repealed. Pub. L. 107–273, div. C, title IV, § 14102(a), Nov. 2, 2002, 116 Stat. 1921
50. §§ 32, 33. Repealed. Pub. L. 91–452, title II, §§ 209, 210, Oct. 15, 1970, 84 Stat. 929
51. § 34. Definitions applicable to sections 34 to 36
52. § 35. Recovery of damages, etc., for antitrust violations from any local government, or official or employee thereof acting in an official capacity
53. § 36. Recovery of damages, etc., for antitrust violations on claim against person based on official action directed by local government, or official or employee thereof acting in an official capacity
54. § 37. Immunity from antitrust laws
55. § 37a. Definitions
56. § 37b. Confirmation of antitrust status of graduate medical resident matching programs
57. § 38. Association of marine insurance companies; application of antitrust laws

U.S. Department of Justice Website Page July 29. 2020

https://www.justice.gov/atr/merger-enforcement

MERGER ENFORCEMENT

Statutes and Guidelines

Antitrust Statutory Provisions

June 30, 2020
Vertical Merger Guidelines

The following superseded Non-Horizontal Merger Guidelines are provided for historical purposes:

- 1984 Non-Horizontal Merger Guidelines

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- [Withdrawn January 2020, see DOJ and FTC Announce Draft Vertical Merger Guidelines for Public Comment]

August 19, 2010
Horizontal Merger Guidelines

The following superseded Horizontal Merger Guidelines are provided for historical purposes:

- 1997 Horizontal Merger Guidelines
- 1992 Horizontal Merger Guidelines
- 1984 Horizontal Merger Guidelines
- 1982 Horizontal Merger Guidelines
- 1968 Horizontal Merger Guidelines

March 2006
Commentary on the Horizontal Merger Guidelines

Herfindahl-Hirschman Index

February 2004
Merger Enforcement Workshop

April 2000
Antitrust Guidelines for Collaborations Among Competitors

October 2004[*]
Policy Guide to Merger Remedies

[*] Update: In effect as of September 25, 2018. See Assistant Attorney General Delrahim's Remarks as Prepared for the 2018 Global Antitrust Enforcement Symposium.

The following superseded Policy Guide to Merger Remedies is provided for historical purposes:

- 2011 Policy Guide to Merger Remedies

Model Documents and Procedures

July 2020
Model Timing Agreement - Revised July 24, 2020 in response to COVID-19 emergency in order to extend post-compliance period from sixty to ninety days and to recognize that it may become appropriate to revisit agreements, and to amend, shorten, extend, or cancel them, in light of developments in the unfolding COVID-19 situation.

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July 2020
Request for Additional Information and Documentary Material Issued to [Weebyewe Corporation] PDF | Word

November 2018
Model Voluntary Request Letter

Frequently Asked Questions – Voluntary Requests and Timing Agreements

June 2001
Second Request Internal Appeal Procedure

2006 Merger Review Process Initiative

Revised December 14, 2006
Merger Review Process Initiative

December 15, 2006
Press Release: Antitrust Division Announces Amendments to Its 2001 Merger Review Process Initiative

December 14, 2006
Background Information on the 2006 Amendments to the Merger Review Process Initiative

December 14, 2006
Model Process and Timing Agreement (for use only as part of the Merger Review Process Initiative)

June 19, 2001
Report to Congress Regarding Merger Review Procedures

Bank Merger Competitive Review

October 9, 2014
Frequently Asked Questions regarding applications filed with the Board of Governors of the Federal Reserve System

Current as of September 13, 2000
Bank Merger Competitive Review: Introduction and Overview (1995)

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Hart-Scott-Rodino (HSR) Premerger Notification

The following information is available on the FTC's website:

Hart-Scott-Rodino Act Information

Early Termination Notices

To check on the status of a filing
Email the FTC's Premerger office at premerger@ftc.gov.

Statistics

Ten Year Workload Statistics Report

HSR Annual Reports to Congress (on the FTC's website)

December 18, 2003
Merger Challenges Data, Fiscal Years 1999–2003

Antitrust Division Annual Report (1999): Appendix B includes information on merger challenges from April 1996 to September 1999.

Other Merger Documents

March 11, 1998
Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General

Updated July 29, 2020

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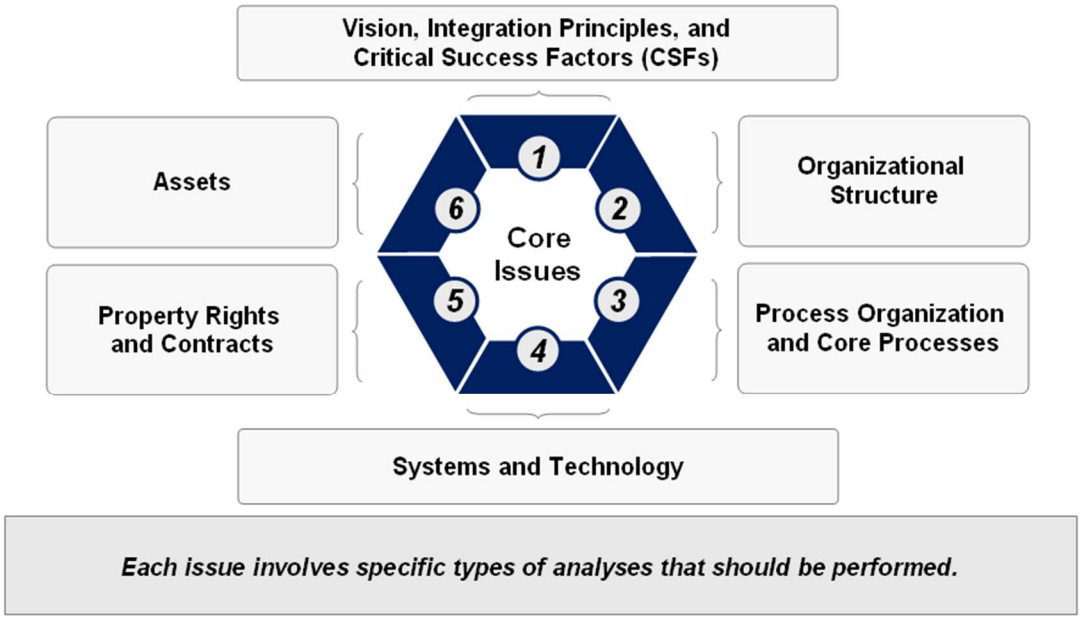
There are 6 areas to carefully analyze—Integration Principles, Structure, Processes, Technology, Rights & Contracts, and Assets

Target Operating Model – 6 Core Issues

In developing the Target Operating Model of the future state organization, there are 6 core issues that must be evaluated in detail.



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Covenants, representations and warranties in all material or strategic Contracts may need be examined.

A. Law dictionaries defines a covenant as:
   i. An agreement, contract, or written promise between two individuals that frequently constitutes a pledge to do or refrain from doing something. The individual making the promise or agreement is known as the covenantor, and the individual to whom such promise is made is called the covenantee. Covenants are really a type of contractual arrangement that, if validly reached,

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is enforceable by a court. They can be phrased so as to prohibit certain actions and in such cases are sometimes called negative covenants

ii. Noun: agreement, arrangement, avowal, binding agreement, collective agreement, commitment, compact, concordat, contract, contractual obligation, contractual statement, *conventio*, convention, engagement, guarantee, mutual understanding, oath, *pacisci,* pact, *pactio*, *pactum*, pledge, promise, stipulation, understanding, warranty, written agreement, written pledge. Associated concepts: breach of covenant, collateral covenants, concurrent covenants, covenant against incumbrancers, covenant appurtenant to the land, covenant for quiet enjoyment, covenant not to institute suit, covenant in praesenti, covenant not to convey, covenant of future assurance, covenant of general warranty, covenant of title, covenant of warranty, covenant running with the land, covenant to pay, dependent covenant, doctrine of implied covenants, joint covenant, negative covenants, restrictive covenant.

B. There are two major categories of covenants in the law governing real property transactions: covenants running with the land and covenants for title. These real estate concepts can have special implications for land value and expenses in the future. Additionally, the real estate concepts could be transferable concepts to license arrangements, intellectual property, marketing agreements, third party and internet marketing, information

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assets and collection of data or security of intellectual property and trade secrets.

i. Covenants Running with the Land (or business assets, cash flow assets etc.)

a. A covenant is said to run with the land in the event that the covenant is annexed to the estate and cannot be separated from the land or the land transferred without it. Such a covenant exists if the original owner as well as each successive owner of the property is either subject to its burden or entitled to its benefit. A covenant running with the land is said to touch and concern the property. For example, an individual might own property subject to the restriction that it is only to be used for church purposes. When selling the land, the person can only do so upon an agreement by the buyer that he or she, too, will only use the land for church purposes. The land is thereby burdened or encumbered by a Restrictive Covenant, since the covenant specifically limits the use to which the land can be put. In addition, the covenant runs with the land because it remains attached to it despite subsequent changes in its ownership. This type of covenant is also called a covenant appurtenant.

b. Certain easements (and rights of use) also run with the land (or business assets). An easement, for example, that permits one

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landowner to walk across a particular portion of the property of an adjoining landowner in order to gain access to the street would run with the land. Subsequent owners of both plots would take the land subject to such easement.

c. A covenant in gross is unlike a covenant running with the land in that it is personal, binding only the particular owner, and not, the land itself. Subsequent owner is not required to keep the promise as one would with a covenant appurtenant.

ii. Covenants for Title

a. When an individual obtains title to, or possession and ownership of, real property, six covenants are ordinarily afforded to him or her. They are

1. covenant for seisin;
2. covenant of the right to convey;
3. covenant against encumbrances;
4. covenant for Quiet Enjoyment;
5. covenant of general Warranty; and
6. covenant for further assurances.

b. A deed to real property that provides for usual covenants generally includes the first five of these covenants. When a deed provides for

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full covenants, it is regarded as giving such protection as is extended pursuant to all six covenants.

c. Covenants for seisin and of the right to convey are ordinarily regarded as being the same thing. Essentially, they make a guarantee to the grantee that the grantor is actually the owner of the estate that he or she is transferring.

d. The covenant against encumbrances promises to the grantee that the property being conveyed is not subject to any outstanding rights or interests by other parties, such as mortgages, liens, easements, profits, or restrictions on its use that would diminish its value. The existence of Zoning restrictions do not constitute breach of this covenant; however, the existence of a violation of some type of zoning or building restriction might be regarded as a breach thereof.

e. The covenants of quiet enjoyment and general warranty both have the legal effect of protecting the grantee against all unlawful claims of others, including the grantor and third parties, who might attempt to effect an actual or constructive eviction of the grantee.

f. The sixth covenant, which is the covenant for further assurances, is not widely used in the United States. It is an agreement by the grantor to

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perform any further necessary acts within his or her ability to perfect the grantee's title.

g. The first three covenants of title ordinarily do not run with the land, since they become personal choses in action—rights to initiate a lawsuit—if breached upon delivery of the deed. The others are covenants appurtenant or run with the land and are enforceable by all grantees of the land.

h. In order to recover on the basis of a breach of a covenant of title, financial loss must actually be sustained by the covenantee, since such covenants are contracts of indemnity. In most jurisdictions, the maximum amount of damages recoverable for such a breach is the purchase price of the land plus interest.

iii. Purposes

a. Land use planning is often affected through the use of covenants. Covenants facilitate the creation of particular types of neighborhoods as part of a neighborhood plan. A housing developer might, for example, buy up vacant land to divide into building lots. A low price is paid for the undeveloped land, which the developer subsequently sells burdened with a number of restrictive covenants. The developer might stipulate in the contract of sale that the owner must retain the original

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size of a lot. Developers can also make owners agree that houses to be constructed upon the lots must be larger than a certain size and include other specifications to ensure that such property will more than likely sell for premium prices because of the desirability of the neighborhood. Courts enforce such covenants provided they benefit and burden all the property owners in a neighborhood equally.

b. **Covenants will not, however, be enforced if they are intended to accomplish an illegal purpose. The Supreme Court ruled in Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), that no court or state officials have the power under law to take any action toward the enforcement of a racial covenant**. In this case, a group of neighbors were bringing suit to prohibit a property owner from selling his home to blacks, based on the argument that the owner had purchased the home subject to the restrictive covenant not to sell to blacks. The covenant was found to be unenforceable based on equal housing laws. To enforce it would constitute a Civil Rights violation.

iv. Covenant Remedies

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a. The name of an action instituted for the recovery of damages for the breach of a covenant or promise under seal. [*citations omitted*].The subject will be considered with reference,

    1. To the kind of claim or obligation on which this action may be maintained.
    2. The form of the declaration.
    3. The plea.
    4. The judgment.

b. To support this action, there must be a breach of a promise under seal. [*citations omitted*].Such promise may be contained in a deed-poll, or indenture, or be express or implied by. law from the terms of the deed; or for the performance of something in future, or that something has been done; or in some cases, though it relate to something in present, as that the covenantor has, a good title. [*citations omitted*].Though, in general, it is said that covenant will not lie on a contract *inpresenti*, as on a covenant to stand seized, or that a certain horse shall henceforth be the property of another. [*citations omitted*]. The action of covenant is the peculiar remedy for the non-performance of a promise under seal, where the damages are unliquidated, and depend in amount on the opinion of a jury, in which case neither debt nor assumpsit can be

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supported but covenant as well as the action of debt, may be maintained upon a single bill for a sum certain. When the breach of the covenant amounts to misfeasance, the covenantee has an election to proceed by action of covenant, or by action on the case for a tort, as against a lessee, either during his term or afterwards, for waste; [*citations omitted*]. but this has been questioned. When the contract under seal has been enlarged by parol, the substituted agreement will be considered, together with the original agreement, as a simple contract. [*citations omitted*].

1. The declaration must state that the contract was under seal and it should make proffer of it, or show some excuse for the omission. [*citations omitted*]. It is not, in general, requisite to state tho consideration of the defendant's promise, because a contract under seal usually imports a consideration; but when the performance of the consideration constitutes a condition precedent, such performance must be averred. So much only of the deed and covenant should be set forth as is essential to the cause of action: although it is usual to declare in the words of the deed, each covenant may be stated as to its legal effect. The breach may be in the negative of the covenant generally

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[*citations omitted*]. or, according to the legal effect, and sometimes in the alternative and several breaches may be assigned at common law. Damages being the object of the suit, should be laid sufficient to cover the real amount. [*citations omitted*].

2. It is said that strictly there is no general issue in this action, though the plea of *non est factum* has been said by an intelligent writer to be the general issue. [*citations omitted*]. But this plea only puts in issue the fact of scaling the deed. [*citations omitted*].. *Non infregit conventionem*, and *nil debet*, have both been held to be insufficient.. In Pennsylvania, by a practice peculiar to that state, the defendant may plead covenants and under this. plea, upon notice of the special matter, in writing, to the plaintiff, without form, he may give anything in evidence which he might have pleaded[*citations omitted*]. And this evidence, it seems, may be given in the circuit courts of the United States in that state without notice, unless called for [*citations omitted*].

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3. The judgment is that the plaintiff recover a named sum for his damages, which he has sustained by reason of the breach or breaches of covenant, together with costs.

V. COVENANT, contracts.

A. A covenant, convention, in its most general signification, means any kind of promise or contract, whether it be made in writing or by parol. [*citations omitted*].. In a more technical sense, and the one in which it is here considered, a covenant is an agreement between two or more persons, entered into in writing and under seal, whereby either party stipulates for the truth of certain facts, or promises to perform or give something to the other, or to abstain from the performance of certain things. [*citations omitted*].

i. It differs from an express assumpsit in this, that the former may be verbal, or in writing not under seal, while the latter must always be by deed. In an assumpsit, a consideration must be shown; in a covenant no consideration is necessary to give it validity, even in a court of equity. [*citations omitted*].

ii. It is proposed to consider first, the general requisites of a covenant; and secondly, the several kinds of covenants. The general requisites are:

a. Proper parties.

b. Words of agreement.

c. A legal purpose.

d. A proper form.

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iii. The parties must be such as by law can enter into a contract. If either for want of understanding, as in the case of an idiot or lunatic; or in the case of an infant, where the contract is not for his benefit; or where there is understanding, but owing to certain causes, as coverture, in the case of a married woman, or duress, in every case, the parties are not competent, they cannot bind themselves.

iv. There must be an agreement. The assent or consent must be mutual for the agreement would be incomplete if either party withheld his assent to any of its terms. The assent of the parties to a contract necessarily supposes a free, fair, serious exercise of the reasoning faculty. Now, if from any cause, this free assent be not given, the contract is not binding.

v. A covenant against any positive law, or public policy, is, generally speaking, void. [*citations omitted*].As an example of the first, is a covenant by one man that he will rob another; and of the last, a covenant by a merchant or tradesman that he will not follow his occupation or calling. This, if it be unlimited, is absolutely void but, if the covenant be that he shall not pursue his business in a particular place, as, that he will not trade in the city of Philadelphia, the covenant is no longer against public policy[*citations omitted*].A covenant to do an impossible thing is also void.

vi. To make a covenant, it must, according to the definition above given, be by deed, or under seal. No particular form of words is necessary to make a covenant, but

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any words which manifest the intention of the parties, in respect to the subject matter of the contract, are sufficient. [*citations omitted*].

B. In Pennsylvania, Delaware, and Missouri, it is declared by statute that the words grant, bargain, and sell, shall amount to a covenant that the grantor was seised of an estate in fee, free from all incumbrances done or suffered by him, and for quiet enjoyment against his acts. But it has been adjudged that those words in the Pennsylvania statute of 1715, (and the decision will equally apply to the statutory language in the other two states,) did not amount to a general warranty, but merely to a covenant that the grantor had not done any act, nor created any incumbrance whereby the estate might be defeated. [*citations omitted*].

C. The several kinds of covenants. They are:

   i. Express Covenant

   ii. An express, covenant, or a covenant in fact, is one expressly agreed between the parties and inserted in the deed. The law does not require any particular form to create an express covenant. The formal word "covenant" is therefore not indispensably requisite. [*citations omitted*].; or, "I bind myself to pay so much such a day, and so much such another day;" [*citations omitted*]; are held to be covenants; and so are the word's of a bond[*citations omitted*].. But words importing merely an order or direction that other persons should pay a sum of money, are not a covenant. [*citations omitted*].Implied Covenant

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a. An implied covenant is one which the law intends and implies, though it be not expressed in words. [*citations omitted*]. There are some words which of themselves do not import an express covenant, yet being made use of in certain contracts, have a similar operation and are called covenants in law. They are as effectually binding on the parties as if expressed in the most unequivocal terms. [*citations omitted*].A few examples will fully explain this. If a lessor demise and grant to his lessee a house or lands for a certain term, the law will imply a covenant on the part of the lessor, that the lessee shall during the term quietly enjoy the same against all incumbrances. [*citations omitted*]., are used, they are so many instances of implied covenants. And the words "yielding and paying" in a lease, imply a covenant on the part of lessee, that he will pay the rent. [*citations omitted*].

iii. Real Covenant

a. A real covenant is one which has for its object something annexed to, or inherent in, or connected with land or other property. [*citations omitted*].. A covenant real, which necessarily runs with the land, as to pay rent, not to cut timber, and the like, is said to be an inherent covenant. [*citations omitted*]. A covenant real runs with the land and descends to the heir; it is also transferred to a purchaser. Such

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covenants are said to run with the land, so that he who has the one is subject to the other. [*citations omitted*].

b. As commonly reckoned, there are five covenants for title,

1. Covenant for seisin.
2. That the grantor has perfect right to convey.
3. That the grantee shall quietly possess and enjoy the premises without interruption, called a covenant for quiet enjoyment.
4. The covenant against incumbrances.
5. The covenant for further assurance. 6. Besides these covenants, there is another frequently resorted to in the United States, which is relied on more, perhaps, than any other, called the covenant of warranty.

iv. Personal Covenant

a. A personal covenant relates only to matters personal, as distinguished from real, and is binding on the covenantor during life, and on his personal representatives after his decease, in respect of his assets. According to Sir William Blackstone, a personal covenant may be transformed into a real, by the mere circumstance of the heirs being named therein, and having assets by descent from the covenantor [*citations omitted*]..

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b. A covenant is personal in another sense, where the covenantor is bound to fulfill the covenant himself; as, to teach an apprentice. [*citations omitted*].

c. Personal covenants are also said to be transitive and intransitive; the former, when the duty of performing them passes to the covenantor's representatives; the latter, when it is limited to himself; as, in the case of teaching an apprentice. [*citations omitted*].

D. As they affect each other in the same deed, covenants may be divided into three classes.

i. Dependent covenants are those in which the performance, of one depends on the performance of the other; there may be conditions which must be performed before the other party is liable to an action on his covenant. [*citations omitted*].

a. To ascertain whether covenants are dependent or not, the intention of the parties is to be sought for and regarded rather than the order or time in which the acts are to be done, or the structure of the instrument, or the arrangements of the covenant[*citations omitted*].

ii. Some covenants are mutual conditions to be performed at the same time; these are concurrent covenants. When, in these cases, one party is ready and offers to perform his part, and the other refuses or neglects to perform his, he who is ready and offers, has fulfilled his engagement, and may maintain an action for the

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default of the other, though it is not certain that either is obliged to do the first act. [*citations omitted*]..

iii. Covenants are independent or mutual, when either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favor, and when it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. [*citations omitted*]..

E. Covenants are affirmative and negative.

i. An affirmative covenant is one by which the covenantor binds himself that something has already been done or shall be performed hereafter. Such a covenant will not deprive a man of a right lawfully enjoyed by him independently of the covenant; 5 as, if the lessor agreed with the lessee that he shall have thorns for hedges growing upon the land, by assignment of the lessor's bailiff; here no restraint is imposed upon the exercise of that liberty which the law allows to the lessee, and therefore he may take hedge-bote without assignment. [*citations omitted*]..

ii. A negative covenant is one where the party binds himself that he has not performed and will not perform a certain act; as, that he will not encumber. Such a covenant cannot be said to be performed until it becomes impossible to break it. On this ground the courts are unwilling to construe a covenant of this kind to be a condition precedent. Therefore, where a tailor assigned his trade to the defendant,

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and covenanted thenceforth to desist from carrying on the said business with any of the customers, and the defendant in consideration of the performance thereof, covenanted to pay him a life annuity of 190, it was held that if the words "in consideration of the performance thereof, “should be deemed to amount to a condition precedent, the plaintiff would never obtain his annuity; because as at any time during his life he might exercise his former trade, until his death it could never be ascertained whether he had performed the covenant or not[*citations omitted*]. The defendant, however, on a breach by plaintiff, might have his remedy by a cross action of covenant. There is also a difference between a negative covenant, which is only in affirmance of an affirmative covenant precedent, and a negative covenant which is additional to the affirmative covenant[*citations omitted*].. To a covenant of the former class a plea of performance generally is good, but not to the latter; the defendant in that case must plead specially. Id.

F. Covenants, considered with regard to the parties who are to perform them, are joint or several.

   i. A joint covenant is one by which several parties agree to perform or do a thing together. In this case although there are several covenantors there is but one contract, and if the covenant be broken, all the covenantors living, must be sued; as there is not a separate obligation of each, they cannot be sued separately.

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G. A several covenant is one entered into by one person only. It frequently happens that a number of persons enter into the same contract, and that each binds himself to perform the whole of it; in such case, when the Contract is under seal, the covenantors are severally bound for the performance of it. The terms usually employed to make a several covenant are "severally," or "each of us." In practice, it is common for the parties to bind themselves jointly and severally, and then the covenant is both joint and several. [*citations omitted*].Covenants are executed or executory.

   i. An executed covenant is one which relates to an act already performed.

   ii. An executory covenant is one to be performed at a future time.

H. Covenants are obligatory or declaratory.

   i. An obligatory covenant is one which is binding on the party himself, and shall never be construed to raise a use.

   ii. A declaratory covenant is one which serves to limit and direct uses.

I. Covenants are principal and auxiliary.

   i. A principal covenant is one which relates directly to the principal matter of the contract entered into between the parties; as, if A covenants to serve B for one year.

   ii. An auxiliary covenant is one, which, not relating directly to the principal matter of the contract between the parties, yet relates to something connected with it; as, if A covenants with B, that C will perform his covenant to serve him for one year.

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In this case, if the principal covenant is void, the auxiliary is discharged. Anstr. 256.

J. Covenants are legal or illegal.

i. A legal covenant is one not forbidden by law. Covenants of this kind are always binding on the parties.

ii. An illegal covenant is one forbidden by law, either expressly or by implication. A covenant entered into, in violation of, the express provision of a statute is absolutely void. [*citations omitted*]..

a. A covenant is also void, if it be of immoral nature; as, a covenant for future illicit intercourse and cohabitation [*citations omitted*].

K. Covenants, in the disjunctive or alternative, are those which give the covenantor the choice of doing, or the covenantee the choice of having, performed one of two or more things at his election; as, a covenant to make a lease to Titus, or pay him one hundred dollars on the fourth day of July, as the covenantor, or the covenantee, as the case may be, shall prefer. [*citations omitted*].

L. Collateral covenants are such as concern some collateral thing, which does not at all, or not so immediately relate to the thing granted; as, to pay a sum of money in gross, that the lessor shall distrain for rent, on some other land than that which is demised, or the like. [*citations omitted*]. These covenants are also termed covenants in gross. [*citations*

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omitted].A Law Dictionary, Adapted to the Constitution and Laws of the United States. By John Bouvier. Published 1856.

LEASE REVIEWS

A. The commercial lease is a multi-party transaction

i. The landlord has financial partners

a. The construction lender;

b. The permanent lender;

c. The ground landlord; and

d. Equity partner.

ii. The tenant also has financial partners

a. Banks and lenders;

b. Equipment suppliers and vendors;

c. Partners.

iii. In addition to the above, the lease involves many other parties:

a. Department stores, major space users, and other tenants;

b. Architects and contractors;

c. Casualty and liability insurers;

d. Utility companies;

e. Governmental agencies; community groups.

B. The lease is a series of interrelated documents:

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i. The lease document;

ii. Property descriptions and surveys;

iii. Site plans;

iv. Descriptions of landlord work and tenant work, including the plans and specifications;

v. Assignments, subordination-attornment agreements, guaranties, estoppel certificates, and other collateral documents.

C. To adapt to the ever-changing business environment, the commercial lease has evolved into specialized forms.

i. The different types of retail commercial centers require different lease forms and have different drafting considerations.

a. The free-standing, strip, or neighborhood retail commercial center: less than 100,000 square feet;

b. The community retail center: from 100,000 to 500,000 square feet, perhaps with an enclosed mall;

c. The regional retail center: above 500,000 square feet, with an enclosed mall;

d. Super regional: above 800,000 square feet, with at least two major anchors (over 100,000 square feet each).

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ii. The different types of office commercial centers likewise require different lease forms and have different drafting considerations:

a. Freestanding office commercial centers;

b. High-rise office commercial centers;

c. Office park office commercial centers; and

d. Suburban mid-rise office commercial centers.

iii. Two types of commercial tenants have evolved.

a. Anchor and Triple A tenants are needed to finance the project. Because of their important role, they generally obtain more favorable terms;

b. Local or small space users may lack financial resources and have less bargaining leverage.

II. Transactional Considerations & Direct & Indirect Parties

Preliminary, collateral and core M&A contracts. A typical M&A transaction involves not one but a suite of contracts. Preliminary to a deal, confidential information is typically shared, and negotiations or auction-like bidding are conducted, generating the need for confidentiality and exclusivity agreements, standstills, letters of intent, and joint defense agreements. Collateral to a deal, employment and other ongoing contractual arrangements must be adjusted, generating the need for employment and non-competition agreements.

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To accomplish a deal, legal requirements must be satisfied, typically by gathering and packaging information, providing it to regulators, shareholders or the public, and analyzed, generating the need both for detailed conditions and agreements concerning who is responsible for and how they will satisfy these requirements, and commonly for separate support agreements, voting agreements, lock-up option agreements, and affiliate letter agreements. Before financing an acquisition, banks and underwriters typically parties specify deal terms, to be reflected in financing agreements, including highly confident letters, commitment letters, sponsor guarantees, loan agreements, solvency opinions, and other agreements called for by the primary financing agreements.

All of these contracts can be understood as "M&A contracts," but they all also lead to or are required by the core M&A contract, the "definitive" deal agreement. Because of the inherently complex nature of M&A and the dynamic nature of the businesses being exchanged, contracts are particularly useful in specifying the basic terms of the deal: the parties, the "deal structure" (e.g., mergers, asset purchases, stock purchases, etc.) and the "deal currency" (e.g., cash, stock, debt, other contract rights, assets, etc.).

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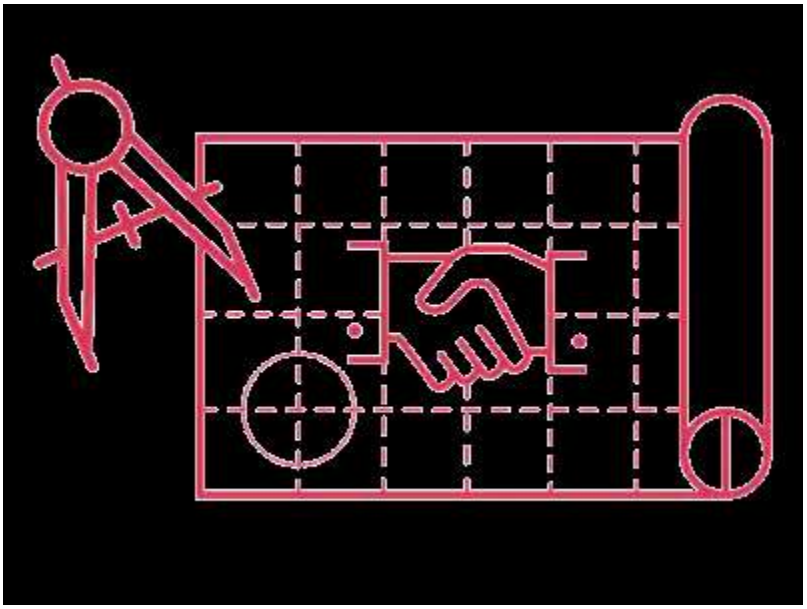

In M&A deals for divisions or units of larger businesses, or which are structured as asset purchases for other reasons, a contract will perform the essential task of specifying what is being transferred. In deals involving anything other than cash as consideration, the contract will specify how the consideration will be valued and transferred. Sometimes, contract specification can economize on corporate law by designating that whole companies to merge or have their stock acquired, but the contract can still play an essential role by controlling or conditioning deal terms on the changes over time, especially changes in the value or risk of the business.

For example, contracts can make clear the extent to which the target owners can receive dividends or distributions while a deal is pending. To be completed, most deals require more work after contract signing, and M&A contracts assist process management – specifying responsibilities and coordinating tasks to get the deal done. Exchanges ancillary to the basic

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*deal – particularly risk sharing, control and information sharing, and service provision – by definition take time, and typically involve detailed specification, ***

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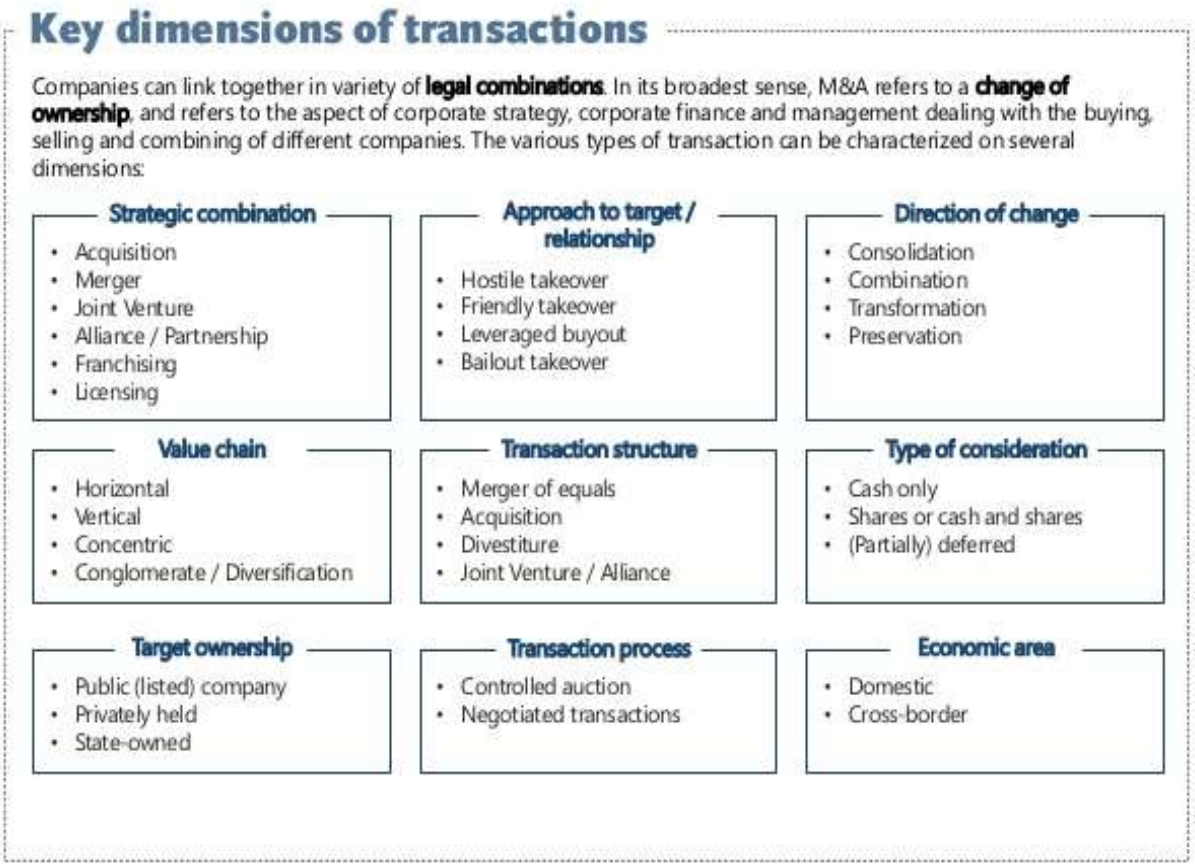

20 Key Due Diligence Activities In A Merger & Acquisition Transaction

Richard D. Harroch & David Lipkin
https://www.forbes.com/sites/allbusiness/2014/12/19/20-key-due-diligence-activities-in-a-merger-and-acquisition-transaction/#7bec14584bfc 2/22 8/5/2020

Mergers and acquisitions typically involve a substantial amount of due diligence by the buyer. Before committing to the transaction, the buyer will want to ensure that it knows what it is

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buying and what obligations it is assuming, the nature and extent of the target company's contingent liabilities, problematic contracts, litigation risks and intellectual property issues, and much more. This is particularly true in private company acquisitions, where the target company has not been subject to the scrutiny of the public markets, and where the buyer has little (if any) ability to obtain the information it requires from public sources.

The following is a summary of the most significant legal and business due diligence activities that are connected with a typical M&A transaction. By planning these activities carefully and properly anticipating the related issues that may arise, the target company will be better prepared to successfully consummate a sale of the company. Of course, in certain M&A transactions such as "mergers of equals" and transactions in which the transaction consideration includes a significant amount of the stock of the buyer, or such stock comprises a significant portion of the overall consideration, the target company may want to engage in "reverse diligence" that in certain cases can be as broad in scope as the primary diligence conducted by the buyer.

Many or all of the activities and issues described below will, in such circumstances, apply to both sides of the transaction. Recommended For You 'Booking.com' Is A Trademark – Does This Matter To Your Business?

1. Financial Matters.

The buyer will be concerned with all of the target company's historical financial statements and related financial metrics, as well as the reasonableness of the target's projections of its future

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performance.

Topics of inquiry or concern will include the following:

What do the company's annual, quarterly, and (if available) monthly financial statements for the last three years reveal about its financial performance and condition.

Are the company's financial statements audited, and if so for how long?

Do the financial statements and related notes set forth all liabilities of the company, both current and contingent? Are the margins for the business growing or deteriorating?

Are the company's projections for the future and underlying assumptions reasonable and believable?

How do the company's projections for the current year compare to the board-approved budget for the same period?

What normalized working capital will be necessary to continue running the business?

How is "working capital" determined for purposes of the acquisition agreement?

(Definitional differences can result in a large variance of the dollar number.)

What capital expenditures and other investments will need to be made to continue growing the business, and what are the company's current capital commitments?

What is the condition of assets and liens thereon?

What indebtedness is outstanding or guaranteed by the company, what are its terms, and when does it have to be repaid?

Are there any unusual revenue recognition issues for the company or the industry in

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which it operates?

What is the aging of accounts receivable, and are there any other accounts receivable issues?

Should a "quality of earnings" report be commissioned?

Are the capital and operating budgets appropriate, or have necessary capital expenditures been deferred?

Has EBITDA and any adjustments to EBITDA been appropriately calculated? (This is particularly important if the buyer is obtaining debt financing.)

Audit, accounting standards, financial regulation and standards across state lines, or international jurisdictions such as EU, Asia, Japan and other markets that may not follow American standards like GAAP based on Internet sales or product deployments and sales in other jurisdictions [added not in article].

Does the company have sufficient financial resources to both continue operating in the ordinary course and cover its transaction expenses between the time of diligence and the anticipated closing date of the acquisition?

2. Technology/Intellectual Property.

The buyer will be very interested in the extent and quality of the target company's technology and intellectual property. This due diligence will often focus on the following areas of inquiry:

- What domestic and foreign patents (and patents pending) does the company have?

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- Has the company taken appropriate steps to protect its intellectual property (including confidentiality and invention assignment agreements with current and former employees and consultants)?
- Are there any material exceptions from such assignments (rights preserved by employees and consultants)?
- What registered and common law trademarks and service marks does the company have?
- What copyrighted products and materials are used, controlled, or owned by the company?
- Does the company's business depend on the maintenance of any trade secrets, and if so what steps has the company taken to preserve their secrecy?
- Is the company infringing on (or has the company infringed on) the intellectual property rights of any third party, and are any third parties infringing on (or have third parties infringed on) the company's intellectual property rights?
- Is the company involved in any intellectual property litigation or other disputes (patent litigation can be very expensive), or received any offers to license or demand letters from third parties?
- What technology in-licenses does the company have and how critical are they to the company's business?

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- Has the company granted any exclusive technology licenses to third parties? Has the company historically incorporated open source software into its products, and if so does the company have any open source software issues?
- What software is critical to the company's operations, and does the company have appropriate licenses for that software (and does the company's usage of that software comply with use limitations or other restrictions)?
- Is the company a party to any source or object code escrow arrangements?
- What indemnities has the company provided to (or obtained from) third parties with respect to possible intellectual property disputes or problems?
- Are there any other liens or encumbrances on the company's intellectual property?

3. Customers/Sales. The buyer will want to fully understand the target company's customer base including the level of concentration of the largest customers as well as the sales pipeline. Topics of inquiry or concern will include the following:

- Who are the top 20 customers and what revenues are generated from each of them?
- What customer concentration issues/risks are there?
- Will there be any issues in keeping customers after the acquisition (including issues relating to the identity of the buyer)?

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- How satisfied are the customers with their relationship with the company? (Customer calls will often be appropriate.)
- Are there any warranty issues with current or former customers?
- What is the customer backlog?
- What are the sales terms/policies, and have there been any unusual levels of returns/exchanges/refunds?
- How are sales people compensated/motivated, and what effect will the transaction have on the financial incentives offered to employees?
- What seasonality in revenue and working capital requirements does the company typically experience?

4. Strategic Fit with Buyer. The buyer is concerned not only with the likely future performance of the target company as a stand-alone business; it will also want to understand the extent to which the company will fit strategically within the larger buyer organization.

Related questions and areas of inquiry will include the following:

- Will there be a strategic fit between the company and the buyer, and is the perception of that fit based on a historical business relationship or merely on unproven future expectations?
- Does the company provide products, services, or technology the buyer doesn't have?

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- Will the company provide key people (is this an acqui-hire?) and if so, what is the likelihood of their retention following the closing?
- What integration will be necessary, how long will the process take, and how much will it cost?
- What cost savings and other synergies will be obtainable after the acquisition?
- What marginal costs (e.g., costs of obtaining third party consents) might be generated by the acquisition?
- What revenue enhancements will occur after the acquisition?

5. Material Contracts.

One of the most time-consuming (but critical) components of a due diligence inquiry is the review of all material contracts and commitments of the target company.

The categories of contracts that are important to review and understand include the following:

- Guaranties,
- loans,
- and credit agreements
- Customer and supplier contracts Agreements of partnership or joint venture; limited liability company or operating agreements
- Contracts involving payments over a material dollar threshold
- Settlement agreements
- Past acquisition agreements

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- Equipment leases
- Indemnification agreements
- Employment agreements
- Exclusivity agreements
- Agreements imposing any restriction on the right or ability of the company (or a buyer) to compete in any line of business or in any geographic region with any other person
- Real estate leases/purchase agreements
- License agreements
- Powers of attorney and also buried in contract clauses and agreements

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- Franchise agreements
- Equity finance agreements
- Distribution, dealer, sales agency, or advertising agreements
- Non-competition agreements
- Union contracts and collective bargaining agreements
- Contracts the termination of which would result in a material adverse effect on the company
- Any approvals required of other parties to material contracts due to a change in control or assignment

All Employee/Management Issues.

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The buyer will want to review a number of matters in order to understand the quality of the target company's management and employee base, including:

- ☆ Management organization chart and biographical information
- ☆ Summary of any labor disputes Information concerning any previous, pending, or threatened labor stoppage
- ☆ Employment and consulting agreements, loan agreements, and documents relating to other transactions with officers, directors, key employees, and related parties
- ☆ Schedule of compensation paid to officers, directors, and key employees for the three most recent fiscal years showing separately salary, bonuses, and non-cash compensation (e.g., use of cars, property, etc.)
- ☆ Summary of employee benefits and copies of any pension, profit sharing, deferred compensation, and retirement plans
- ☆ Evidence of compliance with IRS Section 409A in connection with stock option issuances
- ☆ Summary of management incentive or bonus plans not included in above as well as other forms of non-cash compensation
- ☆ Likelihood of need for compliance with IRS Section 280G (golden parachute) rules in connection with any potential acquisition
- ☆ Employment manuals and policies Involvement of key employees and officers in criminal proceedings or significant civil litigation

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- ☆ Plans relating to severance or termination pay, vacation, sick leave, loans, or other extensions of credit, loan guarantees, relocation assistance, educational assistance, tuition payments, employee benefits, workers' compensation, executive compensation, or fringe benefits
- ☆ Appropriateness of the company's treatment of personnel as independent contractors vs. employees
- ☆ Actuarial reports for past three years
- ☆ What agreements/incentive arrangements are in place with key employees to be retained by the buyer? Will these be sufficient to retain key employees?
- ☆ What layoffs and resultant severance costs will be likely in connection with the acquisition?

7. Litigation.

An overview of any litigation (pending, threatened, or settled), arbitration, or regulatory proceedings involving the target company is typically undertaken.

This review will include the following:

- ☒ Filed or pending litigation, together with all complaints and other pleadings
- ☒ Litigation settled and the terms of settlement
- ☒ Claims threatened against the company Consent decrees, injunctions, judgments, or orders against the company

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☒ Attorneys' letters to auditors Insurance covering any claims, together with notices to insurance carriers

☒Matters in arbitration

☒Pending or threatened governmental proceedings against the company (SEC, FTC, FDA, etc.)

☒ Potentially speaking directly to the company's outside counsel

☒ LITIGATION RESERVES AND TRENDS BASED ON SIMILAR MERGERS TO ANTICIPATE CLAIMS BASED IN FEDERAL ANTITRUST

☒ State, County, subject matter specific Boards and Commissions & Local litigation claims.

☒ Class Actions that may have not been filed but could develop

☒ Competitor meddling and attempts to derail the market effects to such competitor's business interests.

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8. Tax Matters.

Tax due diligence may or may not be critical, depending on the historical operations of the target company, but even for companies that have not incurred historical income tax liabilities, an **understanding of any tax carryforwards and their potential benefit to the buyer may be important.**

Tax due diligence will often incorporate a review of the following:

- Federal, state, local, and foreign incomes sales and other tax returns filed in the last five years
- Government audits
- Copies of any correspondence or notice from any foreign, federal, state, or local taxing authority regarding any filed tax return (or any failure to file)
- Tax sharing and transfer pricing agreements
- Net operating losses or credit carryforwards (including how a change in control might affect the availability thereof) IRS Form 5500 for 401(k) plans
- Agreements waiving or extending the tax statute of limitations
- Allocation of acquisition purchase price issues
- Correspondence with taxing authorities regarding key tax items
- Settlement documents with the IRS or other government taxing authorities

9. Antitrust and Regulatory Issues.

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Antitrust and regulatory scrutiny of acquisitions has been increasing in recent years. The buyer will want to undertake the following activities in order to assess the antitrust or regulatory implications of a potential deal:

- If the buyer is a competitor of the target company, understanding and working around any limitations imposed by the company on the scope or timing of diligence disclosures
- Analyzing scope of any antitrust issues If the company is in a regulated industry that requires approval of an acquisition from a regulator,
- understanding the issues involved in pursuing and obtaining approval
- Confirming if the company has been involved in prior antitrust or regulatory inquiries or investigations
- Addressing issues that may be involved in preparing a Hart-ScottRodino filing (if thresholds are met) and effectively responding to any "second request" from the Department of Justice or Federal Trade Commission
- Considering Exon-Florio issues if the transaction involves national security or foreign investment issues
- Other Department of Commerce filings if the buyer is a foreign entity
- Understanding how consolidation trends in the company's industry might impact the likelihood and speed of antitrust or regulatory approval.

10. Insurance.

In any acquisition, the buyer will want to undertake a review of key insurance policies of the

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target company's business, including:

- If applicable, the extent of self-insurance arrangements
- General liability insurance
- D&O insurance
- Intellectual property insurance
- Car insurance
- Health insurance
- E&O insurance
- Key man insurance
- Employee liability insurance
- Worker's compensation insurance
- Umbrella policies
- **Cyber Insurance ?**
- **Pandemic Risk Insurance ?**
- **Trade Secret Theft Insurance ?**
- **Block Chain Indemnity ?**

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11. General Corporate Matters. Counsel for the buyer will invariably undertake a careful review of the organizational documents and general corporate records (including capitalization) of the target company, including:

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- 🕮 Charter documents (certificate of incorporation, bylaws, etc.)
- 🕮 Good standing and (if applicable) tax authority certificates
- 🕮 List of subsidiaries and their respective charter documents
- 🕮 List of jurisdictions in which the company and its subsidiaries are qualified to do business
- 🕮 List of current officers and directors
- 🕮 Lists of all security holders (common, preferred, options, warrants)
- 🕮 Stock option agreements and plans, including both standard documents and any deviations therefrom
- 🕮 Warrant agreements
- 🕮 Stock sale agreements
- 🕮 Stock appreciation rights plans and related grants
- 🕮 Agreements granting restricted stock units
- 🕮 Stockholder and voting agreements
- 🕮 Stock-related preemptive rights, registration rights, redemption rights, or co-sale rights
- 🕮 Agreements restricting the payment of cash dividends
- 🕮 Evidence that securities were properly issued in compliance with applicable securities laws, including applicable federal and state blue sky laws
- 🕮 Recapitalization or restructuring documents
- 🕮 Agreements related to any sales or purchases of businesses “No-shop” or exclusivity obligations

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- 🕮 Rights of first refusal or first negotiations in connection with a sale of the company or its business
- 🕮 Minutes of stockholders' meetings since inception, including written consents to action without a meeting
- 🕮 Minutes of board of directors and any board committees since inception, including written consents to action without a meeting

12. Environmental Issues.

The buyer will want to analyze any potential environmental issues the target company may face, the scope of which will depend on the nature of its business. Where an environmental review is conducted, it will typically include a review of the following:

- ☼ Environmental audits, records and reports for each owned or leased property, including results of tests or audits of the company's properties and possibly neighboring facilities
- ☼ Hazardous substances used in the company's operations
- ☼ Environmental permits and licenses
- ☼ Correspondence, notices, and files related to EPA, state, or local regulatory agencies Any environmental litigation, claims, or investigations
- ☼ Any known Superfund exposure
- ☼ Any contingent environmental liabilities or continuing indemnification obligations
- ☼ Any contractual obligations relating to environmental issues

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- ☼ The use of any petroleum products on the company's properties other than by passenger vehicles
- ☼ Any asbestos contained in any improvements located on the company's properties
- ☼ Records from any public agency investigation of the company's properties or any neighboring properties with respect to any environmental laws

13. Related Party Transactions. The buyer will be interested in understanding the extent of any "related party" transactions, such as agreements or arrangements between the target company and any current or former officer, director, stockholder, or employee, including the following:

- ⌘ Any direct or indirect interest of any officer, director, stockholder, or employee of the company in any business that competes with or does business with the company
- ⌘ Any agreements with any officer, director, stockholder, or employee that is entitled to compensation
- ⌘ Any agreements where any officer, director, stockholder, or employee has an interest in any asset (real estate, intellectual property, personal property, etc.) of the company

14. Governmental Regulations, Filings, and Compliance with Laws.

The buyer will be interested in understanding the extent to which the target company is subject to and has complied with regulatory requirements, including by reviewing the following:

- ✪ Citations and notices received from government agencies since inception or with continuing effect from an earlier date

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- Pending or threatened investigations or governmental proceedings
- Material reports to and correspondence with any government entity, municipality. or agency, including FDA, USDA, EPA, and OSHA
- Documents showing any certification of compliance with, or any deficiency with respect to, regulatory standards of the company
- Reports on the burdens and costs of regulatory compliance (including ERISA, labor and other federal, state, and local regulation)
- Any problems with such regulatory compliance (including ERISA, labor and other federal, state, and local regulation)
- Material governmental permits and licenses required to carry out the business or operations of the company or its subsidiaries currently in force Information regarding any of the company's permits or licenses that have been canceled or terminated
- Extent of evidence of the company's exemption from any permit or license requirement

15. Property.

- A review of all property owned by the target company or otherwise used in the business is an essential part of any due diligence investigation, with such review including:
    - Deeds
    - Leases of real property
    - Deeds of trust and mortgages
    - Title reports

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- Other interests in real property
- Financing leases and sale and leaseback agreements
- Conditional sale agreements
- Operating leases

16. Production-Related Matters.

Depending on the nature of the target company's business, the buyer will often undertake a review of the company's production-related matters, including the following:

- List of the company's most significant subcontractors, including the dollar volume of business and the type of services or products supplied by each subcontractor
- List of the company's largest suppliers with the amount and type of products purchased from each during the most recent fiscal years and year-to-date, as well as whether or not the supplier is the sole source of such products
- Monthly manufacturing yield summaries, by product
- Schedule of backlog showing customers, products, and requested/scheduled shipping dates
- Copies of inventory reports
- Supplies or materials used by the company to produce or develop products that are in short supply or subject to shortages
- Product service programs and copies of standard form of service contract and any contracts with service providers

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- Information regarding backlogs and levels of plant operation
- All agreements and other arrangements related to the research, development, manufacturing, and testing of the company's products

17. Marketing Arrangements.

As part of diligence, the buyer will want to understand the target company's marketing strategies and arrangements, including through reviewing:

- Sales representative, distributor, agency, and franchise agreements of the company
- Standard company sales forms or literature, including price lists, catalogs, purchase orders, etc.
- All other agreements related to the marketing of the company's products
- Surveys of the markets the company serves or plans to serve, whether or not compiled by or at the direction of the company
- Press releases concerning the company (or any partnership or joint venture involving the company or any subsidiary)

18. Competitive Landscape.

The buyer will want to understand the competitive environment in which the target company's business operates including by obtaining information on the following:

- The company's principal current and anticipated competitors

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- Technologies that could make the company's current technology or manufacturing processes obsolete
- Advantages/disadvantages of the company's products and technologies compared to those of competitors

19. Online Data Room.

It is critically important to the success of a due diligence investigation that the target company establish, maintain, and update as appropriate a well-organized online data room to enable the buyer to conduct due diligence in an orderly fashion.

The following are the common attributes and characteristics of an effective data room:

- The target company makes it available to the buyer as early in the process as possible, at the latest immediately following the parties finalizing the letter of intent or term sheet
- The data room has a logical table of contents or directory and full text search capabilities (which requires scanning of all documents with optical character recognition software)
- The data room permits bookmarking within the application
- Subject to confidentiality concerns, the buyer is permitted to print documents for offline review
- The data room is keyed to any due diligence checklist provided by the buyer to facilitate cross-referencing and review Ideally, access to the data room is accompanied by delivery by the company to the buyer of a draft disclosure schedule and all materials referred to in the disclosure schedule are in the data room

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- Updates to the data room are clearly marked or trigger email notifications to the buyer's counsel, to help ensure that nothing is missed as supplemental materials are added during the process

20. Disclosure Schedule.

As part of any M&A transaction, the **target company** will be required to **prepare** a **comprehensive disclosure schedule** addressing many of the **key diligence topics** described above, **and identifying any exceptions to the company's representations and warranties in the acquisition agreement**. Careful preparation of this disclosure schedule is extremely important and time-consuming for the company. It is not unusual for the company to have to revise and update the document a number of times before it is ready for delivery to the buyer. That means that is essential for the company to begin **preparing the disclosure schedule very early in the planning stages of an M&A** transaction. The buyer and the buyer's counsel will be looking for the following in the disclosure schedule, among many other items:

- ✓ Does the disclosure schedule accurately tie into the representations and warranties set forth in the acquisition agreement?
- ✓ Are all material contracts and amendments listed, with dates and counterparties?
- ✓ Are all contracts listed in the disclosure schedule contained in the target's online data room, and have those contracts been reviewed?
- ✓ Have all patents issued and pending been summarized and listed? Are any important contracts affected by a change in control?

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- ✓ Will consents be obtained from the counterparty before or after the change in control? If litigation is listed, has an analysis been done of the potential exposure?
- ✓ If there are liens on any assets, how will those liens be removed at closing?
- ✓ Are there any unusual employment agreements or severance arrangements?
- ✓ Is the outstanding capital stock, options, and warrants of the company properly listed?
- ✓ Do the company's continuing contracts provide for any issues for the company moving forward?
- ✓ Are there any material matters set forth in the disclosure schedule that are inconsistent with statements previously made on behalf of the company, or with the valuation that the buyer has placed on the business being acquired?
- ✓ Does the disclosure schedule include any broad disclaimers or generalized disclosures that would prevent the buyer from raising legitimate claims following the closing if individual representations and warranties turned out to be untrue?
- ✓ Are there disclosures or statements in the disclosure schedule that are internally inconsistent with each other?
- ✓

Conclusion.

An M&A transaction typically involves a significant amount of due diligence by the buyer and the buyer's counsel and accountants. By being prepared for the due diligence activities

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that a target company will encounter, the process can go smoothly and quickly, serving the best interests of both parties to the transaction.

Copyright © Richard D. Harroch. All Rights Reserved. About the Authors 8/5/2020 20 Key Due Diligence Activities In A Merger And Acquisition Transaction https://www.forbes.com/sites/allbusiness/2014/12/19/20-key-due-diligence-activities-in-a-merger-and-acquisition-transaction/#7bec14584bfc 22/22 Richard Harroch is a Managing Director and Global Head of M&A for VantagePoint Capital Partners. David Lipkin is a partner in the Corporate Department at the law firm of Morrison & Foerster LLP in Palo Alto, specializing in mergers and acquisitions. Read all of Richard Harroch's and David Lipkin's articles on AllBusiness.com. Related Articles on AllBusiness: The 4 Don'ts of Protecting Intellectual Property What Is an NDA and Does Your Business Need One? 4 Strategies for a Successful Business Sale Selling Your Technology Company: The Due Diligence Process For local business information on 15 million businesses, visit InBusiness.com

X. Cases

Ohio CASES

1. **Adopting a less restrictive approach toward assignments of restrictive covenants, the court held a successor company could enforce a restrictive covenant in part because the employee inherited no additional obligations following the acquisition.**

   Artromick International, Inc. v. Koch

   759 N.E.2d 385 (Ohio Ct. App. 2001)

2. **In Besser, the Court found that a public office's business plan, staffing contract, profit/loss analysis, acquisition goal summaries, working assumptions for operations, notes and research on comparable hospitals, draft asset purchase**

agreement, and pro forma for acquisition of a hospital were not proven to be trade secrets.

State ex rel. Besser v. Ohio State University

89 Ohio St. 3d 396 (Ohio 2000)

3. **In Grace v. Koch (1998), 81 Ohio St.3d 577, syllabus, the Supreme Court of Ohio explained "adverse possession" as "(1) acquisition of title by adverse possession requires party to prove, by clear and convincing evidence, exclusive possession and open, notorious, continuous, and adverse use for period of 21 years."**

1 of 2

Grace v. Koch

81 Ohio St. 3d 577 (Ohio 1998)

4. **In Renner v. Derin Acquisition Corp. (1996), 111 Ohio App.3d 326, this court held that a debt under FDCPA does not include payment by check or by the use of a credit card.**

Renner v. Derin Acquisition Corp.

676 N.E.2d 151 (Ohio Ct. App. 1996)

5. **Explaining that to support a deviation from child support guidelines, a court may consider the proximity in time of the acquisition of a capital asset to the date of termination of the child support obligation**

Kamm v. Kamm

67 Ohio St. 3d 174 (Ohio 1993)

6. **In Northeast Ohio Regional Sewer Dist. v. Brooklyn (1989), 64 Ohio App.3d 57, 580 N.E.2d 796, state law allowed the acquisition of licenses and temporary permits for blasting for limited purposes.**

Northeast Ohio Reg. Sewer Dist. v. Brooklyn

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64 Ohio App. 3d 57 (Ohio Ct. App. 1989)

7. **In Legros, the Ohi0 Supreme Court held that a business finder could recover from a party to an acquisition where the party or his agent misappropriates the finder's proprietary information.**

   Legros v. Tarr

   44 Ohio St. 3d 1 (Ohio 1989)

8. **In Diamond Co. v. Gentry Acquisition Corp., 531 N.E.2d 777, 782-83 (Ohio Ct. Com. Pl. 1988), the Court expressly considered a store's allegation that a competitor had violated the predecessor statute to § 4165.02(A)(12) by advertising false reasons for having lower prices than other stores.**

   Diamond Co. v. Gentry Acquisition Corp.

   531 N.E.2d 777 (Ohio Com. Pleas 1988)

9. **In Flaugher, supra, a majority of the court concluded that, in a sale-of-assets acquistion of one company by another, the successor corporation is generally not liable for the torts of its predecessor.**

   Flaugher v. Cone Automatic Machine Co.

   30 Ohio St. 3d 60 (Ohio 1987)

10. **Observing that the court need only focus on the relevant sales-tax provisions because use tax will not apply when the acquisition of property would be exempt from sales tax.**

    Procter Gamble Co. v. Lindley

    477 N.E.2d 1109 (Ohio 1985)

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XI. Termination

Occurs by contract, by regulatory agencies, by public pressure or political influences and competitors.

EXCERPT OF SPRINT-NEXTEL TERMINATION CLAUSE IN 10Q (Full Document in Appendix)

Section 8. Termination

8.1 Termination. This Agreement may be terminated:

(a) by mutual written consent of Parent and the Company at any time prior to the Effective Time;

(b) by either Parent or the Company, upon written notice to the other party, if the Merger shall not have been consummated by 5:00 p.m. New York City time on October 15, 2013 (the "**End Date**"); *provided*, *however*, that a party will not be permitted to terminate this Agreement pursuant to this Section 8.1(b) if the failure to consummate the Merger by the End Date has principally been caused by, or has resulted from, a failure on the part of such party to perform any covenant or obligation in this Agreement required to be performed by such party pursuant to this Agreement; *provided*, *further*, that if the Merger is not consummated by the End Date as a result of a Financing Failure, then, notwithstanding the first proviso to this Section 8.1(b), Parent may terminate this Agreement pursuant to this Section 8.1(b);

(c) by either Parent or the Company, upon written notice to the other party, at any time prior to the End Date if any U.S. court of competent jurisdiction or other U.S. Governmental Body shall have issued a final and nonappealable Order, or shall have taken any other action, having the effect of permanently restraining, enjoining or otherwise prohibiting the Merger; *provided*, *however*, that the party to this Agreement seeking to terminate this Agreement pursuant to this Section 8.1(c) shall have complied with its obligations under Section 5.8;

(d) by either Parent or the Company, upon written notice to the other party, if: (i) the Company Stockholders' Meeting (including any adjournments and postponements thereof) shall have been held and completed and the Company's stockholders shall have taken a final vote on a proposal to adopt this Agreement; and (ii) this Agreement shall not have been adopted at the Company Stockholders' Meeting (or any adjournment or postponement thereof) by the Required Company Vote;

(e) by Parent (at any time prior to the adoption of this Agreement by the Required Company Vote), upon written notice to the Company, if a Triggering Event shall have occurred;

(f) by Parent, upon written notice to the Company, if there shall have been a breach of any representation, warranty, covenant or agreement on the part of the Company contained in this Agreement or any representation or warranty of the Company shall have become untrue after the date hereof, which breach or untrue representation or warranty (i) would, individually or in the aggregate with all other such breaches and untrue

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representations and warranties, give rise to the failure of a condition set forth in Section 6.1(a) or Section 6.1(b) and (ii) is incapable of being cured prior to the End Date by the Company or is not cured within 30 days of written notice of such breach from Parent to the Company;

(g) by the Company, upon written notice to Parent, if there shall have been a breach of any representation, warranty, covenant or agreement on the part of any Parent Entity contained in this Agreement or any representation or warranty of a Parent Entity shall have become untrue after the date hereof, which breach or untrue representation or warranty (i) would, individually or in the aggregate with all other such breaches and untrue representations and warranties, give rise to the failure of a condition set forth in Section 7.1 or Section 7.2 and (ii) is incapable of being cured prior to the End Date by such Parent Entity or is not cured within 30 days of written notice of such breach from the Company to Parent;

(h) by the Company, upon written notice to Parent, if (i) all of the conditions set forth in Section 6 (other than conditions that by their nature are to be satisfied at the Closing) have been satisfied, (ii) the Company has irrevocably confirmed in such written notice to Parent that all of the conditions set forth in Section 7 have been satisfied or that the Company has agreed to waive any unsatisfied conditions in Section 7 and (iii) the Merger shall not have been consummated within 11 Business Days after the delivery of such notice by the Company to Parent; *provided*, *however*, that the Company will not be permitted to terminate this Agreement pursuant to this Section 8.1(h) if the failure of the Merger to have been consummated during the period set forth in clause (iii) above results from a failure on the part of the Company to perform in any material respect any covenant or obligation in this Agreement required to be performed by the Company during such 11 Business Day period and up to the Effective Time;

(i) by the Company, during the period of thirty (30) Business Days that commences on the date that is six months after the date of this Agreement, upon not less than two Business Days' written notice to Parent, if at the time of such termination (A) SoftBank is not a party to one or more Commitment Letters that provide for Debt Financing that is available to be borrowed subject to conditions precedent set forth therein during a period of time that begins on or prior to the date that is six months after the date of this Agreement and ends no earlier than the End Date and (B) SoftBank is not a party to one or more definitive financing documents that provide for Debt Financing that is available to be borrowed subject to conditions precedent set forth therein during a period of time that begins on or prior to the date that is six months after the date of this Agreement and ends no earlier than the End Date;

(j) by the Company (at any time prior to the adoption of this Agreement by the Required Company Vote), upon written notice to Parent, in order to enter into a definitive agreement with a Third Party providing for a Superior Offer in accordance with Section 5.5(e); or

(k) by the Company, upon written notice to Parent, if the Bond Purchase Agreement shall have been validly terminated by the Company pursuant to, and in accordance with the terms of, Section 13.1(d) of the Bond Purchase Agreement.

Notwithstanding anything to the contrary contained in this Section 8.1, this Agreement may not be terminated by any party unless any fee required to be paid (or caused to be paid) by such party pursuant to Section 8.3 at or prior to the time of such termination shall have been paid in full.

8.2 Effect of Termination. In the event of the termination of this Agreement as provided in Section 8.1, this Agreement will be of no further force or effect; *provided*, *however*, that (i) Section 5.13(g), this Section 8.2, Section 8.3 and Section 9 (and the Confidentiality Agreement) will survive the termination of this Agreement and will remain in full force and effect, (ii) except as provided in Section 8.3(g), the termination of this Agreement will not relieve any party from any liability for any fraud or Willful Breach by such party and (iii) no

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termination of this Agreement will in any way affect any of the parties' rights or obligations under the Bond Purchase Agreement.

Ohio Attorney General Antitrust Division

https://www.ohioattorneygeneral.gov/Legal/Antitrust

Antitrust

"Antitrust laws are based on the proposition that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone."
--Judge Learned Hand

The Antitrust Section's attorneys work to foster competition in the marketplace by enforcing both state and federal antitrust laws. These laws prohibit collusive or otherwise anticompetitive business practices.

Attorneys investigate potential violations and ask courts to order that violations stop. The Section in some cases may also seek compensation for consumers and the state.

They also conduct "business reviews" at the request of private companies considering mergers, acquisitions or other combinations.

Through the Partnership for Competitive Purchasing, they perform periodic on-site reviews of Ohio public entity purchase records in an effort to detect bid-rigging or price-fixing schemes of which the public entity may have been a victim.

Antitrust Business Review Details

Although the Ohio Attorney General is not authorized to give advisory opinions to private parties, the Attorney General has statutory enforcement responsibilities under Ohio's antitrust laws. In order to inform and educate businesses **and to allow an individual, business, industry group or other enterprise to plan future business activity that conforms to the antitrust laws**, the Ohio Attorney General, through the Antitrust Section will, in certain circumstances and under specified conditions, review proposed business conduct and state its present enforcement intentions under the antitrust laws.

The guidelines for this business review process are subject to revision and are as follows:

1. Request

   A request for a business review letter must be submitted in writing to:
   Chief of the Antitrust Section
   Office of the Ohio Attorney General
   150 E. Gay St., 22nd Floor
   Columbus, OH 43215

2. Proposed business conduct

   The Antitrust Section will only consider requests with respect to proposed business conduct that **may involve intrastate or interstate commerce. Hypothetical problems will not be considered for review.**

3. Review discretion

   The Antitrust Section may, at its discretion, refuse to consider a request.

4. Applicability

   A business review letter shall have no application to any party that does not join in the request.

5. Obligation of requesting party

   The requesting party is under an affirmative obligation to make full and true disclosure with respect to the business conduct for which review is requested. Each request should be accompanied by a detailed description of the proposed conduct and all relevant data, including background information, copies of all operative documents and statements of collateral or oral understandings, if any. All parties requesting the review letter must provide any additional information or documents the Antitrust Section requests in order to review the matter. Any information given orally must be promptly confirmed in writing.

6. Regulatory review

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Any business review letter issued will state only the Attorney General's present enforcement intentions under the antitrust laws, and shall in no way be taken to indicate the Attorney General's views on legal or factual issues that may be raised where the proposed business conduct is subject to approval, review or regulation by a state or federal agency, commission, department or board. The issuance of a business review letter is not to be represented to mean that the Attorney General believes that there are no anticompetitive consequences warranting a regulatory entity's consideration.

7. Oral clearance is not binding

   No oral clearance, release or other statement purporting to bind the enforcement discretion of the Ohio Attorney General may be given. The requesting party may rely only upon a written business review letter signed by the Chief of the Antitrust Section or a designee.

8. Response by Attorney General

   After reviewing a request the Attorney General, through the Antitrust Section, may:

   a. State his present enforcement intention with respect to the proposed business conduct;
   b. Decline the request; or
   c. Take such other position as he considers appropriate.

9. Commitment of Attorney General

   A business review letter will address the facts upon which it is issued, and will only reflect the enforcement intention of the Attorney General as of the date of the letter and with respect to the facts provided. The Attorney General remains free to bring whatever action may subsequently be required by the public interest. After expressing an intention to not bring an action, the Attorney General will not generally exercise his right to bring an enforcement action where there has been full and true disclosure at the time of the request.

10. Request may be withdrawn

    Any requesting party may withdraw a request for review at any time. The Antitrust Section remains free to submit comments to the requesting party, or take such other action as deemed appropriate.

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XII. Upended Mergers

Global, political, business, antitrust, competitors, financing etc. a merger:

a. Timing Fails
b. Business Markets disrupt
c. Litigation
d. Financing fails
e. Laches
f. Deal abandoned.

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g. Management has unclean hands (has committed contract breaches or violations of a material nature).

h. The mergers' purpose is against public policy.

ANTITRUST LAW

The law bars mergers when the effect "may be substantially to lessen competition or to tend to create a monopoly." Three basic kinds of mergers may have this effect: horizontal mergers, which involve two competitors; vertical mergers, which involve firms in a buyer-seller relationship; and potential competition mergers, in which the buyer is likely to enter the market and become a potential competitor of the seller, or vice versa.

Horizontal Mergers

There are two ways that a merger between competitors can lessen competition and harm consumers: (1) by creating or enhancing the ability of the remaining firms to act in a coordinated way on some competitive dimension (coordinated interaction), or (2) by permitting the merged firm to raise prices profitably on its own (unilateral effect). In either case, consumers may face higher prices, lower quality, reduced service, or fewer choices as a result of the merger.

Coordinated Interaction

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A horizontal merger eliminates a competitor, and may change the competitive environment so that the remaining firms could or could more easily coordinate on price, output, capacity, or other dimension of competition. As a starting point, the agencies look to market concentration as a measure of the number of competitors and their relative size. Mergers occurring in industries with high shares in at least one market usually require additional analysis.

Market shares may be based on dollar sales, units sold, capacity, or other measures that reflect the competitive impact of each firm in the market. The overall level of concentration in a market is measured by the Herfindahl-Hirschman Index (HHI), which is the sum of the squares of the market shares of all participants. For instance, a market with four equal-sized firms has an HHI of 2500 ($25^2 + 25^2 + 25^2 + 25^2$). Markets with many sellers have low HHIs; markets with fewer players or those dominated by few large companies have HHIs approaching 10,000, a level indicating one firm with 100% market share. The larger the market shares of the merging firms, and the higher the market concentration after the merger, the more disposed are the agencies to require additional analysis into the likely effects of the proposed merger.

During a merger investigation, the agency seeks to identify those mergers that are likely either to increase the likelihood of coordination among firms in the relevant market when no coordination existed prior to the merger, or to increase the likelihood that any existing coordinated interaction among the remaining firms would be more successful, complete, or sustainable. Successful coordination typically requires competitors to: (1) reach an agreement

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that is profitable for each participant; (2) have the means to detect cheating (that is, deviations from the plan); and (3) have the ability to punish cheaters and reinstate the agreement. The coordination may take the form of an explicit agreement, such as agreeing to raise prices or reduce output, or the coordination may be achieved by subtle means — known as tacit coordination. Firms may prefer to cooperate tacitly rather than explicitly because tacit agreements are more difficult to detect, and some explicit agreements may be subject to criminal prosecution. The question is: does the merger create or enhance the ability of remaining firms to coordinate on some element of competition that matters to consumers?

> Example: The FTC challenged a merger between the makers of premium rum. The maker of Malibu Rum, accounting for 8 percent of market sales, sought to buy the maker of Captain Morgan's rums, with a 33 percent market share. The leading premium rum supplier controlled 54 percent of sales. Post-merger, two firms would control about 95 percent of sales. The Commission challenged the merger, claiming that the combination would increase the likelihood that the two remaining firms could coordinate to raise prices. Although a small competitor, the buyer had imposed a significant competitive constraint on the two larger firms and would no longer play that role after the merger. To settle claims that the merger was illegal, the buyer agreed to divest its rum business.

Unilateral Effects

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A merger may also create the opportunity for a unilateral anticompetitive effect. This type of harm is most obvious in the case of a merger to monopoly — when the merging firms are the only competitors in a market. But a merger may also allow a unilateral price increase in markets where the merging firms sell products that customers believe are particularly close substitutes. After the merger, the merged firm may be able to raise prices profitably without losing many sales. Such a price increase will be profitable for the merged firm if a sufficient portion of customers would switch *between its products* rather than switch to *products of other firms*, and other firms cannot reposition their products to entice customers away.

> Example: The FTC challenged the merger of two makers of ultrasonic non-destructive testing (NDT) equipment used for quality control and safety purposes in many industries. For many customers, the products of the merging firms were their first and second choice, and evidence showed that the two firms were frequently head-to-head rivals. The merger would have eliminated this beneficial competition on pricing and innovation. To settle the FTC's claim that the proposed merger was illegal, the companies agreed to divest the buyer's NDT business.

Vertical Mergers

Vertical mergers involve firms in a buyer-seller relationship — for example, a manufacturer merging with a supplier of an input product, or a manufacturer merging with a distributor of its finished products. Vertical mergers can generate significant cost savings and improve

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coordination of manufacturing or distribution. But some vertical mergers present competitive problems. For instance, a vertical merger can make it difficult for competitors to gain access to an important component product or to an important channel of distribution. This problem occurs when the merged firm gains the ability and incentive to limit its rivals' access to key inputs or outlets.

> Example: The FTC challenged the combination of an ethanol terminal operator and a gasoline refiner. Refiners need ethanol to create specially blended gasoline, and before the merger, an independent firm with no gasoline sales controlled access to the ethanol supply terminal. After the merger, the acquiring refiner could disadvantage its competitors in the gasoline market by restricting access to the ethanol terminal or raising the price of ethanol sold to them, which would reduce competition for sales of gasoline containing ethanol and raise prices to consumers. As part of a consent agreement, the FTC required the merged firm to create an informational firewall so there could be no preferential access or pricing for its refining affiliate.

Potential Competition Mergers

A potential competition merger involves one competitor buying a company that is planning to enter its market to compete (or vice versa). Such an acquisition could be harmful in two ways. For one thing, it can prevent the actual increased competition that would result from the firm's entry. For another, it would eliminate the procompetitive effect that an outside firm can have on

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a market simply by being recognized as a possible entrant. What accounts for that effect? The firms already in the market may avoid raising prices to levels that would make the outside firm's entry more likely. Eliminating the potential entrant through a merger would remove the threat of entry and possibly lead to higher prices.

> Example: The FTC has challenged a number of mergers between pharmaceutical companies where one firm is already in the market with an-FDA approved drug and the second company has a drug that is in the approval process and could compete once it is approved. Mergers of this type eliminate a future competitor and further delay price competition for certain drugs.

XIII. Conclusions

Benefits of Mergers

28 November 2018 by Tejvan Pettinger

A merger occurs when two firms join together to form one. The new firm will have an increased market share, which helps the firm gain economies of scale and become more profitable. The merger will also reduce competition and could lead to higher prices for consumers.

The main benefit of mergers to the public are:

1. Economies of scale. This occurs when a larger firm with increased output can reduce average costs. Lower average costs enable lower prices for consumers.

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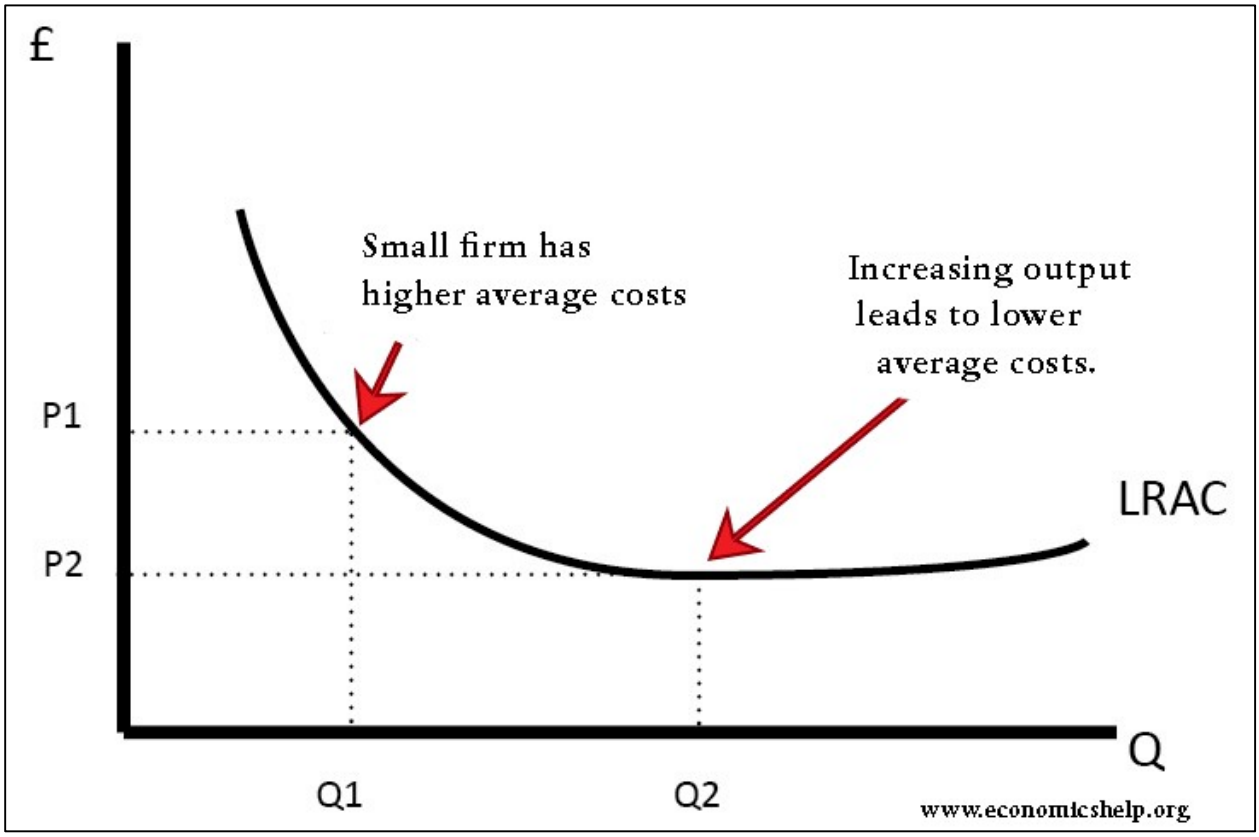

Different economies of scale include:

- **Technical economies; if the firm has significant fixed costs then the new larger firm would have lower average costs,**
- **Bulk buying – A bigger firm can get a discount for buying large quantities of raw materials**
- **Financial – better rate of interest for large company**
- **Organizational – one head office rather than two is more efficient**

A merger can enable a firm to increase in size and gain from many of these factors.

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Note, a vertical merger would have less potential economies of scale than a horizontal merger e.g. a vertical merger could not benefit from technical economies of scale. However, in a vertical merger, there could still be financial and risk-bearing economies.

Some industries will have more economies of scale than others. For example, a car manufacturer has high fixed costs and so gives more economies of scale than two clothing retailers. More on economies of scale.

2. International competition. Mergers can help firms deal with the threat of multinationals and compete on an international scale. This is increasingly important in an era of global markets.

3. Mergers may allow greater investment in R&D This is because the new firm will have more profit which can be used to finance risky investment. This can lead to a better quality of goods for consumers. This is important for industries such as pharmaceuticals which require a lot of investment. It is estimated 90% of research by drug companies never comes to the market. There is a high chance of failure. A merger, creating a bigger firm, gives more scope to tolerate failure, encouraging more innovation.

4. Greater efficiency. Redundancies can be merited if they can be employed more efficiently. It may lead to temporary job losses, but overall productivity should rise.

5. Protect an industry from closing. Mergers may be beneficial in a declining industry where firms are struggling to stay afloat. For example, the UK government allowed a merger between Lloyds TSB and HBOS when the banking industry was in crisis.

6. Diversification. In a conglomerate merger, two firms in different industries merge. Here the benefit could be sharing knowledge which might be applicable to the different industry. For example, AOL and Time-Warner merger hoped to gain benefit from both the new internet industry and an old media firm.

Examples of mergers

2017 – Amazon merger with Whole Foods. Amazon has knowledge and expertise in online shopping. Whole Foods is a major food retailer. It is hoped the merger will enable Whole Foods to benefit from Amazon's existing infrastructure and online delivery.

2000 Glaxo Wellcome Plc and SmithKline Beecham Plc – became GlaxoSmithKline. Hoped larger firm more powerful in developing R&D.

2014 Facebook – WhatsApp –

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2016 Microsoft acquired LinkedIn ($26.2 billion)

Evaluation of mergers

The desirability of a merger will depend upon several factors such as:

1. **Is there scope for economies of scale? Are there high fixed costs in the industry?**
2. **Will there be an increase in monopoly power and a significant reduction in competition?**
3. **Is the market still contestable? (is there freedom of entry and exit)**

Tejvan Pettinger studied PPE at LMH, Oxford University.
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APPENDIX & ADDITIONAL MATERIALS

LEASES, ENVIRONMENTAL. MORTGAGES & OHIO STATUTES

LEASES

III. Before negotiating or drafting a commercial lease you must clarify your role.

A. Are you drafting or reviewing the lease form?

i. If you represent the landlord, you will be aided by the landlord's advantages: landlords are masters in the art of confusion, have psychological advantages over the tenant, and are familiar with the basic lease form.

ii. If you represent the tenant, a complete review of the lease agreement is a must; catalogue your comments as you proceed through the document.

B. Are you negotiating business terms for the developer and tenant?

i. Has the tenant done its homework for the retail lease? Is this a successful center of activity?

ii. Is it convenient to business or residential areas?

iii. Is it accessible over modern roads and is it accessible by public transportation?

iv. Does it have space for expansion, with frontage and visibility? Is the area stable?

v. Is tenant's proposed use complemented by the environs?

vi. Is it the right location for tenant?

vii. Are the architectural style, landscaping, and decorations suitable?

viii. Are the size and location of the parking and loading facilities adequate?

ix. Are key tenants spaced to generate customer traffic to smaller tenants?

x. Is the placing of stores and tenant mix adequate to sustain the center?

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xi. What other leases have been signed?
xii. What is the tenant's proposed location?
xiii. Is it close to entrances, parking, kiosks? Is it visible from thoroughfares?
xiv. Has the tenant done a pro forma profit-and-loss statement?
xv. Do projected gross sales per square foot allow for a profit?
xvi. What is the effect of this site on volume at other stores?
xvii. What is the effect on fixed administrative overhead?

C. What business terms should the tenant negotiate (in addition to rent, size, location, term, and use clauses)?
i. The ability to assign and sublet; the ability to transfer the lease to affiliates?
ii. The hours of availability; operation, and continuous operation?
iii. Use clause; what will tenant's business growth require?
iv. Right to defer the opening or to cancel?
v. Radius restrictions and exclusive rights?
vi. Construction allowance and condition of premises?
vii. Why is it important for the tenant to negotiate at this stage (instead of waiting to raise these issues as part of the "legal" negotiation)?
viii. How should you negotiate the legal terms: default, bankruptcy, casualty, condemnation, and so forth?

IV. What can the tenant hope to achieve?
A. Understand that lease is *not* non-negotiable, but must be financeable by landlord.
B. Understand the tenant's bargaining strength by considering pace of leasing, success of other tenants, location of retail or office space, size of tenant, present economy, and other leases with this landlord.
C. Does the tenant fully understand the economic effect of the lease?
D. Have the exhibits been examined by the right party?
E. Has tenant dealt with this landlord previously? Will there be future lease negotiations?

V.Legal Considerations Common to Most Types of Leases
A. What are the nature and identity of the parties?
i. Are the landlord and tenant duly formed and authorized to enter into lease?
ii. Are spouse, joint, and several obligations, or guarantor signatures necessary?

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iii. Does the landlord have good title? How so? Zoning?
iv. What is the effect of reciprocal construction, operation, and easement agreements?
v. Does a fiduciary or agent have proper authority?
vi. Whose credit is on the line?

B. Review the description of the premises.
i. Is the description accurate? Determining whether the description is accurate can be difficult. The description should use a drawing or a metes-and bounds description.
ii. Review the site plan.
a. When you represent the landlord, make sure site plan does not create an implied covenant that buildings and parking spaces will be constructed as shown or cannot be relocated. Also, reserve rights to relocate and expand in the lease and on the plat.
b. When you represent the tenant, seek to preserve and promote the tenant's parking, access, and visibility. Make sure that there is no detrimental relocation of store or key tenants, or location or relocation of kiosks.
iii. Determine whether rights in common are granted or a terminable license.
iv. Are all of the appurtenances defined, such as the stairway and directory?
v. Measurement of newly constructed premises: will variation in size reduce or increase rent?

VI. Office Lease

C. For office leases, define the level of services that the landlord will provide:
i. Security;
ii. Janitorial;
iii. Utilities;
iv. Off-hour services and access and their cost;
v. Building directory and signage;
vi. Common-area usage, halls, elevator, parking, freight access, toilets, and fountains; and
vii. The landlord's obligation to repaint.

D. How are expenses to be shared? Determine how rent is calculated and what formula is to be used for escalating it.

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i. Is square footage calculated with or without a common area factor?
ii. How are automatic increases of rent calculated? Is a consumer price index used? Are these automatic increases in addition to or instead of expense pass-throughs? How often is rent escalated?
iii. Establish a base for expense pass-throughs:
    a. In a net lease all costs are passed through to the tenant;
    b. The tenant will pay its proportionate share of expenses reckoned over a base, but not until the tenant's first *full* year in which 80 percent of *leasable* space is occupied by bona fide rent-paying tenants with at least one tenant on each floor;
    c. Be sure to distinguish leased from leasable space;
    d. Determine whether a ceiling will apply;
    e. Dollar-stop concept (i.e., all expenses are passed through over a base of stated dollar amount) vs. base-year concept (i.e., all expenses are passed through over the actual expenses incurred in a particular calendar or fiscal year).
iv. Define expenses:
    a. Are capital expenditures distinguished from maintenance expenses?
    b. Are costs attributable solely to office use in a mixed-use project?
    c. Are leasing commissions, salaries and overhead, redecorating for new tenants, sums collected from tenants?
    d. Will there be a ceiling on expenses, or will the tenant have most favored-nation status?
    e. Will the landlord furnish certified statements?
    f. Will the landlords have the right to make special adjustments?
v. How will real property taxes be apportioned?
    a. Will the base year be assessed as if completed for a full tax year?
    b. Will the expansion of the building or differing uses affect the apportionment?

E. What does the proposed lease say about landlord and tenant improvements?
i. What are building standards for outlets, telephone, partitions, floor covering, ceiling, HVAC?
ii. That will the excess cost the tenant? Who will do the work?
iii. Will the tenant have a right to early entry to do work?

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iv. Must an architect, engineer, or contractor review proposed improvements?

F. What does the proposed lease say about future space arrangements?
   i. Does the tenant have renewal rights?
   ii. Does the tenant have cancellation rights?
   iii. Does the tenant have option, first refusal, or expansion space rights?
   iv. Does the tenant have a right to sublease or assign?
   v. Does the tenant have the right to reduce the premises?
   vi. Does the tenant have the right to relocate?
   vii. Does the landlord have the right to recapture space?

G. What does the proposed lease say about security deposits?
   i. Are security deposits controlled by statute?
   ii. How are security deposits applied?
   iii. What is the tax treatment to the landlord?
   iv. Are security deposits to bear interest?

H. Does the proposed lease impose an attornment, nondisturbance, subordination and estoppel requirement? If so, is it:
   i. A landlord requirement?
   ii. A tenant requirement?
   iii. A lender requirement?

I. Are there additional areas of concern? Are there provisions concerning:
   i. Payment of broker's commissions?
   ii. Defining "ready for occupancy" and rent commencement?
   iii. Retaining ownership of improvements?
   iv. Tenant right to repair?
   v. Easement for light and air?
   vi. Assignment to controlled entity without consent?
   vii. Description of premises; parking?
   viii. Rules?

VII. Retail Lease

A. What provisions govern the use of the premises?
   i. What are permitted uses? Absent any restriction, the tenant may use the premises for any lawful purpose.

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a. For the landlord: restrict permitted uses to protect the tenant mix; to avoid the violation of exclusives; and to protect against assignment and sublease.
b. For the tenant: make the permitted uses as broad as possible, to protect ability to assign, sublease, expand or change merchandising in the future and to cover incidental and accessory uses.

ii. Do the permitted use restrictions have anti-trust implications?
   a. Any attempt by a major tenant to obtain or exercise limits on merchandise, services, or pricing of another tenant may violate the Federal Trade Commission Act.
   b. An attempt by landlord to limit merchandising rather than price probably is permitted.
   c. Anti-discount clauses do violate antitrust law.

iii. What about exclusives? The Federal Trade Commission considers exclusives to violate anti-trust law when they are granted to major tenants in centers above 200,000 square feet, although case law may hold otherwise.
   a. For landlord: Expanding merchandise lines may cause a breach of an exclusive granted to another tenant (i.e., one exclusive may require another). Exclusives limit competition and the landlord's percentage rent. Does the exclusive apply to the expansion of the shopping center? Try to condition the enforceability of the exclusive to the tenant's not being in default.
   b. For tenant: Remember that exclusives are permissible in a small shopping centers.

iv. Is there a radius restriction (i.e., the tenant won't compete within a defined area)?
   a. The case law applies a rule of reason.
   b. The Federal Trade Commission holds that radius restrictions violate antitrust law in many instances.
   c. For tenant: The tenant will want to protect its ability to open in nearby center. The tenant should not conspire with landlord. The tenant will want to exclude its existing stores from the restriction and exclude the tenant's other distinct formats.

v. Is there a covenant of continuous operation?

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a. Can a continuous operation requirement be inferred? Does a percentage rent clause imply such a requirement?
b. What effect would a "dark" store have on the shopping center?
c. Under what circumstances would a tenant have the right to close?
d. Should the landlord have the right to specifically enforce the continuous operation obligation?

vi. Does the proposed lease regulate store hours?
a. Does the lease impose minimum store hours?
b. May the tenant limit store hours for strikes, vacations, and the like?
c. The tenant will want other tenants and department stores to be open simultaneously. The tenant will want the right to close for holidays.

vii. Does the proposed lease allow the tenant to change its tradename so its rights to assign or sublet aren't diluted?

viii. Are renewal rights a one-way street?

B. What does the proposed lease have to say about the construction of improvements?
i. In a turn-key lease, the landlord constructs all the improvements.
ii. In a shell lease, the landlord builds the shell and the tenant does the balance under approved plans and specifications.
iii. The tenant will want to negotiate and protect its construction allowance.
a. It may want cash payments from a solvent landlord.
b. The landlord may prefer an offset against percentage rent.
iv. The landlord may assume part of the work at its cost. If that is the case, the tenant will want a warranty on the landlord's work.

C. When does the term commence?
i. The landlord will want the term to commence on a specific date or when the tenant opens for business, whichever is first. The landlord will:
a. For new construction, the landlord will want the term to commence, for example, 60 days after the landlord completes the construction work. (This gives the tenant some time to install trade fixtures, and the like.)
b. The landlord will want to pay particular attention to the term "ready for occupancy."
c. The landlord will want the right to postpone the tenant's opening until the shopping center grand opening.

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ii. The tenant will want to make sure that there is enough time to do its construction work after possession is delivered, but before the start of rent accrual.
    a. The tenant will oppose any requirement to be open until department stores and a certain percentage of other tenants are open.
    b. The tenant will need parking, mall, access, and utilities as opening requirements.
    c. The tenant will want the right to open early and pay only percentage rent.
    d. The tenant will want the right not to open during certain seasons or dates.

iii. Both the tenant and landlord will want the right to cancel the lease if the shopping center is not open by a certain date.

D. What about rent and other monetary obligations?

i. The landlord needs minimum rent to obtain financing.
    a. Minimum rent is usually calculated in dollars per square foot.
    b. Escalations are often based on the CPI, but there is more than one CPI. Which CPI index is to be used? What happens if the selected CPI is discontinued during the course of the lease?

ii. Percentage rent varies according to the tenant's business and shopping center.
    a. Get full value for minimum rent (i.e., Percentage Rent = (percent of Gross Receipts) - Base Rent).
    b. The exclusions from gross sales may include: employee discounts; services at cost; the tenant's share of vending-machine receipts; bad debts and refunds; inter-store exchanges; lay-away sales; and credit card interest.
    c. The tenant reports gross sales, then records and audits them.
    d. The lease should indicate the time for payment. Will the payments be cumulative or not?
    e. The landlord will want an automatic increase in minimum rent if the tenant doesn't achieve some level of percentage rent.
    f. The lease should specify other charges that will offset percentage rent.
    g. What happens if sales increase but profits decline?

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iii. How are taxes handled?
    a. Will the tenant be paying a percentage of all taxes, or only an increase over the first year's taxes?
    b. Is the percentage of taxes based on *leased* or *leasable* space?
    c. Will mezzanines, basements, kiosks, and "tire, battery and accessory" buildings be included or excluded from the tax base on which the tenant pays taxes?
    d. What happens if the shopping center expands? Will this lower the tenant's share of the taxes?
    e. Will the tenant's share of taxes be offset against percentage rent? Will there be a ceiling on the tenant's share of taxes? Will the tenant have "most favored- nation" status?
    f. Will the tenant have the right to appeal taxes?
    g. Must the tenant pay estimated monthly taxes in advance?

iv. How will CAM costs be apportioned?
    a. Will initial capital costs be excluded?
    b. Will they be figured on leased or leasable space?
    c. Will there be offsets, a ceiling, or a most-favored-nation clause?
    d. Will the tenant need a statement of CAM expenses and right to an audit those expenses? Will the landlord have "fiduciary" responsibilities with regard to these costs?
    e. Will CAM charges be adjusted according to CPI increases? If so, which CPI will be used?
    f. Will costs be duplicated?
    g. Is there an affirmative covenant of the landlord to maintain common areas?
    h. What is the landlord's overhead and profit with regard to the common areas?

v. How are repair and maintenance handled?
    a. Is the landlord making a warranty of condition on existing space?
    b. Will the landlord cure faulty construction on new space?
    c. Is the landlord making an affirmative covenant on landlord's obligations and the tenant's right to cure?

vi. How about utility costs?

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a. Is there a ceiling on utility costs?
b. Will the landlord be prohibited from charging higher than the rates from a public utility? Will the landlord be forbidden from selling utility service at a profit?
c. Will there be protection against energy shortages?
d. May the landlord cut off service if the tenant defaults?

vii. Will the tenant be obligated to join a merchants' association?
a. Will the tenant's only obligation be to pay dues?
b. Will there be a ceiling on costs for which the tenant is responsible?
c. Will there be CPI adjustments (which CPI?)?
d. Will others participate in the association, including the landlord?
e. Will the use of the mall by third parties be permitted or not?

E. What about tenant operations?
i. What are the trash removal arrangements?
ii. Where will merchandise deliveries be made?
iii. Where may the tenant place signs and display merchandise?
iv. Are there restrictions on the tenant's right to make changes and alterations?

F. Are there restrictions on assignment and subletting?
i. Is there a provision requiring that the landlord's consent to assignment and subletting not be unreasonably withheld?
ii. Do restrictions on assignment and subletting apply to a transfer of stock?
iii. Will restrictions on assignment and subletting create problems for the sale of a going business?

G. What do the damage and destruction, condemnation, and insurance clauses say?
i. In negotiating the casualty damage clauses, the struggle is over who has the last word.
a. Does the tenant, or the landlord, have the obligation to repair damage from a casualty? How quickly?
b. Does the tenant have the right to terminate the lease if the premises are damaged or destroyed? Does the landlord?
c. What happens if there is a casualty, but no casualty clause?
ii. What about the condemnation clause?
a. Are there obligations to restore the premises?
b. Are there rights of termination?

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c. Does the landlord have an obligation to ensure the adequacy of the award?
d. What if there is a taking of other than demised premises?
e. What effect does a subordinate mortgage have on the tenant's right to share in award?

iii. What about insurance?
a. Which party insures what?
b. How much liability insurance should the tenant carry?
c. Should the parties ask their respective insurers to waivers of subrogation?
d. Which party should insure the plate glass?
e. The lease should deal with insurance increases based on use.

H. What remedies are available upon a default?
i. Is self-help available? Is self-help mutually available?
ii. Is distraint available? What effect would distraint have on the tenant's equipment financing?
iii. May the landlord reenter the leased premises and terminate the lease?
iv. How would landlord's damages be calculated in this case?
v. Are late charges available—these might create usury problems?
vi. Would bankruptcy constitute a default?
vii. Is abatement of rent available if the landlord defaults?

I. Is there a right of cancellation?
i. This can be the landlord's safety net if the building cannot be built.
ii. Does the Rule against Perpetuities affect a right of cancellation?

J. What about the recordation of the lease?
i. Is it necessary?
ii. Who pays the cost?
iii. Are short form leases recordable?

K. The landlord's lender often requires tenants to subordinate their leasehold interests, thus allowing the lender to "wipe out" the tenant's lease if the lender forecloses against the landlord's interests.

L. Estoppel certificates and nondisturbance agreements are between the landlord's lender and the (subordinating) tenant, in which the (then-foreclosing) lender agrees that it will not "wipe out" the tenant's leasehold if the landlord defaults.

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A general warranty deed and that, as such, he is subject to the general warranty covenants contained in the deed and R.C. 5302.06. In regard to general warranty covenants, R.C. 5302.06 states: In a conveyance of real estate, or any interest therein, the words "general warranty covenants" have the full force, meaning, and effect of the following words: "The grantor covenants with the grantee, his heirs, assigns, and successors, that he is lawfully seized in fee simple of the granted premises; that they are free from all encumbrances; that he has good right to sell and convey the same, and that he does warrant and will defend the same to the grantee and his heirs, assigns, and successors, forever, against the lawful claims and demands of all persons."
As demonstrated, included within the general warranty deed is the covenant to convey a title free of encumbrances. The subject mortgage satisfied the definition of "encumbrance." *Ameritrust v. Sherman*, 9th Dist. No. 3507, 1983 Ohio App. LEXIS 14934 (Nov. 16, 1983) (breach of covenant to convey title free of encumbrances occurred when the property subject to a mortgage was transferred via general warranty deed); *Hollon v. Abner*, 1st Dist. No. C960182, 1997 Ohio App. LEXIS 3814 (Aug. 29, 1997) (mortgage constitutes an encumbrance for purposes of general warranty covenants).

VIII. Law dictionaries defines a license as

A. The permission granted by competent authority to exercise a certain privilege that, without such authorization, would constitute an illegal act,a Trespass or a TORT. The certificate or the document itself that confers permission to engage in otherwise proscribed conduct.

i. A license is different from a permit. The terms license and permit are often used interchangeably, but generally, a permit describes a more temporary form of permission. For example, if a homeowner seeks to make structural additions to her property, she may have to apply for permits from local land use and Zoning boards. These permits expire on a certain date or when the work is finished. By contrast, the contractor who completes the work will likely hold a local license that allows her to operate her business for a certain number of years.

ii. Licenses are an important and ubiquitous feature of contemporary society. Federal, state, and local governments rely on licensing to control a broad range of human activity, from commercial and

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professional to dangerous and environmental. Licenses may also be issued by private parties and by patent or Copyright holders.

B. Gerald N. Hill and Kathleen T. Hill defines a license as:
   i. n. governmental permission to perform a particular act (like getting married), conduct a particular business or occupation, operate machinery or vehicle after proving ability to do so safely, or use property for a certain purpose.
   ii. The certificate that proves one has been granted authority to do something under governmental license.
   iii. A private grant of right to use real property for a particular purpose, such as putting on a concert.
   iv. A private grant of the right to use some intellectual property such as a patent or musical composition.

C. Government Licenses
   i. The great many activities that require a license issued by a government authority include fishing; hunting; marrying; driving a motor vehicle; providing HEALTH CARE services; practicing law; manufacturing; engaging in retail and wholesale commerce; operating a private business, trade, or technical school; providing commercial services such as those offered by whitewater rafting outfitters and travel agencies; providing public services such as food and environmental inspection; and operating public pinball machines.
   ii. Not all persons engaged in a licensed activity need to obtain a license. For example, the owner of a liquor store must obtain a license to operate it, but the cashiers and stock persons need not obtain a license to work there. By contrast, not only does a dentist have to obtain a license to conduct business in a dental office, but dental hygienists and other dental assistants must each have a license to work in the office.
   iii. A license gives a person or organization permission to engage in a particular activity. If the government requires a license for an activity, it may issue criminal charges if a person engages in the activity without obtaining a license. Most licenses expire after a certain period of time, and most may be renewed. Failure to abide by certain laws and regulations can result in suspension or revocation of a license.

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Acquiring a license through Fraud or Misrepresentation will result in revocation of the license.

iv. Licenses are issued by the administrative agencies of local, state, and federal lawmaking bodies. Administrative agencies are established by legislative bodies to regulate specific government activities and concerns. For example, the U.S. Congress and state legislatures have each created an agency that exercises authority over environmental issues. This agency usually is called a department of environmental protection or of conservation. It is responsible for issuing licenses for activities such as hunting, fishing, and camping. If the same agency has authority over environmental cleanups, it also may be responsible for issuing licenses for inspectors and businesses that specialize in waste management and removal. Specific boards or divisions within an agency may be responsible for issuing licenses. The licensing process helps to control activity in a variety of ways. License application procedures allow government authorities to screen applicants to verify that they are fit to engage in the particular activity. Before any license is issued by an agency, the applicant must meet certain standards. For example, a person who seeks a driver's license must be at least age 16, must have passed a driver's test and a vision test, and must pay a fee. If an applicant is under age 18, the state department of motor vehicles may require that the applicant obtain the signature of a parent or guardian. If the applicant seeks to drive other than a passenger vehicle, such as a motorcycle or semi-truck, the applicant has to pass tests that relate to the driving of that vehicle and obtain a separate license for driving that vehicle.

v. The requirements for certain business licenses can be stringent. For example, an insurance adjuster in Maine must be at least 18 years old; be competent, trustworthy, financially responsible, and of good personal and business reputation; pass a written examination on insurance adjusting; and have been employed or have undergone special training for not less than one year in insurance adjustment (Me. Rev. Stat.Ann. tit. 24-A, § 1853 [West 1995]). The insurance board can investigate any applicant for an insurance adjuster's license and

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deny an applicant a license if he does not meet the qualifications.

vi. Such rigorous licensing procedures are usually used if the activity places the license holder, or licensee, in a fiduciary relationship, that is, ina position of confidence and trust with other persons. Such activity usually involves the handling of money or health matters, and includes endeavors like medical care, Legal Representation, accounting, insurance, and financial investment.

vii. Requiring a license for a certain activity allows the government to closely supervise and control the activity. The agency responsible for issuing the license can control the number of licensees. This function is important for activities such as hunting, where the licensing of too many hunters may deplete wildlife populations and put hunters in danger of stray bullets.

viii. A license is not a property right, which means that no one has the absolute right to a license. The government may decline to issue a license when it sees fit to do so, provided that the denial does not violate federal or state law. No agency may decline to issue a license on the basis of race, religion, sex, national origin, or ethnic background.

ix. The denial of a license, the requirement of a license, or the procedures required to obtain a license may be challenged in court. The most frequent court challenges involve licenses pertaining to the operation of a business. Such was the case in FW/PBS v. City of Dallas, 493U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990). In FW/PBS three groups of individuals and businesses in the adult entertainment industry filed suit in federal district court challenging a new ordinance passed by the Dallas City Council. The ordinance placed a number of new restrictions on sexually oriented businesses. Among other things it required that owners of sexually oriented businesses obtain a license, renew it each year, and submit to annual inspections.

x. On appeal, the Supreme Court upheld a requirement that hotels renting rooms for less than ten hours obtain a special license. The Court held that the city of Dallas's evidence that such motels fostered prostitution and led to a deterioration of the neighborhoods in which they existed

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was adequate justification for the requirement. However, the Court struck down the application of the licensing requirement to businesses engaged in sexually oriented expression, such as adult bookstores, theaters, and cabarets. The activities of these businesses are protected by the First Amendment, and licenses regarding activity protected by the First Amendment must be issued promptly. The Dallas ordinance failed to meet the promptness requirement because it did not limit the time for review of license applications or provide for quick Judicial Review of license denials. Thus, the Court declared it unconstitutional as applied to businesses engaged in expressive activity.

D. Private Party Licenses
    i. When a landowner allows a person to do work or perform an act on the landowner's property, the visitor has a license to enter the property. This kind of license need not be signed and formalized: it may be oral or it may be implied by the relationship or actions of the parties. For example, a public utility inspector has a license to enter private property for the purposes of maintaining the utility and gauging consumption. In such a case, the grantor of the license, or licensor, owes a duty to the licensee to make sure the premises are safe for the licensee.
E. Patent and Copyright Holder Licenses
    i. A license granted by the holder of a patent or a copyright on literary or artistic work gives the license holder a limited right to reproduce, sell, or distribute the work. Likewise, the owner of a TRADEMARK may give another person a license to use the mark in a region where the owner’s goods have not become known and associated with the owner's use of the mark. These Intellectual Property licenses usually require that the licensee pay a fee to the licensor in exchange for use of the property. For example, computer software companies sell licenses to their products. In the licensing agreement users are informed that although they possess a disk containing the software, they have actually only purchased a license to operate it. The license typically forbids giving the software to someone else, making copies of it, or running it on more than one computer at a time.

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F. LICENSE, contracts
    i. A right given by some competent authority to do an act, which without such authority would be illegal. The instrument or writing which secures this right, is also called a license. Vide Ayl. Parerg, 353; 15 Vin. Ab. 92; Ang. Wat. Co. 61, 85.

G. A license is express or implied
    i. An express license is one which in direct terms authorizes the performance of a certain act; as a license to keep a tavern given by public authority.
    ii. An implied license is one which though not expressly given, may be pr esumed from the acts of the party having a right to give it. Thefollowin g are examples of such licenses: 1. When a man knocks at another's do or, and it is opened, the act of opening the door licenses theformer to e nter the house for any lawful purpose. See Hob. 62. A servant is, in co nsequence of his employment, licensed to admit to thehouse, those wh o come on his master's business, but only such persons. Selw. N. P. 99 9; Cro. Eliz. 246. It may, however, be inferred fromcircumstances that the servant has authority to invite whom he pleases to the house, for la wful purposes.

H. A license is either a bare authority, without interest, or it is coupled with an interest.
    i. A bare license must be executed by the party to whom it is given in person, and cannot be made over or assigned by him to another; and, being without consideration, may be revoked at pleasure, as long as it remains executory; 39 Hen. VI. M. 12, page 7; but when carried into effect, either partially or altogether, it can only be rescinded, if in its nature it will admit of revocation, by placing the other side in the same situation in which he stood before he entered on its execution. 8 East, R. 308; Palm. 71; S. C. Poph. 151; S. C. 2 Roll. Rep. 143, 152.
    ii. When the license is coupled with an interest the authority conferred is not properly a mere permission, but amounts to a grant, which cannot be revoked, and it may then be assigned to a third person. When the license is coupled with an interest, the formalities essential to confer such interest should be observed. Say. R. 3; 6 East, R. 602; 8 East, R.

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310, note. See 14 S. & R.267; 4 S. & R. 241; 2 Eq. Cas. Ab. 522; 11 Ad. & El. 34, 39; S. C. 39 Eng, C. L. R. 19.

I. LICENSE, International law
    i. The effects of the license are to suspend or relax the rules of war to the extent of the authority given. It is the assumption of a state of peace to the extent of the license. In the country which grants them, licenses to carry on a pacific commerce are stricti juris, as being exceptions to the general rule; though they are not to be construed with pedantic accuracy, nor will every small deviation be held to vitiate the fair effect of them. 4 Rob. Rep. 8; Chitty, Law of Nat. 1 to 5, and 260; 1 Kent, Com. 164, 85.
J. LICENSE, pleading
    i. The name of a plea of justification to an action of trespass. A license must be specially pleaded, and cannot, like liberum tenementum, be given in evidence under the general issue. 2. T. R. 166, 108
K. Further readings
    i. Antoniak, Michael. 1995. 21st Century Entrepreneur: How to Start a Home Business. New York: Avon.
    ii. Gellhorn, Walter. 1956. Individual Freedom and Governmental Restraints. Baton Rouge Louisiana State Univ. Press.

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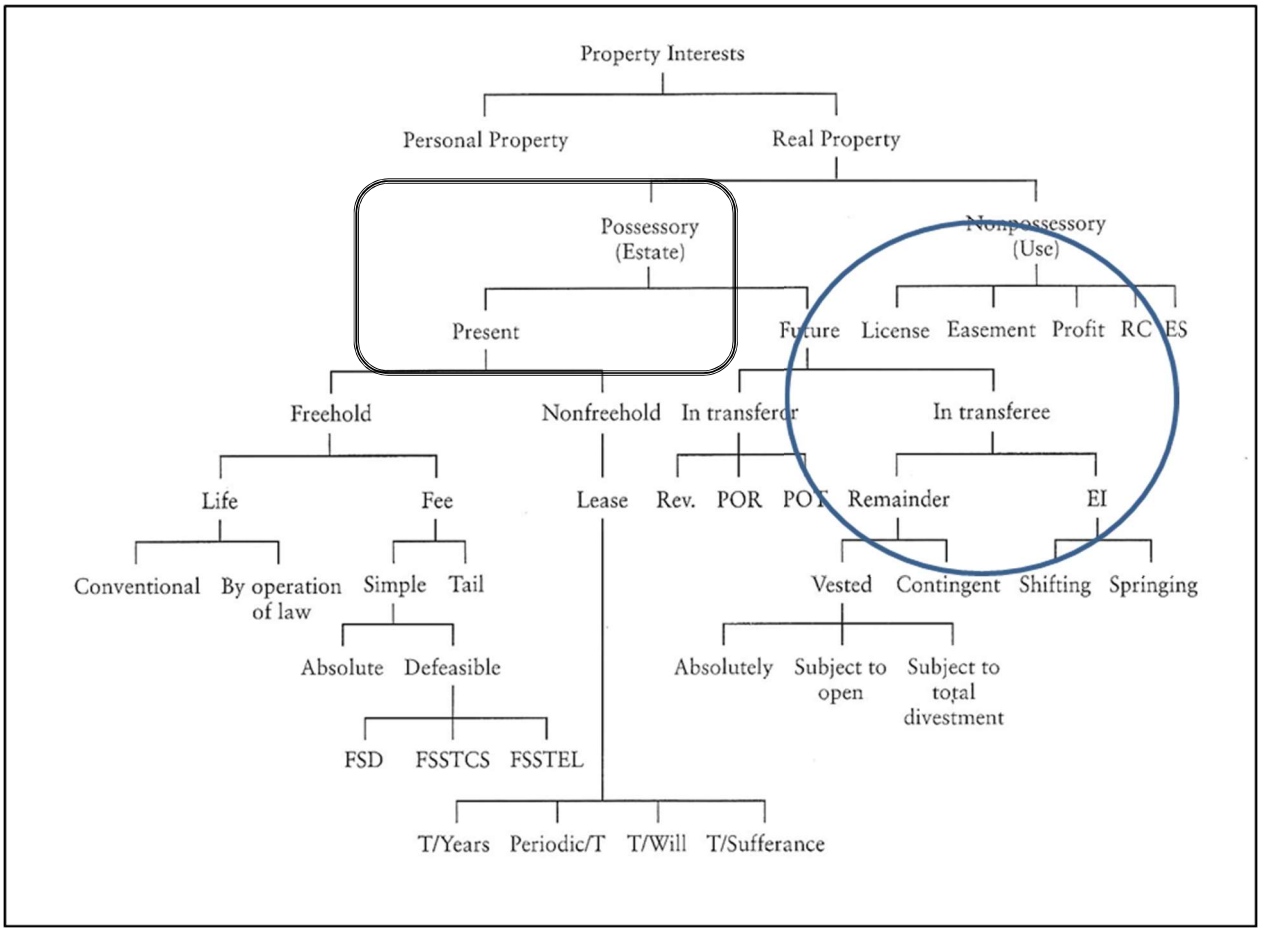

EXCERPTS

CASE LAW

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CASE IN MORE DEPTH CIRCUMSTANES FROM OHIO :

Horstman v. Fanning.pdf

Hobart Corp. v. Dayton Power & Light

v. Jahn (In re HC Liqui

Hardwick Clothes, Inc.

Hand v. Houk.pdf

Gold v. Coenen (In re Trans-Indus., Inc.).pdf

In re Nat'l Prescription Opiate Li

Lammers Barrel PRP Grp. v. Carboline Co.p

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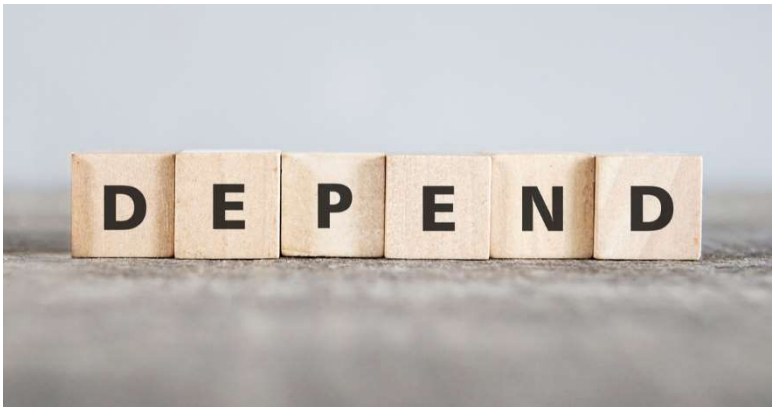
OHIO ANTI-TRUST STATUTES - Examples



Section 153.02 - Debarment of contractor from contract awards

Ohio Rev. Code § 153.02

contractor's business integrity; (7) Been convicted of a criminal offense under state or federal antitrust law ; (8) Deliberately or willfully submitted false or misleading information in connection with the

1. Section 3727.24 - State to provide direction, supervision, and control over approved cooperative agreements

   Ohio Rev. Code § 3727.24

   supervision, and control of cooperative agreements will provide state action immunity under federal antitrust laws to the members of boards of directors or boards of trustees of a group of hospitals who participate

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2. Section 125.25 - Debarment of vendor from contract awards

   Ohio Rev. Code § 125.25

   directly reflects on the vendor's business integrity; (7) Been convicted under state or federal antitrust law; (8) Deliberately or willfully submitted false or misleading information in connection with the

3. Section 4798.02 - General Provisions

   Ohio Rev. Code § 4798.02

   ensure that occupational licensing boards and board members will avoid liability under federal antitrust law R.C. § 4798.02 Added by 132nd General Assembly File No. TBD, SB 255,§1, eff. 4/5/2019.

4. Section 107.56 - Actions reviewed by common sense initiative office

   Ohio Rev. Code § 107.56 Cited 2 times

   by the board or commission. (b) Any other activity that could be subject to state or federal antitrust law if the action were undertaken by a private person or combination of private persons. (2) Except

   brief statement explaining the action and its consistency or inconsistency with state or federal antitrust law and file the statement with the office. If the action is in writing, the board or commission or

5. Section 5513.06 - Debarring vendor from consideration for contract award

   Ohio Rev. Code § 5513.06

   directly reflects on the vendor's business integrity; (7) Been convicted under state or federal antitrust law; (8) Deliberately or willfully submitted false or misleading information in connection with the

6. Section 109.35 - Approval or disapproval of proposed transactions

   Ohio Rev. Code § 109.35

Copyrig...

authority of the attorney general to investigate and prosecute violations of any state or federal antitrust law . (2) Nothing in this section shall be construed to grant to the attorney general any authority

7. Section 3734.44 - Issuance or renewal of permit or license

   Ohio Rev. Code § 3734.44 Cited 2 times

   instituting an antitrust compliance auditing program to help ensure full compliance with applicable antitrust laws. The business concern shall prove by a preponderance of the evidence that the management controls

8. Section 3901.321 - Mergers and acquisitions of domestic insurers

   Ohio Rev. Code § 3901.321

   authority of the attorney general to investigate or prosecute actions under any state or federal antitrust law with respect to any merger or other acquisition involving domestic insurers. (I) In connection…

COUNTY COMMISSIONERS & BOARDS CAN IMPOSE ANTITRUST LAW CONCEPTS ON MERGERS AND ACQUISITIONS

Ohio Admin. Code 107-3-01

Current through All Regulations Filed and Passed through July 10, 2020

Section 107-3-01 - Definitions

As used in this chapter:

(A) "Board or commission" means the same as defined in section 107.56 of the Revised Code.

(B) An "action" means a board's or commission's order, proposed order, or other action or proposed action which is subject to review and referred to the common sense initiative office as described in section 107.56 of the Revised Code.

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(C) "Office" means the commonsense initiative office as described in section 107.61 of the Revised Code.

(D) "Person affected by or likely to be affected by the action or proposed action" of a board or commission means a person that is or will be directly or indirectly affected in the person's business, profession or occupation, or that otherwise is or will be directly or indirectly injured in the person's business or property, because of one or more of the effects described in paragraph (E) of this rule

(E) Actions or proposed actions subject to review include any action that directly or indirectly has an effect on any of the following:

(1) Fixing prices, limiting price competition, or increasing prices in this state for the goods or services that are provided by the occupation or industry regulated by the board or commission;

(2) Dividing, allocating, or assigning customers, potential customers, or geographic markets in this state among members of the occupation or industry regulated by the board or commission;

(3) Excluding present or potential competitors from the occupation or industry regulated by the board or commission;

(4) Limiting the output or supply in this state of any good or service provided by the members of the occupation or industry regulated by the board or commission; or

(5) Any other activity that could be subject to state or federal antitrust law if the action were undertaken by a private person or combination of private persons.

(F) Pursuant to division (B)(2) of section 107.56 of the Revised Code, the following actions or

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proposed actions do not constitute actions subject to review:

(1) Denying an application to obtain a license because the applicant has violated or has not complied with the Revised Code or the Administrative Code; or

(2) Taking disciplinary action against an individual or corporation that is licensed by a board or commission for violations of the Revised Code or the Administrative Code.

Ohio Admin. Code 107-3-01

Effective: 4/12/2018
Five Year Review (FYR) Dates: 04/12/2023
Promulgated Under: 119.03
Statutory Authority: 107.56
Rule Amplifies: 107.56

Ohio Attorney General Antitrust Division

https://www.ohioattorneygeneral.gov/Legal/Antitrust

Antitrust

"Antitrust laws are based on the proposition that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone."
--Judge Learned Hand

The Antitrust Section's attorneys work to foster competition in the marketplace by enforcing both state and federal antitrust laws. These laws prohibit collusive or otherwise anticompetitive business practices. Attorneys investigate potential violations and ask courts to order that violations stop. The Section in some cases may also seek compensation for consumers and the state. They also conduct "business reviews" at the request of private companies considering mergers, acquisitions or other combinations. Through the Partnership for Competitive Purchasing, they perform periodic on-site reviews of Ohio public entity purchase records in an effort to detect bid-rigging or price-fixing schemes of which the public entity may have been a victim.

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Antitrust Business Review Details

Although the Ohio Attorney General is not authorized to give advisory opinions to private parties, the Attorney General has statutory enforcement responsibilities under Ohio's antitrust laws. In order to inform and educate businesses **and to allow an individual, business, industry group or other enterprise to plan future business activity that conforms to the antitrust laws**, the Ohio Attorney General, through the Antitrust Section will, in certain circumstances and under specified conditions, review proposed business conduct and state its present enforcement intentions under the antitrust laws.

The guidelines for this business review process are subject to revision and are as follows:

11. Request

    A request for a business review letter must be submitted in writing to:
    Chief of the Antitrust Section
    Office of the Ohio Attorney General
    150 E. Gay St., 22nd Floor
    Columbus, OH 43215

12. Proposed business conduct

    The Antitrust Section will only consider requests with respect to proposed business conduct that **may involve intrastate or interstate commerce. Hypothetical problems will not be considered for review.**

13. Review discretion

    The Antitrust Section may, at its discretion, refuse to consider a request.

14. Applicability

    A business review letter shall have no application to any party that does not join in the request.

15. Obligation of requesting party

    The requesting party is under an affirmative obligation to make full and true disclosure with respect to the business conduct for which review is requested. Each request should

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be accompanied by a detailed description of the proposed conduct and all relevant data, including background information, copies of all operative documents and statements of collateral or oral understandings, if any. All parties requesting the review letter must provide any additional information or documents the Antitrust Section requests in order to review the matter. Any information given orally must be promptly confirmed in writing.

16. Regulatory review

    Any business review letter issued will state only the Attorney General's present enforcement intentions under the antitrust laws, and shall in no way be taken to indicate the Attorney General's views on legal or factual issues that may be raised where the proposed business conduct is subject to approval, review or regulation by a state or federal agency, commission, department or board. The issuance of a business review letter is not to be represented to mean that the Attorney General believes that there are no anticompetitive consequences warranting a regulatory entity's consideration.

17. Oral clearance is not binding

    No oral clearance, release or other statement purporting to bind the enforcement discretion of the Ohio Attorney General may be given. The requesting party may rely only upon a written business review letter signed by the Chief of the Antitrust Section or a designee.

18. Response by Attorney General

    After reviewing a request the Attorney General, through the Antitrust Section, may:

    a. State his present enforcement intention with respect to the proposed business conduct;
    b. Decline the request; or
    c. Take such other position as he considers appropriate.

19. Commitment of Attorney General

    A business review letter will address the facts upon which it is issued, and will only reflect the enforcement intention of the Attorney General as of the date of the letter and with respect to the facts provided. The Attorney General remains free to bring whatever action may subsequently be required by the public interest. After expressing an intention to not bring an action, the Attorney General will not generally exercise his right to bring

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an enforcement action where there has been full and true disclosure at the time of the request.

20. Request may be withdrawn

Any requesting party may withdraw a request for review at any time. The Antitrust Section remains free to submit comments to the requesting party, or take such other action as deemed appropriate.

C. Abandonment and Extinguishment

I. RELEASE AND TERMINATION MERGER & ACQUISITION

A. RELEASE AND TERMINATION OF EASEMENT

This Release and Termination of Easement ("Termination of Easement") is made as of this _____ day of _____, _____ by _____ and _____, as Trustees of the _____ Trust under Trust Agreement dated _____ as amended (the "Trustees"), with reference to the facts set forth below.

RECITALS

A. Trustees are the owner of fee title to that certain real property situated in the City of _____, County of _____, State of _____ with a street address of _____, more particularly described in Exhibit "A" attached hereto and incorporated herein (the "Property").

B. In addition to the property as described in Exhibit "A," the ownership of the Property includes an easement and right-of-way for ingress and egress and driveway purposes over certain adjacent land, with the easement more fully described on

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Exhibit "B" attached hereto and incorporated herein (the "Existing Easement").

C. Concurrently herewith, Trustees as declarant are recording that certain Declaration of Restrictions; Grant of Easement for Light, Air and View and Exclusive Use Driveway Easement (the "Declaration") which provides, among other things, for an exclusive use driveway easement in favor of and appurtenant to certain property described therein as the dominant tenement, which exclusive use driveway easement area includes the area described in the Existing Easement.

D. Pursuant to this Termination of Easement, Trustees wish to terminate and release all right, title and interest to the Existing Easement for the purpose of establishing the exclusive use driveway easement pursuant to the Declaration.

NOW, THEREFORE, Trustees hereby re-convey, terminate and extinguish the Existing Easement, and the Existing Easement shall be void and of no further force or effect. Any future conveyance of the Property shall convey only the fee title to the property as described on Exhibit "A" and will not convey the Existing Easement or any other easement rights

B.

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Ohio Standards of Title Examination

EXCERPTS

4.4 ENCUMBRANCES-LEASES

Problem A: Should an oil, gas or coal lease be shown when satisfactory evidence is furnished that rentals are in default and that minerals are not being produced?

Standard A: No, provided further that the primary term of the lease has expired.

Comment A: See R.C. Sec. 5301.332.

(Effective as amended May 20, 1965; originally effective May 21, 1953)

Problem B: May an examiner omit from his opinion reference to a recorded lease when the terms expressed in the lease have expired?

Standard B: Yes, in the absence of notice of renewal arising from possession, record or otherwise.

(Effective November 12, 1960)

4.5 ENCUMBRANCES-FORECLOSED MORTGAGES

Problem A: Should any record of a mortgage release in the office of the County Recorder be required when the mortgaged land has been conveyed pursuant to a proper foreclosure sale?

Standard A: No.

(Effective May 21, 1953)

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Problem B: Should the title to real estate be considered unmarketable if any lien thereon has been judicially extinguished but no record of its cancellation has been noted on the record of such lien?

Standard B: No. The examiner is, however, reminded of the Federal right of redemption pursuant to 28 U.S.C. §2410(c), which provides, in pertinent part, as follows:

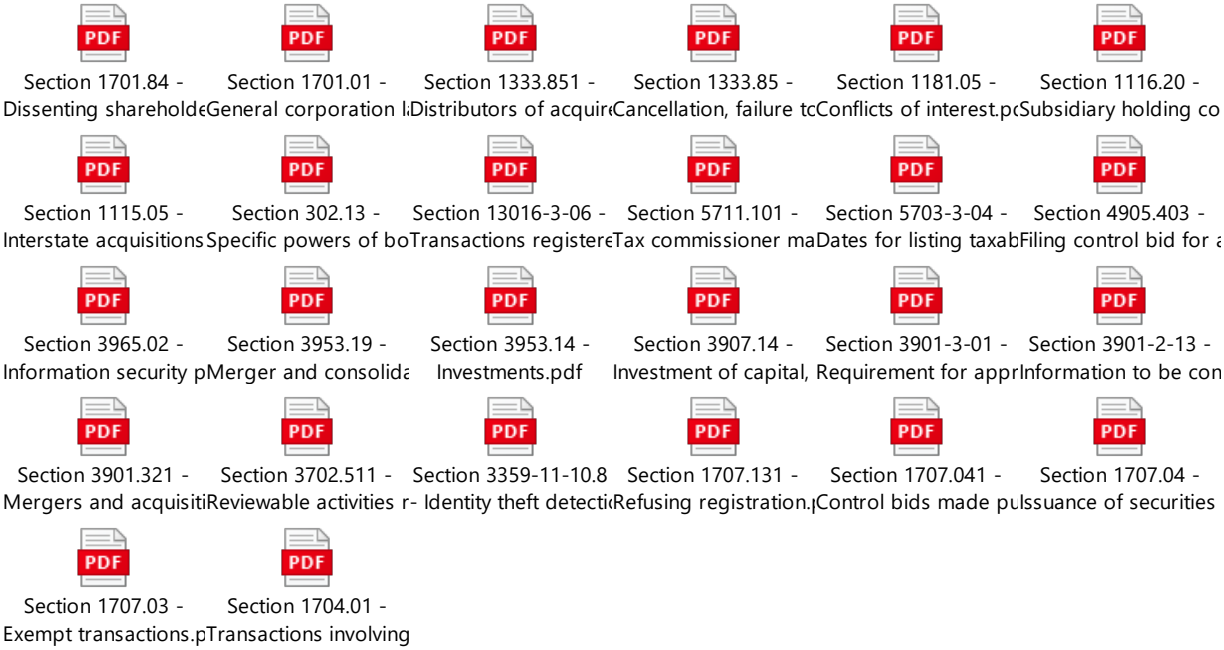
"Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem, except that with respect to a lien arising under internal revenue laws, the period shall be 120 days or the period allowable for redemption under state law, whichever is longer,..."

To which reference should be made.

(Effective May 16, 1957. Standard B was amended September 1999.)

APPENDIX

CERTAIN OHIO BUSINEES STATUTES



OHIO REAL ESTATE STATUES THAT MAY BE INVOLVED IN DUE DILIGENCE OR MATERIAL LITIGATION CIRCUMSTANCES

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Chapter 5301: CONVEYANCES; ENCUMBRANCES

5301.01 Acknowledgment of deed, mortgage, land contract, lease or memorandum of trust.

(A) A deed, mortgage, land contract as referred to in division (A) (21) of section 317.08 of the Revised Code, or lease of any interest in real property and a memorandum of trust as described in division (A) of section 5301.255 of the Revised Code shall be signed by the grantor, mortgagor, vendor, or lessor in the case of a deed, mortgage, land contract, or lease or shall be signed by the trustee in the case of a memorandum of trust. The signing shall be acknowledged by the grantor, mortgagor, vendor, or lessor, or by the trustee, before a judge or clerk of a court of record in this state, or a county auditor, county engineer, notary public, or mayor, who shall certify the acknowledgement and subscribe the official's name to the certificate of the acknowledgement.

(B)

(1) If a deed, mortgage, land contract as referred to in division (A) (21) of section 317.08 of the Revised Code, lease of any interest in real property, or a memorandum of trust as described in division (A) of section 5301.255 of the Revised Code was executed prior to February 1, 2002, and was not acknowledged in the presence of, or was not attested by, two witnesses as required by this section prior to that date, both of the following apply:

(a) The instrument is deemed properly executed and is presumed to be valid unless the signature of the grantor, mortgagor, vendor, or lessor in the case of a deed, mortgage, land contract, or lease or of the settlor and trustee in the case of a memorandum of trust was obtained by fraud.

(b) The recording of the instrument in the office of the county recorder of the county in which the subject property is situated is constructive notice of the instrument to all persons, including without limitation, a subsequent purchaser in good faith or any other subsequent holder of an interest in the property, regardless of whether the instrument was recorded prior to, on, or after February 1, 2002.

(2) Division (B)(1) of this section does not affect any accrued substantive rights or vested rights that came into existence prior to February 1, 2002.

Amended by 130th General Assembly File No. 41, HB 72, §1, eff. 1/30/2014.

Effective Date: 07-20-2004; 2007 SB134 01-17-2008

5301.011 Recorded instrument to contain volume and page reference.

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A recorded grant, reservation, or agreement creating an easement or a recorded lease of any interest in real property shall contain a reference by volume and page to the record of the deed or other recorded instrument under which the grantor claims title, but the omission of such reference shall not affect the validity of the same.

Effective Date: 01-23-1963

5301.012 Identification of agency for whose use and benefit interest in real property is acquired.

(A) As used in this section, "agency" means every organized body, office, or agency established by the laws of the state for the exercise of any function of state government.

(B) Any instrument by which the state or an agency of the state acquires an interest in real property, including any deed, transfer, grant, reservation, agreement creating an easement, or lease, shall identify the agency for whose use and benefit the interest in the real property is acquired.

(C)

(1) If the instrument conveys less than a fee simple interest in real property and if the agency has authority to hold an interest in property in its own name, the instrument shall state that the interest in the real property is conveyed "to ..... (the name of the agency)." Otherwise, the instrument shall state that the interest in the real property is conveyed "to the State of Ohio for the use and benefit of ..... (name of agency)."

(2) If the instrument conveys a fee simple interest in real property and if the agency has authority to hold a fee simple interest in real property in its own name, the instrument shall state that the interest in the real property is conveyed "to the ..... (name of agency) and its successors and assigns." Otherwise, the instrument that conveys a fee simple interest in the real property shall state "to the State of Ohio and its successors and assigns for the use and benefit of ..... (name of agency)."

(D) The purpose of specifying the name of the agency in the instrument is to identify the agency that has the use and benefit of the real property. The identification of the agency pursuant to this section does not confer on that agency any additional property rights in regard to the real property.

Effective Date: 10-26-1999

5301.02 Words necessary to create a fee simple estate.

The use of terms of inheritance or succession are not necessary to create a fee simple estate, and every

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grant, conveyance, or mortgage of lands, tenements, or hereditaments shall convey or mortgage the entire interest which the grantor could lawfully grant, convey, or mortgage, unless it clearly appears by the deed, mortgage, or instrument that the grantor intended to convey or mortgage a less estate.

Effective Date: 10-01-1953

5301.03 Grantee as trustee or agent.

"Trustees," "as trustee," or "agent," or words of similar import, following the name of the grantee in any deed of conveyance or mortgage of land executed and recorded, without other language showing a trust or expressly limiting the grantee's or mortgagee's powers, or for whose benefit the same is made, or other recorded instrument showing such trust and its terms, do not give notice to or put upon inquiry any person dealing with said land that a trust or agency exists, or that there are beneficiaries of said conveyance or mortgage other than the grantee and those persons disclosed by the record, or that there are any limitations on the power of the grantee to convey or mortgage said land, or to assign or release any mortgage held by such grantee. As to all subsequent bona fide purchasers, mortgagees, lessees, and assignees for value, a conveyance, mortgage, assignment, or release of mortgage by such grantee, whether or not his name is followed by "trustee," "as trustee," "agent," or words of similar import, conveys a title or lien free from the claims of any undisclosed beneficiaries, and free from any obligation on the part of any purchaser, mortgagee, lessee, or assignee to see to the application of any purchase money. This section does not apply to suits brought prior to July 16, 1927, in which any such deeds of conveyance, leases, or mortgages are called in question, or in which the rights of any beneficiaries in the lands described therein are involved. This section does not prevent the original grantor, trustor, undisclosed beneficiary, or any one claiming under them, from bringing suits other than suits affecting land which is the subject of such conveyance or mortgage.

Effective Date: 10-01-1953

5301.04 Deed, mortgage, or lease of a married person.

A deed, mortgage, or lease of any interest of a married person in real property shall be signed, acknowledged, and certified as provided in section 5301.01 of the Revised Code.

Effective Date: 02-01-2002

5301.05 [Repealed].

Effective Date: 05-31-1988

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5301.057 Transfer fee covenant.

(A) As used in this section:

(1) "Environmental covenant" means

(a) A servitude that imposes activity and use limitations on real property and meets the requirements of section 5301.82 of the Revised Code;

(b) A conservation easement or agricultural easement as defined in section 5301.67 of the Revised Code.

(2) "Transfer" means the sale, gift, conveyance, assignment, inheritance, or other transfer of an ownership interest in real property located in this state.

(3) "Transfer fee" means a fee or charge required by a transfer fee covenant and payable upon the transfer of an interest in real property, or payable for the right to make or accept such a transfer, regardless of whether the fee or charge is a fixed amount or is determined as a percentage of the value of the property, the purchase price, or other consideration given for the transfer. The following are not transfer fees for purposes of this section:

(a) Any consideration payable by the grantee to the grantor for the interest in real property being transferred. For the purposes of division (A)(3)(a) of this section, an interest in real property includes a separate mineral estate and its appurtenant surface access rights.

(b) Any commission payable to a licensed real estate broker for the transfer of real property pursuant to an agreement between the broker and the grantor or the grantee, including any subsequent additional commission for that transfer payable by the grantor or the grantee based upon any subsequent appreciation, development, or sale of real property;

(c) Any interest, charges, fees, or other amounts payable by a borrower to a lender pursuant to a loan secured by a mortgage against real property;

(d) Any rent, reimbursement, charge, fee, or other amount payable by a lessee to a lessor under a lease;

(e) Any consideration payable to the holder of an option to purchase an interest in real property or the holder of a right of first refusal or first offer to purchase an interest in real property for waiving, releasing, or not exercising the option or right upon the transfer of the property to another person;

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(f) Any tax, fee, charge, assessment, fine, or other amount payable to or imposed by a governmental authority;

(g) Any fee, charge, assessment, fine, or other amount payable to a homeowners, condominium, cooperative, mobile home, or property owners association pursuant to a declaration or covenant or law applicable to the association;

(h) Any payment required pursuant to an environmental covenant.

(4) "Transfer fee covenant" means a declaration or covenant recorded against the title to real property that requires or purports to require the payment of a transfer fee to the declarant or other person specified in the declaration or covenant or to their successors or assigns upon a subsequent transfer of an interest in the real property.

(B) A transfer fee covenant recorded in this state on or after September 13, 2010, does not run with the title to real property and is not binding on or enforceable against any subsequent owner, purchaser, or mortgagee of any interest in real property as an equitable servitude or otherwise.

(C) Any lien purporting to secure the payment of a transfer fee under a transfer fee covenant that is recorded in this state on or after September 13, 2010, is void.

Amended by 129th General AssemblyFile No.162, HB 274, §1, eff. 3/22/2013.

Added by 128th General AssemblyFile No.45, HB 292, §1, eff. 9/13/2010.

5301.06 Instruments executed according to law of place where made.

All deeds, mortgages, powers of attorney, and other instruments of writing for the conveyance or encumbrance of lands, tenements, or hereditaments situated within this state, executed and acknowledged, or proved, in any other state, territory, or country in conformity with the laws of such state, territory, or country, or in conformity with the laws of this state, are as valid as if executed within this state, in conformity with sections 1337.01 to 1337.03 , inclusive, and 5301.01 to 5301.04, inclusive, of the Revised Code.

Effective Date: 10-01-1953

5301.07 Validating certain deeds - limitations.

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When any instrument conveying real estate, or any interest therein, is of record for more than twenty-one years in the office of the county recorder of the county within this state in which such real estate is situated, and the record shows that there is a defect in such instrument, such instrument and the record thereof shall be cured of such defect and be effective in all respects as if such instrument had been legally made, executed, and acknowledged, if such defect is due to any one or more of the following:

(A) Such instrument was not properly witnessed.

(B) Such instrument contained no certificate of acknowledgment.

(C) The certificate of acknowledgment was defective in any respect.

Any person claiming adversely to such instrument, if not already barred by limitation or otherwise, may, at any time within twenty-one years after the time of recording such instrument, bring proceedings to contest the effect of such instrument.

This section does not affect any suit brought prior to November 9, 1959 in which the validity of the acknowledgment of any such instrument is drawn in question.

Effective Date: 01-10-1961

5301.071 Validity of instruments not affected by certain actions or omissions.

No instrument conveying real property, or any interest in real property, and of record in the office of the county recorder of the county within this state in which that real property is situated shall be considered defective nor shall the validity of that conveyance be affected because of any of the following:

(A) The dower interest of the spouse of any grantor was not specifically released, but that spouse executed the instrument in the manner provided in section 5301.01of the Revised Code.

(B) The officer taking the acknowledgment of the instrument having an official seal did not affix that seal to the certificate of acknowledgment.

(C) The certificate of acknowledgment is not on the same sheet of paper as the instrument.

(D) The executor, administrator, guardian, assignee, or trustee making the instrument signed or acknowledged the same individually instead of in a representative or official capacity.

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(E)(1) The grantor or grantee of the instrument is a trust rather than the trustee or trustees of the trust if the trust named as grantor or grantee has been duly created under the laws of the state of its existence at the time of the conveyance and a memorandum of trust that complies with section 5301.255 of the Revised Code and contains a description of the real property conveyed by that instrument is recorded in the office of the county recorder in which the instrument of conveyance is recorded. Upon compliance with division (E)(1) of this section, a conveyance to a trust shall be considered to be a conveyance to the trustee or trustees of the trust in furtherance of the manifest intention of the parties.

(2) Except as otherwise provided in division (E)(2) of this section, division (E)(1) of this section shall be given retroactive effect to the fullest extent permitted under section 28 of Article II, Ohio Constitution. Division (E) of this section shall not be given retroactive or curative effect if to do so would invalidate or supersede any instrument that conveys real property, or any interest in the real property, recorded in the office of the county recorder in which that real property is situated prior to the date of recording of a curative memorandum of trust or the effective date of this section, whichever event occurs later.

Amended by 129th General AssemblyFile No.65, SB 117, §1, eff. 3/22/2012.

Effective Date: 11-09-1959

5301.072 Deed restrictions prohibiting placement of flag unenforceable.

(A) No covenant, condition, or restriction set forth in a deed, and no rule, regulation, bylaw, or other governing document or agreement of a homeowners, neighborhood, civic, or other association, shall prohibit or be construed to prohibit the placement on any property of a flagpole that is to be used for the purpose of displaying, or shall prohibit or be construed to prohibit the display on any property of, the flag of the United States if the flag is displayed in accordance with any of the following:

(1) The patriotic customs set forth in 4 U.S.C.A. 5 - 10 , as amended, governing the display and use of the flag of the United States;

(2) The consent of the property's owner or of any person having lawful control of the property;

(3) The recommended flagpole standards set forth in "Our Flag," published pursuant to S.C.R. 61 of the 105th Congress, 1st Session (1998);

(4) Any federal law, proclamation of the president of the United States or the governor, section of the Revised Code, or local ordinance or resolution.

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(B) A covenant, condition, restriction, rule, regulation, bylaw, governing document, or agreement or a construction of any of these items that violates division (A) of this section is against public policy and unenforceable in any court of this state to the extent it violates that division.

Effective Date: 04-07-2003

5301.08 Certain leases unaffected.

Sections 5301.01 to 5301.45 of the Revised Code do not affect the validity of any lease of lands appropriated by congress for the support of schools or for ministerial purposes for any term not exceeding ten years or of any other lands for any term not exceeding three years or require that lease to be acknowledged or recorded.

Effective Date: 02-01-2002

5301.09 [Effective Until 3/23/2015] Recording lease of natural gas and petroleum.

All leases, licenses, and assignments thereof, or of any interest therein, given or made concerning lands or tenements in this state, by which any right is granted to operate or to sink or drill wells thereon for natural gas and petroleum or either, or pertaining thereto, shall be filed for record and recorded in such lease record without delay, and shall not be removed until recorded. No such lease or assignment thereof shall be accepted for record after September 24, 1963 unless it contains the mailing address of both the lessor and lessee or assignee. If the county in which the land subject to any such lease is located maintains permanent parcel numbers or sectional indexes pursuant to section 317.20 of the Revised Code, no such lease shall be accepted for record after December 31, 1984, unless it contains the applicable permanent parcel number and the information required by section 317.20 of the Revised Code to index such lease in the sectional indexes; and, in the event any such lease recorded after December 31, 1984, is subsequently assigned in whole or in part, and the county in which the land subject thereto is located maintains records by microfilm or other microphotographic process, the assignment shall contain the same descriptive information required to be included in the original lease by this sentence, but the omission of the information required by this section does not affect the validity of any lease. Whenever any such lease is forfeited for failure of the lessee, his successors or assigns to abide by specifically described covenants provided for in the lease, or because the term of the lease has expired, the lessee, his successors or assigns, shall have such lease released of record in the county where such land is situated without cost to the owner thereof.

No such lease or license is valid until it is filed for record, except as between the parties thereto, unless the person claiming thereunder is in actual and open possession.

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Effective Date: 09-20-1984

5301.09 [Effective 3/23/2015] Recording lease of natural gas and petroleum.

In recognition that such leases and licenses create an interest in real estate, all leases, licenses, and assignments thereof, or of any interest therein, given or made concerning lands or tenements in this state, by which any right is granted to operate or to sink or drill wells thereon for natural gas and petroleum or either, or pertaining thereto, shall be filed for record and recorded in such lease record without delay, and shall not be removed until recorded. No such lease or assignment thereof shall be accepted for record after September 24, 1963, unless it contains the mailing address of both the lessor and lessee or assignee. If the county in which the land subject to any such lease is located maintains permanent parcel numbers or sectional indexes pursuant to section 317.20 of the Revised Code, no such lease shall be accepted for record after December 31, 1984, unless it contains the applicable permanent parcel number and the information required by section 317.20 of the Revised Code to index such lease in the sectional indexes; and, in the event any such lease recorded after December 31, 1984, is subsequently assigned in whole or in part, and the county in which the land subject thereto is located maintains records by microfilm or other microphotographic process, the assignment shall contain the same descriptive information required to be included in the original lease by this sentence, but the omission of the information required by this section does not affect the validity of any lease. Whenever any such lease is forfeited for failure of the lessee, the lessee's successors or assigns to abide by specifically described covenants provided for in the lease, or because the term of the lease has expired, the lessee, the lessee's successors or assigns, shall have such lease released of record in the county where such land is situated without cost to the owner thereof.

No such lease or license is valid until it is filed for record, except as between the parties thereto, unless the person claiming thereunder is in actual and open possession.

Amended by 130th General Assembly File No. TBD, HB 9, §1, eff. 3/23/2015.

Effective Date: 09-20-1984

5301.10 Parties defendant in suits to cancel leases.

The plaintiff in an action to cancel a lease or license mentioned in section 5301.09 of the Revised Code, or in any way involving it, in order to finally adjudicate and determine all questions involving such lease or license in such action, need only make those persons defendants, so far as such lease or license is involved, who claim thereunder and are in actual and open possession, and those who then appear of record, or by the files in such office, to own or have an interest in such lease or license. If there is no claimant in actual and open possession, and no persons whose interest appears of record or file, then so far as such lease or

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license is involved, it will only be necessary to make the original lessee or licensee defendant in order to finally adjudicate and determine all questions concerning such lease or license.

Effective Date: 10-01-1953

5301.11 Effect of destruction of building upon lessee.

The lessee of a building which, without fault or neglect on his part, is destroyed or so injured as to be unfit for occupancy, is not liable to pay rent to the lessor or owner thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant. The lessee thereupon must surrender possession of such premises.

Effective Date: 10-01-1953

5301.12 Purchaser at tax sale.

When real estate is sold at tax sale, and the purchaser has received a deed therefor, and it has been placed upon the tax duplicate in his name, or those claiming under him, who openly and notoriously claim the title and ownership to such property, and pay the taxes thereon, as against any title acquired by deed executed after such tax sale, such facts are prima-facie evidence of the possession of such real estate by such purchaser, or those holding under him, from the date of such sale until it is set aside or redeemed. The knowledge, by a person acquiring title by deed executed after such tax sale, of the payment of taxes, and the claim of title and ownership shall, as to him, be conclusive proof of possession.

Effective Date: 10-01-1953

5301.13 Mode of conveyance by state.

All conveyances of real estate, or any interest therein, sold on behalf of the state, with the exception of those agreements made pursuant to divisions (A), (B), (C), (D), and (E) of section 123.53 of the Revised Code, shall be drafted by the auditor of state, executed in the name of the state, signed by the governor, countersigned by the secretary of state, and sealed with the great seal of the state. The auditor of state thereupon must record such conveyance in books to be kept by him for that purpose, deliver them to the persons entitled thereto, and keep a record of such delivery, showing to whom delivered and the date thereof.

Effective Date: 11-15-1981

5301.14 Copy of record of lost deed to be evidence.

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When a title deed, recorded by the auditor of state as required by section 5301.13 of the Revised Code, or recorded in the office of the secretary of state, the record of which is required to be kept in the office of the auditor of state, has been lost or destroyed by accident, without having been recorded in the county recorder's office, on demand and tender of the fees therefor, the auditor of state shall furnish to any person a copy of such deed certified under the auditor of state's official seal, which copy shall be received everywhere in this state as prima-facie evidence of the existence of the deed, and in all respects shall have the effect of certified copies from the official records of the county where such lands are situated.

Amended by 130th General Assembly File No. 41, HB 72, §1, eff. 1/30/2014.

Effective Date: 10-01-1953

5301.15 Governor may execute new deed to supply lost conveyance.

When a deed executed for land purchase from the state is lost or destroyed, or when a person who has an interest in such land, by the use of diligence cannot find it, and no record exists from which a certified copy can be made to supply the evidence of such deed, or when a certificate of the purchase of land sold at a land office of this state, or any other contract, bond, or memorandum evidencing a purchase of land has been lost or destroyed, or when from any cause the owner of such land, by the use of diligence, cannot find such certificate, contract, bond, or memorandum, the governor, when satisfied that the original purchase money for such land has been fully paid, shall execute a deed therefor in the name of the original purchaser which must recite the facts authorizing its making. Such deed shall be recorded in the office of the auditor of state who shall transmit it to the present claimant.

Such deed has the same effect as the original deed, had it been preserved and recorded, or as a deed would have had, made to the original purchaser upon the date of the full payment of the purchase money.

Effective Date: 10-01-1953

5301.16 Execution of conveyance by state when purchaser dies before deed made.

When the purchaser of land from the state dies before a deed is made, and the lands pass to another by descent or devise, and the title still remains in him, or when the person to whom the lands have so passed has conveyed them or his interest therein to another person, by deed of general warranty or quitclaim, upon the proof of such facts being made to him and the attorney general, the governor shall execute the deed directly to the person entitled to the lands, although such person derives his title through one or more successive conveyances from the person to whom the lands passed by descent or devise.

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Effective Date: 10-01-1953

5301.17 New deed from state to correct errors.

When, from satisfactory evidence, it appears to the governor and attorney general that an error has occurred in a deed executed and delivered in the name of the state, or in the certificate of any public officer, upon which, if correct, a conveyance would be required from the state, the governor shall correct such error by the execution of a correct title deed, according to the intent and object of the original purchase or conveyance, to the party entitled to it, his heirs, or legal assigns, and take from such party a release to the state of the property erroneously conveyed.

Effective Date: 10-01-1953

5301.18 Deeds from state must recite facts.

All deeds executed under sections 5301.15 , 5301.16 , and 5301.17 of the Revised Code must recite the facts, as ascertained by the governor and attorney general, upon the proof of which they are executed, and shall be recorded in the office of the auditor of state.

Effective Date: 10-01-1953

5301.19 Release of mortgage to the state.

When lands or tenements are mortgaged to the state to secure the payment of money due the state, and the money so secured, together with the legal interest due thereon, is paid to the treasurer of state, or other person authorized to receive it, the governor shall sign and deliver to the mortgagor, his heirs, or assigns, a deed of release of the real estate so mortgaged.

Effective Date: 10-10-1963

5301.20 Reversion to owner of land conveyed to state.

When a conveyance of lands or tenements made to the state contains a condition that the real estate so conveyed shall revert to the grantor on the payment of a certain sum of money, or on the performance of other conditions, and the money, with legal interest thereon, from the time it was due or payable, is paid to the treasurer of state, or other person authorized to receive it, or the other conditions stated in such deed are performed according to the stipulations contained therein, on receiving a certificate from the proper officer of such payment or other performance, the governor shall execute and deliver to the grantor, his heirs, or assigns, a deed of release for the property so conveyed.

When there has been a foreclosure of the equity of redemption for the nonperformance of the conditions stated in any such deed of conveyance, this section and section 5301.19 of the Revised Code are inoperative as to such case.

Effective Date: 10-01-1953

5301.21 Adjoining owners may fix corner or line.

When the owners of adjoining tracts of land, or of lots in a municipal corporation, agree upon the site of a corner or line common to such tracts or lots, in a written instrument containing a pertinent description thereof, either with or without a plat, executed, acknowledged, and recorded as are deeds, such corner or line thenceforth shall be established as between the parties to such agreement, and all persons subsequently deriving title from them.

Such agreement shall be recorded by the county recorder in the official records. The original agreement, after being so recorded, or a certified copy thereof from the record, is competent evidence in any court in this state against a party thereto, or person in privity with a party.

When a tract of land is owned by the state, the officer or board having administrative control thereof, with the approval of the attorney general, may execute said written instrument and following recording in the county where the land is situated, said instrument shall be filed with the auditor of state with the evidence of title to the land affected.

Amended by 130th General Assembly File No. 41, HB 72, §1, eff. 1/30/2014.

Effective Date: 10-19-1959

5301.22 Effect of agreement with a guardian.

As used in this section, "incompetent person" means a person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide.

No agreement described in section 5301.21 of the Revised Code shall be executed by a minor or incompetent person, but it may be executed and delivered for record, on such a person's behalf, by the person's guardian. When executed, acknowledged, delivered for record, and recorded, such agreement

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shall be as effectual against such minor or incompetent person, as if the person had been under no disability, and had performed such acts personally. An owner, not under any of such disabilities, may perform all such acts by an attorney in fact. The power of such attorney must be in writing and first recorded in the county recorder's office.

Effective Date: 10-01-1953; 2007 HB53 08-07-2007

5301.23 Mortgage effective dates.

(A) All properly executed mortgages shall be recorded in the office of the county recorder of the county in which the mortgaged premises are situated and shall take effect at the time they are delivered to the recorder for record. If two or more mortgages pertaining to the same premises are presented for record on the same day, they shall take effect in the order of their presentation. The first mortgage presented shall be the first recorded, and the first mortgage recorded shall have preference.

(B) A mortgage that is presented for record shall contain the then current mailing address of the mortgagee. The omission of this address or the inclusion of an incorrect address shall not affect the validity of the instrument or render it ineffective for purposes of constructive notice.

Effective Date: 01-01-1994

5301.231 Effective dates of amendments, supplements, modifications or extensions of mortgages, or of debt secured by mortgages,.

(A) All amendments or supplements of mortgages, or modifications or extensions of mortgages or of the debt secured by mortgages, that have been executed in the manner provided in section 5301.01 of the Revised Code shall be recorded in the office of the county recorder of the county in which the mortgaged premises are situated and shall take effect at the time they are delivered to the recorder for record. Sections 317.08 , 5301.23 , and 5301.231 of the Revised Code do not affect the enforceability, validity, or legal effect of instruments recorded in those mortgage records prior to October 10, 1963.

(B) An amendment or supplement of a mortgage, or a modification or extension of a mortgage or of the debt secured by a mortgage, that is presented for record shall contain the then current mailing address of the mortgagee. The omission of this address or the inclusion of an incorrect address shall not affect the validity of the instrument or render it ineffective for purposes of constructive notice.

Effective Date: 01-01-1994

5301.232 Open-end mortgages.

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(A) Whether or not it secures any other debt or obligation, a mortgage may secure unpaid balances of loan advances made after the mortgage is delivered to the recorder for record, to the extent that the total unpaid loan indebtedness, exclusive of interest thereon, does not exceed the maximum amount of loan indebtedness which the mortgage states may be outstanding at any time. With respect to such unpaid balances, division (B) of this section is applicable if the mortgage states, in substance or effect, that the parties thereto intend that the mortgage shall secure the same, the maximum amount of unpaid loan indebtedness, exclusive of interest thereon, which may be outstanding at any time, and contains at the beginning thereof the words "Open-end mortgage."

(B) A mortgage complying with division (A) of this section and securing unpaid balances of loan advances referred to in such division is a lien on the premises described therein from the time such mortgage is delivered to the recorder for record for the full amount of the total unpaid loan indebtedness, including the unpaid balances of such advances that are made under such mortgage, plus interest thereon, regardless of the time when such advances are made. If such an advance is made after the holder of the mortgage receives written notice of a lien or encumbrance on the mortgaged premises which is subordinate to the lien of the mortgage, and if such holder is not obligated to make such advance at the time such notice is received, then the lien of the mortgage for the unpaid balance of the advance so made is subordinate to such lien or encumbrance. If an advance is made after the holder of the mortgage receives written notice of work or labor performed or to be performed or machinery, material, or fuel furnished or to be furnished for the construction, alteration, repair, improvement, enhancement, or embellishment of any part of the mortgaged premises and if such holder is not obligated to make such advance at the time such notice is received, then the lien of the mortgage for the unpaid balance of the advance so made is subordinate to a valid mechanic's lien for the work or labor actually performed or machinery, material, or fuel actually furnished as specified in such notice.

(C) The mortgagor may limit the loan indebtedness secured by the mortgage to that in existence at the time of the delivery of a written notice to that effect to the recorder for record, if such notice is executed by the mortgagor in the manner provided in section 5301.01 of the Revised Code, states the volume and initial page of the record or the recorder's file number of the mortgage, and a copy thereof is served upon the holder of the mortgage prior to the delivery of such notice to the recorder for record. Any such notice shall be recorded and indexed by the recorder as an amendment of the mortgage. Such right of the mortgagor to limit loan indebtedness secured by the mortgage is not applicable to interest subsequently accruing on loan indebtedness, loan advances the holder of the mortgage is obligated to make, or loan advances made after the delivery of any such notice to the recorder for record in order to pay for the cost of completing any construction, alteration, repair, improvement, enhancement, or embellishment of any part of the mortgaged premises the financing of which, in whole or in part, the mortgage was given to secure.

(D) The written notices provided for in division (B) of this section shall be signed by the holder of the lien

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or encumbrance or the person who has performed or intends to perform work or labor or who has furnished or intends to furnish machinery, material, or fuel, or by his agent or attorney, and shall set forth a description of the real property to which the notice relates, the date, parties to, the volume and initial page of the record or the recorder's file number of the mortgage over which priority is claimed for the lien or encumbrance, and the amount and nature of the claim to which the lien or encumbrance relates or the nature of the work or labor performed or to be performed or machinery, material, or fuel furnished or to be furnished and the amount claimed or to be claimed therefor. The written notices provided for in divisions (B) and (C) of this section shall be deemed to have been received by or served upon the holder of the mortgage when delivered to such holder personally or by registered or certified mail at the address of such holder appearing in the mortgage or an assignment thereof or, if no address is so given, at the principal place of business or residence of such holder or the statutory agent of such holder within this state or, if such holder has no principal place of business or residence or a statutory agent within this state, when posted in some conspicuous place on the mortgaged premises.

(E) As used in this section:

(1) "Mortgage" includes a mortgage, deed of trust, or other instrument in the nature of a mortgage.

(2) "Mortgagor" includes the mortgagor's successors in interest as disclosed by the records of the recorder or recorders of the county or counties in which the mortgaged premises are situated.

(3) "Holder of the mortgage" means the holder of the mortgage as disclosed by the records of the recorder or recorders of the county or counties in which the mortgaged premises are situated.

(4) A holder of a mortgage is "obligated" to make an advance if such holder or the person to whom the repayment of such advance is owed has a contractual commitment to do so, even though the making of such advance may be conditioned upon the occurrence or existence, or the failure to occur or exist, of any event or fact.

(5) "Statutory agent" means the statutory agent of a corporation as disclosed by the records of the secretary of state and provided for in sections 1701.07 , 1702.06 , and 1703.041 of the Revised Code.

(6) "Loan indebtedness" does not include unpaid balances of advances made for the payment of taxes, assessments, insurance premiums, and costs incurred for the protection of the mortgaged premises.

(F) This section is not exclusive, does not apply to any mortgage filed or recorded in conformity with section 1701.66 of the Revised Code, and does not prohibit the use of other types of mortgages permitted by law.

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Effective Date: 07-14-1987

5301.233 Mortgage may secure unpaid balances of advances made.

In addition to any other debt or obligation, a mortgage may secure unpaid balances of advances made, with respect to the mortgaged premises, for the payment of taxes, assessments, insurance premiums, or costs incurred for the protection of the mortgaged premises, if such mortgage states that it shall secure such unpaid balances. A mortgage complying with this section is a lien on the premises described therein from the time such mortgage is delivered to the recorder for record for the full amount of the unpaid balances of such advances that are made under such mortgage, plus interest thereon, regardless of the time when such advances are made.

Effective Date: 03-18-1969

5301.234 [Repealed].

Effective Date: 02-01-2002

5301.24 Acquisition of property by state not to affect mortgage lien - state, a party.

The lien or priority of any existing valid mortgage or lien shall not be affected by reason of the fact that this state or any political subdivision thereof acquires the property on which said lien exists, unless said property is acquired by regular judicial proceedings. The state, or any board or commission of the state, may be made a party in any court of common pleas or probate court, to any foreclosure proceedings, or other proceedings to sell real estate and marshal liens, to secure an adjudication concerning any claim, mortgage, or other lien which the state has or claims on the premises involved.

Service of summons shall be made by the clerk of the court who shall, by registered mail, send service of summons and a copy of the petition to the attorney general. The answer day and other proceedings thereafter shall be the same as though a personal service had been made as of the date the return receipt is signed, and thereafter the procedure shall be the same as though a private corporation had been sued under the laws of this state.

No subsequent statute shall modify or change this section unless such statute specifically provides that it is modifying or changing this section.

Effective Date: 10-01-1953

5301.25 Recording in county where real estate situated - survey form.

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(A) All deeds, land contracts referred to in division (A) (21) of section 317.08 of the Revised Code, and instruments of writing properly executed for the conveyance or encumbrance of lands, tenements, or hereditaments, other than as provided in division (C) of this section and section 5301.23 of the Revised Code, shall be recorded in the office of the county recorder of the county in which the premises are situated. Until so recorded or filed for record, they are fraudulent insofar as they relate to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of that former deed, land contract, or instrument.

(B) Whenever a survey is made of lands that are being conveyed, the county auditor shall require that the name of the person who made the survey appear in the deed. The name shall either be printed, typewritten, stamped, or signed in a legible manner. An instrument is in compliance with this division if it contains a statement in the following form:

"A survey of this property was made by ....."

This division does not apply to any court decree, order, judgment, or writ, to any instrument executed or acknowledged outside of this state, or to any instrument executed within this state prior to September 20, 1965.

(C) All tax certificates sold pursuant to section 5721.32 or 5721.33 of the Revised Code, or memoranda thereof, may be recorded in the office of the county recorder of the county in which the premises are situated, as provided in division (B) of section 5721.35 of the Revised Code; provided, however, that the first and superior lien of the state and its taxing districts conveyed to the holder of the tax certificate, as provided in division (A) of section 5721.35 of the Revised Code, shall in no way be diminished or adversely affected if the tax certificate evidencing the conveyance of such first and superior lien, or memorandum thereof, is not recorded as provided in this section.

Amended by 130th General Assembly File No. 41, HB 72, §1, eff. 1/30/2014.

Effective Date: 07-20-2004

5301.251 Memorandum of lease recording.

In lieu of the recording of a lease, there may be recorded a memorandum of that lease, executed and acknowledged in accordance with section 5301.01 of the Revised Code. The memorandum of lease shall contain the names of the lessor and the lessee and their addresses as set forth in the lease, a reference to the lease with its date of execution, a description of the leased premises with such certainty as to identify the property, including the reference provided for in section 5301.011 of the Revised Code, the term of the

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lease, together with any rights of renewal or extension of the lease, and the date of commencement of the term or the manner of determining the commencement of the term as set forth in the lease.

A memorandum of lease that is entitled to be so recorded also may set forth any other provisions contained in the lease, or the substance of those provisions, and shall be constructive notice of only that information contained in the memorandum.

Sections 317.08 , 5301.251, and 5301.33 of the Revised Code shall not be construed to affect the enforceability, validity, or legal effect of instruments recorded in those lease records prior to August 9, 1963.

Effective Date: 02-01-2002

5301.252 Recording affidavit relating to title.

(A) An affidavit stating facts relating to the matters set forth under division (B) of this section that may affect the title to real estate in this state, made by any person having knowledge of the facts or competent to testify concerning them in open court, may be recorded in the office of the county recorder in the county in which the real estate is situated. When so recorded, such affidavit, or a certified copy, shall be evidence of the facts stated, insofar as such facts affect title to real estate.

(B) The affidavits provided for under this section may relate to the following matters:

(1) Age, sex, birth, death, capacity, relationship, family history, heirship, names, identity of parties, marriage, residence, or service in the armed forces;

(2) Possession;

(3) The happening of any condition or event that may create or terminate an estate or interest;

(4) The existence and location of monuments and physical boundaries, such as fences, streams, roads, and rights of way;

(5) In an affidavit of a registered surveyor, facts reconciling conflicts and ambiguities in descriptions of land in recorded instruments.

(C) The county recorder for the county where such affidavit is offered for record shall receive and cause the affidavit to be recorded as deeds are recorded, and collect the same fees for recording such affidavit as

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for recording deeds.

(D) Every affidavit provided for under this section shall include a description of the land, title to which may be affected by facts stated in such affidavit, and a reference to an instrument of record containing such description, and shall state the name of the person appearing by the record to be the owner of such land at the time of the recording of the affidavit. The recorder shall index the affidavit in the name of such record owner.

(E) Any person who knowingly makes any false statement in any affidavit provided for in this section is guilty of falsification under division (A)(6) of section 2921.13 of the Revised Code.

Effective Date: 03-18-1997

5301.253 Written notice of code violations prior to entering into agreement for transfer of title to property.

(A) The owner of any property who has received written notice that the property is in violation of any building or housing code shall give the purchaser or grantee of the property written notice of the code violations prior to entering into an agreement for the transfer of title to the property, or if the owner does not enter into a written agreement for the transfer, prior to the filing for record of a deed to the property. Any notice or order of a court or of a housing or building authority of the state or a political subdivision that relates to a violation of the building or housing code of the state or any political subdivision and that appears on the public records of the issuing authority is notice to all subsequent purchasers, transferees, or any other persons who acquire any interest in the real property in which the violation exists and may be enforced against their interest in the real property without further notice or order to them.

(B) The transfer of title to, or any interest in, real property in which a housing or building code violation exists shall not be grounds for dismissal of charges in any court against a previous owner of the real property for failure to comply with a notice for correction of a housing or building code violation.

Effective Date: 08-16-1978

5301.254 Filing information with secretary of state by nonresident alien acquiring interest in real property.

(A) For the purposes of this section, "nonresident alien" means any individual who is not a citizen of, and is not domiciled in, the United States.

(B) Every nonresident alien who acquires any interest either in his own name or in the name of another, in

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real property located in this state that is in excess of three acres or that has a market value greater than one hundred thousand dollars or any interest in and to minerals, and any mining or other rights appurtenant thereto or in connection therewith that has a market value in excess of fifty thousand dollars shall, within thirty days of the acquisition of the interest in the property, together with a filing fee of five dollars, submit to the secretary of state on forms prescribed by him all of the following information:

(1) Name, address, and telephone number;

(2) Country of citizenship;

(3) Location and amount of acreage of real property;

(4) Intended use of real property at the time of filing.

(C) Every corporation or other business entity that is created or organized under the laws of any state or a foreign nation or that has its principal place of business in a foreign nation, in which a nonresident alien acquires at least ten per cent of the shares of stock or other interests or in which any number of nonresident aliens acquire at least forty per cent of the shares of stock or other interests, and which acquires any interest either in its own name or in the name of another, in real property located in this state that is in excess of three acres or that has a market value greater than one hundred thousand dollars or any interest in and to minerals, and any mining or other rights appurtenant thereto or exercisable in connection therewith that has a market value in excess of fifty thousand dollars shall, within thirty days of acquisition of the interest in the property, together with a filing fee of twenty-five dollars, submit to the secretary of state on forms prescribed by him all of the following information:

(1) Name, address of principal place of business, and address of principal Ohio office;

(2) Name, address, telephone number, and country of citizenship of each nonresident alien who owns at least ten per cent of the shares of stock or other interests, if any;

(3) The percentage, within five percentage points, of shares of stock or other interests controlled by the nonresident aliens of each country represented by them if such interests exceed five per cent;

(4) Location and amount of acreage of real property;

(5) Principal business of corporation or entity;

(6) Intended use of real property at the time of filing;

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(7) Chairman of the governing board, if any; chief executive, if any, and partners, if any;

(8) Corporation's or entity's agent in this state;

(9) Place of incorporation, if a corporation;

(10) Number of persons who own shares of stock or other interests.

(D) If the ownership or control of a corporation or other business entity that is required in division (C) of this section to file with the secretary of state changes in such a way that the information contained on the filing form is no longer accurate, the corporation or other business entity shall notify the secretary of state in writing of such change within thirty days of the occurrence of the change.

If the ownership or control of a corporation or other business entity that owns real property in an amount larger than three acres or that has a market value greater than one hundred thousand dollars or that owns any interest in and to minerals, and any mining or other rights appurtenant thereto or exercisable in connection therewith that has a market value in excess of fifty thousand dollars changes in such a way that a nonresident alien acquires at least ten per cent of the shares of stock or other interests or any number of nonresident aliens acquire at least forty per cent of the shares of stock or other interests, the corporation or other business entity shall file with the secretary of state as required in division (C) of this section within thirty days of the occurrence of the change.

If a nonresident alien who is required to file with the secretary of state in division (B) of this section becomes a resident alien or a citizen of the United States, he shall notify the secretary of state in writing of the change in his status within thirty days of the change.

If a nonresident alien or a corporation or other business entity that is required to file with the secretary of state pursuant to this section sells the real property or mineral or mining rights that were reported to the secretary of state, the nonresident alien or corporation or other business entity shall notify the secretary of state in writing of the sale within thirty days of the sale.

(E) The secretary of state shall:

(1) Prescribe all forms and make all rules that are necessary for the implementation of this section;

(2) Maintain accurate records of the information that he receives pursuant to this section and make such information available to the public;

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(3) Annually report this information, itemized by county, to the general assembly.

(F) No nonresident alien or corporation or other business entity that is required to file with the secretary of state pursuant to this section shall fail to comply with this section. Either the county prosecutor of the county in which the real property or the mineral or mining rights are located or the attorney general may bring action against any alleged offender. The secretary of state may request a county prosecutor or the attorney general to bring such an action.

(G) The filing of the information required by this section shall not be construed to perfect any interests permitted to be perfected under Title XIII [13] of the Revised Code by filing with the secretary of state.

Effective Date: 03-19-1979

5301.255 Memorandum of trust recording.

(A) A memorandum of trust that satisfies both of the following may be presented for recordation in the office of the county recorder of any county in which real property that is subject to the trust is located:

(1) The memorandum shall be executed by the trustee of the trust and acknowledged by the trustee of the trust in accordance with section 5301.01 of the Revised Code.

(2) The memorandum shall state all of the following:

(a) The name and address of the trustee of the trust;

(b) The date of execution of the trust;

(c) The powers specified in the trust relative to the acquisition, sale, or encumbering of real property by the trustee or the conveyance of real property by the trustee, and any restrictions upon those powers.

(B) A memorandum of trust that satisfies divisions (A)(1) and (2) of this section also may set forth the substance or actual text of provisions of the trust that are not described in those divisions.

(C) A memorandum of trust that satisfies divisions (A)(1) and (2) of this section shall constitute notice only of the information contained in it.

(D) Upon the presentation for recordation of a memorandum of trust that satisfies divisions (A)(1) and (2) of this section and the payment of the requisite fee prescribed in section 317.32 of the Revised Code, a

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county recorder shall record the memorandum of trust

in the official records described in division (A) (18) of section 317.08 of the Revised Code, if the memorandum of trust describes specific real property, or in the official records described in division (A) (24) of that section, if the memorandum of trust does not describe specific real property

Amended by 130th General Assembly File No. 41, HB 72, §1, eff. 1/30/2014.

Effective Date: 07-20-2004; 2007 SB134 01-17-2008

5301.26 Vendor's lien.

As between the vendor and vendee of land the vendor shall have a lien for so much of the purchase money as remains unpaid. Such lien shall not be effective as against a purchaser, mortgagee, judgment creditor, or other encumbrancer, unless there is a recital or a reservation of the lien in the deed, or in some instrument of record executed with the same formalities as are required for the execution of deeds and mortgages of land. The vendor waives his lien by taking a mortgage for any unpaid purchase money on the land conveyed or any part thereof, and the filing for record of such a mortgage with the county recorder of the county in which said land is located shall be constructive notice of the waiver of the vendor's lien.

Effective Date: 10-01-1953

5301.27 Conditional grants or devises of real estate.

When any lands are left encumbered, by a deed, will, or other instrument of record, with the payment of money, or the performance of any acts by the grantee or devisee, such grantee or devisee or his heirs or assigns, upon the payment of the money or the performance of the acts, may present the receipt of such payment, or the proof of the performance of such acts, to the probate court of the county in which such lands are situated. The court must enter such payments and the proof of the performance of such acts on its journal, record the receipts and the proof of the performance of such acts on the margin of the will record in which such encumbrances are created, and order that this be done in like manner on the margin of the deed record by the county recorder. Such lands will then be relieved from the encumbrances except for fraud.

No such record of receipts or orders may be made by the probate judge nor shall he enter proof of the performance of such acts until notice thereof has been given as is required by sections 2109.32 and 2109.33 of the Revised Code.

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Effective Date: 10-01-1953

5301.28 Release of mortgage - assignment.

When the mortgagee of property within this state, or the party to whom the mortgage has been assigned, either by a separate instrument, or in writing on that mortgage, or on the margin of the record of the mortgage, which assignment, if in writing on the mortgage or on the margin of the record of the mortgage, need not be acknowledged, receives payment of any part of the money due the holder of the mortgage, and secured by the mortgage, and enters satisfaction or a receipt for the payment, either on the mortgage or its record, that satisfaction or receipt, when entered on the record, or copied on the record from the original mortgage by the county recorder, will release the mortgage to the extent of the receipt. In all cases when a mortgage has been assigned in writing on that mortgage, the recorder shall copy the assignment from the original mortgage upon the margin of the record of the mortgage before the satisfaction or receipt is entered upon the record of the mortgage.

In a county in which the county recorder has determined to use the microfilm process as provided by section 9.01 of the Revised Code, the county recorder may require that all satisfactions of mortgages be made by separate instrument. The original instrument bearing the proper endorsement may be used as such a separate instrument. That separate instrument shall be recorded in the county recorder's official records. The county recorder shall charge the fee for the recording as provided by section 317.32 of the Revised Code for recording mortgages.

Amended by 130th General Assembly File No. 41, HB 72, §1, eff. 1/30/2014.

Effective Date: 02-01-2002

5301.29 Releases of mortgages made valid.

When any release, cancellation, or satisfaction of a mortgage of real estate has been of record for more than twenty-one years in the office of the county recorder of the county in which such real estate is situated, and the record thereof shows that there is a defect in such release, cancellation, or satisfaction, such release, cancellation, or satisfaction, and the record thereof shall be cured of such defect, if such defect is due to any of the following:

(A) It purports to be signed by an agent or attorney of the mortgagee or a trustee, and no power of attorney or other evidence of authority so to release, cancel, or satisfy such mortgage is of record.

(B) It was signed by less than all of two or more executors, administrators, guardians, assignees in

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insolvency, or trustees.

(C) The record of such release, cancellation, or satisfaction is not attested by the recorder.

(D) The release, cancellation, or satisfaction by a corporation is executed by officers thereof without signing the name of the corporation thereto.

Effective Date: 11-09-1959

5301.291 Mortgage release, cancellation, or satisfaction not defective.

No real estate mortgage release, cancellation, or satisfaction of record in the office of the county recorder of the county within this state in which such real estate is situated shall be deemed defective because:

(A) The executor, administrator, guardian, assignee, or trustee signed it individually instead of in his representative or official capacity.

(B) The release, cancellation, or satisfaction is by separate instrument, and the certificate of acknowledgment is not on the same sheet of paper as the release, cancellation, or satisfaction.

(C) A satisfaction was not recorded within ninety days as required by division (B) of section 5301.36 of the Revised Code.

Effective Date: 09-20-1984

5301.30 Expiration of mortgage lien - limitation.

The record of any mortgage which remains unsatisfied or unreleased of record for more than twenty-one years after the date of the mortgage or twenty-one years after the stated maturity date of the principal sum, if a stated date of maturity is provided in the mortgage, whichever is later, secured as shown in the record of such mortgage, does not give notice to or put on inquiry any person dealing with the land described in such mortgage that such mortgage debt remains unpaid or has been extended or renewed. As to subsequent bona fide purchasers, mortgagees, and other persons dealing with such land for value, the lien of such mortgage has expired. The mortgage creditor may at any time refile in the county recorder's office the mortgage or a sworn copy thereof for record, together with an affidavit stating the amount remaining due thereon and the due date thereof, whether or not such date has been extended. Subject to the rights of bona fide purchasers, mortgagees, and other persons dealing with such land for value, whose rights were acquired or vested between such expiration and refiling, such refiling is constructive notice of such

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mortgage only for a period of twenty-one years after such refiling, or for twenty-one years after the stated maturity of the debt, whichever is the longer period.

Effective Date: 07-26-1963

5301.31 Assignment or partial release in margin of original record.

Except in counties in which a separate instrument is required to assign or partially release a mortgage as described in section 5301.32 of the Revised Code, a mortgage may be assigned or partially released by the holder of the mortgage, by writing the assignment or partial release on the original mortgage or upon the margin of the record of the original mortgage and signing it. The assignment or partial release need not be acknowledged, but, if it is written upon the margin of the record of the original mortgage, the signing shall be attested by the county recorder. The assignment, whether it is upon the original mortgage, upon the margin of the record of the original mortgage, or by separate instrument, shall transfer not only the lien of the mortgage but also all interest in the land described in the mortgage. An assignment of a mortgage shall contain the then current mailing address of the assignee. The signature of a person on the assignment or partial release may be a facsimile of that person's signature. A facsimile of a signature on an assignment or partial release is equivalent to and constitutes the written signature of the person for all requirements regarding mortgage assignments or partial releases.

For entering an assignment or partial release of a mortgage upon the margin of the record of the original mortgage or for attesting it, the recorder shall be entitled to the fee provided by section 317.32 of the Revised Code for recording the assignment and satisfaction of mortgages.

Effective Date: 02-01-2002

5301.32 Assignment or partial release by separate instrument.

A mortgage may be assigned or partially released by a separate instrument of assignment or partial release, acknowledged as provided by section 5301.01 of the Revised Code. The separate instrument of assignment or partial release shall be recorded in the county recorder's official records. The county recorder shall be entitled to charge the fee for that recording as provided by section 317.32 of the Revised Code for recording deeds. The signature of a person on the assignment or partial release may be a facsimile of that person's signature. A facsimile of a signature on an assignment or partial release is equivalent to and constitutes the written signature of the person for all requirements regarding mortgage assignments or partial releases.

In a county in which the county recorder has determined to use the microfilm process as provided by section 9.01 of the Revised Code, the county recorder may require that all assignments and partial releases of

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mortgages be by separate instruments. The original instrument bearing the proper endorsement may be used as the separate instrument.

An assignment of a mortgage shall contain the then current mailing address of the assignee.

Amended by 130th General Assembly File No. 41, HB 72, §1, eff. 1/30/2014.

Effective Date: 02-01-2002

5301.33 Cancellation, release, and assignment of leases.

Except in counties where deeds or other separate instruments are required as provided in this section, a lease, whether or not renewable forever, that is recorded in any county recorder's office, may be canceled or partially released by the lessor and lessee, or assigned by either of them, by writing the cancellation, partial release, or assignment on the original lease, or upon the margin of the record of the original lease, and by signing it. That cancellation, partial release, or assignment need not be acknowledged, but if written on the margin of the record, the signing shall be attested to by the county recorder. The assignment by the lessee, whether it is upon the lease, or upon the margin of the record of the lease, or by separate instrument, shall transfer all interest held by the lessee under the lease in the premises described in the lease, unless otherwise stated in the lease or in the assignment. For copying the cancellation, partial release, or assignment upon the margin of the record, if written upon the original instrument, or for attesting it, if written upon the margin of the record, the county recorder shall charge the fee provided by section 317.32 of the Revised Code for recording the assignment and satisfaction of mortgages.

A lease, whether or not renewable forever, that is recorded in any county recorder's office, also may be canceled, partially released, or assigned by deed or by other separate instrument acknowledged as provided in section 5301.01 of the Revised Code. Unless in the form of a deed, a separate instrument of cancellation, partial release, or assignment shall be recorded in the official records provided for by section 317.08 of the Revised Code. The county recorder shall charge the fee for that recording as provided in section 317.32 of the Revised Code for recording deeds.

If a lease has been canceled, partially released, or assigned by deed or by other separate instrument and that deed or other separate instrument recites the county recorder's file number of the original lease or the volume and page of the record in which the original lease is recorded, the county recorder shall note on the margin of the record of the original lease the county recorder's file number of the deed or other separate instrument or the volume and page of the record in which the same is recorded.

"Lessor" and "lessee" as used in this section include an assignee of the interest of either. "Lease" as used

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in this section includes a memorandum of lease provided for by section 5301.251 of the Revised Code. This section does not permit the assignment of any lease if the assignment is prohibited by the terms of the lease.

In a county in which the county recorder has determined to use the microfilm process as provided by section 9.01 of the Revised Code, the county recorder may require that all cancellations, partial releases, and assignments of leases be by deed or other separate instrument. The original instrument bearing the proper endorsement may be used as such separate instrument.

Amended by 130th General Assembly File No. 41, HB 72, §1, eff. 1/30/2014.

Effective Date: 02-01-2002

5301.331 Land contract cancellation, partial release, or assignment.

Except in counties where deeds or other instruments are required as provided in this section, a land contract that is recorded in the office of the county recorder may be cancelled, partially released by the vendor and vendee, or assigned by either of them by writing the cancellation, partial release, or assignment on the original land contract or upon the margin of the record of the original land contract, and by signing it. That cancellation, partial release, or assignment need not be acknowledged, but if written on the margin of the record, the signing shall be attested to by the county recorder. The assignment by the vendee, whether it is on the land contract or upon the margin of the record of that contract, or by separate instrument, shall transfer the right held by the vendee under the land contract in the premises described in the contract unless otherwise stated in the land contract or in the assignment. For copying the cancellation, partial release, or assignment upon the margin of the record, or for attesting it, if written upon the margin of the record, the county recorder shall charge the fee provided by section 317.32 of the Revised Code for recording the assignment and satisfaction of mortgages.

A land contract that is recorded in the office of the county recorder may also be cancelled, partially released, or assigned by deed or by other separate instrument, acknowledged as provided in section 5301.01 of the Revised Code. Unless in the form of a deed, a separate instrument of cancellation, partial release, or assignment shall be recorded in the county recorder's official records. The county recorder shall charge the fee for that record as provided for in section 317.32 of the Revised Code for record fees.

If a land contract has been cancelled, partially released, or assigned by deed or other separate instrument, and that deed or other separate instrument recites the county recorder's file number of the original land contract or the volume and page of the record in which the original land contract is recorded, the county recorder shall note on the margin of the original land contract the county recorder's file number of the deed or other separate instrument or the volume and page of the record in which the same is recorded.

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"Vendor" and " vendee" as used in this section include an assignee of the interest of either. This section does not permit the assignment of any land contract if the assignment is prohibited by the terms of the land contract.

In a county where the county recorder has determined to use the microfilm process as provided by section 9.01 of the Revised Code, the county recorder may require that all cancellations, partial releases, and assignments of land contracts be by deed or other separate instrument. The original instrument bearing the proper endorsement may be used as such separate instrument.

Amended by 130th General Assembly File No. 41, HB 72, §1, eff. 1/30/2014.

Effective Date: 02-01-2002

5301.332 Forfeiture for failure of lessee, successors or assigns to abide by specifically described covenants.

(A)(1) Whenever leases of natural gas and oil lands recorded under section 5301.09 of the Revised Code concerning lands upon which there are no producing or drilling oil or gas wells become forfeited for failure of the lessee or the lessee's successors or assigns to abide by specifically described covenants provided for in the lease, or because the term of the lease has expired, the lessor or the lessor's successors or assigns may file for record an affidavit of forfeiture with the county recorder after serving notice by certified mail, return receipt requested, to the lessee or the lessee's successors or assigns, at the lessee's or the lessee's successors' or assigns' last known address, or if service is not obtained by certified mail, by giving notice by publication at least once in a newspaper of general circulation in the county in which the land is located of the lessor's intent to declare the lease forfeited.

(2) The notice or publication shall be addressed to the lessee or the lessee's successors or assigns, and shall contain the name of the lessee; a general description of the land; the number of acres; the date of the lease; the volume and page of the lease record where the lease is recorded; the cause of the forfeiture; and shall state the intention of the lessor to file for record an affidavit of forfeiture with the county recorder if the lessee does not have the lease released of record within thirty days from the date of receipt of the notice or of publication.

(B) After thirty days and not more than sixty days from the date of proof of mailing or publication of the notice, the lessor or the lessor's successors or assigns may file with the county recorder an affidavit of forfeiture setting forth that such person is the lessor of an oil or gas lease; the file number or volume and page of the lease record where the oil or gas lease is recorded; that the lessee or the lessee's successors or assigns, have failed and neglected to comply with specifically described covenants provided for in the lease,

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reciting the facts constituting such failure, or that the term of the lease has expired; that there are no producing or drilling oil or gas wells on the leased premises; that the lease has been forfeited and is void; and that notice was served on the lessee or the lessee's successors or assigns, or that publication was made, and the manner and time thereof.

(C) If the lessee or the lessee's successors or assigns claims that the lease is in full force and effect, the lessee or the lessee's successors or assigns shall, within sixty days after the mailing or publication of the notice of the lessor of the lessor's intention to declare the lease forfeited, notify the person who filed the affidavit of forfeiture of the claim, and file for record an affidavit with the office of the county recorder of the county in which the land is situated stating that the lease has not been forfeited and that the lessee or the lessee's successors or assigns still claim that the lease is in full force and effect.

(D) If the lessee or the lessee's successors or assigns do not give such notice in writing to the lessor at any time prior to the sixtieth day after the mailing or publication of the notice of the lessor of the lessor's intention to declare the lease forfeited, then the lessor shall file for record with the county recorder a notice of failure to file. The notice shall contain all of the following:

(1) A statement that the person filing the notice is the lessor or the lessor's successors or assigns;

(2) The document number or volume and page of the lease record where the oil or gas lease is recorded;

(3) A general description of the land;

(4) The statement: "This lease cancelled pursuant to affidavit of forfeiture recorded as Document Number ....., or Official Record/Lease Vol. ....., Page ....."

Thereafter, the record of the lease shall not be notice to the public of the existence of the lease or of any interest therein or rights thereunder and the record shall not be received in evidence in any court of the state on behalf of the lessee or the lessee's successors or assigns, or against the lessor or the lessor's successors or assigns.

(E) For recording the affidavit of forfeiture, the affidavit giving notice that the lease has not been forfeited, and the notice of failure to file, the county recorder shall charge the fees provided by section 317.32 of the Revised Code.

Amended by 130th General Assembly File No. 41, HB 72, §1, eff. 1/30/2014.

Effective Date: 10-31-1979

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5301.34 Release of mortgage on certificate of mortgagee or assignee.

A mortgage shall be discharged upon the record of the mortgage by the county recorder when there is presented to the county recorder a certificate executed by the mortgagee or the mortgagee's assigns, acknowledged as provided in section 5301.01 of the Revised Code, or when there is presented to the recorder a deed of release executed by the governor as provided in section 5301.19 of the Revised Code, certifying that the mortgage has been fully paid and satisfied. In addition to the discharge on the records by the county recorder, such certificate shall be recorded in the official records kept by the county recorder. The county recorder is entitled to the fees for such recording as provided by section 317.32 of the Revised Code for recording deeds.

Amended by 130th General Assembly File No. 41, HB 72, §1, eff. 1/30/2014.

Effective Date: 02-01-2002

5301.35 Waiver of priority of mortgages - execution and recording - fees.

The priority of the lien of a mortgage may be waived to the extent specified by the holder of the lien in favor of any lien, mortgage, lease, easement, or other interest in the property covered by the mortgage, by writing the waiver of priority on the original mortgage and signing it, by writing the waiver of priority upon the margin of the record of that mortgage and signing it, or by a separate instrument acknowledged as provided by section 5301.01 of the Revised Code. That waiver, when recorded upon the margin of the record of the mortgage, or when recorded as a separate instrument, is constructive notice to all persons dealing with either the property described in that mortgage or the mortgage itself from the date of filing the waiver for record. The waiver, if written upon the mortgage or upon the margin of the record of the mortgage, need not be acknowledged, but if written upon the margin of the record, the signing shall be attested by the county recorder.

If the waiver of priority is by separate instrument, it shall be recorded in the official records of the county recorder. For the recording, the county recorder may charge the fee as provided by section 317.32 of the Revised Code for recording deeds. For entering any waiver of priority upon the margin of the record of the mortgage, or for attesting it, the county recorder is entitled to the fees for recording those waivers of priority that are charged for assignments or satisfactions of mortgages under section 317.32 of the Revised Code.

In a county in which the county recorder has determined to use the microfilm process as provided by section 9.01 of the Revised Code, the county recorder may require that all waivers of priority of mortgages be made by separate instrument. The original instrument bearing the proper endorsement may be used as such separate instrument.

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Amended by 130th General Assembly File No. 41, HB 72, §1, eff. 1/30/2014.

Effective Date: 02-01-2002

5301.36 [Effective Until 3/23/2015] Entry of satisfaction.

(A) Except in a county in which the county recorder has elected to require that all satisfactions of mortgages be recorded by separate instrument as allowed under section 5301.28 of the Revised Code, when recording a mortgage, county recorders shall leave space on the margin of the record for the entry of satisfaction, and record therein the satisfaction made on the mortgage, or permit the owner of the claim secured by the mortgage to enter such satisfaction. Such record shall have the same effect as the record of a release of the mortgage.

(B) Within ninety days from the date of the satisfaction of a residential mortgage, the mortgagee shall record the fact of the satisfaction in the appropriate county recorder's office and pay any fees required for the recording. The mortgagee may, by contract with the mortgagor, recover the cost of the fees required for the recording of the satisfaction by the county recorder.

(C) If the mortgagee fails to comply with division (B) of this section, the mortgagor may recover, in a civil action, damages of two hundred fifty dollars. This division does not preclude or affect any other legal remedies that may be available to the mortgagor.

(D) As used in this section, "residential mortgage" means an obligation to pay a sum of money evidenced by a note and secured by a lien upon real property located within this state containing two or fewer residential units or on which two or fewer residential units are to be constructed and shall include such an obligation on a residential condominium or cooperative unit.

Effective Date: 12-13-1984

5301.36 [Effective 3/23/2015] Entry of satisfaction.

(A) Except in a county in which the county recorder has elected to require that all satisfactions of mortgages be recorded by separate instrument as allowed under section 5301.28 of the Revised Code, when recording a mortgage, county recorders shall leave space on the margin of the record for the entry of satisfaction, and record therein the satisfaction made on the mortgage, or permit the owner of the claim secured by the mortgage to enter such satisfaction. Such record shall have the same effect as the record of a release of the mortgage.

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(B) Within ninety days from the date of the satisfaction of a mortgage, the mortgagee shall record a release of the mortgage evidencing the fact of its satisfaction in the appropriate county recorder's office and pay any fees required for the recording. The mortgagee may, by contract with the mortgagor, recover the cost of the fees required for the recording of the satisfaction by the county recorder.

(C) If the mortgagee fails to comply with division (B) of this section, the mortgagor of the unrecorded satisfaction and the current owner of the real property to which the mortgage pertains may recover, in a civil action, damages of two hundred fifty dollars. This division does not preclude or affect any other legal remedies or damages that may be available to the mortgagor.

(D)(1) If upon the expiration of the ninety-day period described in division (B) of this section, the satisfaction of mortgage remains unrecorded, the current owner of the real property shall provide the mortgagee written notice, in accordance with the Rules of Civil Procedure, of the failure to enter the release of the mortgage of record. The notice shall be in substantially the following form:

"OHIO LAW REQUIRES A MORTGAGEE, WHETHER THE ORIGINAL MORTGAGEE OR ANY SUCCESSOR TO THE INTEREST OF THE ORIGINAL MORTGAGEE, TO RECORD A RELEASE OF A MORTGAGE EVIDENCING ITS SATISFACTION IN THE APPROPRIATE COUNTY RECORDER'S OFFICE AND TO PAY ANY FEES REQUIRED FOR THE RECORDING WITHIN A CERTAIN TIME PERIOD. (Name of mortgagor)'S MORTGAGE LOAN, (loan number or other loan identification), FOR PROPERTY LOCATED AT (property address), WAS SATISFIED ON (date of satisfaction). IT APPEARS YOU HAVE YET TO RECORD A RELEASE OF THIS MORTGAGE. FAILURE TO RECORD THE RELEASE WITHIN 15 DAYS OF RECEIVING THIS NOTICE MAY RESULT IN A CIVIL ACTION FILED AGAINST YOU TO RECOVER REASONABLE ATTORNEYS' FEES AND COSTS INCURRED IN SUCH AN ACTION OR OTHERWISE TO OBTAIN THE RECORDING, PLUS DAMAGES OF $100 FOR EACH DAY OF NONCOMPLIANCE NOT TO EXCEED $5,000 IN TOTAL DAMAGES."

(2) Within fifteen days after delivery of the notice described in division (D)(1) of this section, the mortgagee shall record a release of the mortgage evidencing the fact of its satisfaction in the appropriate county recorder's office and pay any fees required for the recording. The mortgagee may, by contract with the mortgagor or current owner of the real property, recover the cost of the fees required for the recording of the satisfaction by the county recorder.

(E) If the mortgagee fails to comply with division (D)(2) of this section after receiving the notice in accordance with division (D)(1) of this section, the current owner of the real property may recover, in a civil action, reasonable attorneys' fees and costs incurred in such an action or otherwise to obtain the recording of a satisfaction of mortgage plus damages of one hundred dollars for each day of noncompliance, not to exceed five thousand dollars in total damages.

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This division does not preclude or affect any other legal remedies or damages that may be available to the current owner.

(F) A mortgagee that records a release of a mortgage evidencing the fact of its satisfaction within the time periods required by this section shall not be in violation of this section, or subject to damages or fees, due to the failure of a county recorder to timely process that release of mortgage.

(G) A current owner may combine the civil actions described in divisions (C) and (E) of this section by bringing one action to collect for both damages, or may bring separate actions.

(H) As used in this section :

(1) "Mortgagee" includes the original mortgagee or any successor to or assignee of the original mortgagee.

(2) "Satisfaction" means that the obligation secured by a mortgage has been paid in full and the underlying obligation terminated, with no opportunities for future advancements.

Amended by 130th General Assembly File No. TBD, HB 201, §1, eff. 3/23/2015.

Effective Date: 12-13-1984

5301.361 [Effective 3/23/2015] Unreleased mortgages; liability for damages for failure to record.

(A)(1) With respect to an unreleased commercial mortgage that has been satisfied more than ninety days prior to the effective date of this section, but not recorded, the mortgagee shall not be subject to a civil action or damages as described in division (C) of section 5301.36 of the Revised Code.

(2) The current owner of the real property to which such a mortgage pertains shall provide the mortgagee the written notice described in division (D)(1) of section5301.36 of the Revised Code not sooner than on the effective date of this section and may recover damages in a civil action for failure to comply with division (D)(2) of that section pursuant to division (E) of that section.

(B)(1) With respect to an unreleased commercial mortgage that has been satisfied less than ninety days prior to the effective date of this section, but not recorded, the mortgagee shall not be subject to a civil action or damages as described in division (C) of section 5301.36 of the Revised Code.

(2) The current owner of the real property to which such a mortgage pertains shall provide the mortgagee the written notice described in division (D)(1) of section5301.36 of the Revised Code not sooner than on

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the ninetieth day after the mortgage was satisfied and may recover damages in a civil action for failure to comply with division (D)(2) of that section pursuant to division (E) of that section.

(C)(1) With respect to an unreleased residential mortgage that has been satisfied, but not recorded, prior to the effective date of this section, the mortgagee shall be subject to a civil action or damages as described in division (C) of section 5301.36 of the Revised Code for failure to comply with division (B) of that section.

(2) If such a mortgage was satisfied more than ninety days prior to the effective date of this section, the current owner of the real property to which the mortgage pertains shall provide the mortgagee the written notice described in division (D)(1) of section 5301.36 of the Revised Code not sooner than on the effective date of this section and may recover damages in a civil action for failure to comply with division (D)(2) of that section pursuant to division (E) of that section. If such a mortgage was satisfied less than ninety days prior to the effective date of the section, the current owner shall provide the mortgagee the written notice described in division (D)(1) of section 5301.36 of the Revised Code not sooner than on the ninetieth day after the mortgage was satisfied and may recover damages in a civil action for failure to comply with division (D)(2) of that section pursuant to division (E) of that section.

(D) As used in this section, "mortgagee" has the same meaning as in section 5301.36 of the Revised Code.

Added by 130th General Assembly File No. TBD, HB 201, §1, eff. 3/23/2015.

5301.37 Recording of separate instruments.

Whenever the county recorder in making photostatic or photographic records leaves no margin suitable for the entering or recording of assignments, cancellations, or further transactions relating to the instruments so recorded, or whenever such margin is completely filled with assignments, cancellations, or further transactions relating to the instruments so recorded, such transactions shall be effected by separate instruments executed and recorded according to law.

Effective Date: 10-01-1953

5301.38 Record of patents, copies, and exemplifications.

Patents for lands lying within this state, granted to any person by the president of the United States, and copies of such patents, certified under the official seal of the commissioner of the general land office of the United States, and exemplifications of the record of the general land office of any patent recorded there, may be recorded in the office of the county recorder of the county in which such lands, or a part thereof, are situated.

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The recorder shall be paid the fees for recording such patents as provided in section 317.32 of the Revised Code for recording deeds.

Effective Date: 10-01-1953

5301.39 When court to order clerk to make entry on record of mortgage.

The court in which proceedings are commenced, relative to a mortgage or other lien, change of title, or partition of lands, the final judgment, order, or decree in which is to release or declare such mortgage or other lien void, in whole or in part, or require the judicial sale of property included in the mortgage or other lien, in case of failure to pay the amount secured thereby, or when the title has been changed by judgment or decree, or partition made and confirmed between tenants in common, at the rendition of such final judgment, order, or decree, shall make the necessary order for the proper entry of a memorandum, release, or satisfaction, by the clerk of such court, on the record of such mortgage or other lien, and in cases of change of title or partition, for the record of so much of the decree in the records in the office of the county recorder, as is necessary to show such change of title or partition.

In a county in which the county recorder has determined to use the microfilm process as provided by section 9.01 of the Revised code and has elected to require a separate instrument for satisfactions and other actions affecting mortgages and other liens on real property, the court order for proper entry as referred to in this section, or certified copy thereof, may constitute the separate instrument and shall be recorded according to the type of action involved.

Effective Date: 12-17-1973

5301.40 Mortgage or lien satisfied by suit.

When a mortgage or other lien is satisfied or declared void, in whole or in part, by a judgment, final order, or decree, the clerk of the court in which the proceedings are had shall enter upon the record of the mortgage or other lien, in the county recorder's office where it is recorded, a memorandum of the character of the proceedings, giving also the volume and page of the record where they are recorded.

The clerk may tax in the bill of costs the fees of the recorder provided by law for the entry of the memorandum, release, satisfaction, or record, including a fee to himself for making the entry as provided for in division (K) of section 2303.20 of the Revised Code, and the fees provided by law for official copies of records.

In a county in which the county recorder has determined to use the microfilm process as provided by

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section 9.01 of the Revised Code and has elected to require a separate instrument for satisfactions of mortgages and other liens, the judgment, final order, or decree may constitute the separate instrument and shall be recorded as appropriate for the type of action involved.

Effective Date: 01-01-1993

5301.41 Effect of reversal of judgment.

If the final judgment, order, or decree referred to in section 5301.39 of the Revised Code, upon which the entry of release, satisfaction, change of title, or partition is based, or in which the order for release, satisfaction, or record is included, is reversed, vacated, or modified, such reversal, vacation, or modification, so far as it applies to such memorandum, release, or satisfaction of such mortgage or other lien, record of change of title, or partition, will vacate or modify the entry and record.

Effective Date: 01-10-1961

5301.42 Effect of entry by clerk.

Sections 5301.39 to 5301.41 , inclusive, of the Revised Code do not give to any judgment, order, or decree an effect, by reason of the entry thereof in the county recorder's office, other than that which it would have had without such entry.

Effective Date: 10-01-1953

5301.43 Certified copy of record of instrument as evidence.

A copy of the record of a deed or other instrument of writing, certified by the county recorder with his official seal affixed thereto, shall be received in all courts and places within this state, as prima-facie evidence of the existence of such instrument, and as conclusive evidence of the existence of such record.

Effective Date: 10-01-1953

5301.44 Certified copy of record in action to cure defects.

When a conveyance of real estate has been executed in which there is a mistake, defect or omission in the description of the lands, execution, acknowledgment, or otherwise, and it has been recorded in the county recorder's office of the county where the lands are or were situated at the time of such record, the record or a certified copy thereof in an action to cure or supply such defect, mistake, or omission, or to compel the execution of a valid conveyance of such real estate, may be read in evidence, and shall be prima-facie

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evidence that such instrument was executed and existed as shown by such record.

Effective Date: 10-01-1953

5301.45 Instrument executed and acknowledged upon different sheets.

When a deed, mortgage, lease, or other instrument of writing intended to convey or encumber an interest in real estate is not printed or written on a single sheet, or when the certificate of acknowledgment thereof is not printed or written on the same sheet with the instrument, and such defective conveyance is corrected by the judgment of a court, or by the voluntary act of the parties thereto, such judgment or act shall relate back so as to be operative from the time of filing the original conveyance in the county recorder's office.

Effective Date: 10-01-1953

5301.46 Assignment, release, or cancellation of interest made by separate instrument to contain description.

(A) As used in this section, "separate instrument" means an instrument other than the writing in which was created the interest in real property that is being assigned, released, or canceled.

(B) In any county that maintains sectional indexes pursuant to section 317.20 of the Revised Code, each assignment, release, or cancellation of an interest in real property that is made by a separate instrument shall contain a description of the real property that is subject to the interest sufficient to enable the county recorder to index the assignment, release, or cancellation correctly, and the description shall include all of the following:

(1) The permanent parcel number, if there is one, for the real property;

(2) The section, range, tract, subdivision, addition, lot, quarter, and municipal corporation, town, or township associated with the real property.

(C) If division (B) of this section requires a description of the subject real property to be contained in an assignment, release, or cancellation of an interest in real property that is made by a separate instrument, the omission in the assignment, release, or cancellation of any part of the description does not invalidate that instrument.

Effective Date: 10-10-1991

5301.47 Marketable title definitions.

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As used in sections 5301.47 to 5301.56 , inclusive, of the Revised Code:

(A) "Marketable record title" means a title of record, as indicated in section 5301.48 of the Revised Code, which operates to extinguish such interests and claims, existing prior to the effective date of the root of title, as are stated in section 5301.50 of the Revised Code.

(B) "Records" includes probate and other official public records, as well as records in the office of the recorder of the county in which all or part of the land is situate.

(C) "Recording," when applied to the official public records of the probate or other court, includes filing.

(D) "Person dealing with land" includes a purchaser of any estate or interest therein, a mortgagee, a levying or attaching creditor, a land contract vendee, or any other person seeking to acquire an estate or interest therein, or impose a lien thereon.

(E) "Root of title" means that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined. The effective date of the "root of title" is the date on which it is recorded.

(F) "Title transaction" means any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage.

Effective Date: 09-29-1961

5301.48 Unbroken chain of title of record.

Any person having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for forty years or more, has a marketable record title to such interest as defined in section 5301.47 of the Revised Code, subject to the matters stated in section 5301.49 of the Revised Code.

A person has such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than forty years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest, either in:

(A) The person claiming such interest; or

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(B) Some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest; with nothing appearing of record, in either case, purporting to divest such claimant of such purported interest.

Effective Date: 09-29-1961

5301.49 Record marketable title.

Such record marketable title shall be subject to:

(A) All interests and defects which are inherent in the muniments of which such chain of record title is formed; provided that a general reference in such muniments, or any of them, to easements, use restrictions, or other interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such easement, use restriction, or other interest; and provided that possibilities of reverter, and rights of entry or powers of termination for breach of condition subsequent, which interests are inherent in the muniments of which such chain of record title is formed and which have existed for forty years or more, shall be preserved and kept effective only in the manner provided in section 5301.51 of the Revised Code;

(B) All interests preserved by the filing of proper notice or by possession by the same owner continuously for a period of forty years or more, in accordance with section5301.51 of the Revised Code;

(C) The rights of any person arising from a period of adverse possession or user, which was in whole or in part subsequent to the effective date of the root of title;

(D) Any interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title or record is started; provided that such recording shall not revive or give validity to any interest which has been extinguished prior to the time of the recording by the operation of section 5301.50 of the Revised Code;

(E) The exceptions stated in section 5301.53 of the Revised Code.

Effective Date: 01-23-1963

5301.50 Interests prior to effective date of root of title.

Subject to the matters stated in section 5301.49 of the Revised Code, such record marketable title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests,

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claims, or charges whatsoever, the existence of which depends upon any act, transaction, event, or omission that occurred prior to the effective date of the root of title. All such interests, claims, or charges, however denominated, whether legal or equitable, present or future, whether such interests, claims, or charges are asserted by a person sui juris or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.

Effective Date: 09-29-1961

5301.51 Preservation of interest in land.

(A) Any person claiming an interest in land may preserve and keep effective the interest by filing for record during the forty-year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice in compliance with section 5301.52 of the Revised Code. No disability or lack of knowledge of any kind on the part of anyone suspends the running of the forty-year period. The notice may be filed for record by the claimant or by any other person acting on behalf of any claimant who is:

(1) Under a disability;

(2) Unable to assert a claim on his own behalf; or

(3) One of a class, but whose identity cannot be established or is uncertain at the time of filing the notice of claim for record.

(B) If the same record owner of any possessory interest in land has been in possession of the land continuously for a period of forty years or more, during which period no title transaction with respect to such interest appears of record in his chain of title, and no notice has been filed by him on his behalf as provided in division (A) of this section, and such possession continues to the time when marketability is being determined, the period of possession is equivalent to the filing of the notice immediately preceding the termination of the forty-year period described in division (A) of this section.

Effective Date: 05-31-1988

5301.52 Notice and filing of claim of interest in land.

(A) To be effective and entitled to recording, the notice referred to in section 5301.51 of the Revised Code shall satisfy all of the following:

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(1) Be in the form of an affidavit;

(2) State the nature of the claim to be preserved and the names and addresses of the persons for whose benefit the notice is being filed;

(3) Contain an accurate and full description of all land affected by the notice, which description shall be set forth in particular terms and not by general inclusions, except that if the claim is founded upon a recorded instrument, the description in the notice may be the same as that contained in such recorded instrument;

(4) State the name of each record owner of the land affected by the notice, at the time of its recording, together with the recording information of the instrument by which each record owner acquired title to the land;

(5) Be made by any person who has knowledge of the relevant facts or is competent to testify concerning them in court.

(B) The notice shall be filed for record in the office of the county recorder of the county or counties where the land described in it is situated. The county recorder of each county shall accept all such notices presented that describe land situated within the county , and shall enter and record them in the official records of that county, and shall index each notice in the direct index under the names of the claimants appearing in that notice and in the reverse index under the names of the record owners appearing in that notice. If the county recorder maintains indexes under section 317.20 of the Revised Code, the notices also shall be indexed under the description of the real estate involved . The county recorder shall charge the same fees for the recording of such notices as are charged for recording deeds.

(C) A notice prepared, executed, and recorded in conformity with the requirements of this section, or a certified copy of it, shall be accepted as evidence of the facts stated insofar as they affect title to the land affected by that notice.

(D) Any person who knowingly makes any false statement in a notice executed under this section is guilty of perjury under section 2921.11 of the Revised Code.

Amended by 130th General Assembly File No. 41, HB 72, §1, eff. 1/30/2014.

Effective Date: 05-31-1988

5301.53 Certain rights not barred or extinguished.

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(A) Any lessor or his successor as reversioner of his right to possession on the expiration of any lease, or any lessee or his successor of his rights in and to any lease, except as may be permitted under section 5301.56 of the Revised Code;

(B) Any easement or interest in the nature of an easement created or held for any railroad or public utility purpose;

(C) Any easement or interest in the nature of an easement, the existence of which is clearly observable by physical evidence of its use;

(D) Any easement or interest in the nature of an easement, or any rights granted, excepted, or reserved by the instrument creating such easement or interest, including any rights for future use, if the existence of such easement or interest is evidenced by the location beneath, upon, or above any part of the land described in such instrument of any pipe, valve, road, wire, cable, conduit, duct, sewer, track, pole, tower, or other physical facility and whether or not the existence of such facility is observable;

(E) Any right, title, estate, or interest in coal, and any mining or other rights pertinent to or exercisable in connection with any right, title, estate, or interest in coal;

(F) Any mortgage recorded in conformity with section 1701.66 of the Revised Code;

(G) Any right, title, or interest of the United States, of this state, or of any political subdivision, body politic, or agency of the United States or this state.

Effective Date: 03-22-1989

5301.54 Effect of changes.

Nothing contained in sections 5301.47 to 5301.56 , inclusive, of the Revised Code, shall be construed to extend the period for the bringing of an action or for the doing of any other required act under any statutes of limitations, nor, except as provided in sections 5301.47 to 5301.56 , inclusive, of the Revised Code, to affect the operation of any statutes governing the effect of the recording or the failure to record any instrument affecting land.

Effective Date: 09-29-1961

5301.55 Liberal construction of statutes.

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Sections 5301.47 to 5301.56 , inclusive, of the Revised Code, shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in section 5301.48 of the Revised Code, subject only to such limitations as appear in section 5301.49 of the Revised Code.

Effective Date: 09-29-1961

5301.56 Mineral interests - vesting in surface owner.

(A) As used in this section:

(1) "Holder" means the record holder of a mineral interest, and any person who derives the person's rights from, or has a common source with, the record holder and whose claim does not indicate, expressly or by clear implication, that it is adverse to the interest of the record holder.

(2) "Drilling or mining permit" means a permit issued under Chapter 1509., 1513., or 1514. of the Revised Code to the holder to drill an oil or gas well or to mine other minerals.

(3) "Mineral interest" means a fee interest in at least one mineral regardless of how the interest is created and of the form of the interest, which may be absolute or fractional or divided or undivided.

(4) "Mineral" means gas, oil, coal, coalbed methane gas, other gaseous, liquid, and solid hydrocarbons, sand, gravel, clay, shale, gypsum, halite, limestone, dolomite, sandstone, other stone, metalliferous or nonmetalliferous ore, or another material or substance of commercial value that is excavated in a solid state from natural deposits on or in the earth.

(5) "Owner of the surface of the lands subject to the interest" includes the owner's successors and assignees.

(B) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface of the lands subject to the interest if the requirements established in division (E) of this section are satisfied and none of the following applies:

(1) The mineral interest is in coal, or in mining or other rights pertinent to or exercisable in connection with an interest in coal, as described in division (E) of section 5301.53 of the Revised Code. However, if a mineral interest includes both coal and other minerals that are not coal, the mineral interests that are not in coal may be deemed abandoned and vest in the owner of the surface of the lands subject to the interest.

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(2) The mineral interest is held by the United States, this state, or any political subdivision, body politic, or agency of the United States or this state, as described in division (G) of section 5301.53 of the Revised Code.

(3) Within the twenty years immediately preceding the date on which notice is served or published under division (E) of this section, one or more of the following has occurred:

(a) The mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located.

(b) There has been actual production or withdrawal of minerals by the holder from the lands, from lands covered by a lease to which the mineral interest is subject, from a mine a portion of which is located beneath the lands, or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations, under sections 1509.26 to 1509.28 of the Revised Code, in which the mineral interest is participating, provided that the instrument or order creating or providing for the pooling or unitization of oil or gas interests has been filed or recorded in the office of the county recorder of the county in which the lands that are subject to the pooling or unitization are located.

(c) The mineral interest has been used in underground gas storage operations by the holder.

(d) A drilling or mining permit has been issued to the holder, provided that an affidavit that states the name of the permit holder, the permit number, the type of permit, and a legal description of the lands affected by the permit has been filed or recorded, in accordance with section 5301.252 of the Revised Code, in the office of the county recorder of the county in which the lands are located.

(e) A claim to preserve the mineral interest has been filed in accordance with division (C) of this section.

(f) In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the county auditor's tax list and the county treasurer's duplicate tax list in the county in which the lands are located.

(C)(1) A claim to preserve a mineral interest from being deemed abandoned under division (B) of this section may be filed for record by its holder. Subject to division (C)(3) of this section, the claim shall be recorded in accordance with division (H) of this section and sections 317.18 to 317.20 and 5301.52 of the Revised Code, and shall consist of a notice that does all of the following:

(a) States the nature of the mineral interest claimed and any recording information upon which the claim is based;

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(b) Otherwise complies with section 5301.52 of the Revised Code;

(c) States that the holder does not intend to abandon, but instead to preserve, the holder's rights in the mineral interest.

(2) A claim that complies with division (C)(1) of this section or, if applicable, divisions (C)(1) and (3) of this section preserves the rights of all holders of a mineral interest in the same lands.

(3) Any holder of an interest for use in underground gas storage operations may preserve the holder's interest, and those of any lessor of the interest, by a single claim, that defines the boundaries of the storage field or pool and its formations, without describing each separate interest claimed. The claim is prima-facie evidence of the use of each separate interest in underground gas storage operations.

(D)(1) A mineral interest may be preserved indefinitely from being deemed abandoned under division (B) of this section by the occurrence of any of the circumstances described in division (B)(3) of this section, including, but not limited to, successive filings of claims to preserve mineral interests under division (C) of this section.

(2) The filing of a claim to preserve a mineral interest under division (C) of this section does not affect the right of a lessor of an oil or gas lease to obtain its forfeiture under section 5301.332 of the Revised Code.

(E) Before a mineral interest becomes vested under division (B) of this section in the owner of the surface of the lands subject to the interest, the owner of the surface of the lands subject to the interest shall do both of the following:

(1) Serve notice by certified mail, return receipt requested, to each holder or each holder's successors or assignees, at the last known address of each, of the owner's intent to declare the mineral interest abandoned. If service of notice cannot be completed to any holder, the owner shall publish notice of the owner's intent to declare the mineral interest abandoned at least once in a newspaper of general circulation in each county in which the land that is subject to the interest is located. The notice shall contain all of the information specified in division (F) of this section.

(2) At least thirty, but not later than sixty days after the date on which the notice required under division (E)(1) of this section is served or published, as applicable, file in the office of the county recorder of each county in which the surface of the land that is subject to the interest is located an affidavit of abandonment that contains all of the information specified in division (G) of this section.

(F) The notice required under division (E)(1) of this section shall contain all of the following:

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(1) The name of each holder and the holder's successors and assignees, as applicable;

(2) A description of the surface of the land that is subject to the mineral interest. The description shall include the volume and page number of the recorded deed or other recorded instrument under which the owner of the surface of the lands claims title or otherwise satisfies the requirements established in division (A)(3) of section 5301.52 of the Revised Code.

(3) A description of the mineral interest to be abandoned. The description shall include the volume and page number of the recorded instrument on which the mineral interest is based.

(4) A statement attesting that nothing specified in division (B)(3) of this section has occurred within the twenty years immediately preceding the date on which notice is served or published under division (E) of this section;

(5) A statement of the intent of the owner of the surface of the lands subject to the mineral interest to file in the office of the county recorder an affidavit of abandonment at least thirty, but not later than sixty days after the date on which notice is served or published, as applicable.

(G) An affidavit of abandonment shall contain all of the following:

(1) A statement that the person filing the affidavit is the owner of the surface of the lands subject to the interest;

(2) The volume and page number of the recorded instrument on which the mineral interest is based;

(3) A statement that the mineral interest has been abandoned pursuant to division (B) of this section;

(4) A recitation of the facts constituting the abandonment;

(5) A statement that notice was served on each holder or each holder's successors or assignees or published in accordance with division (E) of this section.

(H)(1) If a holder or a holder's successors or assignees claim that the mineral interest that is the subject of a notice under division (E) of this section has not been abandoned, the holder or the holder's successors or assignees, not later than sixty days after the date on which the notice was served or published, as applicable, shall file in the office of the county recorder of each county where the land that is subject to the mineral interest is located one of the following:

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(a) A claim to preserve the mineral interest in accordance with division (C) of this section;

(b) An affidavit that identifies an event described in division (B)(3) of this section that has occurred within the twenty years immediately preceding the date on which the notice was served or published under division (E) of this section.

The holder or the holder's successors or assignees shall notify the person who served or published the notice under division (E) of this section of the filing under this division.

(2) If a holder or a holder's successors or assignees who claim that the mineral interest that is the subject of a notice under division (E) of this section has not been abandoned fails to file a claim to preserve the mineral interest, files such a claim more than sixty days after the date on which the notice was served or published under division (E) of this section, fails to file an affidavit that identifies an event described in division (B)(3) of this section that has occurred within the twenty years immediately preceding the date on which the notice was served or published under division (E) of this section, or files such an affidavit more than sixty days after the date on which the notice was served or published under that division, the owner of the surface of the lands subject to the interest who is seeking to have the interest deemed abandoned and vested in the owner shall file in the office of the county recorder of each county where the land that is subject to the mineral interest is located a notice of failure to file. The notice shall contain all of the following:

(a) A statement that the person filing the notice is the owner of the surface of the lands subject to the mineral interest;

(b) A description of the surface of the land that is subject to the mineral interest;

(c) The statement: "This mineral interest abandoned pursuant to affidavit of abandonment recorded in volume ...., page ....."

Immediately after the notice of failure to file a mineral interest is recorded, the mineral interest shall vest in the owner of the surface of the lands formerly subject to the interest, and the record of the mineral interest shall cease to be notice to the public of the existence of the mineral interest or of any rights under it. In addition, the record shall not be received as evidence in any court in this state on behalf of the former holder or the former holder's successors or assignees against the owner of the surface of the lands formerly subject to the interest. However, the abandonment and vesting of a mineral interest pursuant to divisions (E) to (I) of this section only shall be effective as to the property of the owner that filed the affidavit of abandonment under division (E) of this section.

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(I) For purposes of a recording under this section, a county recorder shall charge the fee established under section 317.32 of the Revised Code.

Amended by 130th General Assembly File No. 41, HB 72, §1, eff. 1/30/2014.

Effective Date: 03-22-1989; 06-30-2006

5301.61 Removal of fixtures or improvements from mortgaged realty.

No person having an interest in real property, buyer, lessee, tenant, or occupant of real property, knowing that such real property is mortgaged or the subject of a land contract, shall remove, or cause or permit the removal of any improvement or fixture from such real property without the consent of the mortgagee, vendor under the land contract, or other person authorized to give such consent.

Effective Date: 01-01-1974

5301.63 Solar access easement requirements.

For the purpose of ensuring adequate access of solar energy collection devices to sunlight, any person may grant a solar access easement. Such easements shall be in writing and shall be subject to the same conveyance and recording requirements as other easements.

Any instrument that grants a solar access easement shall include:

(A) A description of the real property burdened and benefited by the solar access easement;

(B) A description of the limits in heights, locations, or both, of permissible development on the burdened land in terms of structures, vegetation, or both, for the purpose of providing solar access for the benefited land;

(C) Any terms or conditions under which the solar access easement is granted or may be terminated;

(D) A term stating that the solar access easement runs with the land, unless terminated in accordance with the terms of the easement regarding termination, or unless otherwise agreed by the parties;

(E) Any other provisions necessary or desirable to execute the instrument.

The owner of the benefited land may prevent any obstruction of the solar access described in the solar

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access easement by any equitable remedy, and may maintain any action at law for any damages caused by any such obstruction.

Nothing in this section shall affect the status of any recorded easement to protect or ensure adequate access of solar energy collection devices to sunlight conveyed prior to the effective date of this section.

Effective Date: 08-14-1979

5301.67 Conservation, agricultural easement definitions.

As used in sections 5301.67 to 5301.70 of the Revised Code:

(A) "Conservation easement" means an incorporeal right or interest in land that is held for the public purpose of retaining land, water, or wetland areas predominantly in their natural, scenic, open, or wooded condition, including, without limitation, the use of land in agriculture when consistent with and in furtherance of the purpose of retaining those areas in such a condition, or retaining their use predominantly as suitable habitat for fish, plants, or wildlife; that imposes any limitations on the use or development of the areas that are appropriate at the time of creation of the conservation easement to achieve one or more of those purposes; and that includes appropriate provisions for the holder to enter the property subject to the easement at reasonable times to ensure compliance with its provisions.

(B) "Agriculture" means those activities occurring on land devoted exclusively to agricultural use, as defined in section 5713.30 of the Revised Code, or on land that constitutes a homestead.

(C) "Agricultural easement" means an incorporeal right or interest in land that is held for the public purpose of retaining the use of land predominantly in agriculture; that imposes any limitations on the use or development of the land that are appropriate at the time of creation of the easement to achieve that purpose; that is in the form of articles of dedication, easement, covenant, restriction, or condition; and that includes appropriate provisions for the holder to enter the property subject to the easement at reasonable times to ensure compliance with its provisions.

(D) "Homestead" means the portion of a farm on which is located a dwelling house, yard, or outbuildings such as a barn or garage.

Effective Date: 07-26-2001

5301.68 Granting conservation or agricultural easement.

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An owner of land may grant a conservation easement to the department of natural resources, a park district created under Chapter 1545. of the Revised Code, a township park district created under section 511.18 of the Revised Code, a conservancy district created under Chapter 6101. of the Revised Code, a soil and water conservation district created under Chapter 1515. of the Revised Code, a regional water and sewer district created under Chapter 6119. of the Revised Code, a county, a township, a municipal corporation, or a charitable organization that is authorized to hold conservation easements by division (B) of section 5301.69 of the Revised Code, in the form of articles of dedication, easement, covenant, restriction, or condition. An owner of land also may grant an agricultural easement to the director of agriculture; to a municipal corporation, county, township, or soil and water conservation district; or to a charitable organization described in division (B) of section5301.69 of the Revised Code. An owner of land may grant an agricultural easement only on land that is valued for purposes of real property taxation at its current value for agricultural use under section 5713.31 of the Revised Code or that constitutes a homestead when the easement is granted.

All conservation easements and agricultural easements shall be executed and recorded in the same manner as other instruments conveying interests in land.

Amended by 129th General AssemblyFile No.141, HB 509, §1, eff. 9/28/2012.

Effective Date: 07-26-2001; 04-15-2005

5301.69 Who may acquire conservation or agricultural easement.

(A) The director of natural resources, the board of park commissioners of a park district created under Chapter 1545. of the Revised Code, the board of park commissioners of a township park district created under section 511.18 of the Revised Code, the board of directors of a conservancy district created under Chapter 6101. of the Revised Code, the board of supervisors of a soil and water conservation district created under Chapter 1515. of the Revised Code, the board of trustees of a regional water and sewer district created under Chapter 6119. of the Revised Code, the board of county commissioners of a county, the board of township trustees of a township, or the legislative authority of a municipal corporation may acquire conservation easements in the name of the state, the district, or the county, township, or municipal corporation in the same manner as other interests in land may be acquired under section 307.02 , 307.18 , 505.10 , 505.261 , 511.23 , 717.01 , 1501.01 ,1515.08 , 1545.11 , 6101.15, or 6119.111 of the Revised Code. Each officer, board, or authority acquiring a conservation easement shall name an appropriate administrative officer, department, or division to supervise and enforce the easement.

(B) A charitable organization may acquire and hold conservation easements if it is exempt from federal taxation under subsection 501(a) and is described in subsection 501(c) of the "Internal Revenue Code of

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1954," 68A Stat. 3, 26 U.S.C. 1 , as amended, and organized for any of the following purposes: the preservation of land areas for public outdoor recreation or education, or scenic enjoyment; the preservation of historically important land areas or structures; or the protection of natural environmental systems. Such a charitable organization also may acquire and hold agricultural easements subject to the limitation that it may do so only on land that is valued for purposes of real property taxation at its current value for agricultural use under section 5713.31 of the Revised Code or that constitutes a homestead when the easement is granted.

Amended by 129th General AssemblyFile No.141, HB 509, §1, eff. 9/28/2012.

Effective Date: 07-26-2001

5301.691 Director of agriculture purchase of agricultural easements.

(A)(1) Subject to divisions (A)(2) and (F) of this section, the director of agriculture, with moneys credited to the agricultural easement purchase fund created in section901.21 of the Revised Code, may purchase agricultural easements in the name of the state.

(2) Not less than thirty days prior to the acquisition of an agricultural easement under division (A)(1) of this section or the extinguishment of such an easement purchased under that division, the director shall provide written notice of the intention to do so to the board of county commissioners of the county in which the land that is or is proposed to be subject to the easement or extinguishment is located, and either to the legislative authority of the municipal corporation in which the land is located, if it is located in an incorporated area, or to the board of township trustees of the township in which the land is located, if it is located in an unincorporated area. If, within thirty days after the director provides the notice, the board of county commissioners, legislative authority, or board of township trustees requests an informational meeting with the director regarding the proposed acquisition or extinguishment, the director shall meet with the legislative authority or board to respond to the board's or authority's questions and concerns. If a meeting is timely requested under division (A)(2) of this section, the director shall not undertake the proposed acquisition or extinguishment until after the meeting has been concluded.

The director, upon the director's own initiative and prior to the purchase of an agricultural easement under division (A)(1) of this section or the extinguishment of such an easement, may hold an informational meeting with the board of county commissioners and the legislative authority of the municipal corporation or board of township trustees in which land that would be affected by the proposed acquisition or extinguishment is located, to respond to any questions and concerns of the board or authority regarding the proposed acquisition or extinguishment.

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(B)(1) Subject to division (F) of this section, the legislative authority of a municipal corporation, board of county commissioners of a county, or board of trustees of a township, with moneys in the political subdivision's general fund not required by law or charter to be used for other specified purposes or with moneys in a special fund of the political subdivision to be used for the purchase of agricultural easements, may purchase agricultural easements in the name of the municipal corporation, county, or township.

(2) Subject to division (F) of this section, the legislative authority of a municipal corporation, board of county commissioners of a county, or board of township trustees of a township may acquire agricultural easements by gift, devise, or bequest. Any terms may be included in an agricultural easement so acquired that are necessary or appropriate to preserve on behalf of the grantor of the easement the favorable tax consequences of the gift, devise, or bequest under the "Internal Revenue Act of 1986," 100 Stat. 2085, 26 U.S.C.A. 1 , as amended.

(C)(1) Subject to division (F) of this section, the board of supervisors of a soil and water conservation district, with moneys in any fund not required by law to be used for other specified purposes or with moneys provided to the board through matching grants made under section 901.22 of the Revised Code for the purchase of agricultural easements, may purchase agricultural easements in the name of the board.

(2) Subject to division (F) of this section, the board of supervisors of a soil and water conservation district may acquire agricultural easements by gift, devise, or bequest. Any terms may be included in an agricultural easement so acquired that are necessary or appropriate to preserve on behalf of the grantor of the easement the favorable tax consequences of the gift, devise, or bequest under the "Internal Revenue Act of 1986," 100 Stat. 2085, 26 U.S.C.A. 1 , as amended.

(D)(1) The term of an agricultural easement purchased wholly or in part with money from the agricultural easement purchase fund shall be perpetual and shall run with the land.

(2) The term of an agricultural easement purchased by the legislative authority of a municipal corporation, board of county commissioners of a county, board of township trustees of a township, or board of supervisors of a soil and water conservation district without the use of any money from the agricultural easement purchase fund may be perpetual or for a specified period. The agricultural easement shall run with the land. The instrument conveying an agricultural easement for a specified period shall include provisions specifying, at a minimum, all of the following:

(a) The consideration to be paid for the easement and manner of payment;

(b) Whether the easement is renewable and, if so, procedures for its renewal;

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(c) The circumstances under which the easement may be extinguished;

(d) The method for determining the amount of money, if any, due the holder of the easement upon extinguishment and for payment of that amount to the holder.

(E)(1) The director and each legislative authority of a municipal corporation, board of county commissioners, board of township trustees, or board of supervisors of a soil and water conservation district, upon acquiring an agricultural easement by purchase, gift, devise, or bequest under this section or section 901.21 of the Revised Code, shall name an appropriate administrative officer, department, or division to supervise and enforce the easement. A legislative authority of a municipal corporation, board of county commissioners, or board of township trustees may enter into a contract with the board of park commissioners of a park district established under Chapter 1545. of the Revised Code, the board of park commissioners of a township park district established under section 511.18 of the Revised Code, or the board of supervisors of a soil and water conservation district having territorial jurisdiction within the municipal corporation, county, or township, or with a charitable organization described in division (B) of section 5301.69 of the Revised Code, to supervise on behalf of the legislative authority or board an agricultural easement so acquired. A board of supervisors of a soil and water conservation district may enter into a contract with the board of park commissioners of a park district established under Chapter 1545. of the Revised Code or the board of park commissioners of a township park district established under section 511.18 of the Revised Code having territorial jurisdiction within the soil and water conservation district, or with a charitable organization described in division (B) of section 5301.69 of the Revised Code, to supervise on behalf of the board an agricultural easement so acquired. The contract may be entered into on such terms as are agreeable to the parties and shall specify or prescribe a method for determining the amounts of any payments to be made by the legislative authority , board of county commissioners , board of township trustees, or board of supervisors for the performance of the contract.

(2) With respect to an agricultural easement purchased with a matching grant that is made under division (D) of section 901.22 of the Revised Code and that consists in whole or in part of moneys from the clean Ohio agricultural easement fund created in section 901.21 of the Revised Code, the recipient of the matching grant shall make an annual monitoring visit to the land that is the subject of the easement. The purpose of the visit is to ensure that no development that is prohibited by the terms of the easement has occurred or is occurring. In accordance with rules adopted under division (A)(1)(d) of section 901.22 of the Revised Code, the grant recipient shall prepare a written annual monitoring report and submit it to the office of farmland preservation in the department of agriculture. If necessary to enforce the terms of the easement, the grant recipient shall take corrective action in accordance with those rules. The director may agree to share these monitoring and enforcement responsibilities with the grant recipient.

(F) The director; a municipal corporation, county, township, or soil and water conservation district; or a

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charitable organization may acquire agricultural easements by purchase, gift, devise, or bequest only on land that is valued for purposes of real property taxation at its current value for agricultural use under section 5713.31 of the Revised Code or that constitutes a homestead when the easement is granted.

(G) An agricultural easement acquired by the director under division (A) of this section may be extinguished if an unexpected change in the conditions of or surrounding the land that is subject to the easement makes impossible or impractical the continued use of the land for the purposes described in the agricultural easement, or if the requirements of the easement are extinguished by judicial proceedings. Upon the sale, exchange, or involuntary conversion of the land subject to the easement, the director shall be paid an amount of money that is at least equal to the proportionate value of the easement compared to the total value of the land at the time the easement was acquired. Moneys so received shall be credited to the agricultural easement purchase fund.

An agricultural easement acquired by a municipal corporation, county, or township under division (B) of this section or by a soil and water conservation district under division (C) of this section may be extinguished under the circumstances prescribed, and in accordance with the terms and conditions set forth, in the instrument conveying the agricultural easement. An agricultural easement acquired by a charitable organization described in division (B) of section 5301.69 of the Revised Code may be extinguished under the circumstances prescribed, and in accordance with the terms and conditions set forth, in the instrument conveying the agricultural easement.

Any instrument extinguishing an agricultural easement shall be executed and recorded in the same manner as other instruments conveying or terminating interests in real property.

(H) Promptly after the recording and indexing of an instrument conveying an agricultural easement to any person or to a municipal corporation, county, township, or soil and water conservation district or of an instrument extinguishing an agricultural easement held by any person or such a political subdivision, the county recorder shall mail, by regular mail, a photocopy of the instrument to the office of farmland preservation in the department of agriculture. The photocopy shall be accompanied by an invoice for the applicable fee established in section 317.32 of the Revised Code. Promptly after receiving the photocopy and invoice, the office of farmland preservation shall remit the fee to the county recorder.

(I) The director, the legislative authority of a municipal corporation, a board of county commissioners, a board of township trustees, or a board of supervisors of a soil and water conservation district may receive and expend grants from any public or private source for the purpose of purchasing agricultural easements and supervising and enforcing them.

Effective Date: 05-30-2002; 04-15-2005

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5301.692 Holding land or interests in land for purpose of retaining use of land predominantly in agriculture.

The legislative authority of a municipal corporation, board of county commissioners of a county, or board of township trustees of a township, in addition to the legislative authority's or board's other powers, may hold land or interests in land for the purpose of retaining the use of the land predominantly in agriculture. The authority and boards may do all things necessary or appropriate to achieve that purpose, including, without limitation, performing any of the activities described in division (A)(1) or (2) of section 5713.30 of the Revised Code or entering into contracts to lease or rent the land or interests in land so held to persons or governmental entities who will use the land predominantly in agriculture.

Effective Date: 04-05-1999

5301.70 Enforcement of conservation easement.

Conservation easements are not unenforceable for lack of privity of contract or estate or lack of benefit to a particular dominant estate. Conservation easements are assignable to another entity authorized to hold conservation easements. Nothing in sections 5301.67 to 5301.70 of the Revised Code affects the enforceability of any article of dedication, restriction, easement, covenant, or condition that does not meet the requirements of those sections.

The terms of a conservation easement may be enforced by injunction or in any other civil action by the holder of the easement.

Effective Date: 03-14-1980

5301.80 Environmental covenants - definitions.

As used in sections 5301.80 to 5301.92 of the Revised Code:

(A) "Activity and use limitations" means restrictions or obligations created under sections 5301.80 to 5301.92 of the Revised Code with respect to real property.

(B) "Agency" means the environmental protection agency or any other state or federal agency that determines or approves the environmental response project pursuant to which an environmental covenant is created.

(C) "Common interest community" means a condominium, a cooperative, or other real property with respect to which a person, by virtue of the person's ownership of a parcel of real property, is obligated to

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pay property taxes or insurance premiums or to pay for maintenance or improvement of other real property described in a recorded covenant that creates the common interest community.

(D) "Environmental covenant" means a servitude arising under an environmental response project that imposes activity and use limitations and that meets the requirements established in section 5301.82 of the Revised Code.

(E) "Environmental response project" means a plan or work performed for environmental remediation of real property or for protection of ecological features associated with real property and conducted as follows:

(1) Under a federal or state program governing environmental remediation of real property that is subject to agency review or approval, including, but not limited to, property that is the subject of any of the following:

(a) A corrective action, closure, or post-closure pursuant to the "Resource Conservation and Recovery Act of 1976," 90 Stat. 2806, 42 U.S.C.A. 6921 , et seq., as amended, or any regulation adopted under that act, or Chapter 3734. of the Revised Code or any rule adopted under it;

(b) A removal or remedial action pursuant to the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," 94 Stat. 2767, 42 U.S.C.A. 9601 , et seq., as amended, or any regulation adopted under that act, or Chapter 3734. or 6111. of the Revised Code or any rule adopted under those chapters;

(c) A no further action letter submitted with a request for a covenant not to sue pursuant to section 3746.11 of the Revised Code;

(d) A no further action letter prepared pursuant to section 122.654 of the Revised Code;

(e) A corrective action pursuant to section 3737.88 , 3737.882 , or 3737.89 of the Revised Code or any rule adopted under those sections.

(2) Pursuant to a mitigation requirement associated with the section 401 water quality certification program or the isolated wetland program as required by Chapter 6111. of the Revised Code;

(3) Pursuant to a grant commitment or loan agreement entered into pursuant to section 6111.036 or 6111.037 of the Revised Code;

(4) Pursuant to a supplemental environmental project embodied in orders issued by the director of

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environmental protection pursuant to Chapter 6111. of the Revised Code.

(F) "Holder" means a grantee of an environmental covenant as specified in division (A) of section 5301.81 of the Revised Code.

(G) "Person" includes the state, a political subdivision, another state or local entity, the United States and any agency or instrumentality of it, and any legal entity defined as a person under section 1.59 of the Revised Code.

(H) "Record," when used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

Effective Date: 12-30-2004

5301.81 Holder of environmental covenant.

(A) Any person, including a person that owns an interest in the real property that is the subject of an environmental covenant, may be a holder. An environmental covenant may identify more than one holder.

(B) The interest of a holder is an interest in real property. However, a right of an agency under sections 5301.80 to 5301.92 of the Revised Code or under an environmental covenant, other than a right as a holder, is not an interest in real property.

Effective Date: 12-30-2004

5301.82 Contents of environmental covenant - required signatures.

(A) An environmental covenant shall contain all of the following:

(1) A statement that the instrument is an environmental covenant executed pursuant to sections 5301.80 to 5301.92 of the Revised Code;

(2) A legally sufficient description of the real property that is subject to the environmental covenant;

(3) A description of the activity and use limitations on the real property;

(4) Requirements for notice following transfer of a specified interest in, or concerning proposed changes in the use of, applications for building permits for, or proposals for any site work affecting contamination

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on, the property that is subject to the environmental covenant;

(5) The name or identity of every holder;

(6) Rights of access to the property granted in connection with implementation or enforcement of the environmental covenant;

(7) The signatures of the applicable agency, every holder, and, unless waived by the agency, every owner of the fee simple of the real property that is subject to the environmental covenant;

(8) An identification of the name and location of any administrative record for the environmental response project pursuant to which the environmental covenant is created.

(B) In addition to the information required by division (A) of this section, an environmental covenant may contain other information, restrictions, and requirements agreed to by the persons who signed the environmental covenant, including any of the following:

(1) Requirements for periodic reporting describing compliance with the environmental covenant;

(2) A brief narrative description of contamination on the property and its remedy, including the contaminants of concern, the pathways of exposure, limits on exposure, and the location and extent of the contamination;

(3) Limitations on amendment or termination of the environmental covenant in addition to those established in sections 5301.89 and 5301.90 of the Revised Code;

(4) Rights of the holder in addition to the right to enforce the environmental covenant pursuant to section 5301.91 of the Revised Code.

(C) In addition to other conditions for an agency's approval of an environmental covenant, the agency may require those persons specified by the agency who have interests in the real property that is the subject of the environmental covenant to sign the covenant.

Effective Date: 12-30-2004

5301.83 Copies of environmental covenant to be provided.

(A) A copy of an environmental covenant shall be provided to all of the following in a manner required by

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the applicable agency:

(1) Each person that signed the environmental covenant;

(2) Each person holding a recorded interest in the real property that is subject to the environmental covenant;

(3) Each person in possession of the real property that is subject to the environmental covenant;

(4) Each unit of local government in which the real property that is subject to the environmental covenant is located;

(5) Any other person that the agency requires.

(B) The validity of an environmental covenant is not affected by failure to provide a copy of the environmental covenant as required under this section.

Effective Date: 12-30-2004

5301.84 Obligations under environmental covenant.

An agency is bound by any obligation that it expressly assumes in an environmental covenant, but an agency does not assume obligations merely by signing an environmental covenant. Any other person that signs an environmental covenant is bound by the obligations that the person assumes in the environmental covenant, but signing the environmental covenant does not change obligations, rights, or protections that are granted or imposed under law other than sections 5301.80 to5301.92 of the Revised Code, except as provided in the environmental covenant.

Effective Date: 12-30-2004

5301.85 Environmental covenant runs with land - enforceability.

(A) An environmental covenant that complies with sections 5301.80 to 5301.92 of the Revised Code runs with the land.

(B) An environmental covenant that is otherwise effective is valid and enforceable even if any of the following limitations on enforcement of interests applies:

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(1) It is not appurtenant to an interest in real property.

(2) It can be or has been assigned to a person other than the original holder.

(3) It is not of a character that has been recognized traditionally at common law.

(4) It imposes a negative burden.

(5) It imposes an affirmative obligation on a person having an interest in the real property or on the holder.

(6) The benefit or burden of the environmental covenant does not touch or concern real property.

(7) There is no privity of estate or contract.

(8) The holder dies, ceases to exist, resigns, or is replaced.

(9) The owner of an interest that is subject to the environmental covenant and the holder are the same person.

(C) An instrument that creates restrictions or obligations with respect to real property that would qualify as activity and use limitations except for the fact that the instrument was recorded before the effective date of sections 5301.80 to 5301.92 of the Revised Code is not invalid or unenforceable because of any of the limitations on enforcement of interests described in division (B) of this section or because it was identified as an easement, servitude, deed restriction, or other interest. Sections5301.80 to 5301.92 of the Revised Code do not apply in any other respect to such an instrument.

(D) Sections 5301.80 to 5301.92 of the Revised Code do not invalidate or render unenforceable any interest, whether designated as an environmental covenant or other interest, that is otherwise enforceable under the laws of this state.

(E) Nothing in sections 5301.80 to 5301.92 of the Revised Code shall be construed to restrict, affect, or impair the rights of any person under the Revised Code or common law to enter into or record a restrictive covenant, institutional control, easement, servitude, or other restriction on the use of property that does not satisfy the requirements of division (A) of section 5301.82 of the Revised Code and does not have the permission, approval, or consent of an agency, political subdivision, regulatory body, or other unit of government. However, a restrictive covenant, institutional control, easement, servitude, or other restriction on the use of property entered into or recorded without such permission, approval, or consent is not an environmental covenant and is not binding on an agency, political subdivision, regulatory body, or other

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unit of government.

Effective Date: 12-30-2004

5301.86 Antecedent interests in real property - subordination agreement.

With respect to interests in real property in existence at the time that an environmental covenant is created or amended, all of the following apply:

(A) An interest that has priority under other law is not affected by an environmental covenant unless the person that owns the interest agrees to subordinate that interest to the environmental covenant.

(B) Sections 5301.80 to 5301.92 of the Revised Code do not require a person that owns a prior interest to subordinate that interest to an environmental covenant or to agree to be bound by the covenant.

(C) A subordination agreement may be contained in an environmental covenant or in a separate record. If the environmental covenant covers commonly owned property in a common interest community, the record may be signed by any person who is authorized by the common interest community.

(D) An agreement by a person to subordinate a prior interest to an environmental covenant affects the priority of that persons's interest, but does not by itself impose any affirmative obligation on the person with respect to the environmental covenant.

Effective Date: 12-30-2004

5301.87 Zoning regulations and prior instruments.

Sections 5301.80 to 5301.92 of the Revised Code do not authorize a use of real property that is otherwise prohibited by zoning, by law other than sections 5301.80 to5301.92 of the Revised Code regulating use of real property, or by a recorded instrument that has priority over an environmental covenant. An environmental covenant may prohibit or restrict uses of real property that are authorized by zoning or by law other than sections 5301.80 to 5301.92 of the Revised Code.

Effective Date: 12-30-2004

5301.88 Filing and recording of environmental covenants.

(A) Except as otherwise provided in division (B) of this section, an environmental covenant and any

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amendment or termination of the environmental covenant shall be filed in the office of the county recorder of each county in which the real property that is subject to the environmental covenant is located and shall be recorded in the same manner as a deed to the property. For purposes of indexing, a holder shall be treated as a grantee.

(B) Pursuant to Chapter 5309. of the Revised Code, an environmental covenant and any amendment or termination of the environmental covenant in connection with registered land, as defined in section 5309.01 of the Revised Code, shall be entered as a memorial on the page of the register where the title of the owner is registered.

(C) Except as otherwise provided in division (C) of section 5301.89 of the Revised Code, an environmental covenant is subject to the laws of this state governing recording and priority of interest in real property.

Effective Date: 12-30-2004

5301.89 Environmental covenant perpetual - exceptions - judicial termination - limitation.

(A) An environmental covenant is perpetual unless any of the following applies:

(1) The environmental covenant is limited by its terms to a specific duration or is terminated by its terms by the occurrence of a specific event.

(2) The environmental covenant is terminated by consent pursuant to section 5301.90 of the Revised Code.

(3) The environmental covenant is terminated pursuant to division (B) of this section.

(4) The environmental covenant is terminated by foreclosure of an interest that has priority over the environmental covenant.

(5) The environmental covenant is terminated or modified in an eminent domain proceeding, but only if all of the following apply:

(a) The agency that signed the environmental covenant is a party to the proceeding.

(b) All persons identified in divisions (A) and (B) of section 5301.90 of the Revised code are given notice of the pendency of the proceeding.

(c) The court determines, after a hearing, that the termination or modification will not adversely affect

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human health or safety or the environment.

(B) If the agency that signed an environmental covenant has determined that the intended benefits of the environmental covenant can no longer be realized, a court, under the doctrine of changed circumstances, in an action in which all persons identified in divisions (A) and (B) of section 5301.90 of the Revised Code have been given notice, may terminate the environmental covenant or reduce its burden on the real property that is subject to the environmental covenant.

(C) Except as otherwise provided in divisions (A) and (B) of this section, an environmental covenant may not be extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien, or application of the doctrine of adverse possession, prescription, abandonment, waiver, lack of enforcement, or acquiescence or a similar doctrine.

(D) An environmental covenant may not be extinguished, limited, or impaired by application of sections 5301.47 to 5301.56 of the Revised Code.

Effective Date: 12-30-2004

5301.90 Amendment or termination of environmental covenant by consent - assignment.

(A) An environmental covenant may be amended or terminated by consent only if the amendment or termination is signed by all of the following:

(1) The applicable agency;

(2) Unless waived by that agency, the current owner of the fee simple of the real property that is subject to the environmental covenant;

(3) Each person that originally signed the environmental covenant unless the person waived in a signed record the right to consent or a court finds that the person no longer exists or cannot be located or identified with the exercise of reasonable diligence;

(4) Except as otherwise provided in division (D)(2) of this section, each holder.

(B) If an interest in real property is subject to an environmental covenant, the interest is not affected by an amendment of the environmental covenant unless the current owner of the interest consents in writing to the amendment or has waived in a signed record the right to consent to amendments.

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(C) Except for an assignment undertaken pursuant to a governmental reorganization, assignment of an environmental covenant to a new holder is an amendment of the environmental covenant.

(D) Except as otherwise provided in an environmental covenant, both of the following apply:

(1) A holder may not assign its interest without consent of the other parties to the environmental covenant specified in division (A) of this section.

(2) A holder may be removed and replaced by agreement of the other parties specified in division (A) of this section.

(E) A court of competent jurisdiction may fill a vacancy in the position of holder.

Effective Date: 12-30-2004

5301.91 Civil action for violation - regulatory authority - liability.

(A) A civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by any of the following:

(1) A party to the environmental covenant specified in division (A) of section 5301.90 of the Revised Code that is not otherwise specified in divisions (A)(2) to (6) of this section;

(2) The environmental protection agency;

(3) The applicable agency if it is other than the environmental protection agency;

(4) Any person to whom the environmental covenant expressly grants the authority to maintain such an action;

(5) A person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the environmental covenant;

(6) A unit of local government in which the real property that is subject to the environmental covenant is located.

(B) Sections 5301.80 to 5301.92 of the Revised Code do not limit the regulatory authority of the applicable agency or the environmental protection agency if it is not the applicable agency under any law other than

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sections 5301.80 to 5301.92 of the Revised Code with respect to an environmental response project.

(C) A person is not responsible for or subject to liability for environmental remediation solely because it has the right to enforce an environmental covenant.

Effective Date: 12-30-2004

5301.92 Preemption of federal electronic signatures statute.

Sections 5301.80 to 5301.92 of the Revised Code modify, limit, or supersede the "Electronic Signatures in Global and National Commerce Act," 114 Stat. 464 (2000), 15 U.S.C. 7001 et seq., as amended, except that sections 5301.80 to 5301.92 of the Revised Code do not modify, limit, or supersede section 101 of that act, 15 U.S.C. 7001(a) , as amended, or authorize electronic delivery of any of the notices described in section 103 of that act, 15 U.S.C. 7003(b) , as amended.

Effective Date: 12-30-2004

5301.99 Penalty.

(A) Any individual, corporation, or other business entity that violates section 5301.254 of the Revised Code shall be fined not less than five thousand dollars nor more than an amount equal to twenty-five per cent of the market value of the real property or mineral or mining rights about which information must be filed with the secretary of state pursuant to section 5301.254 of the Revised Code.

(B) Whoever violates section 5301.61 of the Revised Code is guilty of a misdemeanor of the first degree.

Effective Date: 03-19-1979

Journal of Business and Economics, ISSN 2155-7950, USA December 2015, Volume 6, No. 12, pp. 2027-2039 DOI: 10.15341/jbe(2155-7950)/12.06.2015/004 © Academic Star Publishing Company, 2015 http://www.academicstar.us 2027 Fuzzy Acquisition Boundaries: A Success Model of Regulatory Stakeholder Interests Terry R. Adler1 , Thomas G. Pittz2 (1. New Mexico State University, Las Cruces, NM 88003-8001, USA; 2. East Carolina University, Greenville, NC 27858, USA)

Abstract: The purpose of this paper is to describe how powerful regulatory stakeholder interests succeed in a business relationship due to what we refer to as “fuzzy acquisition boundaries”. In

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the case described in this article, the city of Seattle, Washington lost their National Basketball Association (NBA) championship team, the Seattle Supersonics, due to combination of legitimate strategic deception, legal disputation power and low minority stakeholder salience by the city of Seattle. We postulate that these three conditions as well as a close relationship with NBA leadership provided the framework that enabled Oklahoma City People's Basketball Club to sever the tenuous but valued partnership between the city of Seattle and the Supersonics. While secondary source data is used as a basis for this case, we apply a stakeholder, institutional and transaction cost theoretical lens to provide insights for understanding how and why this NBA team was acquired and moved. Relevant literature and practical applications to strategic research are also discussed. Key words: stakeholder success; strategic deception; acquisition and firm boundaries JEL codes: L2, L5, Z2

1. Introduction Scholars have discussed various events to explain why a merger or acquisition fails or succeeds (Bruner, 2005; Bruner & Levitt, 2009; Finkelstein, 2003; Gulati, 1998; McCarter, Mahoney & Northcraft, 2011; Marks & Mirvis, 2001; Straub, 2007). Research questions along these lines can be difficult to evaluate, however, since information untainted by historical bias that predicts success in mergers and acquisitions is not always available. This is especially true in cases where strategic deception is used as a primary tactic in the acquisition process. Our paper explores such an acquisition through a case study approach to achieve theory elaboration as suggested by Graebner (2009) and Lee, Mitchell and Sablynski (1999) to provide a valuable theoretical framework. The case study methodology itself was chosen since it is "particularly well suited for research areas where existing theory seems inadequate" (Eisenhardt, 1989, p. 548). We propose that firms acquiring other organizations experience what we call "fuzzy acquisition boundaries" due to legitimate strategic deception, legal disputation power and low minority stakeholder salience.Fuzzy acquisition boundaries are legally nebulous arrangements (among two or more organizations) primarily based on tacit agreements that control the resources, products, services, and technologies of participating firms. While members of an acquired firm (sellers) may not know what will happen to them, they do know that the organization will change. Some acquired firms are shuttered completely (Santos & Eisenhardt, 2009) while others simply experience unwelcome practices and strategies (Jemison & Sitkin, 1986). The potential to "rip out their technology" (Graebner, 2009) exists, however, thereby de-motivating seller stakeholders about plans. Acquired firms experience a lack of stable boundaries and their stakeholders have little knowledge about how or if firms will integrate resources. Thus, fuzzy acquisition boundaries fulfill the interests of buyers because as Graebner (2009, p. 446) states, "in the course of the acquisition, sellers lose power while buyers gain power." The purpose of this paper is to investigate how a powerful buyer and regulatory stakeholder shaped the transaction between two National Basketball Association (NBA) ownership groups and their respective municipal governments. The seller in this transaction, the city of Seattle and the NBA ownership group led by Howard Schultz, lost its championship professional basketball team (the

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Supersonics) despite open public resentment. The buyer in this transaction, the Oklahoma City People's Basketball Club (PBC) led by Clay Bennett, used a combination of legitimate strategic deception, legal disputation power and low minority stakeholder salience to gain a foothold in acquiring a professional basketball franchise. After the transaction, the NBA gained a lucrative new business partner in a city favorable to its interests. While we use an abundance of robust secondary source data as the basis for this case, this method does not diminish the lessons learned that have the potential to add to our understanding of how strategic deception affects stakeholder interests. Using a stakeholder, institutional and transaction cost theoretical lens to shape our discussion responds to a call from previous research for studying other types of acquisitions during the study of deception (Graebner, 2009; Mitchell, Agle & Wood, 1997; Wanasika & Adler, 2011). In addition to the development of a new model to understand acquisition boundaries in the context of strategic deception, several propositions for further research are also proposed. 2. Fuzzy Acquisition Boundaries Organizational boundaries have been a fundamental discussion for decades (Akerlof, 1970; Gentile & Samuelson, 2005; Santos & Eisenhardt, 2009; Williamson, 1975, 1985). These are but a few of the scholars who have addressed the issue of defining where an organization begins and ends. For instance, transaction cost logic as proposed by Williamson (1975) suggests that an organization's boundary is formed by the degree of transaction costs involved to carry out the multitude of activities required by an organization. If transaction costs become too expensive for an activity then a firm would seek to accumulate the resources required to govern that activity and move them in-house, thus providing more cost control. If transaction costs were relatively less expensive outside of the organization, the firm would remain in the market since it would be more efficient and cost effective. What happens, however, when transaction costs are not apparent, not well defined, and possibly even surreptitious? It is at that point that transaction cost logic breaks down in terms of explaining a firm's boundaries relative to the market. The term "fuzzy acquisition boundaries" is used to describe the opaque nature of the purchasing firms' interest and complex governance structures that can be used to blur the lines between stakeholder interests at the time of the transaction. The legally nebulous arrangements, or "fuzzy acquisition boundaries", are demonstrated in this case by the influence of the NBA on the Supersonic transaction that set terms and conditions for the team to Fuzzy Acquisition Boundaries: A Success Model of Regulatory Stakeholder Interests 2029 remain in Seattle or move elsewhere. Are the Supersonics an independent basketball club or are the boundaries of the club much more inclusive? Where do the boundaries of the NBA and the teams that make up its league begin and end? Is this a typical problem of any business franchise? To answer these questions, we need to address the influence of the NBA first. The NBA's former chief legal counsel, Mr. David Stern, spearheaded tight control over NBA teams in the league. A lawyer by profession, he became the fourth NBA Commissioner in 1984. His goal of modernizing arenas was a national phenomenon that was fought locally, particularly in the case of Seattle Supersonics fans and their city government. The influence of the NBA as an organization over NBA teams is confusing however. Where does one

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begin and one end? Williamson (1985) relates something similar in his discussion of specialized forms of governance that have characteristics of both market and hierarchy. Williamson (1985, p. 60) states, "The benefits of specialized governance structures are greatest for transactions supported by considerable investment in transaction-specific assets." Since players and requisite basketball-related resources are generic, or non-specific (i.e., gym, weight rooms, physical therapy, etc.), any NBA team could be uprooted based on the whims of the NBA front office. With regard to the Supersonics in Seattle, there was nothing unique about their assets that could keep them in Seattle. Is this a typical franchising problem? The answer to that question is most likely "yes", as NBA teams appear to function like a McDonalds or other franchise businesses. The major exception to this analogy, however, is that NBA teams compete for the "NBA World Championship" which drives legions of fans and other minority stakeholders to the business. The NBA is a strange mix of sports competition that drives a business model based on athletes, who are the focus of fans, while simultaneously managing teams from a cost-revenue basis. A major challenge lies with stakeholders (i.e., fans, cities, or municipalities) over-identifying with their teams and athletes to the point where they lose focus on what sustains most teams — profits for the owners. Williamson (1985, p. 310) warns, "Communities that make investments in support of a firm should therefore scrutinize the character of the investments that the firm itself makes." In that vein, Howard Schultz's Basketball Club of Seattle should have done more due diligence in scrutinizing the intentions of the Oklahoma Thunder's People's Basketball Club (PBC) before the sale and acquisition. From an institutional perspective, however, due diligence is difficult to accomplish. It would require an understanding about what really is going in the NBA Commissioner's office and that is virtually impossible through legal means. Using Hawley's (1968) description of isomorphism, one unit in a population is forced to resemble other units that encounter the same set of environmental conditions (i.e., much like a franchise). This definition provides some understanding about why and how the NBA pressured and supported the PBC. The NBA had previously overseen the ripping out of three teams from their communities. The Kansas City Kings became the Sacramento Kings, the Vancouver Grizzlies became the Memphis Grizzlies, and the Charlotte Hornets became the New Orleans Hornets. The NBA also spearheaded two successful campaigns to build new arenas in San Antonio and Orlando using taxpayer monies. The NBA had the experience and knowledge of how to pressure local communities to pay for their own expansion (and benefit) and the NBA's own Board of Governors had approval authority that served to regulate where teams were located and played home games. Exactly where the NBA begins and ends, as an entity relative to any NBA team is unclear. One NBA club, the PBC, appeared to have more relative power over other NBA teams with their access to the immense resources of the NBA that the city of Seattle did not have. When the state of Washington voted not to help build a new arena in April 2008, it was a death sentence for the Supersonics in Seattle and a clear chasm was created between the Fuzzy Acquisition Boundaries: A Success Model of Regulatory Stakeholder Interests 2030 team and the state of Washington. The boundaries between the NBA, PBC and Howard Shultz's

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Basketball Club of Seattle remained unclear, or fuzzy, providing the necessary conditions for the move to Oklahoma City. 3. Underpinnings of Fuzzy Acquisition Boundaries How the Oklahoma City (OKC) Thunder of the NBA came into existence is an interesting case study. We reviewed many sources in this investigation but two documentaries in particular, one called "Sonicsgate" published by The Seattle SuperSonics (also commonly referred to as the "Sonics") Historical Preservation Society (2009) and the other a commercially available version in (2012) title "Sonicsgate: Requiem for a team" by Green and Gold Media, were especially poignant. "Sonicsgate", in general, is unique in that even though the acquisition was observed in the public realm, it appeared as though the move was coldly and meticulously planned from the beginning. We discuss these details from a stakeholder lens to shed light on key underpinnings of the move. The Supersonics were an American professional basketball team based in Seattle, Washington that played in the Pacific and Northwest Divisions of the National Basketball Association (NBA) from 1967 until 2008. The Sonics won the NBA Championship in 1979 but by 2008 were a team in disarray. The owner in early 2006 was Howard Schultz, of the famed Starbucks Corporation. Mr. Schultz had failed in his attempts to obtain public money for renovations to KeyArena where the Supersonics played their home games. Frustrated, Schultz sold the Supersonics on October 31, 2006, to the PBC led by businessman Clay Bennett. Terms of the sale required the PBC to "use good faith best efforts" for the term of 12 months in securing a new arena lease or venue in the greater Seattle area. Howard Schultz openly said that he sold the Supersonics to the OKC group only on the stipulation that this new ownership group, the PBC, would preserve the Supersonics deep basketball tradition in city of Seattle (Sonicsgate, 2009). The use of legitimate strategic deception, low minority stakeholder salience, and legal disputation power provide the underpinnings for what we call fuzzy acquisition boundaries (see Figure 1). We suggest that the acquisition of the Sonics by the Oklahoma City PBC describes how the city of Seattle lost its most recognized sports team (at the time) due to these three conditions. In the next section, we will explain how fuzzy acquisition boundaries were created in the case of the Seattle Supersonics to demonstrate the tenants of our conceptual model followed by a discussion of regulatory stakeholder success. Figure 1 Regulatory Stakeholder Success Model 3.1 Legitimate Strategic Deception Organizations enter into business partnerships for many reasons. These range from the access to new technology, markets, and customers to synergies gained when resources are combined, or the actual products or services are offered by selling firms (Bruner, 2005; Buono & Bowditch, 1989; Hartzell, Ofek & Yermack, 2004; Legitimate Strategic Deception Legal Disputation Power Low Minority Stakeholder Salience Fuzzy Acquisition Boundaries Regulatory Stakeholder Success P3 P2 P4 P1 Fuzzy Acquisition Boundaries: A Success Model of Regulatory Stakeholder Interests 2031 Jemison & Sitkin, 1986; Shull & Hanweck, 2001; Ulijn, Duysters & Meijer, 2010). While many hope for an ethical partnership in the pre-negotiation, negotiation, and post-negotiation phases of acquisition and in contract terms and conditions (Schweitzer, Ordonez & Douma, 2004; Williams, 2007), the anticipation and actualization of deception by seller and buyer is always present (Graebner, 2009). For instance,

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Buono & Bowditch (1989, p. 256) state that deception by buyers is "standard practice" while Marks and Mirvis (2001, p. 87) propose that "prior promises mean nothing". The use of deception is so pronounced that many authors find there is no way to prevent it from happening (Pittz & Adler, 2014; Zhang & Rajagopalan, 2002). International settings further complicate acquisitions due to different laws and cultural norms. Other authors suggest that deception is strategic and should be planned into the acquisition to help an organization achieve its goals (Wanasika & Adler, 2011). Lazarus and Folkman (1984, p. 32) suggest that these threats are nothing more than "harms and losses that have not yet taken place but are anticipated" in a business venture. In this vein, strategic deception can be viewed as beneficial, especially when it is legitimately used to increase the value of the organization (Graebner, 2009; Webb, Tihanyi, Ireland & Sirmon, 2009). Unbeknownst to Howard Schultz, statements made by Clay Bennett in February 2006 prior to the sale of the Supersonics to the PBC revealed the PBC group's true intentions. Bennett stated the following (Allen, 2006): "If the Hornets go back to New Orleans, I expect we'll [Oklahoma City] get a franchise. There haven't been any promises made, but there have been a lot of congratulations offered to us." The NBA's New Orleans Hornets played two seasons in Oklahoma City due to Hurricane Katrina. It was not an act of love on the part of the PBC to offer an arena for the Hornets but part of the plan to acquire an NBA franchise. The fact that the PBC expected something in return for this two-year expensive accommodation of the Hornets seems likely given that the PBC was looking for a franchise, any franchise, to bring to Oklahoma City. Ultimately, the Hornets did go back to New Orleans and Mr. Bennett did get a franchise — the Supersonics of Seattle. Mr. Bennett's primary money source in the PBC was a man named Aubrey McClendon. In August 2007 in an interview with the Oklahoma City Business Journal, Mr. McClendon stated that the PBC Group "didn't buy the team to keep it in Seattle". The sale of the Supersonics was a convenient and necessary step for the PBC to claim an NBA ownership. Wanasika and Adler (2011) define strategic deception as actions aimed at misleading others from the true strategic intent of their own organization. While Mr. Bennett publicly and repeatedly stated that he did not intend to move the Supersonics out of Seattle, it appears he always had the intent to do so given his and Mr. McClendon's statements. The use of this kind of strategic deception is not only legitimate but also expected for achieving a competitive advantage. Such advantage can be achieved through increasing rivals' cost functions, tying up competitor resources in less productive areas, wearing down competitors by launching multiple feints before executing the actual strategy, exploiting asymmetric information to make early market or product entry, or simply muddying the competitive environment to increase the level of noise (e.g., useless information and subsequent uncertainty). These strategies lead to increased waste for others, thereby, driving up transaction costs in an acquisition for competitors. Legitimate strategic deception muddies the waters of acquisitions because it allows major players in a transaction the latitude and time to do things they deem necessary without scrutiny or accountability. Hendricks and McAfee (2006) found that firms using strategic deception often disguise their true intent while Fuzzy Acquisition Boundaries: A

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Success Model of Regulatory Stakeholder Interests 2032 entering new markets. Several e-mails that were transmitted between Mr. Bennett and other members of the PBC indicate that there was a healthy bit of back-room discussion in moving the Supersonics. The e-mail exchange provided here between Clay Bennett and Tom Ward, a key PBC member, again indicates the true intent of the PBC (Sonicsgate, 2012): Tom Ward's e-mail to Clay Bennett (copied to Aubrey McClendon): "Is there any way to move here for next season or are we doomed to have another lame duck season in Seattle?" April 17, 2007 at 5:42 am. Clay Bennett's response: "I am a man possessed! Will do everything we can. Thanks for hanging with me boys, the game is getting started!" April 17, 2007 at 7:48 am. Tom Ward's response to Clay Bennett's response: "That's the spirit!! I am willing to help any way I can to watch ball here next year" April 17, 2007 at 7:56 am. These e-mail exchanges again show the true intent of the PBC and Mr. Bennett. It is no wonder that the disclosure of these e-mails greatly distressed Supersonics fans. When confronted by these e-mails when they became public, Clay Bennett vehemently disputed the idea that his use of the word "possessed" indicated that he was maneuvering to move the team to Oklahoma City. The apparent lack of agreement between the PBC's "official" and "true" agendas fueled great consternation amongst Supersonics fans, an intended outcome of legitimate strategic deception. Supersonics stakeholders naturally questioned the intent of the PBC owners as to where the club's true, future home would be while the PBC worked behind the scenes to move the club to Oklahoma City. The emerging and conflicting messages sent by the PBC revealed just how much the PBC was gaining momentum in moving the club to Oklahoma City while at the same time diminishing the power of Seattle's stakeholder groups to share in this governance decision. The uncertainty caused by this deception greatly clouded the role of Seattle's stakeholders and how they should participate in the post-acquisition of the team. Thus, we suggest that: Proposition 1: Legitimate strategic deception is a tactic used to create fuzzy acquisition boundaries. 3.2 Legal Disputation Power Firms that try to protect their interests legally are limited by what they can anticipate and subsequently put into contract terms and conditions. Williamson (1975, 1985) suggests that this stems from a cognitive inability to anticipate threats and, when combined with limited information, creates a contractual vacuum that limits prevention efforts towards mitigating potential harm. Williamson does not expand upon the idea that a buyer or seller has the ability to dispute law in their favor at the expense of a business partner, however. We refer to this ability as "legal disputation power" where buyer or seller has the capacity to influence legal outcomes due to superior legal preparation or acumen. This type of power reinforces the common belief that "if my lawyers are better than your lawyers, I will win the case." This "I win = You lose" mentality is at the core of a legal dispute. The PBC's ability to dispute law, or challenge law, in their favor at the expense of the city of Seattle was evident when Brad Keller, lead attorney for the PBC, was able to get Greg Nickels, the mayor of Seattle, to publicly state in trial that keeping the Supersonics in KeyArena was economically unfeasible. This occurred on 16 June 2008. This admission at the beginning of the trial established the fact that the Supersonics could not economically stay in KeyArena and if

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they could not stay in KeyArena, the option of going to Oklahoma City seemed viable. If the state of Washington was not going to own up with funds for a new facility, then the Supersonics move to Oklahoma City seemed even more reasonable. How did Brad Keller prove to be so much better than the city of Seattle's attorneys? Mr. Keller was an accomplished business litigation attorney who in the words of Michael Hood (2009), a writer for the Washington Fuzzy Acquisition Boundaries: A Success Model of Regulatory Stakeholder Interests 2033 Super Lawyers magazine, said: "Brad Keller is energized by taking on the seemingly impossible cases of publically perceived bad guys. His great successes have been in making those cases not only competitive in the high noon of the courtroom, but usually victorious." PBC had hired the best in Mr. Keller and he subsequently grilled the city's mayor to the point where Mr. Nickels admitted that he had not even been to a Supersonics game in more than two years. In essence, Mr. Keller was better at this game than the city of Seattle's attorneys. We refer to this type power as "legal disputation power" where one has an ability to influence legal outcomes due to superior legal performance. Mr. Keller also filed a motion stipulating that the lawsuit and the release of the e-mails by the city were meant to drive up the cost of leaving Seattle and force the PBC ownership group to sell the team. Hence, the transaction costs would be too high to move the Supersonics out of Seattle, as legal costs would prevent them from realizing any business gain. Although this motion was denied, it did serve to put the city on notice that if they continued to fight the PBC legally they would be in for a long fight and one that would cost the city a lot of money. On April 21, 2008, Mr. Slade Gorton, U. S. Senator from Washington (retired), said that he would be open to a settlement if the league promised a replacement team for Seattle. He said it was "highly unlikely" that the Supersonics would stay and indicated the city should instead focus on gaining a replacement team, but noted that local governments would need to be willing to fund an expansion of KeyArena first. Attorneys on both sides made their closing arguments in the city's case in June 2008 and the judge announced that she would issue her ruling on the following Wednesday. On July 2, 2008, just hours before the judge was to release her ruling, the PBC announced that the team and city had reached a settlement where the PBC would pay the city $45 million immediately in exchange for breaking the lease and an additional $30 million if Seattle was not given a replacement team in five years. According to the conditions of the settlement, the Supersonics' name and colors could not be used by the team in Oklahoma City, but could be taken by a future team in Seattle. The OKC team would retain the franchise history of the Supersonics that could be "shared" with any future NBA team in Seattle. The team moved to Oklahoma City immediately and played their first home game on 14 October 2008. The NBA, PBC, nor any other entity made any promise to offer a replacement team to Seattle. The fact that a settlement was reached before the judge announced her decision reveals just how complex and muddied the relationship was between the NBA, PBC and city of Seattle. Why would a settlement be reached after all that was presented in court? We argue that the PBC won their case through legal disputation power that successfully challenged the interests and claims of stakeholders. The city of Seattle and all the Supersonics fans found out they truly did not have a

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legal basis to have a voice in the governance of this acquisition (more on stakeholder interests in the next section). Thus, we suggest that: Proposition 2: Legal disputation power is used as a tactic to frame fuzzy acquisition boundaries. 3.3 Stakeholder Salience The notion of stakeholder theory, originally developed by Freeman (1984), however suggests that stakeholders should have a voice in an organization's decision making. Freeman (1984, p. 46) defined a stakeholder as "any group or individual who can affect or is affected by the achievement of the activities of an organization". Organizations, however, make decisions that do not consider all stakeholder interests even though many stakeholders have a legitimate claim to an organization's actions (Phillips, 2003). Further, Mitchell et al. (1997) prioritize stakeholder interests based on their power, legitimacy, and urgency. At times these overlap with Fuzzy Acquisition Boundaries: A Success Model of Regulatory Stakeholder Interests 2034 regard to how strong each of the actors is relative to a firm's power, legitimacy, and urgency. For instance, stakeholders with high urgency but low power and legitimacy are nothing more than "mosquitoes buzzing in the ears" (Mitchell et al., 1997, p. 875). These type of stakeholders would have low salience as defined by Bundy, Shropshire and Buchholtz (2013), or low priority, and an organization would not necessarily respond to their interests or needs (David, Bloom & Hillman, 2007) nor would a firm's responsibilities require a response to their concerns (Carroll, 1979). In this case, fans of the Supersonics are stakeholders, albeit minority ones, of the professional basketball team in Seattle. These stakeholders were at a distinct disadvantage because while they were great in number, they were lacking in power. This led to a lack of stakeholder salience and their relative priority was low given PBC's true agenda (Bundy et al., 2013; Mitchell et al., 1997). Given the power, legitimacy, and urgency framework of Mitchell et al. (1997) that was discussed previously, the city of Seattle and Supersonics fans appeared to have high urgency but low degrees of power and legitimacy. They were at a distinct disadvantage with regard to not only the content of PBC's actions but also the timing of those actions. For instance, two days after Bennett's self-imposed October 31, 2007 deadline passed for public financing of a new arena, he informed NBA commissioner David Stern that the PBC intended to move the Supersonics to Oklahoma City as soon as it was possible. The timing of the announcement, one day after the Supersonics' home opener, drew critical comments from Tom Carr, Seattle's attorney, who said (Carr, 2007): "Mr. Bennett's announcement today is a transparent attempt to alienate the Seattle fan base and follow through on his plan to move the team to Oklahoma City. Making this move now continues the current ownership's insulting behavior toward the Sonics' dedicated fans and the citizens of the city." Other evidence suggests that while grass roots fan-based movements did spring up through mass demonstrations, Clay Bennett simply avoided them and did not provide them with an opportunity to be heard. Even the rallying cry of "Save Our Sonics" (SOS) led by fans, former players, coaches, and media darlings were ineffective at halting the transfer of the team. To make matters worse, PBC did not want negative attention so they limited player interaction with the local media and traded popular players (highlighted by the Gary Payton deal) who might eventually become important icons to the Supersonics stakeholder cause. By limiting

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fan interaction with the players, fans became more emotionally separated from the team and, hence, less likely to fight to keep the team in Seattle. The PBC's gag order of Supersonics players, however, just made the urgency of Supersonics fans to do something more prevalent. Unfortunately, this urgency was without the corresponding power required to affect change. When the Washington state legislature did not give approval for funds by the April 10, 2008 deadline, Seattle Mayor Greg Nickels said that the "SOS" effort had failed and the city's hopes rested in its lawsuit. Bennett also reiterated that the team was not for sale and dismissed attempts by local groups and fans to repurchase the team. While Sonics fans had loyalty and empathy for their team and community, their lack of power to stop or hinder the PBC acquisition proved significant. Thus, we suggest that: Proposition 3: Low minority stakeholder salience is necessary to maintain fuzzyacquisition boundaries. 4. The Success of Regulatory Stakeholders We suggest that there is a category of powerful stakeholders in this case: the NBA Board of Governors' and the NBA Commissioner as regulatory stakeholders. Regulatory stakeholders are groups or individuals who can Fuzzy Acquisition Boundaries: A Success Model of Regulatory Stakeholder Interests 2035 affect the decisions of organizations through policy and law. These stakeholders tend to be powerful as they can permit or limit organizational action (Hiatt & Park, 2013; North, 1990). Since they are powerful, they tend to pursue actions that benefit their own self-interests (North, 1990; Shull & Hanweck, 2001). Abrahamson and Hambrick (1997) discuss how stakeholders, for instance, shape regulatory agencies and their decisions. Thus, there seems to be reciprocity between the organization and the regulatory groups assigned to watch over these organizations. Abrahamson and Hambrick (1997) refer to these groups as 3rd party actors who pursue greater autonomy and resources in the regulation of industries and organizations. The NBA and its owners have all the attributes of regulatory stakeholders and we apply this term to this group since the NBA, in essence, regulates all NBA teams with regard to policy, discipline, and strategy. The NBA's success came from its relationship with the fuzzy boundary of the ownership of the Seattle Supersonics. This relationship between the NBA and PBC was carefully cultivated over time and significantly enhanced when Oklahoma City volunteered to provide a temporary home to the New Orleans Hornets during the fallout of Hurricane Katrina. The relationship was so well developed that e-mails surfacing between NBA Commissioner David Stern and Clay Bennett of PBC demonstrated a friendship between the two that went well beyond business exigencies. For instance, the following e-mail was sent from Clay Bennett to David Stern showing that Mr. Stern's relationship with Mr. Bennett was closer than with other NBA ownership groups (Sonicsgate, 2012): "David you know how I feel about our relationship both personally and professionally. You are among a very few, notwithstanding our relative brief actual physical time together that have significantly affected my life. I view you as a role model as an extraordinarily gifted executive, a deep and compassionate thinker…." As evidence of this relationship, the NBA did nothing to counteract the PBC stratagem to relocate the Supersonics and, in fact, was quick to support the PBC when the state of Washington refused the use of public funds to finance a new arena. The state had recently invested heavily in stadiums for the

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Seattle Mariners (a major league baseball franchise) and the Seattle Seahawks (a national football league team) and the region was experiencing "stadium fatigue" following those expenditures. Legislators at the state level believed their constituents did not support stadium funding and several vocal minority activist groups at the local level insisted that public money could be better spent elsewhere. David Stern, the face of the NBA, unequivocally demanded a new arena that he knew Washington taxpayers would find difficult to support. Oklahoma City, conversely, craved a NBA basketball team. Their desire was evident in the stadium they built for the New Orleans Hornets as a temporary relocation spot from Hurricane Katrina. The decision to provide shelter to the Hornets achieved three goals with the NBA: First, it proved the viability of NBA basketball in OKC. Second, it ingratiated the city and the future ownership group with the David Stern, and the Board of Governors. Third, it created momentum both within the OKC fan base and potential investor groups. A compelling case could be made that Commissioner David Stern and the NBA, as regulatory stakeholders, shared the intent of the PBC to move the team to OKC. As Friedman (1970, p. 124) states, "the social responsibility of business is to increase profits." While the Seattle fans sent out an "SOS" with the "Save Our Sonics" mantra, really it boiled down to which city, Seattle or OKC had the best economic projections for the team. The NBA Commissioner and Board of Governors' responsiveness to towards Oklahoma City at the expense of Seattle demonstrated which side they favored. The blurry relationship between who was really driving the boat in this acquisition, the PBC or NBA, was evident throughout this case. Thus, we suggest that: Fuzzy Acquisition Boundaries: A Success Model of Regulatory Stakeholder Interests 2036 Proposition 4: Fuzzy acquisition boundaries allow regulatory stakeholder success during complex acquisitions. 5. Implications for Future Research The animosity between Seattle stakeholders and the NBA and PBC cannot be overstated. While there are many ways to analyze this case, we believe the crux of the matter boils down to the fuzziness of the acquisition boundaries of who governed decisions of the Seattle Supersonics. Who really controlled the team? Certainly from a legal and property-rights perspective, the PBC owned and controlled the club. Yet, it appeared that the NBA controlled the PBC which expanded the boundaries to include a quasi-regulatory, quasi-legal authority from which the PBC looked to for direction. Conversely, the city of Seattle provided all the necessary hard resources for the club to play in and with a long-term lease (i.e., 30 years), there appeared to be a quasi-hierarchy in which the fans, club, and city enjoyed a mutual forbearance of success. This may simply be a case of change for the sake of change since the NBA upgraded their market from a "neighborhood team" to an "arena-shopping mall". In addition, this may be a case where the NBA looked at Seattle and said, "this city is vulnerable," therefore the Supersonics could be relocated at relatively low cost compared to other teams. This type of transaction cost logic would compare the costs and benefits of the acquisition based on a city-to-city comparison (Graebner, 2009). The concept of fuzzy acquisition boundaries also has implications to organizational theorists. We argue that other cases involving permeable boundaries, legal disputation, legitimate strategic deception, and low stakeholder salience exist to be studied.

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Among the many candidates for application to our model is the fire-sale of Bear Stearns to JP Morgan Chase in March of 2008 that served as a prelude to the risk management meltdown of the investment bank industry that left minority stakeholders unrecompensed and continues to raise questions about federal intervention. Other examples include the influence of the Ministry of Economy, Trade, and Industry (METI) in Japan, the Food and Drug Administration (FDA) in the US, and mergers in highly regulated industries such as within the energy or telecom sectors. Due to the clandestine nature of these cases, information revealing characteristics about deception, fuzzy boundaries, and legal disputation power can be difficult to obtain, but we believe that these concepts are highly underreported aspects of corporate strategic planning. Since strategic deception refers to strategic actions aimed at misleading rivals from the true strategic intent of the firm or the environment, further review of how strategic deception develops under different political, legal, and cultural environments would be enlightening (Gentile & Samuelson, 2005; Pitesa & Thau, 2013; Webb et al., 2009). The extent and nature of deception may vary from simple concealment of trivial information to outright lies and disinformation. Providing characteristics of deception would assist researchers in more fully understanding how organizational asymmetries work under different trust, distrust, and information conditions. This would in turn assist practitioners in also developing better safeguards, or safe harbors (Donaldson & Dunfee, 1994), for protecting valuable resources. Although acquiring data on deception can be difficult, cases that have become public are excellent venues to study the topic. Applying research on strategic deception to the burgeoning field of social networks is also an important task in developing a more complete understanding of organizational networks and, hence, boundaries. We have a long way to go to fully comprehend the relationship between deception and organizational boundaries in part because what is legal and legitimate in one society is not in another (Donaldson & Dunfee, 1994). Deception also has a leveraging effect such that when organizations use deception to accommodate their Fuzzy Acquisition Boundaries: A Success Model of Regulatory Stakeholder Interests 2037 intent, their influence increases to the point of expanding their own borders surreptitiously. As more companies and industries engage in business practices like the NBA, then the potential for reducing local stakeholder salience becomes more likely and more pronounced. 6. Conclusion We have provided a model to explicate the process by which legitimate strategic deception, legal disputation power and low minority stakeholder salience leads to fuzzy acquisition boundaries and, ultimately, to regulatory stakeholder success. Furthermore, this construct of regulatory stakeholder success is a mechanism to expand the transaction cost logic model to include the fuzziness of acquisition boundaries as a potentially powerful force in determining the costs, terms, and conditions of a partnership. As values, norms, and cultures change, so do our definitions of what is legal and legitimate with regards to deception and legality (Donaldson & Dunfee, 1994). The Supersonics-to-Thunder transaction put examples of national and local stakeholders on display to illuminate the various elements of the model. These elements led to the regulatory stakeholder success that we suggest was a result of

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the NBA's actions, the PBC's tactics of strategic deception and legal disputation power, and Seattle's low stakeholder salience. The result was the Seattle Supersonics transformation into the Oklahoma City Thunder. Our model provides necessary information to build a theoretical underpinning for understanding other aspects of organizational theory such as negotiation, external analysis, internal analysis, and strategy planning. We suggest an expansion of traditional industrial-economic models to include other acquisitions with a focus on legitimate actions given the growing plethora of rules, laws, and policies that were once forbidden but are now acceptable in many business decisions. Finally, we suggest that without considering the constructs presented in Figure 1, realistic investigations of business partnerships are limited. References: Abrahamson E. and Hambrick D. C. (1997). "Attentional homogeneity in industries: The effect of discretion", Journal of Organizational Behavior, Vol. 18, pp. 513-532. Akerlof G. (1970). "The market for Lemons: Quality uncertainty and the market mechanism", Quarterly Journal of Economics, Vol. 84, pp. 488-500. Allen P. (2006). "Sonics could find a suitor in Oklahoma", accessed on 8 February 2006, available online at: http://seattletimes.com/html/sports/2002791270_soni08.html. Bruner R. F. (2005). Deals from Hell: M & A Lessons That Rise Above the Ashes, Hoboken, N.J: Wiley. Bruner R. F. and Levitt A. (2009). Deals from Hell: M & A Lessons that Rise Above the Ashes (Part II), Hoboken: John Wiley & Sons. Bundy J., Shropshire C. and Buchholtz A. K. (2013). "Strategic cognition and issue salience: Toward an explanation of firm responsiveness to stakeholder concerns", Academy of Management Review, Vol. 38, pp. 352-376. Buono A. F. and Bowditch J. L. (1989). The Human Side of Mergers and Acquisitions, San Francisco: Jossey-Bass. Carr T. A. (2007). "Seattle City Attorney Tom Carr's response to Mr. Bennett's recent statement to the press", Seattle City Attorney Office, 2 November 2007. Carroll A. B. (1979). "A three-dimensional conceptual model of corporate performance", Academy of Management Review, Vol. 4, pp. 497-505. David P., Bloom M. and Hillman A. J. (2007). "Investor activism, managerial responsiveness, and corporate social performance", Strategic Management Journal, Vol. 28, pp. 91-100. Donaldson T. and Dunfee T. (1994). "Toward a unified conception of business ethics: Integrative social contracts theory", Academy of Management Review, Vol. 19, pp. 252-284. Finke

Defining "Knowledge" in a Purchase Agreement
May 14, 2018
https://www.winston.com/en/thought-leadership/defining-knowledge-in-a-purchase-agreement.html

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. Any opinions in this article are not those of Winston & Strawn or its clients; the opinions in this article are the authors' opinions only.

"The devil is in the details," is the raison d'etre of the transactional lawyer. One such detail that mergers and acquisition lawyers lovingly nibble on, and quibble over, are knowledge qualifications in the representations and warranties of a purchase agreement and the corresponding definition given to knowledge in the purchase agreement.

A knowledge qualification is applied to representations and warranties in order to limit their scope. For example, consider the following variations of the same representation:

Example 1: "There is no threatened litigation against the Company."

Example 2: "To Seller's Knowledge, there is no threatened litigation against the Company."

The difference between these two representations is how the risk of the unknown is allocated. The knowledge qualification in the second example serves to shift risk of any unknown threatened litigation away from the seller and onto the buyer. This type of knowledge qualification is often viewed as acceptable when the representation involves a potential third-party claim (and is often viewed by buyers as an unacceptable risk-shifting device in other contexts).

Understanding the precise nature of the risk-allocation in a knowledge-qualified representation also requires understanding what it means for a party to have "knowledge." Taking a step back, why define knowledge in the first place?

WHY DEFINE KNOWLEDGE?

Parties define knowledge so that the rules of the game are clear. Fundamentally, knowledge definitions seek to delineate whose knowledge matters for the purposes of determining whether a knowledge-qualified representation has been breached. The reason this is important is because, absent a contractual limitation, courts may be willing to impute knowledge to a pool of people that is larger than intended. Specifically, "[a]n employee's knowledge can be imputed to her employer if she becomes aware of the knowledge while she is in the scope of employment, her

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'knowledge … pertain[s] to [her] duties' as an employee, and she has the 'authority to act' on the knowledge."[1]

As a result, if a representation were simply qualified by the "knowledge of the Company," there is a significant risk that a court could impute the knowledge of employees who were not even involved in preparing or reviewing the representations and warranties in the purchase agreement — something that sellers want to avoid. In addition, there are potential defenses to the imputation of knowledge in an agency relationship (e.g., an employee was not acting within the scope of their employment when they acquired the knowledge). A prudent buyer may want to dispense with these kinds of defenses by expressly providing that the knowledge of a certain employee counts (no matter how acquired).

The importance of these concerns has resulted in a nearly universal trend[2] to tie the definition of knowledge to a list of knowledge parties (i.e., a list of persons or specifically identified titles). In other words, practitioners use the knowledge definition to tell a court whose knowledge can (and should) be imputed to the seller.

CONSTRUCTIVE VS. ACTUAL KNOWLEDGE

That matter resolved, the next question becomes what it means for a listed knowledge party to have knowledge. This isn't arm-chair philosophy. Practitioners must decide whether they should instruct the court, in its evaluation of whether a person had knowledge, to apply either an objective or subjective test. If a court applies an objective test to knowledge, it will look to what a reasonable person should have known. This is constructive knowledge, which, as defined by Black's Law Dictionary (10th ed. 2014), is "knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person."

Constructive knowledge definitions will often expressly include language referencing a duty of inquiry or reasonable investigation. This language is often similar to the due diligence defense under Section 11(c) of the Securities Act of 1933. Section 11(a) of the '33 Act imposes liability upon certain persons for material misstatements in a registration statement. One of the defenses available to such persons is a "due diligence defense." This is the defense that after reasonable investigation, the defendant had reasonable grounds to believe (and did believe) in the truth of

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the misstatement. In interpreting the due diligence defense, courts have consistently acknowledged the facts and circumstances nature of the inquiry. Nonetheless, the standard of investigation required is clear: one of "a reasonable man in the management of his own property." This standard goes beyond simply asking questions and may require further action under certain facts and circumstances.[3]

Conversely, applying a subjective test, a court will (at least in theory) look to what a person actually knew. This is actual knowledge, which Black's Law Dictionary (10th ed. 2014) defines as "direct and clear knowledge, as distinguished from constructive knowledge."

Notwithstanding conventional wisdom that constructive and actual knowledge are different species, the practical relationship may be better understood as one of degrees. A trier of fact cannot (yet) plug a human brain into a computer and ascertain what it knew and when it knew it. Actual knowledge can be demonstrated through circumstantial evidence and if the circumstances are such that the defendant "must have known," an inference of actual knowledge is permitted.[4]

Furthermore, one of the key understood distinctions between actual knowledge and constructive knowledge is the duty of inquiry imposed by a constructive knowledge standard. Even where a party is subjected to an actual knowledge standard, however, they cannot simply stick their head in the sand. In a recent U.S. Supreme Court case, the doctrine of willful blindness was adapted from criminal law and applied in a civil patent infringement case. The Supreme Court described the doctrine as follows:

The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge … It is also said that persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts.[5]

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A similar rationale was applied in Agranoff v. Miller,[6] when then-Vice Chancellor Leo Strine, indicated a similar willingness to apply the doctrine in the corporate context, saying, "Calculated, self-chosen and willful ignorance by Miller of the actual terms of a restriction about which he had actual knowledge does not render him an innocent purchaser for value."

Nonetheless, sellers will prefer an actual knowledge definition, because it is generally viewed as a less stringent standard. Conversely, buyers will favor a constructive knowledge definition, because it is generally viewed as a more stringent standard. There are strong arguments for each. In favor of an actual knowledge test, sellers typically argue:

- Constructive knowledge injects the kind of uncertainty and 20/20 hindsight that including a knowledge definition is intended to avoid.
- In an M&A transaction, only a limited number of employees are "under the tent" and the practical reality is that inquiries cannot be made of employees who do not have knowledge of the transaction.
- A constructive knowledge standard may loop in employees that will transfer with the business to the buyer and the loyalty of those employees will naturally shift to the buyer by the time a dispute over who had knowledge arises.
- The buyer is fairly protected if the list of knowledge parties is lengthy and/or covers each of the functional operational and financial heads.

Conversely, in favor a constructive knowledge standard, buyers typically argue:

- The buyer is relying on diligence provided by the seller to identify appropriate knowledge parties and it should have a contractual backstop to that diligence to ensure that the sellers are asking the right questions of the right personnel.
- Liability should not be allocated to the buyer simply because the seller has chosen not to bring certain employees "under the tent." Fairness dictates that liability should lie with the seller for its refusal to bring employees under the tent and a constructive knowledge achieves this standard.

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MARKET SHIFT

Notwithstanding the strong arguments that each side can proffer, according to the ABA Private Target Mergers & Acquisitions Deal Point Study for 2016-2017, there has been a steady and inexorable shift in the market toward the use of a constructive knowledge standard. Twelve years ago, constructive knowledge was used in a narrow majority of deals (61 percent of the time). Today, the constructive knowledge standard is used a fulsome 82 percent of the time.

We found this shift toward a buyer-friendly knowledge definition particularly interesting because it occurred during a time period when the deal landscape has been predominately seller-friendly. This is likely driven by more impactful market shifts at play, which are changing how parties think about risk allocation.

The ABA Deal Study found that nearly a third of private M&A deals expressly referenced representation and warranty insurance. As a result, and not surprisingly, nearly a third of the deals surveyed had escrows or holdbacks that were less than 3 percent of transaction value. It was not too long ago when market indemnity ranges were 5-10 percent, with even 10-20 percent indemnity packages not unusual. In that world, the representations and warranties operated as a lawyer's battleground, where the diligent and detail-oriented could win meaningful risk allocation points. In a world in which sellers often had significant post-closing exposure, these battles at the margin really mattered.

In today's climate, however, where sellers often have significantly less post-closing liability exposure for breaches of representations and warranties, sellers have been de-incentivized to fight over risk-allocation points. This dynamic has led to a general willingness by sellers to provide buyers with more fulsome representations than may have been customary in the past. The approach, within the bounds of reason, is that if the seller believes a representation is true, it will lean toward providing the representation. While sellers will still often fight over materiality qualifiers, the principled basis for doing so is that materiality qualifiers can provide the seller with valuable insulation against fraud claims. Knowledge qualifiers, on the other hand, are different — they merely allocate risk of the unknown. In this context, the benefit to sellers of haggling over the knowledge definition is diminishing.

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Most thoughtful practitioners are able to reach a middle ground on the knowledge definition, particularly in this new market era where sellers have less skin in the game. Buyers will often live with an actual knowledge standard if the knowledge parties include the functional heads of the relevant departments at the target company. Conversely, sellers will often understand a buyer's need for a constructive knowledge standard if there is a short list of knowledge parties. The destinations are the same, even if the paths are different.

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[1] Hecksher v. Fairwinds Baptist Church, Inc., 115 A.3d 1187, 1200 (Del., 2015).

[2] 98 percent of all deals surveyed in the ABA Private Target Mergers & Acquisitions Deal Point Study for 2016-2017 included a list of knowledge parties.

[3] See, e.g., In re: Worldcom Inc. SEC Litig., 346 F. Supp. 2d 628 (S.D.N.Y. 2004).

[4] See, e.g., Donchin v. Guerrero, 41 Cal.Rptr.2d 192, 34 Cal.App.4th 1832 (Cal. App. 2 Dist., 1995); see also Dougherty v. Hibbits, No. N14C-05-105 PRW, 2015 WL 5168157 (Del. Super., 2015).

[5] Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 766 (2011).

[6] Agranoff v. Miller, 1999 WL 219650 (Del. Ch., 1999),

Rossisa Participações S.A. v. Reynolds & Re
Premier Dealer Servs., Inc. v. Allegianc
Porter v. AAR Aircraft Servs.pdf
Parker Hannifin Corp. v. Standard Motor Pro
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Ohio, Federal Statutes & Resources

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United States v. Miraca Life Scis., Inc. Case No. 1:15cv2355 (N.D. Ohio Jul. 14, 2020) In January 2013, the Anatomic Pathology Division of Predictive was acquired by Defendant Miraca Life Sciences, Inc. ("MLS"). (Id. at ¶¶ 6, 129.) Relator acknowledges that he "does not know whether the transaction whereby [MLS] acquired [Predictive] was a merger, a reorganization, a sale of stock, a sale of assets or some other type of transaction." (Id. at ¶ 129.) However, Relator alleges, "on information and belief," that the acquisition was one "where [MLS] took over the corporate entity which was previously known as Predictive Biosciences, Inc." (Id. at ¶ 130.) In the alternative, Relator alleges that "the acquisition was one in which Miraca acquired assets from Predictive." (Id. at ¶ 131.)

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https://www.americanbar.org/groups/antitrust_law/

ABA ANTITRUST SECTION

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https://www.justice.gov/atr

US Department of Justice Antitrust Division

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https://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition

FTC's Bureau of Competition enforces the nation's antitrust laws, which form the foundation of our free market economy.

Ohio Valentines Act

Chapter 1331: MONOPOLIES

1331.01 Monopoly definitions.

As used in sections 1331.01 to 1331.14 of the Revised Code:

(A) "Person" includes corporations, partnerships, and associations existing under or authorized by any state or territory of the United States, and solely for the purpose of the definition of division (C) of this section, a foreign governmental entity.

(B) "Public office" means any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government. "Public office" does not include the nonprofit corporation formed under section 187.01 of the Revised Code.

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(C)

(1) "Trust" is a combination of capital, skill, or acts by two or more persons for any of the following purposes:

(a) To create or carry out restrictions in trade or commerce;

(b) To limit or reduce the production, or increase or reduce the price of merchandise or a commodity;

(c) To prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce, or a commodity;

(d) To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce, or commerce intended for sale, barter, use, or consumption in this state;

(e) To make, enter into, execute, or carry out contracts, obligations, or agreements of any kind by which they bind or have bound themselves not to sell, dispose of, or transport an article or commodity, or an article of trade, use, merchandise, commerce, or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity, or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers, or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine, or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected;

(f) To refuse to buy from, sell to, or trade with any person because such person appears on a blacklist issued by, or is being boycotted by, any foreign corporate or governmental entity.

(2) "Trust" also means a combination of capital, skill, or acts by two or more bidders or potential bidders, or one or more bidders or potential bidders and any person affiliated with a public office, to restrain or prevent competition in the letting or awarding of any public contract in derogation of any statute, ordinance, or rule requiring the use of competitive bidding or selection in the letting or awarding of the public contract.

(3) "Trust," as defined in this section, does not include bargaining by a labor organization in negotiating or effecting contracts with an employer or employer group with reference to minimum payment to any member of the labor organization for any motor vehicles owned, driven, and used exclusively by such member in the performance of the member's duties of employment pursuant to a collective bargaining agreement between the labor organization and the employer or employer group.

(4) A trust as defined in this division is unlawful and void.

Amended by 131st General Assembly File No. TBD, SB 227, §1, eff. 4/6/2017.

Effective Date: 10-01-1976.

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1331.02 Prohibition against issuing or owning trust certificates or entering into combination, contract, or agreement.

No person shall issue or own trust certificates, and no person shall enter into a combination, contract, or agreement, the purpose and effect of which is to place the management or control of such combination, or the product or service thereof, in the hands of a trustee with the intent to limit or fix the price or lessen the production or sale of an article or service of commerce, use, or consumption, to prevent, restrict, or diminish the manufacture or output of such article or service, or refuse to buy from, sell to, or trade with any person because such person appears on a blacklist issued by, or is being boycotted by, any foreign corporate or governmental entity.

Effective Date: 10-01-1976.

1331.021 Control acquisition of Ohio company which substantially lessens competition in petroleum products market.

No person, corporation, partnership, or combination shall acquire control of an Ohio corporation or its assets where the effect of such acquisition may be to substantially lessen competition in any market for petroleum products in Ohio, or to substantially lessen, directly or indirectly, the number of competitors in any market for petroleum products in Ohio, or to diminish the availability of supply of any petroleum product to persons purchasing such product for resale in Ohio. Upon request of the governor or the general assembly, the attorney general shall bring an action in the court of common pleas of Franklin county to enjoin any actual or threatened violation of this provision. The attorney general shall have the sole authority to enforce the provisions of this section.

Effective Date: 11-17-1981.

1331.03 Forfeiture after notice.

Whoever violates sections 1331.01 to 1331.14 of the Revised Code, shall forfeit to the state, for the use of the general revenue fund, five hundred dollars for each day that such violation is committed or continued after due notice is given by the attorney general or a prosecuting attorney. Such sum may be recovered in the name of the state. The attorney general, or the prosecuting attorney of any county upon the order of the attorney general, shall prosecute for the recovery thereof. When such action is prosecuted by the attorney general he may begin the same in the court of common pleas of Franklin county or of any other county in which there is proper venue.

Effective Date: 10-01-1976 .

1331.04 Conspiracy against trade prohibited.

Every combination, contract, or agreement in the form of a trust is declared to be a conspiracy against trade and illegal. No person shall engage in such conspiracy or take part therein, or aid or advise in its commission, or, as principal, manager, director, agent, servant, or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, or rates, or furnish any information to assist in carrying out such purposes, or orders thereunder, or in pursuance thereof, or in any manner violate sections 1331.01 to 1331.14 of the Revised Code. Each day's violation of this section is a separate offense.

Amended by 131st General Assembly File No. TBD, SB 227, §1, eff. 4/6/2017.

Effective Date: 10-01-1953 .

1331.05 [Repealed].

Repealed by 131st General Assembly File No. TBD, SB 227, §2, eff. 4/6/2017.

Effective Date: 10-01-1953 .

1331.06 Illegal contract.

A contract or agreement in violation of sections 1331.01 to 1331.14, inclusive, of the Revised Code, is void.

Effective Date: 10-01-1953 .

1331.07 Compliance by foreign corporations.

A foreign corporation or foreign association exercising any of the powers, franchises, or functions of a corporation in this state, violating sections 1331.01 to 1331.14, inclusive, of the Revised Code, shall not do any business in this state. The attorney general shall enforce this section by proceedings in quo warranto in the supreme court, or the court of appeals of the county in which the defendant resides or does business, or by injunction or other proceedings.

The secretary of state shall revoke the certificate of such corporation or association.

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Effective Date: 10-01-1953 .

1331.08 Liability for damages.

In addition to the civil and criminal penalties provided in sections 1331.01 to 1331.14 of the Revised Code, the person injured in the person's business or property by another person by reason of anything forbidden or declared to be unlawful in those sections, may sue therefor in any court having jurisdiction and venue thereof, without respect to the amount in controversy, and recover treble the damages sustained by the person and the person's costs of suit. When it appears to the court, before which a proceeding under those sections is pending, that the ends of justice require other parties to be brought before the court, the court may cause them to be made parties defendant and summoned, whether or not they reside in the county where the action is pending.

Effective Date: 02-20-2002 .

1331.09 Contents of indictment.

In an indictment for an offense provided for in sections 1331.01 to 1331.14, inclusive, of the Revised Code, it is sufficient to state the purpose or effects of the trust or combination, and that the accused is a member thereof, or acted with or in pursuance of it or aided or assisted in carrying out its purposes, without giving its name or description, or how, when, and where it was created.

Effective Date: 10-01-1953 .

1331.10 Evidence.

In prosecutions under sections 1331.01 to 1331.14 of the Revised Code, it is sufficient to prove that a trust or combination exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing an article of agreement, or a written instrument on which it may have been based; or that it was evidenced by a written instrument.

Effective Date: 10-01-1976 .

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1331.11 Jurisdiction of courts.

Courts of common pleas are invested with jurisdiction to restrain and enjoin violators of sections 1331.01 to 1331.14 of the Revised Code. For a violation of such sections, the attorney general, or the prosecuting attorney of the proper county, shall institute proper proceedings in a court of competent jurisdiction in any county in which there is proper venue.

When such suit is instituted by the attorney general in quo warranto, he may begin the same in the supreme court of the state, or the court of appeals of Franklin county. When such suit is instituted by the attorney general to restrain and enjoin a violation of sections 1331.01 to 1331.14 of the Revised Code, he may begin the same in the court of common pleas of Franklin county. Such proceedings to restrain and enjoin such violation shall be by way of complaint setting forth the case, and praying that such violation be enjoined or otherwise prohibited.

Upon the filing of such complaint, and before final decree, the court may make such temporary restraining order or prohibition as is just in the premises. In any action or proceeding in quo warranto by the attorney general or a prosecuting attorney against a corporation, the court in which such action or proceeding is pending may, ancillary to such action or proceeding, restrain or enjoin the corporation and its officers and agents from continuing or committing during the pendency of the action the alleged act by reason of which the action is brought.

When, in a proceeding in quo warranto by the attorney general or any prosecuting attorney, any Ohio corporation is, on final hearing, found guilty of violating such sections, the court may declare a forfeiture of all its rights, privileges, and franchises to the state and may order the corporation dissolved and appoint a trustee to wind up its affairs, as is provided in other cases in quo warranto.

Effective Date: 10-01-1976 .

1331.12 Parties defendant - multiple proceedings - statute of limitations.

(A) In any action or proceeding in quo warranto, in injunction, or otherwise brought by the attorney general or a prosecuting attorney under sections 1331.01 to 1331.14 of the Revised Code, all persons that are party to or participating in the trust or conspiracy against trade violative of those sections may be made parties defendant and summoned, whether or not they reside in the county in which the action or proceeding is instituted. Actions or proceedings in quo warranto and in injunction may be instituted simultaneously, or while one or another of them is pending, such actions or proceedings being started in the proper court as provided in section 1331.11 of the Revised Code, and no action or proceeding in injunction is a bar to an action or proceeding in quo warranto, nor is an action or proceeding in quo warranto a bar to one instituted to restrain and enjoin.

(B) Any civil or criminal action or proceeding for a violation of sections 1331.01 to 1331.14 of the Revised Code, other than one upon which an action was brought in any court by any person not later than forty-five days after the effective date of the current amendment, shall be forever barred unless commenced within four years after the cause of action accrued.

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Effective Date: 02-20-2002 .

1331.13 Witnesses are not excused from testifying.

If a court of record, or a judge thereof in vacation, in which is pending a civil or criminal action or proceeding brought or prosecuted by the attorney general or a prosecuting attorney for the violation of sections 1331.01 to 1331.14, inclusive, of the Revised Code, or an action or proceeding for a violation of a law, common or statute, against a conspiracy or combination in restraint of trade, so orders, no person shall be excused from attending, testifying, or producing books, papers, schedules, contracts, agreements, or other documents in obedience to the subpoena or order of such court or a commissioner, referee, or master appointed by such court to take testimony, or a notary public or other person authorized to take depositions, when the order made by such court or judge includes a witness whose deposition is being taken before such notary public or other officer, for the reason that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty. No person shall be prosecuted or subjected to a penalty for or on account of a transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise, before such court, person, or officer.

Effective Date: 10-01-1953 .

1331.14 Cumulative provisions.

Sections 1331.01 to 1331.13, inclusive, of the Revised Code are cumulative of each other and of all other laws in any manner affecting them.

Effective Date: 10-01-1953 .

1331.15 Prohibited acts.

No person engaged in the business of buying milk, cream, or butter fat shall, for the purpose of creating a monopoly, or to restrain trade, or to prevent or limit competition, or to destroy the business of a competitor, discriminate between different sections, localities, communities, or cities of this state, by purchasing such commodity at a higher price or rate in one locality than in another, after making due allowance for the difference in the actual costs of transportation from the locality of purchase to the locality of manufacture.

Effective Date: 10-01-1953 .

1331.16 Investigative demand for discovery.

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(A) As used in this section, "documentary material" means the original or any copy of any writings, drawings, graphs, charts, photographs, phonorecords, and other data compilation from which intelligence, relevant to any investigation conducted to determine if any person is or has been engaged in a violation of this chapter, can be perceived with or without the use of detection devices.

(B) Whenever the attorney general has reasonable cause to believe that any person, as defined in section 1331.01 of the Revised Code, may be in possession, custody, or control of any documentary material or may have knowledge of any fact that is relevant to any investigation conducted to determine if any person is or has been engaged in a violation of this chapter, the attorney general or the attorney general's designated representative may issue in writing, and cause to be served upon any person or the representative or agent of the person, an investigative demand that requires the person to produce the documentary material for inspection and copying or reproduction, to answer under oath and in writing written interrogatories, or to appear and testify under oath before the attorney general or the attorney general's duly authorized representative, or that requires the person to do any combination of the three demands.

(C) Each investigative demand shall:

(1) Describe the conduct under investigation and state the provisions of law applicable thereto;

(2) If it is a demand for production of documentary material:

(a) Describe with reasonable particularity the documentary material to be produced;

(b) Prescribe a return date that will provide a reasonable period of time within which the material may be assembled and made available for inspection and copying or reproduction;

(c) Identify the custodian to whom the material shall be made available.

(3) If it is a demand for answers to written interrogatories:

(a) Identify the representative of the attorney general to whom the answers shall be made;

(b) Prescribe a date by which the answers shall be presented.

(4) If it is a demand for the giving of oral testimony:

(a) Prescribe a date, time, and place at which oral testimony shall be taken;

(b) Identify the representative of the attorney general who shall conduct the oral examination.

(D) No investigative demand shall:

(1) Contain any requirement that would be unreasonable if contained in a subpoena or a subpoena duces tecum issued by a court in aid of a grand jury investigation;

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(2) Except as provided in division (H) of this section, require any answers to written interrogatories, the giving of any oral testimony, or the production of any documentary material that would be privileged from disclosure if demanded by a subpoena or subpoena duces tecum issued by a court in aid of a grand jury investigation.

(E) Service of any investigative demand may be made and is complete by doing either of the following:

(1) Depositing a copy of the demand in the United States mails, by certified mail addressed to the person to be served at his principal office, place of business, or residence;

(2) Delivering a copy of the demand to the person, or to the representative or agent of the person.

(F) Any person who is served with a demand under this section may be represented by counsel at the taking of that person's testimony.

(G) In all respects, the taking of oral testimony, answering of written interrogatories, and production of documentary material under this section, except as otherwise provided in this section, shall follow the procedures established by the discovery provisions of the Rules of Civil Procedure.

(H)

(1) Whenever a natural person who is served with a demand under this section refuses, on the basis of the person's privilege against self-incrimination, to provide any oral testimony, to answer any written interrogatories, or to produce any documentary material, the attorney general or the attorney general's designated representative may file a written request with a court of common pleas, and the court, unless it finds that to do so would not further the administration of justice, shall compel that person to provide the oral testimony, to answer the written interrogatories, or to produce the documentary material if all of the following apply:

(a) The attorney general or the attorney general's designated representative makes a written request to the court of common pleas to order the person to provide oral testimony, to answer written interrogatories, or to produce documentary material, notwithstanding his claim of privilege;

(b) The written request is made to a court of common pleas in the county in which the person resides, transacts business, or is otherwise found, except that if the person transacts business in more than one county, the request shall be made in the county in which the person maintains his principal place of business;

(c) The court of common pleas informs the person that by providing oral testimony, answering written interrogatories, or producing documentary material the person will receive immunity under division (H)(2) of this section.

(2) If, but for division (H) of this section, the person would have been privileged to withhold any oral testimony, answers to written interrogatories, or documentary material given in these proceedings and if the person complies with an order under division (H)(1) of this section that compels the person to provide testimony, answers, or material, the person shall not be prosecuted or subjected to any criminal penalty for or on account of any transaction or matter concerning which, in compliance with the order, the person provided testimony, answers, or material.

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(3) A person granted immunity under division (H)(2) of this section may be subjected to a criminal penalty for any violation of section 2921.11, 2921.12, or 2921.13 of the Revised Code, or for contempt committed in providing oral testimony, answers to written interrogatories, or documentary material in compliance with the order.

(I) Within twenty days after service of an investigative demand upon any person pursuant to this section, or at any time before the compliance date specified in the demand, whichever period is shorter, the person may file in the court of common pleas in the county in which the person resides, transacts business, or is otherwise found, and serve upon the attorney general, a request for an order of the court modifying or setting aside the demand, except that if the person transacts business in more than one county, the request shall be filed in the county in which the person maintains the person's principal place of business, or in any other county that may be agreed upon by the person and the attorney general, or the attorney general's designated representative. The application shall specify each ground upon which the person relies in seeking relief. The time allowed for compliance with the demand shall be tolled during the pendency of the request in court.

(J) Whenever any person fails to fully comply with an investigative demand served upon the person pursuant to this section, the attorney general may file in the court of common pleas in the county in which the person resides, transacts business, or is otherwise found, and serve upon the person, a request for an order of the court that compels compliance with the demand, except that if the person transacts business in more than one county, the request shall be filed in the county in which the person maintains the person's principal place of business, or in any other county that may be agreed upon by the person and the attorney general, or the attorney general's designated representative. If the court finds that the noncompliance was in bad faith or for the purpose of delay, it may order the person to pay to the attorney general the reasonable expenses incurred in obtaining the order, including attorney's fees, and may invoke the sanctions provided by Rule 37 of the Rules of Civil Procedure.

(K) A person who obstructs an investigative demand made under this section may be liable for criminal prosecution for a violation of section 2921.13, 2921.31, or 2921.32 of the Revised Code.

(L) The attorney general is responsible for the custody, use, and necessary preservation of the documentary material made available pursuant to a demand and for its return as provided by this section. All documentary material, answers to written interrogatories, and transcripts of oral testimony that are provided pursuant to an investigative demand are, for purposes of section 149.43 and division (E)(2) of section 1347.08 of the Revised Code, trial preparation records, and shall be confidential and shall not be subject to disclosure, inspection, or copying except as provided in this section. Unless otherwise ordered by a court of common pleas, no documentary material, answers to written interrogatories, or transcripts of oral testimony that are provided pursuant to an investigative demand shall be available for inspection or copying by, nor shall the contents of the material, answers, or transcripts be disclosed to, any individual other than an authorized representative of the attorney general, without the consent of the person who provided the material, answers, or testimony, except that the material, answers, or testimony may be used in any grand jury investigation or, after reasonable notice to the person who provided the material, answers, or testimony, in the conduct of any case or other official proceeding involving an alleged violation of this chapter. No employee of the office of the attorney general shall purposely make available for inspection or copying documentary material, answers to written interrogatories, or transcripts of oral testimony provided pursuant to an investigative demand, nor disclose the contents of the material, answers, or transcripts, except as provided by this section.

(M) When copies of documentary material made available pursuant to an investigative demand are no longer required for use in a pending proceeding, or, absent any pending proceeding, are no longer required in connection with the investigation for which they were demanded, or at the end of twenty-four months following the date when the material was made available, whichever is sooner, all copies of the material shall be returned, unless a request to extend the period beyond twenty-four months has been filed in the court of common pleas in which a request for an order compelling compliance pursuant to division (J) of this section could be filed. This division shall not require the return of any copies of the documentary material that have passed into the control of any court or grand jury.

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(N) Public officers and their deputies, assistants, clerks, subordinates, and employees shall render and furnish to the attorney general, or to the attorney general's designated representatives when so requested, all information and assistance in their possession or within their power.

(O) When any request is filed in any court of common pleas under this section, the court shall have jurisdiction to hear and determine the matter presented and to enter any order that may be required to carry into effect the provisions of this chapter.

(P) Nothing contained in this section impairs the authority of the attorney general to file any complaint alleging an antitrust violation that is not described in the demand, nor does this section prevent the use of any evidence, obtained through this section or otherwise, in such an action.

(Q) Nothing in this section impairs the authority of the attorney general or the attorney general's representatives to lay before any grand jury that is impaneled in this state any evidence, obtained through this section or otherwise, concerning any alleged violation of this chapter, to invoke the power of the courts to compel the production of any evidence before any grand jury that is impaneled in this state, or to institute any proceeding for the enforcement of any order or process that is issued in execution of such power or to punish disobedience of any such order or process by any person.

Effective Date: 07-01-1996 .

1331.17 Public disclosure by attorney general.

In carrying out official duties, the attorney general shall not disclose publicly the facts developed in an investigation conducted pursuant to this chapter unless the matter has become a matter of public record in enforcement proceedings, in public hearings, or other official proceedings, or unless the person from whom the information has been obtained consents to the public disclosure.

Added by 131st General Assembly File No. TBD, SB 227, §1, eff. 4/6/2017.

1331.99 Violation; penalty.

(A)

(1) Whoever violates section 1331.04 of the Revised Code is guilty of conspiracy against trade. Except as provided in division (A)(2) of this section, a conspiracy against trade is a felony of the fifth degree.

(2) If any of the following conditions apply, the conspiracy against trade is a felony of the fourth degree:

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(a) The amount of the contract or the amount of the sale of commodities or services involved is seven thousand five hundred dollars or more.

(b) The conspiracy against trade relates to a contract with or the sale of commodities or services to or from a local, state, or federal governmental entity.

(c) The contract or sale of commodities or services involves, in whole or in part, funding to or from a local, state, or federal governmental entity.

(B) Whoever violates section 1331.02 of the Revised Code is guilty of a felony of the fifth degree.

(C) Whoever violates division (L) of section 1331.16 of the Revised Code is guilty of a misdemeanor of the first degree.

(D) Whoever violates section 1331.15 of the Revised Code is guilty of a misdemeanor of the second degree.

Amended by 131st General Assembly File No. TBD, SB 227, §1, eff. 4/6/2017.

Effective Date: 07-01-1996 .

Federal Chapter 15

15 U.S. Code CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

- U.S. Code
- Notes

58. § 1. Trusts, etc., in restraint of trade illegal; penalty
59. § 2. Monopolizing trade a felony; penalty
60. § 3. Trusts in Territories or District of Columbia illegal; combination a felony
61. § 4. Jurisdiction of courts; duty of United States attorneys; procedure
62. § 5. Bringing in additional parties
63. § 6. Forfeiture of property in transit
64. § 6a. Conduct involving trade or commerce with foreign nations

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65. § 7. “Person” or “persons” defined
66. § 8. Trusts in restraint of import trade illegal; penalty
67. § 9. Jurisdiction of courts; duty of United States attorneys; procedure
68. § 10. Bringing in additional parties
69. § 11. Forfeiture of property in transit
70. § 12. Definitions; short title
71. § 13. Discrimination in price, services, or facilities
72. § 13a. Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties
73. § 13b. Cooperative association; return of net earnings or surplus
74. § 13c. Exemption of non-profit institutions from price discrimination provisions
75. § 14. Sale, etc., on agreement not to use goods of competitor
76. § 15. Suits by persons injured
77. § 15a. Suits by United States; amount of recovery; prejudgment interest
78. § 15b. Limitation of actions
79. § 15c. Actions by State attorneys general
80. § 15d. Measurement of damages
81. § 15e. Distribution of damages
82. § 15f. Actions by Attorney General
83. § 15g. Definitions
84. § 15h. Applicability of parens patriae actions
85. § 16. Judgments
86. § 17. Antitrust laws not applicable to labor organizations
87. § 18. Acquisition by one corporation of stock of another
88. § 18a. Premerger notification and waiting period
89. § 19. Interlocking directorates and officers
90. § 19a. Repealed. Aug. 23, 1935, ch. 614, § 329, 49 Stat. 717
91. § 20. Repealed. Pub. L. 101–588, § 3, Nov. 16, 1990, 104 Stat. 2880
92. § 21. Enforcement provisions
93. § 21a. Actions and proceedings pending prior to June 19, 1936; additional and continuing violations
94. § 22. District in which to sue corporation
95. § 23. Suits by United States; subpoenas for witnesses
96. § 24. Liability of directors and agents of corporation
97. § 25. Restraining violations; procedure
98. § 26. Injunctive relief for private parties; exception; costs

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99. § 26a. Restrictions on the purchase of gasohol and synthetic motor fuel
100. § 26b. Application of antitrust laws to professional major league baseball
101. § 27. Effect of partial invalidity
102. § 27a. Transferred
103. § 28. Repealed. Pub. L. 98–620, title IV, § 402(11), Nov. 8, 1984, 98 Stat. 3358
104. § 29. Appeals
105. § 30. Repealed. Pub. L. 107–273, div. C, title IV, § 14102(f), Nov. 2, 2002, 116 Stat. 1922
106. § 31. Repealed. Pub. L. 107–273, div. C, title IV, § 14102(a), Nov. 2, 2002, 116 Stat. 1921
107. §§ 32, 33. Repealed. Pub. L. 91–452, title II, §§ 209, 210, Oct. 15, 1970, 84 Stat. 929
108. § 34. Definitions applicable to sections 34 to 36
109. § 35. Recovery of damages, etc., for antitrust violations from any local government, or official or employee thereof acting in an official capacity
110. § 36. Recovery of damages, etc., for antitrust violations on claim against person based on official action directed by local government, or official or employee thereof acting in an official capacity
111. § 37. Immunity from antitrust laws
112. § 37a. Definitions
113. § 37b. Confirmation of antitrust status of graduate medical resident matching programs
114. § 38. Association of marine insurance companies; application of antitrust laws

https://www.naag.org/antitrust.php

The National Association of Attorneys General Antitrust Project

https://www.sec.gov/Archives/edgar/data/101830/000119312512423540/d424642dex21.htm

Sprint & Nextel Agreement & plan of Merger 2012 SEC EX. 2.1
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Exhibits

Exhibit A - Certain Definitions

Exhibit B - Form of Certificate of Incorporation of Parent

Exhibit C - Form of Bylaws of Parent

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Exhibit D - Form of Warrant Agreement

Exhibit E - Form of 2007 Omnibus Incentive Plan

Exhibit F - Form of Employee Stock Purchase Plan

AGREEMENT AND PLAN OF MERGER

THIS AGREEMENT AND PLAN OF MERGER ("**Agreement**") is made and entered into as of October 15, 2012, by and among: SOFTBANK CORP., a Japanese *kabushiki kaisha* ("**SoftBank**"); Starburst I, Inc., a Delaware corporation and a direct wholly owned subsidiary of SoftBank ("**HoldCo**"); Starburst II, Inc., a Delaware corporation and a direct wholly owned subsidiary of HoldCo ("**Parent**"); Starburst III, Inc., a Kansas corporation and a direct wholly owned subsidiary of Parent ("**Merger Sub**"); and Sprint Nextel Corporation, a Kansas corporation (the "**Company**"). Certain capitalized terms used in this Agreement are defined in Exhibit A.

RECITALS

A. The boards of directors of SoftBank, HoldCo, Parent and Merger Sub (collectively, the "**Parent Entities**") and the Company have each approved this Agreement and the Merger.

B. Parent and the Company have entered into a Bond Purchase Agreement of even date herewith (the "**Bond Purchase Agreement**"), pursuant to which Parent has agreed to purchase from the Company a Bond (the "**Bond**") in the principal amount of $3,100,000,000, which Bond is convertible, subject to the conditions of, and adjustments set forth in, the Bond Purchase Agreement, into an aggregate of 590,476,190 shares of Company Common Stock. Immediately prior to the Effective Time, the Bond will be converted into shares of Company Common Stock in accordance with the terms and conditions of the Bond Purchase Agreement (such shares of Company Common Stock issued upon conversion of the Bond, the "**Bond Shares**").

C. The parties intend to effect a merger of Merger Sub with and into the Company in accordance with this Agreement and Section 17-6701 of the KGCC (the "**Merger**"). Upon consummation of the Merger, Merger Sub will cease to exist, and the Company will become a wholly owned subsidiary of Parent.

D. In the Merger, each outstanding share of Series 1 common stock, $2.00 par value, of the Company ("**Company Common Stock**") will be converted into (i) cash in an amount equal to $7.30 (the "**Per Share Amount**"), (ii) one share of Parent Common Stock, or (iii) a combination of cash and a fraction of a share of Parent Common Stock, all as more fully provided herein. Immediately following the Merger, subject to the terms and conditions of this Agreement, HoldCo will hold shares of Parent Common Stock representing 69.642% of the fully diluted equity of Parent (excluding shares of Parent Common Stock issuable upon exercise of the warrant contemplated by the Warrant Agreement), and the former stockholders and other former equityholders of the Company will hold, collectively, shares of Parent Common Stock and other equity securities of Parent collectively representing 30.358% of the fully diluted equity of Parent (excluding shares of Parent Common Stock issuable upon exercise of the warrant contemplated by the Warrant Agreement).

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E. At the Effective Time, SoftBank will cause HoldCo (i) to contribute to Parent not less than $17,040,000,000 (of which amount (x) the amount of Aggregate Cash Consideration

($12,140,000,000) will be paid to the Company's stockholders subject to the terms and conditions set forth in this Agreement and (y) $4,900,000,000 will remain in the cash balances of Parent as of immediately following the Effective Time), and (ii) to enter into a Warrant Agreement with Parent substantially in the form of Exhibit D (the "**Warrant Agreement**") and consummate the transactions contemplated thereby.

AGREEMENT

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

Section 1. Parent Entities

1.1 Organization of HoldCo, Parent and Merger Sub.

(a) SoftBank has caused HoldCo to be organized under the laws of the State of Delaware. The authorized capital stock of HoldCo consists of 1,000 shares of common stock, par value $0.01 per share, all of which shares have been issued to SoftBank.

(b) HoldCo has caused Parent to be organized under the laws of the State of Delaware. As of the date hereof, the authorized capital stock of Parent consists of 2,000 shares of common stock, par value $0.01 per share, of which 1,000 shares have been designated Class A Common Stock, none of which have been issued to date, and 1,000 shares have been designated Class B Common Stock (the "**Parent Class B Common Stock**"), all of which shares have been issued to HoldCo. Pursuant to the Parent Charter and Section 1.2(b) hereof, immediately prior to the Effective Time, the Parent Class B Common Stock shall be reclassified as a class of common stock, par value $0.01 per share, of Parent (the "**Parent Common Stock**").

(c) Parent has caused Merger Sub to be organized under the laws of the State of Kansas for the sole purpose of effectuating the Merger. The authorized capital stock of Merger Sub consists of 1,000 shares of common stock, par value $0.01 per share, all of which shares have been issued to Parent.

1.2 Charter Documents of Parent.

(a) SoftBank will take, and will cause Parent to take, all requisite action to cause the certificate of incorporation of Parent to be substantially in the form of Exhibit B (the "**Parent Charter**") and the bylaws of Parent to be substantially in the form of Exhibit C (the "**Parent Bylaws**"), in each case, at or immediately prior to the Effective Time (with such modifications to the Parent Charter and Parent Bylaws as Parent and the Company agree to prior to the Effective Time). SoftBank agrees to comply, and to cause its Subsidiaries to comply, with the provisions of Article VI of the Parent Charter.

(b) Pursuant to Section 4.2 of the Parent Charter and as of the Effective Time, all issued and outstanding shares of Class B Common Stock outstanding as of immediately prior to the Effective Time shall be reclassified into a number of shares of Parent Common Stock equal to the HoldCo Number pursuant to the following provisions, and the parties agree and acknowledge that such provisions will govern the calculation of the number of shares of Parent Common Stock to be held by HoldCo immediately following the Effective Time,

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with the purpose and intent (subject to such provisions) that, immediately following the Effective Time, HoldCo will hold shares of Parent Common Stock representing 69.642% of the fully diluted equity of Parent (excluding shares of Parent Common Stock issuable upon exercise of the warrant contemplated by the Warrant Agreement), and the former stockholders and other former equityholders of the Company will hold, collectively, shares of Parent Common Stock and other equity securities of Parent collectively representing 30.358% of the fully diluted equity of Parent (excluding shares of Parent Common Stock issuable upon exercise of the warrant contemplated by the Warrant Agreement).

(i) "**Aggregate Exercise Price**" means the aggregate exercise price that would be payable if all In the Money Options were exercised in full (and not net exercised).

(ii) "**Aggregate Option Shares**" means the aggregate number of shares of Company Common Stock that would be issuable if all In the Money Options were exercised in full (and not net exercised).

(iii) "**In the Money Multiplier**" means (A) one minus (B) a fraction (x) whose numerator is the Aggregate Exercise Price, and (y) whose denominator is the product of (1) the Aggregate Option Shares multiplied by (2) the Per Share Amount.

(iv) "**In the Money Options**" means Company Options and Company ESPP Options outstanding immediately prior to the Effective Time with an exercise price per share of Company Common Stock that is less than the Per Share Amount.

(v) "**HoldCo Number**" means the product of (A) 2.294 multiplied by (B) the sum of (1) the aggregate number of shares of Parent Common Stock that would be issuable to holders of Company Common Stock in the Merger pursuant to Sections 2.5(a)(iii) and 2.6 (and assuming for this purpose that there were no Dissenting Shares and without regard to whether or not there are in fact any Dissenting Shares), *plus* (2) the product of (x) the In the Money Multiplier multiplied by (y) the Aggregate Option Shares; *plus* (3) the aggregate number of shares of Parent Common Stock issuable upon the conversion of Company RSUs outstanding immediately prior to the Effective Time pursuant to Section 2.10(b) of the Merger Agreement.

(vi) At the Effective Time, all outstanding shares of Parent Class B Common Stock held by HoldCo as of immediately prior to the Effective Time will automatically be reclassified into a number of shares of Parent Common Stock equal to the HoldCo Number.

1.3 Directors of Parent. At the Effective Time, the directors of Parent will consist of ten members, six of whom will be designated by SoftBank prior to the Effective Time (of which six members, three will not be directors, officers or employees of any Parent Entity or any of their respective Affiliates other than an Acquired Corporation and will be independent directors under the listing standards of the NYSE), three of whom will be any three non-management directors of the Company as of immediately prior to the Effective Time and who are independent directors under the listing standards of the NYSE and one of whom will be the

Chief Executive Officer of the Company. Each such director will remain in office until his or her successors are elected in accordance with the Parent Bylaws.

1.4 Actions of Parent Entities. SoftBank, HoldCo, Parent and Merger Sub have approved this Agreement, and HoldCo, the holder of all the outstanding shares of Parent Common Stock, will cause Parent, as the sole stockholder

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of Merger Sub, to adopt this Agreement. SoftBank will cause HoldCo, Parent and Merger Sub to perform their respective obligations under this Agreement and, subject to the terms and conditions of this Agreement, to cause each such Person to consummate the Merger and the Contemplated Transactions. Any obligation, covenant, undertaking or other agreement of or binding on HoldCo, Parent or Merger Sub contained in this Agreement shall be deemed to include an obligation, covenant, undertaking and agreement of SoftBank to cause HoldCo, Parent and Merger Sub, as applicable, to fully comply with such obligation, covenant, undertaking or agreement and, if such obligation, covenant, undertaking or agreement involves the making of any payment or satisfaction of any financial obligation, shall be deemed to include an obligation of SoftBank to provide the necessary cash amounts to HoldCo, Parent and Merger Sub necessary to make such payments or satisfy such obligations in full.

Section 2. Merger and Related Matters

2.1 Merger of Merger Sub into the Company. Upon the terms and subject to the conditions set forth in this Agreement, at the Effective Time (as defined in Section 2.3), Merger Sub will be merged with and into the Company pursuant to Section 17-6701 of the KGCC, and the separate existence of Merger Sub will cease. The Company will continue as the surviving corporation in the Merger (the "**Surviving Corporation**").

2.2 Effects of the Merger. The Merger will have the effects set forth in this Agreement and in the applicable provisions of the KGCC. Without limiting the generality of the foregoing, and subject thereto, at the Effective Time all of the properties, rights, privileges, immunities, powers and franchises of the Company and Merger Sub will vest in the Surviving Corporation, and all debts, liabilities, obligations and duties of the Company and Merger Sub will become the debts, liabilities, obligations and duties of the Surviving Corporation.

2.3 Closing; Effective Time. The consummation of the Merger and the other Contemplated Transactions (the "**Closing**") will take place at the offices of Morrison & Foerster LLP, 425 Market Street, San Francisco, California, at 1:00 p.m. (California time) on the later of (a) the date that is three Business Days after the satisfaction or waiver (other than those that are not legally permitted to be waived) of the last to be satisfied or waived of the conditions set forth in Section 6 and Section 7, other than any conditions which by their nature are to be satisfied at the Closing, but subject to the satisfaction or waiver (other than those conditions that are not legally permitted to be waived) of each such condition, and (b) such later date (not later than seven Business Days after the date specified in clause (a) above) as Parent may designate in order to obtain the Debt Financing, or on such other date or at such other time or location as Parent and the Company may mutually designate in writing. The date on which the Closing actually takes place is referred to as the "**Closing Date**." Subject to the provisions of this Agreement, a certificate of merger satisfying the applicable requirements of the KGCC will be duly executed by the Company in connection with the Closing and, concurrently with or as soon

as practicable following the Closing, filed with the Secretary of State of the State of Kansas. The Merger will become effective at the time of the filing of such certificate of merger with the Secretary of State of the State of Kansas or at such later time as may be specified in such certificate of merger with the written consent of Parent and the Company (the time as of which the Merger becomes effective being referred to as the "**Effective Time**").

2.4 Articles of Incorporation and Bylaws; Directors and Officers. At the Effective Time, unless otherwise determined by Parent prior to the Effective Time:

(a) the Articles of Incorporation of the Surviving Corporation will be amended to conform to the Articles of Incorporation of Merger Sub as in effect immediately prior to the Effective Time, except that (i) the authorized

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capital stock of the Surviving Corporation will consist of a number of shares of common stock that is at least equal to the sum of (x) 1,000 and (y) the number of Bond Shares and (ii) the Articles of Incorporation of the Surviving Corporation will comply with the provisions of Section 5.7;

(b) the Bylaws of the Surviving Corporation will be amended to conform to the Bylaws of Merger Sub as in effect immediately prior to the Effective Time, except that the Bylaws of the Surviving Corporation will comply with the provisions of Section 5.7; and

(c) the directors and officers of the Surviving Corporation will be the respective individuals who are directors and officers of Merger Sub immediately prior to the Effective Time.

2.5 Conversion of Shares of Company Common Stock and Common Stock of Merger Sub.

(a) At the Effective Time, by virtue of the Merger and without any further action on the part of any of the Parent Entities, the Company or any holder of shares of the Company:

(i) any shares of Company Common Stock then held by the Company or any wholly owned Subsidiary of the Company or held in the Company's treasury will be canceled and retired and will cease to exist, and no consideration will be delivered in exchange therefor;

(ii) (A) each share of Company Common Stock then outstanding that is owned of record by Parent, including the Bond Shares, will be converted into one newly and validly issued, fully paid and non-assessable share of common stock of the Surviving Corporation, and no consideration will otherwise be delivered therefor, and (B) each share of Company Common Stock then outstanding that is owned of record by Merger Sub or any other wholly owned Subsidiary of Parent will be canceled and retired and will cease to exist, and no consideration will be delivered therefor;

(iii) except as provided in clauses (i) and (ii) of this Section 2.5(a) and subject to Sections 2.5(b), 2.5(c) and 2.9, each share of Company Common Stock then outstanding will be cancelled and extinguished and automatically converted into the right to

receive (upon the proper surrender of the Certificate representing such share or, in the case of a Book-Entry Share, the proper surrender of such Book-Entry Share) the following:

(1) if such share is a Cash Electing Share, cash in an amount equal to the Per Share Amount (except, that to the extent provided in Section 2.6, such Cash Electing Share may instead be converted into the right to receive a combination of cash and a fraction of a share of Parent Common Stock, subject to Section 2.5(d)):

(2) if such share is a Stock Electing Share, one share of Parent Common Stock (except that, to the extent provided in Section 2.6, such Stock Electing Share may instead be converted into the right to receive a combination of cash and a fraction of a share of Parent Common Stock, subject to Section 2.5(d)); and

(3) if such share is a Non-Electing Share, one of the following, as determined in accordance with Section 2.6: (x) cash in an amount equal to the Per Share Amount; (y) one share of Parent Common Stock; or (z) a combination of cash and a fraction of a share of Parent Common Stock, subject to Section 2.5(d); and

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(iv) each share of the common stock, $0.01 par value per share, of Merger Sub then outstanding will be converted into one newly and validly issued, fully paid and non-assessable share of common stock of the Surviving Corporation.

(b) Between the date of this Agreement and the Effective Time, if the outstanding shares of Company Common Stock are changed into a different number or class of shares by reason of any stock split, division or subdivision of shares, stock dividend, reverse stock split, consolidation of shares, reclassification, recapitalization or other similar transaction, then without limiting any provisions of the Parent Charter (including any provisions that relate to the calculation of the number of shares of Parent Common Stock to be held by HoldCo), the Merger Consideration and similarly dependent terms will be adjusted to the extent necessary or appropriate to achieve the same economic outcome.

(c) If (i) any share of Company Common Stock outstanding immediately prior to the Effective Time is unvested or is subject to a repurchase option, risk of forfeiture or other condition under any restricted stock purchase agreement or other restricted stock agreement with the Company or under which the Company has any rights, and (ii) such restricted stock purchase agreement or other restricted stock agreement does not provide that the vesting of such share of Company Common Stock will fully accelerate at or prior to the Effective Time, then the Merger Consideration payable with respect thereto (or with respect to any portion that does not accelerate at or prior to the Effective Time) will also be unvested and subject to the same repurchase option, risk of forfeiture or other condition. The Company will take all action that may be necessary to ensure that, from and after the Effective Time, Parent is entitled to exercise any such repurchase option or other right set forth in any such restricted stock purchase agreement or other restricted stock agreement.

(d) No fractional shares of Parent Common Stock will be issued in connection with the Merger, and no certificates or scrip for any such fractional shares will be issued in connection with the Merger. Any record holder of Company Common Stock who

would otherwise be entitled to receive a fraction of a share of Parent Common Stock in the Merger (after aggregating all fractional shares of Parent Common Stock issuable to such record holder in the Merger) will, in lieu of such fraction of a share and upon surrender of such holder's Certificate(s) (as defined in Section 2.8(b)), be paid in cash the dollar amount (rounded to the nearest whole cent), without interest, determined by multiplying such fraction by the Per Share Amount.

2.6 Cash-Stock Election Allocation Provisions.

(a) As used in this Agreement (and in particular this Section 2.6), the following terms have the meanings specified below:

(i) "**Aggregate Cash Consideration**" means $12,140,000,000.

(ii) "**Cash Electing Share**" means a share of Company Common Stock outstanding immediately prior to the Effective Time as to which a valid Election has been made to receive cash in the Merger, and "**Cash Electing Shares Number**" means the sum of (x) the number of Cash Electing Shares *plus* (y) the number of Dissenting Shares.

(iii) "**Cash Proration Fraction**" means the quotient derived by dividing (A) the Cash Share Number, by (B) the Cash Electing Shares Number.

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(iv) "**Cash Share Number**" means the quotient determined by dividing (A) the Aggregate Cash Consideration by (B) the Per Share Amount.

(v) "**Default Cash Fraction**" means a fraction (A) whose numerator is the amount (if any) by which (x) the Cash Share Number *exceeds* (y) the Cash Electing Shares Number, and (B) whose denominator is the number of Non-Electing Shares.

(vi) "**Default Stock Fraction**" means a fraction (A) whose numerator is the amount (if any) by which (x) the Stock Share Number *exceeds* (y) the Stock Electing Shares Number, and (B) whose denominator is the number of Non-Electing Shares.

(vii) "**Non-Electing Shares**" means all shares of Company Common Stock outstanding immediately prior to the Effective Time (excluding for the avoidance of doubt the Bond Shares) as to which neither (x) a valid Election to receive cash in the Merger, nor (y) a valid Election to receive Parent Common Stock in the Merger, has been made.

(viii) "**Stock Electing Share**" means a share of Company Common Stock outstanding immediately prior to the Effective Time as to which a valid Election has been made to receive Parent Common Stock in the Merger, and "**Stock Electing Shares Number**" means the number of Stock Electing Shares; *provided*, *however*, that a Stock Electing Share that is held by a Person not a citizen of the United States may be treated as a Cash Electing Share if Parent and the Company mutually determine that it is necessary to do so to ensure SoftBank's compliance with any applicable limits on foreign ownership under Section 310(b) of the FCC Act solely to the extent such limits are applied to SoftBank by the FCC.

(ix) "**Stock Proration Fraction**" means the quotient derived by dividing (A) the Stock Share Number, *by* (B) the Stock Electing Shares Number.

(x) "**Stock Share Number**" means the amount by which (A) the number of shares of Company Common Stock outstanding immediately prior to the Effective Time (excluding any shares of Company Common Stock described in Sections 2.5(a)(i) and 2.5(a)(ii)) *exceeds* (B) the Cash Share Number.

(b) If the Cash Electing Shares Number *exceeds* the Cash Share Number:

(i) each Stock Electing Share and (subject to Section 2.9) each Non-Electing Share will be converted into the right to receive one share of Parent Common Stock; and

(ii) each Cash Electing Share will be converted into the right to receive a combination of (A) cash in an amount equal to the product of (x) the Per Share Amount *multiplied by* (y) the Cash Proration Fraction, and (B) a fraction of a share of Parent Common Stock equivalent to one *minus* the Cash Proration Fraction.

(c) If the Stock Electing Shares Number *exceeds* the Stock Share Number:

(i) each Cash Electing Share and (subject to Section 2.9) each Non-Electing Share will be converted into the right to receive cash in an amount equal to the Per Share Amount; and

(ii) each Stock Electing Share will be converted into the right to receive a combination of (A) a fraction of a share of Parent Common Stock equivalent to the Stock Proration Fraction, and (B) cash in an amount equal to the product of (x) the Per Share Amount *multiplied by* (y) one *minus* the Stock Proration Fraction.

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(d) In the event that neither Section 2.6(b) nor Section 2.6(c) is applicable:

(i) each Cash Electing Share will be converted into the right to receive cash in an amount equal to the Per Share Amount;

(ii) each Stock Electing Share will be converted into the right to receive one share of Parent Common Stock; and

(iii) subject to Section 2.9, each Non-Electing Share will be converted into the right to receive (A) cash in an amount equal to the product of (i) the Per Share Amount *multiplied by* (ii) the Default Cash Fraction, and (B) a fraction of a share of Parent Common Stock equal to the Default Stock Fraction.

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2.7 Exercise of Election by Company Stockholders.

(a) Prior to the Effective Time, Parent will designate a bank or trust company reasonably acceptable to the Company to act as exchange agent in the Merger (the "**Exchange Agent**"), and the Exchange Agent will administer the Election process described in this Section 2.7 and the process described in Section 2.8. All elections in accordance with this Section 2.7 ("**Elections**") will be made on a form designed for that purpose and mutually acceptable to the Company and Parent (a "**Form of Election**") and mailed to holders of record of shares of the Company Common Stock on the date that is at least 20 Business Days prior to the Effective Time or such other date as Parent and the Company mutually agree in writing (the "**Election Record Date**"). To the extent practicable, the Form of Election will permit each holder that beneficially owns shares of the Company Common Stock, in more than one name or account, to specify (through appropriate and customary documentation and instructions) how to allocate the cash paid and shares of Parent Common Stock to be issued in the Merger among the various accounts that such holder beneficially owns. Parent and the Company will make available one or more Forms of Election as may be reasonably requested by any Person who becomes a holder (or beneficial owner) of shares of the Company Common Stock between the Election Record Date and the close of business on the day prior to the Election Deadline.

(b) A Form of Election must be properly completed, signed, and actually received by the Exchange Agent not later than 5:00 p.m. New York City time on the date five Business Days prior to the Effective Time (such time hereinafter referred to as the "**Election Deadline**") in order to be effective. Any share of Company Common Stock for which the record holder has not, prior to the Election Deadline, properly submitted a properly completed Form of Election to the Exchange Agent will be deemed to be a Non-Electing Share. Any record holder of shares of Company Common Stock who has made an Election may at any time prior to the Election Deadline change such holder's Election by submitting a revised Form of Election, properly completed and signed, that is received by the Exchange Agent prior to the Election Deadline. After an Election has been validly made, any subsequent transfer of the shares of Company Common Stock as to which such election related shall automatically revoke such Election. In addition, all Forms of Election will automatically be revoked if the Exchange Agent is notified in writing by Parent and the Company that the Merger has been abandoned. The Election Deadline shall only be extended by mutual agreement of SoftBank and the Company, and the parties shall promptly make a public announcement of any such agreement.

(c) The Exchange Agent will have the discretion to determine whether Forms of Election have been properly completed, signed, and timely submitted or to disregard defects in forms. Any such reasonable determination of the Exchange Agent will be conclusive and binding. The Exchange Agent will not be under any obligation to notify any Person of any defect in a Form of Election submitted to the Exchange Agent. Any share of Company Common Stock with respect to which a holder is deemed to have not submitted a valid Election prior to the Election Deadline will be deemed to be a Non-Electing Share.

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(d) The Exchange Agent will make all the computations contemplated by this Section 2.7, including the determination of the number of Cash Electing Shares, Stock Electing Shares and Non-Electing Shares, and all such computations will be conclusive and binding on the former holders of shares of the Company Common Stock absent manifest error.

The Exchange Agent may, with the agreement of Parent and the Company's approval (such approval not to be unreasonably withheld, conditioned or delayed), make such rules as are consistent with this Section 2.7 for the implementation of the Elections provided for herein as are necessary or desirable to effect fully such Elections. Prior to the Effective Time, Parent will enter into an exchange agent and nominee agreement with the Exchange Agent, in a form reasonably acceptable to Parent and the Company (the "**Exchange Agent Agreement**"), setting forth the procedures to be used in accomplishing the deliveries and other actions contemplated by this Section 2.7.

(e) In the event that this Agreement is terminated without the Merger having been consummated, Parent will instruct the Exchange Agent to return all shares of Company Common Stock submitted or transferred to the Exchange Agent pursuant to this Section 2.7.

2.8 Surrender of Certificates; Stock Transfer Books.

(a) At or prior to the Effective Time, Parent will deposit with the Exchange Agent (i) cash in an amount equal to the aggregate amount of cash payable pursuant to Sections 2.5 and 2.6, (ii) certificates representing shares of Parent Common Stock issuable pursuant to Sections 2.5 and 2.6, and (iii) cash sufficient to make any payments in lieu of fractional shares of Parent Common Stock that would have been payable with respect to Company Common Stock but for Section 2.5(d), in each case excluding amounts applicable to Dissenting Shares. The cash amounts and any shares of Parent Common Stock so deposited with the Exchange Agent, together with any dividends or distributions received by the Exchange Agent with respect to such shares, are referred to collectively as the "**Exchange Fund**." The cash in the Exchange Fund will be invested by the Exchange Agent as directed by Parent in money market funds or similar short-term liquid investments pursuant to the terms of the Exchange Agent Agreement. The Exchange Fund shall not be used for any other purpose. Parent shall promptly replace or restore or shall cause the prompt replacement or restoration of the cash in the Exchange Fund so as to ensure that the Exchange Fund is at all times maintained at a level sufficient for the Exchange Agent to make such payments required under Section 2. Nothing contained in this Section 2.8 and no investment losses resulting from investment of the funds deposited with the Exchange Agent shall diminish the rights of any holder of Company Common Stock to receive the Merger Consideration.

(b) Promptly after the Effective Time, Parent will instruct the Exchange Agent to mail to the Persons who, immediately prior to the Effective Time, were record holders of certificates representing shares of Company Common Stock ("**Certificates**") or uncertificated shares of Company Common Stock represented by Book-Entry Shares, (i) a letter of transmittal (the "**Letter of Transmittal**") in customary form and containing such provisions as Parent may reasonably specify (including, in the case of holders of Certificates, a provision confirming that delivery of Certificates will be effected, and risk of loss and title to Certificates will pass, only upon delivery of such Certificates to the Exchange Agent), and (ii) instructions for use in effecting the surrender of Certificates and Book-Entry Shares. Upon surrender of a Certificate or Book-Entry Share to the Exchange Agent for exchange, together with a duly executed Letter of Transmittal and such other documents as may be reasonably required by the Exchange Agent or Parent, (A) the holder of such Certificate or Book-Entry Share will be

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entitled to receive in exchange therefor the Merger Consideration deliverable to such holder pursuant to Sections 2.5 and 2.6 and any cash payment in lieu of a fractional share of Parent Common Stock in accordance with Section 2.5(d), and (B) the Certificate or Book-Entry Share so surrendered will be canceled. Until surrendered as contemplated by this Section 2.8(b), each Certificate or Book-Entry Share will be deemed, from and after the Effective Time, to represent solely the right to receive the applicable Merger Consideration for each share of Company Common Stock formerly evidenced by such Certificate or Book-Entry Share. If any Certificate has been lost, stolen or destroyed, Parent may, in its discretion and as a condition to the delivery of any Merger Consideration with respect thereto, require the owner of such lost, stolen or destroyed Certificate to provide an appropriate affidavit and to deliver a bond (in such sum as Parent may reasonably direct) as indemnity against any claim that may be made against the Exchange Agent, Parent or the Surviving Corporation with respect to such Certificate.

(c) No dividends or other distributions declared or made with respect to Parent Common Stock with a record date after the Effective Time will be paid to the holder of any unsurrendered Certificate with respect to any shares of Parent Common Stock that such holder has the right to receive in the Merger until such holder surrenders such Certificate in accordance with this Section 2.8 (at which time such holder will be entitled, subject to the effect of applicable escheat or similar laws, to receive all such dividends and distributions, without interest).

(d) Any portion of the Exchange Fund that remains undistributed to holders of Certificates or Book-Entry Shares as of the first anniversary of the Effective Time will be delivered to Parent upon demand, and any holders of Certificates or Book-Entry Shares who have not theretofore surrendered their Certificates or Book-Entry Shares in accordance with this Section 2.8 will thereafter look only to Parent for satisfaction of their claims for delivery of Merger Consideration.

(e) At the Effective Time, holders of Certificates and Book-Entry Shares that were outstanding immediately prior to the Effective Time will cease to have any rights as stockholders of the Company, and the stock transfer books of the Company will be closed with respect to all shares of Company Common Stock outstanding immediately prior to the Effective Time. No further transfer of any such shares of Company Common Stock will be made on such stock transfer books after the Effective Time. If, after the Effective Time, a valid Certificate or Book-Entry Share is presented to the Surviving Corporation or Parent, such Company Certificate or Book-Entry Share will be canceled and will be exchanged as provided in this Section 2.8.

(f) To the extent permitted by applicable Legal Requirements, if any Certificate has not been surrendered by the earlier of (i) the fifth anniversary of the Effective Time or (ii) the date immediately prior to the date on which the consideration that such Certificate represents the right to receive would otherwise escheat to or become the property of any Governmental Body, then such consideration will become the property of the Surviving Corporation, free and clear of any claim or interest of any Person previously entitled thereto.

(g) Neither Parent nor the Surviving Corporation will be liable to any holder or former holder of Company Common Stock or to any other Person with respect to any

Merger Consideration (or dividends or distributions with respect to shares of Parent Common Stock included in such Merger Consideration) delivered to any public official pursuant to any applicable abandoned property law, escheat law or similar Legal Requirement.

2.9 Appraisal Rights.

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(a) Notwithstanding anything to the contrary contained in this Agreement, any share of Company Common Stock that, as of the Effective Time, is held by a holder who is entitled to, and who has properly preserved, appraisal rights under Section 17-6712 of the KGCC with respect to such share (a "**Dissenting Share**") will not be converted into or represent the right to receive the applicable Merger Consideration in accordance with Sections 2.5 and 2.6, and the holder of such share will be entitled only to such rights as may be granted to such holder pursuant to Section 17-6712 of the KGCC with respect to such share; *provided*, *however*, that if such appraisal rights have not been perfected or the holder of such share has otherwise lost such holder's appraisal rights with respect to such share, then, as of the later of the Effective Time or the time of the failure to perfect such rights or the loss of such rights, such share will automatically be converted into and will represent only the right to receive (upon the surrender of the Certificate representing such share) the applicable Merger Consideration in accordance with Sections 2.5 and 2.6.

(b) The Company will give Parent (i) prompt notice of any written demand for appraisal received by the Company prior to the Effective Time pursuant to Section 17-6712 of the KGCC and (ii) the opportunity to participate in all negotiations and proceedings with respect to any such demand. The Company may not make any payment or settlement offer prior to the Effective Time with respect to any such demand unless Parent has consented in writing to such payment or settlement offer.

2.10 Stock Options, RSUs, Performance Units and ESPP.

(a) At the Effective Time, each Company Option that is outstanding and unexercised immediately prior to the Effective Time, whether or not vested, will be converted into and become an option to purchase Parent Common Stock, with such conversion effected through Parent assuming such Company Option in accordance with the terms (as in effect as of the date of this Agreement) of the applicable Company Equity Plan and the terms of the stock option agreement by which such Company Option is evidenced. All rights with respect to Company Common Stock under Company Options assumed by Parent will thereupon be converted into options with respect to Parent Common Stock. Accordingly, from and after the Effective Time: (A) each Company Option assumed by Parent may be exercised solely for shares of Parent Common Stock; and (B) subject to the terms of the stock option agreement by which such Company Option is evidenced, any restriction on the exercise of any Company Option assumed by Parent will continue in full force and effect and the term, exercisability, vesting schedule and other provisions of such Company Option will otherwise remain unchanged as a result of the assumption of such Company Option; *provided*, *however*, that Parent's board of directors or a committee thereof will succeed to the authority and responsibility of the Company Board or any committee thereof with respect to each Company Option assumed by Parent. As of the Effective Time, each such Company Option as so assumed and converted shall be for that number of whole shares of Parent Common Stock (rounded down to the nearest whole share)

equal to the product of (i) the number of shares of Company Common Stock subject to such Company Option *multiplied by* (ii) the Award Exchange Ratio, at an exercise price per share of Parent Common Stock (rounded up to the nearest whole cent) equal to the quotient obtained by dividing (x) the exercise price per share of Company Common Stock of such Company Option by (y) the Award Exchange Ratio; *provided*, *however*, that the exercise price and the number of shares of Parent Common Stock subject to the Company Option shall be determined in a manner consistent with the requirements of Section 409A of the Code (together with guidance and regulations thereunder, including the final Treasury Regulations issued thereunder, "**Section 409A**"), and, in the case of Company Options that are intended to qualify as incentive stock options within the meaning of Section 422 of the Code, consistent with the requirements of Section 424 of the Code.

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(b) At the Effective Time, each Company RSU that is outstanding immediately prior to the Effective Time, whether or not vested, will be converted into and become a right to be issued Parent Common Stock, with such conversion effected through Parent assuming such Company RSU in accordance with the terms (as in effect as of the date of this Agreement) of the applicable Company Equity Plan and the terms of the award agreement by which such Company RSU is evidenced. All rights with respect to Company Common Stock under Company RSUs assumed by Parent will thereupon be converted into rights to be issued Parent Common Stock upon settlement of such assumed Company RSUs. Accordingly, from and after the Effective Time: (A) each Company RSU assumed by Parent will represent a right to be issued solely shares of Parent Common Stock upon settlement thereof; and (B) subject to the terms of the award agreement by which such Company RSU is evidenced, any restriction on the issuance of shares under any Company RSU assumed by Parent will continue in full force and effect and the term, vesting schedule and other provisions of such Company RSU will otherwise remain unchanged as a result of the assumption of such Company RSU; *provided*, *however*, that Parent's board of directors or a committee thereof will succeed to the authority and responsibility of the Company Board or any committee thereof with respect to each Company RSU assumed by Parent. As of the Effective Time, each such Company RSU as so assumed and converted shall be for that number of shares of Parent Common Stock (after aggregating all fractional shares with respect to each award, rounded down to the nearest whole share) equal to the product of (i) the number of shares of Company Common Stock underlying to such Company RSU *multiplied by* (ii) the Award Exchange Ratio.

(c) Each Company Performance Unit that is outstanding immediately prior to the Effective Time, whether or not vested, will be assumed by Parent in accordance with the terms (as in effect as of the date of this Agreement) of the applicable Company Equity Plan. Accordingly, from and after the Effective Time, the term, vesting schedule and other provisions of such Company Performance Unit will otherwise remain unchanged as a result of the assumption of such Company Performance Unit; *provided*, *however*, that Parent's board of directors or a committee thereof will succeed to the authority and responsibility of the Company Board or any committee thereof with respect to each Company Performance Unit assumed by Parent.

(d) Notwithstanding anything to the contrary, (i) with respect to the Company RSUs and Company Performance Units which provide for vesting subject to achievement of performance objectives, which objectives relate to performance periods that have

not yet been completed as of the Closing Date, each such Company RSU and Company Performance Unit shall be converted as if target performance had been achieved as of the Closing Date, and each such Company RSU and Company Performance Unit shall otherwise continue to vest during the applicable performance period (subject to satisfying such other terms and conditions, including continued employment or service, applicable to each such Company RSU and Company Performance Unit), and (ii) from and after the Closing Date and reflecting Section 2.10(d)(i) above, (A) the provisions under the award agreements for each award of Company Options, Company RSUs and Company Performance Units shall continue in full force and effect, including but not limited to the provisions relating to effects of a termination following a Change in Control and (B) if the holder of a Company Performance Unit experiences a termination of employment during the CIC Severance Protection Period (as such term is defined under the applicable Company Equity Plan) and such holder receives severance benefits under the Company's Separation Plan, the Company's Change in Control Severance Plan or an equivalent or greater severance benefit, then all outstanding Company Performance Units held by such individual shall become vested and non-forfeitable, without pro-ration, and shall be paid within thirty (30) days of such termination of employment, subject to Section 409A of the Code, if applicable.

(e) As used in this Agreement, the following terms have the meaning specified below:

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(i) The "**Aggregate Share Consideration**" means the amount by which (A) the number of shares of Company Common Stock (excluding any shares of Company Common Stock described in Sections 2.5(a)(i) and 2.5(a)(ii)) outstanding immediately prior to the Effective Time, *exceeds* (B) the quotient determined by dividing (x) the Aggregate Cash Consideration by (y) the Per Share Amount;

(ii) The "**Award Exchange Ratio**" means the sum of the Share Exchange Ratio and the Cash Exchange Ratio.

(iii) The "**Cash Exchange Ratio**" means the quotient obtained by dividing (x) the Per Share Cash Portion by (y) an amount equal to the volume weighted average trading price of Parent Common Stock on the NYSE over the five consecutive trading days immediately following (and exclusive of) the Closing Date.

(iv) The "**Share Exchange Ratio**" means the quotient obtained by dividing (x) Aggregate Share Consideration by (y) the number of shares of Company Common Stock (excluding any shares of Company Common Stock described in Sections 2.5(a)(i) and 2.5(a)(ii)) outstanding immediately prior to the Effective Time.

(v) The "**Per Share Cash Portion**" means the quotient obtained by dividing (x) the Aggregate Cash Consideration by (y) the number of shares of Company Common Stock (excluding any shares of Company Common Stock described in Sections 2.5(a)(i) and 2.5(a)(ii)) outstanding immediately prior to the Effective Time.

(f) Parent will file with the SEC, no later than 15 Business Days after the date on which the Merger becomes effective, a registration statement on Form S-8 (or any

successor form), if available for use by Parent, relating to the shares of Parent Common Stock issuable with respect to the Company Options assumed by Parent in accordance with Section 2.10(a) and Company RSUs assumed by Parent in accordance with Section 2.10(b), and will use its commercially reasonable efforts to maintain the effectiveness of such registration statement thereafter for so long as any of such options or restricted stock units remain outstanding.

(g) At the Effective Time, if Parent determines that it desires to do so, Parent may assume any or all of the Company Equity Plans, including the Company's 2007 Omnibus Incentive Plan (in the form attached hereto as Exhibit E, with such changes that are determined necessary to reflect this Section 2.10(g)). If Parent elects to so assume any Company Equity Plan, then, under such Company Equity Plan, Parent will be entitled to grant stock awards, to the extent permissible under applicable Legal Requirements, using the share reserves of such Company Equity Plan as of the Effective Time (including any shares returned to such share reserves as a result of the termination of Company Options and Company RSUs that are assumed or replaced by Parent pursuant to Sections 2.10(a) and 2.10(b), except that: (i) stock covered by such awards will be shares of Parent Common Stock; (ii) all references in such Company Equity Plan to a number of shares of Company Common Stock will be deemed amended to refer instead to that number of shares of Parent Common Stock (rounded down to the nearest whole share) as adjusted pursuant to the application of the Award Exchange Ratio; and (iii) Parent's board of directors or a committee thereof will succeed to the authority and responsibility of the Company Board or any committee thereof with respect to the administration of such Company Equity Plan.

(h) Prior to the Effective Time, the Company will take all action that may be reasonably necessary (under the Company Equity Plans and otherwise) to effectuate the provisions of this Section 2.10 and to ensure that, from and after the Effective Time, holders of Company Options, Company RSUs and Company Performance Units have no rights with respect thereto other than those specifically provided in this Section 2.10.

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(i) At the Effective Time, Parent will assume the Company ESPP (in the form attached hereto as Exhibit F, with such changes that are determined necessary to reflect this Section 2.10(i) and the adjustment of the available share reserve under the Company ESPP after application of the Award Exchange Ratio) and each Company ESPP Option under the Company ESPP that is outstanding and the Company ESPP Offering Period has not expired will be converted into and become an option to purchase Parent Common Stock, with such conversion effected through Parent assuming such Company ESPP Option in accordance with the terms of the Company ESPP (as in effect on the date of this Agreement) and the terms of the Company ESPP Subscription Agreement (as in effect immediately prior to the Effective Time) of each Company Associate who is participating in the Company ESPP immediately prior to the Effective Time. All rights with respect to Company Common Stock under Company ESPP Options assumed by Parent will thereupon be converted into options with respect to Parent Common Stock. Accordingly, from and after the Effective Time: (i) each Company ESPP Option assumed by Parent will be automatically exercised solely for shares of Parent Common Stock; (ii) the number of shares of Parent Common Stock subject to each Company ESPP Option assumed by Parent will be equal to the number of shares of Company Common Stock that were subject to such Company ESPP Option immediately prior to the Effective Time; (iii) the per share exercise price for the Parent Common Stock issuable upon exercise of each Company ESPP Option assumed by Parent will be 95% of the Parent Common Stock Fair Market Value on

the Company ESPP Purchase Date; and (iv) any restriction on a Company ESPP Option, as set forth in the terms of the Company ESPP (as in effect on the date of this Agreement) and in a Company ESPP Subscription Agreement (as in effect immediately prior to the Effective Time) will continue in full force and effect notwithstanding such assumption or replacement.

(j) At the Effective Time, all accounts under Company Plans that are deferred compensation plans which provide for hypothetical investments in Company Common Stock ("**DC Accounts**") will be converted into hypothetical investment accounts for Parent Common Stock equal to the product of (i) the number of shares of Company Common Stock credited to the DC Account as of the Effective Time *multiplied by* (ii) the Award Exchange Ratio. At and following the Effective Time, the DC Accounts will continue to be governed by the terms of the applicable deferred compensation plans, *provided* that Parent's board of directors or a committee thereof will succeed to the authority and responsibility of the Company Board or any committee thereof with respect to the administration of such plans.

2.11 Further Action. If, at any time after the Effective Time, any further action is determined by Parent in its sole discretion to be necessary or desirable to vest the Surviving Corporation with full right, title and possession of and to all rights and property of Merger Sub and the Company, the officers and directors of the Surviving Corporation and Parent will be fully authorized (in the name of Merger Sub, in the name of the Company and otherwise) to take such action, and the Company and its officers and directors will be deemed to have granted to the Surviving Corporation an irrevocable power of attorney to execute and deliver all such deeds, assignments or assurances in law and to take all acts necessary, proper or desirable to vest, perfect or confirm title to and possession of such rights, properties or assets in the Surviving Corporation, and the officers and directors of the Surviving Corporation are authorized in the name of the Company or otherwise to take any and all such action.

2.12 Withholding Rights. Each of Parent, Merger Sub, the Surviving Corporation and the Exchange Agent will be entitled to deduct and withhold from the Merger Consideration otherwise payable pursuant to this Section 2 to any holder of Company Common Stock such amounts as are required to be deducted and withheld with respect to the making of such payment under the Code and the Treasury Regulations, or any provision of state, local or foreign Tax law. To the extent that amounts are so deducted and withheld, and paid over to the appropriate Governmental

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Body, such withheld amounts will be treated for all purposes of this Agreement as having been paid to the holder of the Company Common Stock in respect of which such deduction and withholding was made.

Section 3. Representations and Warranties of the Company

Except as explicitly set forth in any registration statement, proxy statement or other statement, report, schedule, form or other document filed with the SEC by the Company on or after January 1, 2012 and prior to the date of this Agreement, but excluding any "risk factors" or similar statements in any such filings that are cautionary, predictive or forward-looking in nature, other than any specific factual information contained in such "risk factors" or similar statements, and except as set forth in the Company Disclosure Schedule, whether or not any particular representation or warranty refers to or excepts therefrom any specific section of the Company Disclosure Schedule (it being understood that any exception or disclosure set forth in any part or

subpart of the Company Disclosure Schedule will be deemed an exception or disclosure, as applicable, only with respect to: (a) the corresponding Section or subsection of this Section 3; (b) the Section or subsection of this Section 3 corresponding to any other part or subpart of the Company Disclosure Schedule that is explicitly cross-referenced therein; and (c) any other Section or subsection of this Section 3 with respect to which the relevance of such exception or disclosure is reasonably apparent), the Company represents and warrants to the Parent Entities as follows:

3.1 Due Organization; Subsidiaries; Etc.

(a) Each of the Acquired Corporations is an Entity duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation (except, in the case of good standing, for Entities organized under the laws of any jurisdiction that does not recognize such concept) and has all necessary power and authority: (i) to conduct its business in the manner in which its business is currently being conducted; and (ii) to own and use its assets in the manner in which its assets are currently owned and used, except, with respect to the Subsidiaries of the Company, where the failure to be so duly organized, validly existing or in good standing, individually or in the aggregate, would not reasonably be expected to have a Company Material Adverse Effect.

(b) Each of the Acquired Corporations is qualified to do business as a foreign Entity, and is in good standing (except for any jurisdiction that does not recognize such concept), under the laws of all jurisdictions where the nature of its business requires such qualification, except where the failure to be so qualified or in good standing, individually or in the aggregate, would not reasonably be expected to have a Company Material Adverse Effect.

(c) The Company has no Subsidiaries, and does not own as of the date of this Agreement 5% or more of the capital stock of, or equity interests of any nature (and which capital stock or equity interests have a value exceeding $1,000,000) in, any other Entity, other than the Entities and interests identified in Part 3.1(c) of the Company Disclosure Schedule. The Company has not agreed and is not obligated to make, and is not bound by any Contract under which it may become obligated to make, any future equity investment in or capital contribution to any such Entity in excess of $10 million.

3.2 Charter Documents. The Company has Made Available to Parent accurate and complete copies of the Charter Documents of each of the material Acquired Corporations, each as currently in effect. The Company has Made Available to Parent (a) accurate and complete copies of the charters of all committees of the Company Board and the board of directors of any Acquired Corporation that is not, directly or indirectly, wholly owned by the Company,

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and (b) any code of conduct or similar policy adopted by the Company, each as in effect as of the date hereof. Each Acquired Corporation has complied with its Charter Documents in all material respects.

3.3 Authority.

(a) The Company has all necessary corporate power and authority to execute and deliver this Agreement, to perform its obligations hereunder and, subject to

obtaining the Required Company Vote, to consummate the Merger and the other Contemplated Transactions. The execution, delivery and performance of this Agreement by the Company and the consummation by the Company of the Merger and the other Contemplated Transactions have been duly and validly authorized by all necessary corporate action, and no other corporate proceedings on the part of the Company are necessary to authorize this Agreement or to consummate the Merger and the other Contemplated Transactions (other than, with respect to the Merger, the Required Company Vote and the filing of the certificate of merger pursuant to the KGCC). This Agreement has been duly and validly executed and delivered by the Company and, assuming the due authorization, execution and delivery by the Parent Entities, constitutes a legal, valid and binding obligation of the Company, enforceable against the Company in accordance with its terms, except that (i) such enforcement may be subject to applicable bankruptcy, insolvency, reorganization or moratorium laws or other similar Legal Requirements, now or hereafter in effect, affecting creditors' rights generally, and (ii) the remedy of specific performance and injunctive and other forms of equitable relief may be subject to equitable defenses and to the discretion of the court before which any proceeding therefor may be brought.

(b) The Company Board, at a meeting duly called and held on or prior to the date hereof, adopted resolutions approving and declaring advisable this Agreement, the Merger and the other Contemplated Transactions (such approval and declaration having been made in accordance with the KGCC) and without limiting Section 5.5(c), resolving to make the Company Board Recommendation.

3.4 Non-Contravention; Consents.

(a) Neither the execution and delivery of this Agreement by the Company nor the consummation by the Company of the Merger will: (i) conflict with or result in any breach of the Charter Documents of the Company; (ii) assuming that the Required Company Vote has been obtained and that all consents, approvals and authorizations contemplated by Section 3.4(b) have been obtained and all filings and notifications described in such clauses have been made, conflict with or result in a violation by the Company of any Legal Requirement or Order to which the Company is subject; (iii) assuming that all required consents, approvals, authorizations and actions with respect to the agreements set forth in Part 3.4(a) of the Company Disclosure Schedule have been obtained or taken, violate, conflict with, result in a breach of, or constitute (with notice or lapse of time or both) a default under any Material Contract to which any Acquired Corporation is a party or by which any Acquired Corporation is bound or to which any Acquired Corporation's properties or assets is subject; or (iv) assuming that all required consents, approvals, authorizations and actions with respect to the agreements set forth in Part 3.4(a) of the Company Disclosure Schedule have been obtained or taken, result in the creation or imposition of any Lien upon the Acquired Corporations' properties or assets pursuant to any Material Contract, except with respect to clauses (ii), (iii) and (iv) for such violations, conflicts breaches, defaults or Liens as would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Corporations taken as a whole.

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(b) None of the Acquired Corporations is required to make any filing with or give any notice to, or to obtain any Consent from, any Governmental Body prior to the Effective Time in connection with the execution, delivery or performance of this Agreement or the consummation of the Merger or any of the other Contemplated Transactions, except for: (i)

such filings as are required under applicable requirements of the Securities Act and the Exchange Act and the rules and regulations promulgated thereunder, and under state securities and "blue sky" laws; (ii) the pre-merger notification requirements under the HSR Act and such filings are necessary to comply with any other applicable competition, merger control, antitrust or similar Legal Requirement of any jurisdiction (together with the HSR Act, the "**Antitrust Laws**"); (iii) such filings as are necessary to comply with the Defense Production Act of 1950, 50 U.S.C. App. §2170, as amended by the Foreign Investment and National Security Act of 2007 ("**FINSA**"), the rules and regulations of the Committee on Foreign Investment in the United States ("**CFIUS**") and any other Legal Requirement relating to restrictions on foreign investment in any jurisdiction; (iv) such filings as are necessary to comply with the National Industrial Security Program Operating Manual (DOD 5220.22-M) ("**NISPOM**") with the Defense Security Service ("**DSS**"); (v) such filings as are necessary to comply with the International Traffic in Arms Regulations; (vi) such filings as are necessary to comply with the applicable rules of the NYSE; (vii) such filings, notices and Consents as are required under the FCC Act; (viii) such filings as are required by any State Commissions; (ix) such filings as are necessary to comply with the KGCC; (x) such filings as are required by any foreign regulatory bodies, none of which are material; and (xi) such filings, notices, Consents and expirations of waiting periods the failure of which to make or obtain or expire would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect.

3.5 Capitalization, Etc.

(a) The authorized capital stock of the Company consists of: (i) 6,000,000,000 shares of Company Common Stock, of which 3,004,205,406 shares have been issued and are outstanding as of October 11, 2012; (ii) 500,000,000 shares of Company Series 2 Common Stock, of which no shares are issued or are outstanding; (iii) 100,000,000 shares of Company Non-Voting Common Stock, of which no shares are issued or are outstanding; and (iv) 20,000,000 shares of Company Preferred Stock, of which (A) 3,000,000 shares have been designated as Preferred Stock-Sixth Series, Junior Participating, of which no shares have been issued or are outstanding, (B) 300,000 shares have been designated as Preferred Stock-Seventh Series, Convertible, of which no shares have been issued or are outstanding, (C) 232,745 shares have been designated as Ninth Series Zero Coupon Convertible Preferred Stock Due 2013, of which no shares have been issued or are outstanding, and (D) 16,467,255 shares have not been designated, have not been issued and are not outstanding. As of October 11, 2012, the Company held no shares of its capital stock in its treasury. All of the outstanding shares of Company Common Stock have been duly authorized and validly issued, and are fully paid and nonassessable and free of preemptive rights, purchase option, call, right of first refusal or any similar right. The Company is not under (and will not as a result of the Merger or any of the other Contemplated Transactions become under) any contractual obligation to repurchase, redeem or otherwise acquire any outstanding shares of Company Common Stock or other voting securities, except for obligations under Company Plans.

(b) As of October 11, 2012: (i) 66,866,935 shares of Company Common Stock are subject to issuance pursuant to Company Options; (ii) 73,813,916 shares of Company Common Stock are reserved for future issuance pursuant to the Company ESPP; (iii) 22,227,728 shares of Company Common Stock are reserved for future issuance pursuant to Company Equity Awards; and (iv) 135,195,891 shares of Company Common Stock are reserved

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for future issuance pursuant to equity awards not yet granted under the Company Equity Plans. The Company has Made Available to Parent a complete and accurate list that sets forth with respect to each Company Equity Award outstanding as of October 11, 2012 the following information: (A) the particular plan (if any) pursuant to which such Company Equity Award was granted; (B) the number of shares of Company Common Stock subject to such Company Equity Award; (C) the per share exercise price (if any) of such Company Equity Award; (D) the date on which such Company Equity Award was granted; (E) the date on which such Company Equity Award expires; (F) if such Company Equity Award is a Company Option, whether such Company Option is an "incentive stock option" (as defined in the Code) or a non-qualified stock option; (G) whether such Company Equity Award is a restricted stock unit or a restricted stock award; and (H) if such Company Equity Award is a Company RSU, the dates on which shares of Company Common Stock are scheduled to be delivered, if different from the applicable vesting schedule. The Company has Made Available to Parent accurate and complete copies of all Company Equity Plans pursuant to which any outstanding Company Equity Awards were granted by the Company. No vesting schedule or provision, whether time-based or performance-based, of any Company Equity Award, will accelerate solely as a consequence of the Merger or any of the other Contemplated Transactions. There are no outstanding or authorized stock appreciation, phantom stock, profit participation or similar rights or equity based awards with respect to any of the Acquired Corporations other than as set forth in Part 3.5(b) of the Company Disclosure Schedule.

(c) Except as set forth in Section 3.5(b), there is no: (i) outstanding subscription, option, call, warrant or right (whether or not currently exercisable) to acquire any shares of the capital stock or other voting securities of any of the Acquired Corporations; (ii) outstanding security, instrument or obligation that is or may become convertible into or exchangeable for any shares of the capital stock or other voting securities of any of the Acquired Corporations; or (iii) stockholder rights plan (or similar plan commonly referred to as a "poison pill") or, other than any Company Plan, Contract under which the Company is or may become obligated to sell or otherwise issue any shares of its capital stock or any other voting securities.

(d) All outstanding shares of Company Common Stock, Company Equity Awards and other securities of any of the Acquired Corporations have been issued and granted in compliance in all material respects with all applicable securities laws and other applicable Legal Requirements.

(e) All of the outstanding shares of capital stock of each of the material Acquired Corporations have been duly authorized and validly issued, are fully paid and nonassessable and free of preemptive rights and are owned beneficially and of record by the Company or a Subsidiary of the Company, free and clear of any material Liens.

3.6 SEC Filings; Internal Controls and Procedures; Financial Statements.

(a) The Company has filed with the SEC all registration statements, proxy statements and other statements, reports, schedules, forms and other documents required to be filed by the Company with the SEC since January 1, 2009 through the date of this Agreement, and all amendments thereto (the "**Company SEC Documents**"). The Company has offered to make available to Parent accurate and complete copies of each Company SEC Document

(including each exhibit thereto) that is not publicly available through EDGAR. None of the Company's Subsidiaries is required to file any documents with the SEC. As of the time it was filed with the SEC (or, if amended or superseded by a filing prior to the date of this Agreement, then on the date of such filing): (i) each of the Company SEC Documents complied in all material respects with the applicable requirements of the Securities Act or the Exchange Act (as the case may be) and the applicable rules and regulations of the SEC thereunder; and (ii) none of

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the Company SEC Documents contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading. Each of the certifications and statements required by: (A) Rule 13a-14 or Rule 15d-14 under the Exchange Act; (B) 18 U.S.C. §1350 (Section 906 of the Sarbanes-Oxley Act); or (C) any other rule or regulation promulgated by the SEC or applicable to the Company SEC Documents (collectively, the "**Certifications**") are accurate and complete, and comply as to form and content with all applicable Legal Requirements.

(b) The Company maintains disclosure controls and procedures as such terms are defined in, and required by, Rule 13a-15(e) and 15d-15(e) under the Exchange Act. Such disclosure controls and procedures are reasonably designed to ensure that the information required to be disclosed by the Company in the reports that it submits under the Exchange Act is recorded and reported on a timely basis to the individuals responsible for the preparation of the Company's filings with the SEC under the Exchange Act.

(c) The Company maintains a system of internal controls over financial reporting (as defined in, and required by, Rules 13a-15(f) and 15d-15(f) under the Exchange Act) sufficient to provide reasonable assurances regarding the reliability of financial reporting and the preparation of financial statements in accordance with GAAP for external purposes. The Company's management has completed an assessment of the effectiveness of the Company's system of internal controls over financial reporting in compliance with the requirements of Section 404 of the Sarbanes-Oxley Act for the fiscal year ended December 31, 2011, and the description of such assessment set forth in the Company's Annual Report on Form 10-K for the fiscal year ended December 31, 2011 is accurate. Based solely upon such assessment, (i) the Company had no significant deficiencies or material weaknesses in the design or operation of its internal control over financial reporting, and (ii) the Company does not have Knowledge of any fraud, whether or not material, that involves the Company's management or other employees who have a significant role in the Company's internal control over financial reporting.

(d) The consolidated financial statements (including any related notes) contained or incorporated by reference in the Company SEC Documents (as amended prior to the date of this Agreement): (i) complied as to form, as of their respective dates of filing with the SEC, in all material respects with the published rules and regulations of the SEC applicable thereto; (ii) were prepared in accordance with GAAP applied on a consistent basis throughout the periods covered (except as may be indicated in the notes to such financial statements or, in the case of unaudited financial statements, as permitted by the SEC); and (iii) fairly presented, in all material respects, the consolidated financial position of the Company and its consolidated Subsidiaries as of the respective dates thereof and the consolidated results of operations and cash flows of the Company and its consolidated Subsidiaries for the periods covered thereby (subject,

in the case of unaudited financial statements, to normal and recurring year-end adjustments). No financial statements of any Person other than the Acquired Corporations are required by GAAP to be included in the consolidated financial statements of the Company.

(e) To the Knowledge of the Company, the Company's auditor has at all times since January 1, 2009 been: (i) a registered public accounting firm (as defined in Section 2(a)(12) of the Sarbanes-Oxley Act); (ii) "independent" with respect to the Company within the meaning of Regulation S-X under the Exchange Act; and (iii) in compliance with subsections (g) through (l) of Section 10A of the Exchange Act and the rules and regulations promulgated by the SEC and the Public Company Accounting Oversight Board thereunder. Since January 1, 2009, all non-audit services

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performed by the Company's auditors for the Acquired Corporations that were required to be approved in accordance with Section 202 of the Sarbanes-Oxley Act have been so approved.

(f) As of the date of this Agreement, there are no unresolved comments issued by the staff of the SEC in comment letters with respect to any of the Company SEC Documents.

(g) The Company is in compliance in all material respects with the applicable rules and regulations of the New York Stock Exchange LLC and the applicable listing requirements of the NYSE, and has not since January 1, 2009 received any notice asserting any non-compliance with the rules and regulations of the New York Stock Exchange LLC or the listing requirements of the NYSE.

(h) None of the Acquired Corporations has any accrued, contingent or other liabilities of any nature, either matured or unmatured, that are, individually or in the aggregate, material to the Acquired Corporations taken as a whole, except for: (a) liabilities reflected or reserved against on the Unaudited Interim Balance Sheet; (b) liabilities that have been incurred by the Acquired Corporations since the date of the Unaudited Interim Balance Sheet in the ordinary course of business; (c) liabilities for performance of obligations of the Acquired Corporations under Company Contracts (pursuant to the terms of such Company Contracts), to the extent such liabilities are readily ascertainable (in nature, scope and amount) from the written terms of such Company Contracts; and (d) liabilities described in Part 3.6(h) of the Company Disclosure Schedule.

3.7 Absence of Changes. Since the date of the Unaudited Interim Balance Sheet through the date hereof, except as contemplated or permitted by this Agreement, the Acquired Corporations have conducted their businesses, in all material respects, in the ordinary course. Since the date of the Unaudited Interim Balance Sheet through the date hereof, there has not been any event, condition, circumstance, development, change or effect that has had, or that would reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect.

3.8 Title to Assets. The Acquired Corporations either (i) own, and have good and valid title to, all material assets purported to be owned by them, including all material assets reflected on the Unaudited Interim Balance Sheet (except for inventory sold or otherwise disposed of in the ordinary course of business since the date of the Unaudited Interim Balance

Sheet), or (ii) are the lessees or sublessees of, and hold valid leasehold interests in, all material assets purported to have been leased by them, including all material assets reflected as leased on the Unaudited Interim Balance Sheet (except for leased assets that have been returned or vacated pursuant to the terms of the leases).

3.9 Insurance. Except for failures to maintain insurance or self-insurance that would not reasonably be expected to be material to the Company, since January 1, 2009 each of the Acquired Corporations has been continuously insured with reputable insurers or has self-insured, in each case in such amounts and with respect to such risks and losses as the Company reasonably believes are adequate for the business and operations of the Company and its Subsidiaries (taking into account the cost and availability of such insurance). As of the date hereof, neither the Company nor any of its Subsidiaries has received any written notice of any pending or threatened cancellation or termination with respect to any material insurance policy of the Company or any of its Subsidiaries.

3.10 Real Property; Leasehold.

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(a) There are no outstanding options or other Company Contracts to purchase, lease or use, or rights of first refusal to purchase, any real property having a value in excess of $200 million owned by any of the Acquired Corporations (the "**Owned Real Property**").

(b) All real property leased to the Acquired Corporations pursuant to any lease or sublease, including all buildings, structures, fixtures and other improvements leased to the Acquired Corporations, is referred to as the "**Leased Real Property**." The Merger will not affect the enforceability against the applicable Acquired Corporation or, to the Company's Knowledge, any other Person of any material lease or sublease or any material rights of an Acquired Corporation thereunder or otherwise with respect to any material Company Real Property, including the right to the continued use and possession of the Company Real Property for the conduct of business as presently conducted.

(c) Except as would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect, all of the buildings, fixtures and other improvements located on the Company Real Property are adequate and suitable in all material respects for the purpose of conducting the Acquired Corporations' business as presently conducted, and the operation thereof as presently conducted is not in violation in any material respect of any Legal Requirement.

3.11 Intellectual Property.

(a) Each of the Acquired Corporations owns or possesses the right to use all Intellectual Property employed by it in connection with the businesses it operates, and no such ownership or right would be affected by the execution, delivery or performance of this Agreement, or the consummation of the Merger and the other Contemplated Transactions, except (in each case) as would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Corporations taken as a whole.

(b) None of the Acquired Corporations and none of the Company Products is infringing (directly, contributorily, by inducement or otherwise), misappropriating or otherwise violating (or has infringed (directly, contributorily, by inducement or otherwise), misappropriated or otherwise violated since January 1, 2009) any Intellectual Property of any other Person, except as would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Corporations taken as a whole.

(c) No infringement, misappropriation, or similar claim or Legal Proceeding is pending or, to the Knowledge of the Company, threatened in writing against any Acquired Corporation, except (i) as would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Corporations taken as a whole, or (ii) as set forth in Part 3.11(c) of the Company Disclosure Schedule.

(d) Since January 1, 2009, none of the Acquired Corporations has received any notice or other communication (in writing or otherwise) relating to any actual, alleged or suspected infringement, misappropriation, or violation of any Intellectual Property of any Third Party, or any invitation to take a license under the Intellectual Property of any Third Party, except (i) with respect to Intellectual Property under which the Acquired Corporations are licensed pursuant to agreements with such Third Party, (ii) as would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Corporations taken as a whole, or (iii) as set forth in Part 3.11(d) of the Company Disclosure Schedule.

(e) Neither the execution, delivery or performance of this Agreement, nor the consummation of the Merger or any of the other Contemplated Transactions, will, with or without notice or the lapse of time or both, (i) result in any Third Party having (or give any Third Party) the right or option to modify or terminate any license, covenant not to sue,

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immunity or other rights with respect to any Intellectual Property granted to any of the Acquired Corporations, or (ii) result in any Third Party having (or give any Third Party) the right or option to receive, or to modify or accelerate the right or option to receive, any payment with respect to Intellectual Property licensed to any of the Acquired Corporations, except (in each case) as would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Corporations taken as a whole.

(f) To the Knowledge of the Company, neither the execution, delivery or performance of this Agreement, nor the consummation of the Merger or any of the other Contemplated Transactions will, with or without notice or the lapse of time or both, (i) result in any Third Party having (or give or purport to give any Third Party) the right or option to a license, immunity or other rights with respect to the Intellectual Property of SoftBank or any of its Affiliates or (ii) impose a covenant not to sue on SoftBank or any of its Affiliates with respect to the Intellectual Property of SoftBank or any of its Affiliates.

(g) None of the Acquired Corporations is a party to or bound by any decree, judgment, order or arbitration award that is reasonably expected to require (i) any of the Acquired Corporations to grant to any Third Party any license, immunity or other right with respect to any Intellectual Property, except as would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Corporations taken as a whole.

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3.12 Data Protection. Each of the Acquired Corporations (a) is and since January 1, 2009 has been in compliance in all material respects with all Company Privacy Policies and with all applicable Legal Requirements pertaining to privacy, data protection, user data, or Personal Data; and (b) has implemented and maintained a data security plan that maintains commercially reasonable administrative, technical and physical safeguards to protect Personal Data against loss, damage, and unauthorized access and use. Since January 1, 2009, there has been no material loss, damage, or unauthorized access, use, modification, or breach of security of Personal Data maintained by or on behalf of any of the Acquired Corporations. Since January 1, 2009, no Person (including any Governmental Body) has made any claim or commenced any action with respect to loss, damage, or unauthorized access or use of Personal Data maintained by or on behalf of any of the Acquired Corporations, except as would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Corporations taken as a whole. None of (i) the execution, delivery, or performance of this Agreement or (ii) the consummation of the Merger or any of the other Contemplated Transactions will violate any Company Privacy Policy or any Legal Requirement pertaining to privacy, data protection, user data, or Personal Data, except in each case as would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Corporations taken as a whole.

3.13 Contracts.

(a) Part 3.13(a) of the Company Disclosure Schedule identifies each of the following Company Contracts that is unexpired and effective as of the date of this Agreement (each such Company Contract, a "**Material Contract**"):

(i) any Company Contract that is required to be filed by the Company as a "material contract" pursuant to Item 601(b)(10)(i) of Regulation S–K under the Securities Act or disclosed by the Company on a Current Report on Form 8-K;

(ii) any credit agreement, indenture or other Company Contract with any Third Party related to any Indebtedness for borrowed money in excess of $100 million;

(iii) any Company Contract entered into after the date of the Unaudited Interim Balance Sheet involving the acquisition from a Third Party or disposition to a Third Party, directly or indirectly (by merger or otherwise), of

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assets outside of the ordinary course of business or capital stock or other equity interests for aggregate consideration under such Company Contract (or series of related Company Contracts) in excess of $100 million (other than acquisitions or dispositions of inventory, capital expenditures or capital commitments, in each case in the ordinary course of business);

(iv) any Company Contract related to an acquisition, divestiture, merger or similar transaction that contains indemnities, "earn-outs" or other contingent payment obligations that are still in effect and, individually or in the aggregate, could reasonably be expected to result in payments in excess of $250 million, in each case other than any Company Contracts concerning Tax matters, which are governed solely by Section 3.17 hereof;

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(v) any Company Contract obligating the Company to make any capital commitment or capital expenditure, other than acquisitions of inventory in the ordinary course of business, acquisitions of network equipment in the ordinary course of business or acquisitions that do not exceed $200 million;

(vi) any Company Contract providing for any guarantee or assumption of Indebtedness of any Third Party or reimbursement of any maker of a letter of credit, except for any such Company Contracts entered into in the ordinary course of business that relate to Indebtedness which does not exceed $100 million;

(vii) any license agreements that are material to the Acquired Corporations taken as a whole pursuant to which the Company or any of its Subsidiaries licenses in any Intellectual Property owned by a Third Party, other than license agreements for software or hardware that is generally commercially available, or licenses out any material Intellectual Property owned by any of the Acquired Corporations;

(viii) any customer or vendor Company Contract the performance of which involves, individually or together with related Company Contracts with the same customer or vendor, as the case may be, annual consideration in excess of $100 million (in the case of customer Company Contracts) or annual consideration in excess of $200 million (in the case of vendor Company Contracts), in each case which are not cancelable by the Company on 90 calendar days' or less notice without premium or penalty, other than acquisitions of inventory, network equipment or cell tower leases in the ordinary course of business;

(ix) any roaming Company Contracts that cannot be terminated without premium or penalty on 90 days or less notice with respect to the wireless services of the Acquired Corporations; or any long distance, indefeasible right of use, non-tariff interconnection Company Contracts for transport of voice, data, or Internet Protocol traffic; or wholesale Company Contract with a reseller, in each case that is material to the Acquired Corporations taken as a whole;

(x) any Company Contract that includes any exclusive dealing arrangement or any other arrangement that grants any material right of first refusal or material right of first offer or similar right or that limits or purports to limit in any material respect the ability of the Acquired Corporations to own, operate, sell, transfer, pledge or otherwise dispose of any material assets or business;

(xi) any Company Contract that limits or restricts the Acquired Corporations taken as a whole in any material respect from (A) engaging or competing with any Third Party in any material activity or material line of business or (B) competing with any Third Party or operating in any location;

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(xii) any Company Contract the effect of which would be to grant to any Third Party following the Merger any actual or potential right or license to any material Intellectual Property owned as of the date of this Agreement by any of the Acquired Corporations solely as a result of the Merger;

(xiii) any Company Contract pursuant to which any of the Acquired Corporations could be required to purchase or sell, as applicable, any wireless spectrum, in each case that is material to the Acquired Corporations taken as a whole; and

(xiv) any Company Contract set forth in Part 3.13(a)(xiv) of the Company Disclosure Schedule.

The Company has Made Available to Parent an accurate and complete copy (with the exception of redactions) of each Material Contract.

(b) Except to the extent that it has previously expired in accordance with its terms, each Material Contract is valid and in full force and effect in all material respects, and is enforceable against the Acquired Corporations party thereto (and to the Knowledge of the Company is enforceable against each other party thereto) in accordance with its terms, except that (i) such enforcement may be subject to applicable bankruptcy, insolvency, reorganization or moratorium laws or other similar Legal Requirements, now or hereafter in effect, affecting creditors' rights generally, and (ii) the remedy of specific performance and injunctive and other forms of equitable relief may be subject to equitable defenses and to the discretion of the court before which any proceeding therefor may be brought.

(c) (i) None of the Acquired Corporations is in material violation, breach or default under any Material Contract; (ii) to the Knowledge of the Company, no other Person is in material violation, breach or default under, any Material Contract; and (iii) none of the Acquired Corporations has received any written notice or, to the Knowledge of the Company, other overt communication regarding any actual or possible material violation or breach of, or material default under, any Material Contract.

3.14 Government Contracts.

(a) To the Knowledge of the Company, all of the Government Contracts were legally awarded, are binding on the parties thereto, and are in full force and effect.

(b) The Acquired Corporations and each of their employees are in compliance in all material respects with all terms and conditions of each Government Contract to which they are parties, and are performing in all material respects all obligations to be required to be performed by them thereunder.

(c) Neither any of the Acquired Corporations nor any of their respective current officers or directors or principals or employees (as defined in FAR 52.209-5) have been debarred or suspended from doing business with the United States Government or any of its agencies or any other Governmental Body (other than Governmental Bodies with whom the Acquired Corporations are prohibited from doing business pursuant to Legal Requirements), received written notice that any such suspension or debarment action has been proposed, or otherwise excluded from participation in the award of any Government Contract, or for any reason listed on the List of Parties Excluded from Federal Procurement and Non-procurement Programs (available at www.epls.gov). No circumstances exist to the Knowledge of the Company that would warrant the institution of suspension or debarment proceedings against the Company, any of its Subsidiaries, or any of their respective current officers or directors or

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principals or employees in connection with the performance of their duties for or on behalf of the Acquired Corporations.

(d) No show cause notices, notices of termination for default, or cure notices have been issued relating to any Government Contract against any of the Acquired Corporations, except as to any such cure notices, those with respect to which cure has been made in the ordinary course of business, and to the Knowledge of the Company no event, condition or omission has occurred or exists that have resulted in a termination for default of such Government Contract. Other than routine cost or pricing audits, none of the Acquired Corporations is being audited as of the date hereof by any Governmental Body relating to any Government Contracts which audit has been found to result in noncompliance with a Government Contract.

(e) Neither any of the Acquired Corporations nor (to the Knowledge of the Company) any of their respective officers or directors or principals (as defined in FAR 52.209-5) are currently, and none of the foregoing have been since January 1, 2009, (i) charged with, received, or been advised in writing or orally of any charge, investigation, claim, or assertion of, or indicted or convicted for, criminal activity with respect to any alleged material violation of a Government Contract, or (ii) had a civil judgment rendered against them with respect to any alleged material violation of a Government Contract.

(f) Since January 1, 2009, none of the Acquired Corporations has made any voluntary disclosure regarding material non-compliance relating to any material Government Contract that remains uncured or unresolved in any material respect.

(g) To the Knowledge of the Company, none of the Acquired Corporations has taken any action or is a party to any litigation pertaining to any Government Contract that could reasonably be expected to give rise to: (i) liability under the False Claims Act, (ii) a claim for price adjustment under the Truth in Negotiations Act, (iii) a claim under the Contract Disputes Act, or (iv) any other request for a reduction in the price of any Government Contract.

3.15 Compliance with Legal Requirements; Licenses; Spectrum Leases.

(a) The business of the Company and the Acquired Corporations has been since January 1, 2009 and is being conducted in compliance in all material respects with all Legal Requirements, Orders and Licenses, in each case other than with respect to Tax matters, which are governed solely by Section 3.17 hereof. As of the date hereof, no material investigation by any Governmental Body with respect to any of the Acquired Corporations or any of their material assets is pending or, to the Knowledge of the Company, threatened, nor has any Governmental Body indicated to any of the Acquired Corporations in writing an intention to conduct the same, in each case other than with respect to Tax matters, which are governed solely by Section 3.17 hereof. Each of the Acquired Corporations has obtained and is in compliance in all material respects with all Communications Licenses necessary to conduct its business as conducted as of the date hereof.

(b) Part 3.15(b) of the Company Disclosure Schedule sets forth a true and complete list, as of the date hereof, of:

(i) all Spectrum Leases for the use by any of the Acquired Corporations of wireless spectrum licensed to other FCC licensees, all material Licenses necessary to conduct the business of the Acquired Corporations as presently conducted (the "**Material Licenses**"), and all Licenses, other than business radio licenses, point-to-point microwave licenses and experimental licenses, issued or granted to any of the Acquired Corporations by the FCC (such

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Licenses, together with Section 214 authorizations set forth in (ii) below, "**FCC Licenses**") (A) having an expiration date within three years of the date of this Agreement, (B) subject to FCC construction or substantial service requirements that, as of the date of this Agreement, remain unfulfilled or (C) subject to modification after re-banding;

(ii) all Section 214 authorizations;

(iii) all Material Licenses issued or granted to any of the Acquired Corporations by State Commissions for the conduct of any telecommunications business ("**State Licenses**");

(iv) all Material Licenses issued or granted to any of the Acquired Corporations by foreign Governmental Bodies regulating telecommunications businesses (collectively with the FCC Licenses and State Licenses, the "**Communications Licenses**");

(v) all pending applications for Licenses that would be Communications Licenses if issued or granted; and

(vi) all pending applications by any of the Acquired Corporations for material modification, extension or renewal of any Communications License.

Part 3.15(b) of the Company Disclosure Schedule sets forth, for each License listed therein, (i) the lawful, beneficial and exclusive holder, (ii) the call sign or other identifying information and (iii) the frequency block and market area.

(c) Each of the Acquired Corporations is in compliance in all material respects with its obligations under each of the Communications Licenses and the rules and regulations of the FCC, the State Commissions and foreign Governmental Bodies. There is not pending from or, to the Knowledge of the Company, threatened by the FCC, the Federal Aviation Administration (the "**FAA**") or any other Governmental Body any proceeding, notice of violation, order of forfeiture or complaint or investigation against any of the Acquired Corporations relating to any of the Communications Licenses, that, if determined as requested by the moving party or as indicated in any document initiating the proceeding, could result in the revocation, modification, restriction, cancellation, termination, suspension or non-renewal of any Communications License, other than those that would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Corporations taken as a whole. The FCC actions granting all FCC Licenses, together with all underlying construction permits, have not been reversed, stayed, enjoined, annulled or suspended, and there is not pending or, to the Knowledge of the Company, threatened any application, petition, objection or other pleading

with the FCC, the FAA or any other Governmental Body that challenges or questions the validity of or any rights of the holder under any such FCC License or State License, other than those that would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Corporations taken as a whole. To the Company's Knowledge, except as set forth on Part 3.15(c) of the Company Disclosure Schedule, the FCC Licenses will be renewed in the ordinary course and there is no event, condition or circumstance that could reasonably be expected to preclude the FCC Licenses from being renewed in the ordinary course.

(d) Each Spectrum Lease to which an Acquired Corporation is a party is (i) valid and binding, (ii) meets in all material respects all applicable Legal Requirements, and (iii) is enforceable in accordance with its terms.

(e) To the Knowledge of the Company, other than (i) the terms of the applicable Spectrum Lease, (ii) the FCC rules limiting the duration of such Spectrum Lease, (iii) the FCC's renewal of the underlying License, and (iv) the FCC's

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renewal of its consent to any De Facto Transfer Lease, there are no facts or circumstances that would reasonably be likely (whether with or without notice, lapse of time or the occurrence of any other event) to preclude the renewal or extension of any Spectrum Lease in the ordinary course of business.

(f) None of the Acquired Corporations has, nor to the Knowledge of the Company has any other party to any material Spectrum Lease, claimed in writing that a counterparty to such material Spectrum Lease is in material breach or default under such Spectrum Lease, and any past material breach or default has been waived, cured or otherwise settled.

(g) No party to any material Spectrum Lease has claimed in writing nor, to the Knowledge of the Company, has any party threatened in writing that it has the right to terminate the Spectrum Lease or to seek damages against any transferor for the violation, breach or default by a transferor of any Spectrum Lease.

(h) No Acquired Corporation is a party to any Contract to assign or otherwise dispose of, or that would materially and adversely affect, Parent's or any of the Acquired Corporations' ownership of, any material Spectrum Lease after the Effective Time.

(i) To the Knowledge of the Company, all FCC Licenses underlying the Spectrum Leases were validly issued and are in full force and effect, and are not subject to proceedings or threatened proceedings that could reasonably be expected to result in the revocation, modification, restriction, cancellation, termination, suspension or non-renewal of any such FCC License.

(j) The Acquired Corporations validly hold the Communications Licenses. The Communications Licenses are free and clear of all Liens or any restrictions which would reasonably be expected, individually or in the aggregate, to limit the full operation of the Communications Licenses in any material respect.

(k) All of the currently operating cell sites, microwave paths, fiber routes, and other network facilities of Acquired Corporations in respect of which a filing with a Governmental Body was required have been constructed and, to the Knowledge of the Company,

are currently operated in all material respects as represented to the Governmental Body in currently effective filings, and modifications to such cell sites, microwave paths, fiber routes and other network facilities have been preceded by the submission to the Governmental Body of all required filings. Without limiting the foregoing, all such cell sites, microwave paths, fiber routes and other network facilities were constructed and, to the Knowledge of the Company, are operated in all material respects in accordance with the applicable environmental processing requirements (including environmental assessments for tower siting and radiofrequency radiation exposure limitations as provided in FCC rules and regulations) and conform in material respects to all applicable Legal Requirements.

(l) The Acquired Corporations have filed all material reports required by the FCC rules and in connection with any State Licenses, and have paid all assessments required by federal or state regulations, except where exempted or waived or where such failure to file a report or pay an assessment would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Corporations taken as a whole.

(m) The Acquired Corporations do not hold any Communications License to offer, and do not offer, any services or features other than (i) wireless voice and data services and features, (ii) landline long distance services, (iii) landline

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local exchange services, (iv) Internet backbone or other high speed transmission services, and (v) any other communications services or features.

3.16 Certain Business Practices.

(a) Since January 1, 2009, to the Knowledge of the Company, neither any of the Acquired Corporations, nor any director, officer, employee or agent of any of the Acquired Corporations, has, directly or indirectly, (i) offered, paid, promised to pay, or authorized a payment, of any money or other thing of value (including any fee, gift, sample, travel expense or entertainment) or any commission payment, or any payment related to political activity, to any government official or employee, to any employee of any organization owned or controlled in part or in full by any Governmental Body, or to any political party or candidate, to influence the official or employee to act or refrain from acting in relation to the performance of official duties, with the purpose of obtaining or retaining business or any other improper business advantage, or (ii) taken any action which would cause them to be in violation of (x) the Foreign Corrupt Practices Act of 1977, as amended, or any rules or regulations thereunder; (y) the UK Bribery Act 2010; or (z) any other anti-corruption or anti-bribery Legal Requirements applicable to the Acquired Corporations (whether by virtue of jurisdiction or organization or conduct of business).

(b) Since January 1, 2009, to the Knowledge of the Company, neither any of the Acquired Corporations, nor any director, officer, employee or agent of any of the Acquired Corporations, has made any payments or transfers of value with the intent, or which have the purpose or effect, of engaging in commercial bribery, or acceptance of or acquiescence in kickbacks or other unlawful or improper means of obtaining business.

(c) Each Acquired Corporation has conducted its export transactions in material compliance with all Legal Requirements where it is located and where it conducts

business, and is in material compliance in all respects with all U.S. import and export Legal Requirements and all comparable Legal Requirements outside the United States. To the Knowledge of the Company, none of the Acquired Corporation engages in any transactions that may be subject to regulation under the International Traffic in Arms Regulations (as set forth at 22 CFR Parts 120-129).

3.17 Tax Matters.

(a) All material Tax Returns required to be filed under Legal Requirements by or with respect to each of the Acquired Corporations have been filed. Each of such Tax Returns is true, correct and complete in all material respects, and all Taxes shown on such Tax Returns have been timely paid. There are no material Liens for Taxes upon any assets of the Acquired Corporations.

(b) The most recent financial statements contained in the Company SEC Documents filed prior to the date hereof reflect, in accordance with GAAP, an adequate reserve for all Taxes payable by the Acquired Corporations for all taxable periods through the date of such financial statements.

(c) There is no claim, audit, action, suit, proceeding or investigation now pending against or with respect to any of the Acquired Corporations in respect of any Tax or Tax asset which is reasonably likely to be upheld and which, if upheld, would reasonably be expected to be material.

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(d) As of the date hereof, none of the Acquired Corporations has received written notice of any claim made by a Governmental Body in a jurisdiction where such Acquired Corporation does not file a Tax Return that such Acquired Corporation is or may be subject to taxation by that jurisdiction.

(e) Since January 1, 2009, none of the Acquired Corporations has constituted either a "distributing corporation" or a "controlled corporation" within the meaning of Section 355(a)(1)(A) of the Code in a distribution of stock intended to qualify for tax-free treatment under Section 355 of the Code.

(f) None of the Acquired Corporations has any liability for the Taxes of any Third Party under Treasury Regulation Section 1.1502-6 (or any similar provision of state, local or foreign law), as a transferee or successor, by Contract, or otherwise.

(g) None of the Acquired Corporations is a party to any Tax sharing agreement or Tax indemnity agreement, and none of the Acquired Corporations has assumed the Tax liability of any other Person under Contract, other than (i) any such agreement that includes solely some or all of the Acquired Corporations, (ii) any such agreement with customers, vendors, lessors or similar third parties entered into in the ordinary course of business or (iii) any agreement that as of the Closing Date is expected to terminate without any further material payments being required to be made.

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(h) None of the Acquired Corporations has engaged in any "listed transaction" as defined in Treasury Regulations Section 1.6011-4(b)(2) or Treasury Regulations Section 301.6111-2(b)(2).

(i) None of the Acquired Corporations is or has been, within the last five years, a United States real property holding corporation within the meaning of Section 897(c)(2) of the Code.

(j) Except in each case with respect to matters for which adequate reserves or accruals have been established in accordance with GAAP on the Unaudited Interim Balance Sheet as adjusted for the passage of time in the ordinary course of business and consistent with past practice, the Acquired Corporations are and have been in compliance in all material respects with all applicable transfer pricing laws and regulations, including the execution and maintenance of contemporaneous documentation substantiating transfer pricing practices of the Acquired Corporations.

(k) The Acquired Corporations are in compliance in all material respects with, all terms and conditions of any Tax exemption, Tax holiday, or other Tax reduction or incentive agreement, arrangement or order.

3.18 Employee and Labor Matters; Benefit Plans.

(a) (i) None of the Acquired Corporations is a party to or bound by any collective bargaining agreement or union contract, and no collective bargaining agreement is being negotiated by any of the Acquired Corporations and (ii) no Covered Employees are represented by any works council or other form of collective employee representation with respect to employment with any Acquired Corporations. To the Knowledge of the Company, there are no activities or proceedings of any labor union to organize any employees. There is no walkout, strike, union activity, picketing, work stoppage or work slowdown or any other similar occurrence pending against any of the Acquired Corporations or, to the Knowledge of the Company, threatened in writing. Each of the Acquired Corporations is, and has since January 1, 2009 been, in compliance, in all material respects, with all applicable laws respecting employment and employment practices, terms and conditions of employment, wages, hours of work and occupational safety and health. There are no material actions, suits, claims, labor disputes or grievances pending or, to the Knowledge of the

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Company, threatened in writing relating to any labor, safety or discrimination matters involving any Company Associate, including charges of unfair labor practices or discrimination complaints. There is no obligation to inform, consult or obtain consent whether in advance or otherwise of any labor union, works council, employee representatives or other representative bodies in order to consummate the Merger or any of the other Contemplated Transactions.

(b) Part 3.18(b) of the Company Disclosure Schedule contains a true, correct and complete list of each material Company Plan maintained in the United States (collectively, the "**U.S. Plans**").

(c) The Company has Made Available to Parent accurate and complete copies of: (i) all documents setting forth the terms of each U.S. Plan, including all amendments

thereto and all related trust documents; (ii) the most recent IRS determination or opinion letter issued with respect to each U.S. Plan intended to be qualified under Section 401(a) of the Code; and (iii) with respect to each material Foreign Plan, to the extent applicable, (A) the most recent annual report or similar compliance documents required to be filed with any Governmental Body with respect to such plan and (B) any document comparable to the determination letter referenced under clause (iii) above issued by a Governmental Body relating to the satisfaction of applicable law necessary to obtain the most favorable tax treatment.

(d) Except for such matters that would not reasonably be expected to result, individually or in the aggregate, in any material liability to the Acquired Corporations taken as a whole, (i) each of the Acquired Corporations and Company Affiliates has performed all obligations required to be performed by it under each U.S. Plan and each U.S. Plan has been established, maintained and funded in accordance with its terms and in compliance in all material respects with all applicable Legal Requirements, and (ii) with respect to each applicable U.S. Plan, (A) no non-exempt "prohibited transaction," within the meaning of Section 4975 of the Code or Section 406 of ERISA, has occurred; and (B) there are no actions, suits, claims audits, inquiries, or proceedings pending, or, to the Knowledge of the Company, threatened or anticipated (other than routine claims for benefits) against any, or with respect to, such Company Plan or fiduciary thereto or against the assets of any such Company Plan.

(e) No U.S. Plan is a (i) "multiemployer plan" within the meaning of Section (3)(37) of ERISA, (ii) plan subject to Section 413 of the Code, (iii) "multiple employer welfare arrangement" (within the meaning of Section 3(40) of ERISA) or (iv) "funded welfare plan" within the meaning of Section 419 of the Code.

(f) Part 3.18(f) of the Company Disclosure Schedule contains a true, correct and complete list of each U.S. Plan that is an "employee pension benefit plan," within the meaning of Section 3(2) of ERISA (a "**Pension Plan**") which is subject to Title IV of ERISA or Section 412 of the Code. Except for such matters that would not reasonably be expected to result, individually or in the aggregate, in any material liability to the Acquired Corporations taken as a whole, as of the Effective Time: (i) no legal or administrative action has been taken by the PBGC to terminate or to appoint a trustee to administer the Pension Plan; (ii) no liability to the PBGC under Title IV of ERISA has been incurred by the Company or a Company Affiliate that has not been satisfied in full; (iii) each Pension Plan has been maintained in compliance with the minimum funding standards of ERISA and the Code where applicable and has not incurred any "accumulated funding deficiency," as defined in Section 302 of ERISA and Section 412 of the Code, whether or not waived; and (iv) no Pension Plan has incurred any event described in Section 4041 (other than the standard termination contemplated therein), 4062 or 4063 of ERISA.

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(g) No Company Plan provides (except at no cost to the Acquired Corporations or any Company Affiliate), or reflects or represents any liability of any of the Acquired Corporations and Company Affiliates to provide, post-termination or retiree life insurance, post-termination or retiree health benefits or other post-termination or retiree employee welfare benefits to any Person for any reason, except as may be required by the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended, or other applicable Legal Requirements.

(h) Except as set forth in Part 3.18(h) of the Company Disclosure Schedule, and except as expressly required or provided by this Agreement, neither the execution and delivery of this Agreement, nor the consummation of the Merger or any of the other Contemplated Transactions will (either alone or upon the occurrence of a termination of employment) constitute an event under any Company Plan that may result (either alone or in connection with any other circumstance or event) in or give rise directly or indirectly to: (i) any payment (whether of severance pay or otherwise), acceleration, forgiveness of indebtedness, vesting, distribution, increase in benefits or obligation to fund benefits with respect to any Company Associate; (ii) any "parachute payment" within the meaning of Section 280G(b)(2) of the Code or (iii) the payment of any amount that would not be deductible pursuant to Section 162(m) of the Code (or any comparable provision under state or foreign Tax laws). None of the Acquired Corporations is a party to any agreement to compensate any Person for excise taxes payable pursuant to Section 409A or Section 4999 of the Code.

(i) Except for such matters that would not reasonably be expected to result, individually or in the aggregate, in material liability to the Acquired Companies taken as a whole, (i) each Company Plan, that is a "nonqualified deferred compensation plan" (within the meaning of Section 409A(d)(1) of the Code), subject to Section 409A, is in compliance with Section 409A and (ii) no event has occurred that would be treated by Section 409A(b) as a transfer of property for purposes of Section 83 of the Code.

(j) Except for such matters that would not reasonably be expected to result, individually or in the aggregate, in any material liability to the Acquired Corporations taken as a whole, with respect to each material Foreign Plan: (i) all employer and employee contributions required by law or by the terms of such Foreign Plan have been made, or, if applicable, accrued in accordance with normal accounting practices, and a pro rata contribution for the period prior to and including the date of this Agreement has been made or accrued; (ii) the fair market value of the assets of each such Funded Foreign Plan, the liability of each insurer for any Foreign Plan funded through insurance or the book reserve established for any Foreign Plan, together with any accrued contributions, is sufficient to procure or provide for the benefits determined on an ongoing basis accrued to the date of this Agreement with respect to all current and former participants under such Foreign Plan according to the actuarial assumptions and valuations most recently used to determine employer contributions to such Foreign Plan, and neither the Merger nor any of the other Contemplated Transactions will cause such assets or insurance obligations to be less than such benefit obligations; (iii) each such Foreign Plan required to be registered has been registered and has been maintained in good standing with applicable regulatory authorities and is approved by any applicable taxation authorities to the extent such approval is available; and (iv) to the extent applicable, each such Foreign Plan has been approved by the relevant taxation and other Governmental Bodies so as to enable: (A) the Company or any of its Company Affiliates and the participants and beneficiaries under the relevant Foreign Plan and (B) in the case of any such Foreign Plan under which resources are set aside in advance of the benefits being paid (a "**Funded Foreign Plan**"), the assets held for the purposes of the Funded Foreign Plans, to enjoy the most favorable taxation status possible and the Company is not aware of any ground on which such approval may cease to apply.

3.19 Environmental Matters.

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(a) Each of the Acquired Corporations: (i) is and since January 1, 2009 has been in compliance in all material respects with all applicable Environmental Laws; and (ii) possesses all material permits and other authorizations of Governmental Bodies required under applicable Environmental Laws, and is in compliance with the terms and conditions thereof in all material respects.

(b) Except for matters which have been resolved to the satisfaction of the issuing Governmental Authority, (i) none of the Acquired Corporations has received any written notice or, to the Knowledge of the Company, other communication, from a Governmental Body that alleges that any of the Acquired Corporations has violated any Environmental Law, (ii) all Leased Real Property and any other property that is owned or controlled by any of the Acquired Corporations, and all surface water, groundwater and soil associated with such property, is free of any Materials of Environmental Concern in all material respects and (iii) none of the Acquired Corporations has Released any Materials of Environmental Concern except in compliance with all applicable Environmental Laws in all material respects.

3.20 Transactions with Affiliates. As of May 15, 2012, other than compensation payable to officers and directors and employee expense reimbursement obligations and except to the extent not required to be disclosed pursuant to Item 404 of Regulation S-K promulgated under the Securities Act, there are no existing contracts or transactions between any Acquired Corporation, on the one hand, and any of the directors, officers or other Affiliates (which are not themselves an Acquired Corporation) of any Acquired Corporation, on the other hand.

3.21 Legal Proceedings; Orders.

(a) As of the date hereof, there are no Legal Proceedings pending or, to the Knowledge of the Company, threatened against any of the Acquired Corporations, reasonably expected to result in a claim involving an amount in dispute in excess of $100 million.

(b) As of the date hereof, there is no Order to which any of the Acquired Corporations is subject that materially and adversely affects or could reasonably be expected to materially and adversely affect the business, financial condition or results of operations of the Acquired Corporations taken as a whole.

3.22 Takeover Statute. Assuming that immediately prior to the execution and delivery of this Agreement and the Bond Purchase Agreement neither SoftBank nor any of its "affiliates" is an "interested shareholder" of the Company, the Company Board has taken all corporate actions necessary to cause the restrictions applicable to business combinations contained in KSA 17-12,100 through KSA 17-12,104 to be inapplicable to the execution, delivery and performance of this Agreement and to the consummation of the Merger and the other Contemplated Transactions.

3.23 Brokers and Expenses. No broker, finder or investment banker (other than the Company Financial Advisors) is entitled to any brokerage, finder's or other fee or

commission in connection with the Contemplated Transactions based upon arrangements made by, or on behalf of, any Acquired Corporation.

3.24 Opinion of Financial Advisors. Prior to the execution of this Agreement, the Company Board received an opinion from each of the Company Financial Advisors to the effect that, as of the date thereof and based upon and

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subject to the various qualifications and assumptions set forth therein, the aggregate Merger Consideration is fair to the holders of the Company Common Stock (other than Parent, Merger Sub or any other wholly owned Subsidiary of Parent) from a financial point of view. The Company will make available to Parent only for information purposes a copy of such opinions promptly following the execution of this Agreement.

3.25 No Other Representations or Warranties. Except for the representations and warranties contained in Section 3 or in the Bond Purchase Agreement, the Company acknowledges that neither the Parent Entities nor any other Person on their behalf, makes any express or implied representation or warranty with respect to the Parent Entities or any information provided to any other Person resulting from the distribution to the Company, or the Company's use of, any such information, including any information, documents, projections, forecasts or other material made available to the Company in certain "data rooms" or management presentations, and the Company has not relied on such information or any other representation or warranty not set forth in this Agreement or the Bond Purchase Agreement.

Section 4. Representations and Warranties of Parent Entities

Except as set forth in the Parent Disclosure Schedule, whether or not any particular representation or warranty refers to or excepts therefrom any specific section of the Parent Disclosure Schedule (it being understood that any exception or disclosure set forth in any part or subpart of the Parent Disclosure Schedule will be deemed an exception or disclosure, as applicable, only with respect to: (a) the corresponding Section or subsection of this Section 4; (b) the Section or subsection of this Section 4 corresponding to any other part or subpart of the Parent Disclosure Schedule that is explicitly cross-referenced therein; and (c) any other Section or subsection of this Section 4 with respect to which the relevance of such exception or disclosure is reasonably apparent), the Parent Entities represent and warrant to the Company as follows:

4.1 Due Organization. Each of HoldCo, Parent and Merger Sub is duly organized, validly existing and in good standing, under the laws of the jurisdiction in which it is incorporated. SoftBank is organized and validly existing under the laws of Japan.

4.2 Charter Documents. The Parent Entities have Made Available to the Company accurate and complete copies of the Charter Documents of all of the Parent Entities, each as currently in effect. Each of the Parent Entities is in compliance with its Charter Documents.

4.3 Ownership. HoldCo is a wholly owned subsidiary of SoftBank. Parent is a wholly owned subsidiary of HoldCo that was formed solely for the purpose of engaging in the Merger, the other Contemplated Transactions, the Bond Purchase Agreement and the First

Primary Investment. Merger Sub is a wholly owned subsidiary of Parent that was formed solely for the purpose of engaging in the Merger and the other Contemplated Transactions. Since their respective dates of incorporation and prior to the Effective Time, HoldCo, Parent and Merger Sub have not carried on, and will not carry on, any business or conduct any operations other than the execution of this Agreement, the performance of their respective obligations hereunder, the consummation of the Merger and the other Contemplated Transactions and matters ancillary thereto. None of the Parent Entities owns, beneficially or of record, any Company Common Stock or any stock of the Acquired Corporations.

4.4 Authority; Binding Nature of Agreement.

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(a) Each of the Parent Entities has all necessary corporate power and authority to execute and deliver this Agreement, to perform its obligations hereunder and to consummate the Merger and the other Contemplated Transactions, including the Debt Financing. The execution, delivery and performance of this Agreement by each of the Parent Entities and the consummation by each of the Parent Entities of the Merger and the other Contemplated Transactions, including the Debt Financing, have been duly and validly authorized by all necessary corporate action, and no other corporate proceedings on the part of any of the Parent Entities is necessary to authorize this Agreement or to consummate the Merger and the other Contemplated Transactions, including the Debt Financing. This Agreement has been duly and validly executed and delivered by the Parent Entities and, assuming the due authorization, execution and delivery by the Company, constitutes a legal, valid and binding obligation of each of the Parent Entities, enforceable against the Parent Entities in accordance with its terms, except that (i) such enforcement may be subject to applicable bankruptcy, insolvency, reorganization or moratorium laws or other similar Legal Requirements, now or hereafter in effect, affecting creditors' rights generally, and (ii) the remedy of specific performance and injunctive and other forms of equitable relief may be subject to equitable defenses and to the discretion of the court before which any proceeding therefor may be brought.

(b) The board of directors of each of the Parent Entities, at a meeting duly called and held on or prior to the date hereof, at which all of the directors of each of the Parent Entities were present, or by action by written consent, unanimously adopted resolutions approving this Agreement, the Merger and the other Contemplated Transactions, including the Debt Financing.

4.5 Non-Contravention; Consents.

(a) Neither the execution and delivery of this Agreement by any of the Parent Entities nor the consummation by any of the Parent Entities of the Merger and the other Contemplated Transactions, including the Debt Financing, will: (i) conflict with or result in any breach of the Charter Documents of any of the Parent Entities; (ii) assuming that all consents, approvals and authorizations contemplated by Section 4.5(b) have been obtained and all filings and notifications described in such clauses have been made, conflict with or result in a violation by any of the Parent Entities of any Legal Requirement or Order to which any of the Parent Entities is subject; (iii) assuming that all required consents, approvals, authorizations and actions with respect to the agreements set forth in Part 4.5(a) of the Parent Disclosure Schedule have been obtained or taken, violate, conflict with, result in a breach of, or constitute (with notice or

lapse of time or both) a default under any material Contract to which any Parent Entity or any of its Subsidiaries is a party or by which any Parent Entity or any of its Subsidiaries is bound or to which any of the Parent Entities' or any of their respective Subsidiaries' properties or assets is subject; or (iv) assuming that all required consents, approvals, authorizations and actions with respect to the agreements set forth in Part 4.5(a) of the Parent Disclosure Schedule have been obtained or taken, result in the creation or imposition of any Lien upon any of the Parent Entities or any of their respective Subsidiaries' properties or assets pursuant to any material Contract, except with respect to clauses (ii), (iii) and (iv) for such violations, conflicts breaches, defaults or Liens as would not, individually or in the aggregate, prevent or materially impede or delay the consummation of the Merger and other Contemplated Transactions, including the Debt Financing, by the Parent Entities.

(b) None of the Parent Entities is required to make any filing with or give any notice to, or to obtain any Consent from, any Governmental Body prior to the Effective Time in connection with the execution, delivery or performance of this Agreement or the consummation of the Merger or any of the other Contemplated Transactions, including the Debt Financing, except for: (i) such filings as are required under applicable requirements of the Securities Act and

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the Exchange Act and the rules and regulations promulgated thereunder, and under state securities and "blue sky" laws; (ii) the pre-merger notification requirements under the HSR Act and such filings are necessary to comply with any of the Antitrust Laws; (iii) such filings as are necessary to comply with the Defense Production Act of 1950, 50 U.S.C. App. §2170, as amended by FINSA, the rules and regulations of CFIUS and any other Legal Requirement relating to restrictions on foreign investment in any jurisdiction; (iv) such filings as are necessary to comply with NISPOM with DSS; (v) such filings as are necessary to comply with the International Traffic in Arms Regulations; (vi) such filings as are required under the FCC Act; (vii) such filings as are required by any State Commissions; (viii) such filings as are necessary to comply with the Delaware General Corporation Law; (ix) such filings as are required by any foreign regulatory bodies, none of which are material; (x) as required by the NASD Bylaws (as they relate to the Registration Statement and the Prospectus/Proxy Statement); and (xi) such filings, notices, Consents and expirations of waiting periods the failure of which to make or obtain or expire would not reasonably be expected to prevent or materially impede or delay the consummation of the Merger and other Contemplated Transactions by the Parent Entities.

4.6 Compliance. The business of Parent and the Parent Entities has been since January 1, 2009 and is being conducted in compliance with all Legal Requirements, Orders and Licenses, except for noncompliance that, individually or in the aggregate, would not reasonably be expected to prevent or materially impede or delay the consummation of the Merger and other Contemplated Transactions by the Parent Entities. As of the date hereof, no investigation by any Governmental Body with respect to Parent or any of its Subsidiaries or any of their material assets is pending or, to the Knowledge of SoftBank, threatened, nor has any Governmental Body indicated to any Parent Entity in writing an intention to conduct the same, except as would not reasonably be expected to prevent or materially impede or delay the consummation of the Merger and other Contemplated Transactions by the Parent Entities.

4.7 Capitalization. At the Effective Time, Parent will have the number of authorized shares of capital stock necessary to enable Parent to consummate the Merger and the

other Contemplated Transactions in accordance with the terms of this Agreement. All outstanding shares of Parent Common Stock, when issued in accordance with the requirements of this Agreement and other applicable documents, will be validly issued, fully paid and non-assessable and free of preemptive rights or purchase option, call, right of first refusal or any similar rights.

4.8 No Vote Required. Parent, in its capacity as the sole stockholder of Merger Sub, will adopt this Agreement promptly after the date hereof. No vote or other action by the stockholders of any other Parent Entity is required by any Legal Requirement, such Parent Entity's Charter Documents or otherwise in order for such Parent Entity to consummate the Merger, the Debt Financing and the other Contemplated Transactions.

4.9 Debt Financing.

(a) Concurrently with the execution of this Agreement, SoftBank has delivered to the Company copies of the Commitment Letters pursuant to which, and subject to the terms and conditions of which, the Financing Parties have committed to lend the amounts set forth therein to SoftBank for the purpose of funding the Merger and the other Contemplated Transactions (such committed financing, together with, unless the context otherwise requires, any debt securities issued in lieu thereof, the "**Debt Financing**").

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(b) The Commitment Letters have been duly executed and delivered by, and constitute valid and binding obligations of SoftBank. To the Knowledge of SoftBank, the Commitment Letters constitute valid and binding obligations of the Financing Parties, enforceable against the Financing Parties in accordance with their terms, except that (i) such enforcement may be subject to applicable bankruptcy, insolvency, reorganization or moratorium laws or other similar Legal Requirements, now or hereafter in effect, affecting creditors' rights generally, and (ii) the remedy of specific performance and injunctive and other forms of equitable relief may be subject to equitable defenses and to the discretion of the court before which any proceeding therefor may be brought. As of the date hereof, (i) each of the Commitment Letters in the form so delivered is (as to SoftBank and, to the Knowledge of SoftBank, the Financing Parties) valid and in full force and effect, (ii) none of the Commitment Letters has been withdrawn, terminated or otherwise amended or modified in any respect, (iii) SoftBank is not in breach of any of the material terms set forth therein, and (iv) no event has occurred that, with or without notice, lapse of time or both, would constitute a default or breach by SoftBank of any material term of the Commitment Letters that would prevent the funds from being available, or the Financing Parties from lending, pursuant to the terms of the Commitment Letters.

(c) The Commitment Letters constitute, as of the date hereof, the entire and complete agreement among the respective parties thereto with respect to the Debt Financing contemplated thereby. Except as set forth, described or provided for in the Commitment Letters, there are no conditions precedent to the respective obligations of the Financing Parties under the Commitment Letters to provide the Debt Financing. The aggregate proceeds from the Debt Financing constitute all of the financing required for the consummation of the Merger and the other Contemplated Transactions and, together with other cash sources, are sufficient to consummate the Merger and the other Contemplated Transactions.

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(d) As of the date hereof, (i) SoftBank has no reason to believe that any of the conditions to the Debt Financing will not be satisfied on a timely basis or that the funding contemplated in the Debt Financing will not be made available to SoftBank on a timely basis in order to consummate the Merger and the other Contemplated Transactions, (ii) no event has occurred, to the Knowledge of SoftBank, which would make any of the assumptions or any of the statements set forth in the Commitment Letters inaccurate in any material respect and (iii) no Financing Party has notified SoftBank of its intention to terminate any of the commitments set forth in the Commitment Letters or not to provide the Debt Financing.

(e) SoftBank has fully paid any and all commitment fees, if any, and other fees required by the Commitment Letters to have been paid to the Financing Parties on or prior to the date hereof.

4.10 Brokers and Expenses. No broker, finder or investment banker (other than the Parent Financial Advisors) is entitled to any brokerage, finder's or other fee or commission in connection with the Contemplated Transactions based upon arrangements made by, or on behalf of, any of the Parent Entities.

4.11 Tax Treatment. None of the Parent Entities is aware of any fact or circumstance, including any action that it has taken or agreed to take, that would be reasonably likely to prevent the exchanges that occur pursuant to the Merger, taken together, from qualifying as exchanges described in Section 351 of the Code.

4.12 No Other Representations or Warranties. Except for the representations and warranties contained in Section 3 or in the Bond Purchase Agreement, the Parent Entities acknowledge that neither the Acquired Corporations nor any other Person on their behalf, makes any express or implied representation or warranty with respect to the Acquired Corporations or any information provided to any other Person resulting from the distribution to the Parent Entities, or the Parent Entities' use of, any such information, including any information, documents,

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projections, forecasts or other material made available to the Parent Entities in certain "data rooms" or management presentations, and the Parent Entities have not relied on such information or any other representation or warranty not set forth in this Agreement or the Bond Purchase Agreement.

Section 5. Certain Covenants of the Parties

5.1 Access and Investigation.

(a) During the period from the date of this Agreement through the earlier of (1) the Effective Time and (2) the termination of this Agreement pursuant to Section 8.1 (the "**Pre-Closing Period**"), subject to applicable Legal Requirements, the Company will, and will cause the respective Representatives of the Company to upon reasonable prior notice: (x) provide the Parent Entities and their respective Representatives with reasonable access during normal business hours, to the offices, properties and books and records of the Acquired Corporations; and (y) provide SoftBank, Parent and their Representatives with such additional financial and operating data, and other documents and information, regarding the Acquired Corporations, in each case as SoftBank or Parent may reasonably request.

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(b) Notwithstanding the foregoing, (i) no Parent Entity will have access to individual performance or evaluation records, medical histories or other information the disclosure of which could reasonably be expected to subject it or any of its Subsidiaries to risk of liability or information that is subject to attorney-client privilege, and (ii) the Company may restrict the foregoing access to those Persons who have entered into or are bound by a confidentiality agreement with it and to the extent required by Legal Requirement or Contract to which any Acquired Corporation is a party. All such access will be subject to reasonable restrictions imposed from time to time with respect to any applicable confidentiality agreement then in effect with any Person; *provided*, *however*, that for such information that is so subject to a confidentiality agreement, the Company will, in good faith, use its commercially reasonable efforts to obtain access for Parent's Representatives. In conducting any inspection of any properties of the Acquired Corporations, the Parent Entities and their Representatives will not unreasonably interfere with the business conducted at such property. During the Pre-Closing Period, the Parent Entities and their Representatives will not have the right to conduct environmental testing or sampling at any of the facilities or properties of any of the Acquired Corporations. All information obtained pursuant to this Section 5.1 will be subject to the Confidentiality Agreement to the extent such information constitutes Confidential Information (as defined in the Confidentiality Agreement).

(c) Without limiting the generality of any of the foregoing, during the Pre-Closing Period, the Company will promptly provide SoftBank and Parent with copies of:

(i) any material written materials or communications sent by or on behalf of the Company to its stockholders, except for those filed with the SEC which are immediately available on EDGAR; and

(ii) any material written materials or communications sent or received by any Acquired Corporation to or from any rating agency (including any such materials or communications relating to any potential downgrade, watchlist, outlook change or otherwise relating to any credit rating of any Acquired Corporation or its outstanding obligations).

5.2 Operation of the Company's Business.

(a) During the Pre-Closing Period, except as (w) required by this Agreement or by Legal Requirements or Orders, (x) expressly permitted by the terms of this Section 5.2, or (y) set forth in Part 5.2 of the Company Disclosure

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Schedule or (z) consented to by Parent (which consent, as to subsection (ii) hereof, will not be unreasonably withheld, conditioned or delayed):

(i) the Company will, and will cause each other Acquired Corporation to, conduct its business: (A) in the ordinary course and in accordance with past practice; and (B) in compliance with all applicable Legal Requirements and the requirements of all Material Contracts, in each case in all material respects;

(ii) the Company will, and will cause each of its Subsidiaries to, use its commercially reasonable efforts to (x) preserve substantially intact its current business

organization and (y) keep available the services of its current officers and key employees and maintain its relations and goodwill with material suppliers, customers, creditors, licensors, licensees, distributors, resellers, employees and other Persons having business relationships with the respective Acquired Corporations; and

(iii) the Company will promptly notify Parent of (A) any written notice or other written communication of which the Company has Knowledge from any Person alleging that the Consent of such Person is or may be required in connection with the Merger or any of the other Contemplated Transactions, and (B) any Legal Proceeding commenced, or, to the Knowledge of the Company, threatened in writing against, relating to, involving or otherwise affecting any of the Acquired Corporations that relates to the consummation of the Merger or any of the other Contemplated Transactions.

Notwithstanding anything to the contrary contained in this Section 5.2(a), no action or failure to take action by any Acquired Corporation with respect to matters specifically addressed by any provision of Section 5.2(b) will constitute a breach under this Section 5.2(a) unless such action or failure to take action would constitute a breach of such provision of Section 5.2(b).

(b) During the Pre-Closing Period, except as (v) required by this Agreement or by Legal Requirements or Orders, (w) expressly permitted by the terms of this Section 5.2, (x) set forth in Part 5.2(b) of the Company Disclosure Schedule, (y) may be necessary or advisable to satisfy the condition to Closing set forth in Section 6.11 or (z) consented to by Parent (which consent, as to subsections (ii), (iii), (vii) and (ix) hereof, will not be unreasonably withheld, conditioned or delayed), the Company will not, and will cause the other Acquired Corporations not to:

(i) declare or pay any dividend or make any other distribution in respect of any shares of capital stock (other than between or among wholly owned Acquired Corporations in the ordinary course of business), split, combine or reclassify any capital stock of the Company or repurchase, redeem or otherwise reacquire, directly or indirectly, any shares of capital stock of the Company other than repurchases from employees of the Company following termination of employment pursuant to the terms of an applicable pre-existing restricted stock agreement or Company Plan;

(ii) sell, issue, grant, deliver or authorize the sale, issuance, delivery or grant of: (A) any capital stock; (B) any option, call, warrant or right to acquire any capital stock; or (C) any instrument convertible into or exchangeable for any capital stock (except for such actions in clause (A), (B) or (C) between or among wholly owned Acquired Corporations in the ordinary course of business and consistent with past practice) and except that: (1) the Company may issue shares of Company Common Stock (x) upon the valid exercise of Company Options outstanding as of the date of this Agreement, or granted after the date hereof in compliance with this Agreement or upon the vesting or settlement of Company RSUs outstanding as of the date of this Agreement or granted after the date hereof in compliance with this Agreement and (y) pursuant to the Company ESPP; and (2) the Company may, in the ordinary

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course of business consistent with past practice, grant to any employee of the Company in connection with either the hiring of such employee during the Pre-Closing Period or the Company's annual employee review and grant process (x) options (having an exercise price

equal to the fair market value of the Company Common Stock covered by such options determined as of the time of the grant of such options, containing the Company's standard vesting schedule and other terms and conditions), (y) Company RSUs (containing the Company's standard vesting schedule and other terms and conditions) or (z) Company Performance Units (containing the Company's standard vesting schedule) under the Company Equity Plans; *provided*, *however*, that with respect to the grant of Company RSUs and Performance Units subject to a performance-based vesting schedule, the Company will take such actions as are necessary to ensure that the vesting schedule of these awards does not convert to time-based vesting in accordance with the applicable Company Equity Plan but is otherwise consistent with the terms and conditions of the Company's standard vesting schedule; *provided further*, that the Company shall not be permitted to implement a long-term incentive plan or program for 2013 or otherwise grant any options, restricted stock, restricted stock units, performance units or any other award that would constitute a Company Equity Award, if granted, in lieu thereof.

(iii) amend or waive any of its rights under, or accelerate the vesting under, any provision of any of the Company Equity Plans or any provision of any Contract evidencing any outstanding Company Equity Award or any restricted stock purchase agreement, or otherwise modify any of the terms of any outstanding option, restricted stock units, warrant or other security or any related Contract, other than any acceleration of vesting that occurs in accordance with the terms of a Company Contract in effect as of the date of this Agreement;

(iv) (A) amend or permit the adoption of any amendment to any of the Company's Charter Documents, or (B) effect or become a party to any merger, consolidation, share exchange, business combination, amalgamation, recapitalization, reclassification of shares, stock split, reverse stock split, division or subdivision of shares, consolidation of shares or similar transaction, in the case of the actions in clause (B), except by between or among wholly owned Subsidiaries of the Company;

(v) acquire any equity interest in a Third Party or make any asset acquisition from a Third Party (other than acquisitions of a type that would not require disclosure in Section 3.13(a)(iii) or Section 3.13(a)(v)), other than any acquisition of equity (i) for consideration not exceeding $100 million or (ii) made in the ordinary course of business in the Company's or any of its Subsidiaries' investment portfolios;

(vi) make any capital expenditure that, when added to all other capital expenditures made by the Acquired Corporations since the date of this Agreement, exceeds $8,500,000,000;

(vii) other than in the ordinary course of business, (A) enter into any Material Contract, (B) amend or waive in any material respect or terminate any Material Contract or (C) grant any material exclusive license or right with respect to any Intellectual Property of any of the Acquired Corporations;

(viii) lend money to any Third Party (other than reimbursement of expenses made in the ordinary course of business), or incur or guarantee any indebtedness for

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borrowed money or obtain or enter into any bond or letter of credit or any related Contract, in each case except for (i) indebtedness incurred in the ordinary course of business under the Company's current borrowing agreements or indentures, (ii) indebtedness solely among or between Acquired Corporations in the ordinary course of business, (iii) any guarantee or support arrangement by an Acquired Corporation of obligations of one or more other Acquired Corporation in the ordinary course of business, (iv) any refinancing of any such indebtedness described in clauses (i), (ii) or (iii) on market terms or (v) indebtedness not in excess of $3,000,000,000; *provided*, *however*, that any such indebtedness shall expressly permit the consummation of the Merger, and shall not include any default or prepayment right as a result thereof;

(ix) establish, adopt, enter into or amend any Company Plan, pay any bonus or make any profit-sharing or similar payment to, or increase the amount of the wages, salary, commissions, fringe benefits or other compensation (including equity-based compensation, whether payable in stock, cash or other property) or remuneration payable to, any of its directors or any of its executive officers (except that the Company: (A) may provide routine, reasonable salary increases to employees in the ordinary course of business and in accordance with past practice in connection with the Company's customary employee review process; (B) may amend the Company Plans to the extent required by applicable Legal Requirements; and (C) may make customary bonus payments and profit sharing payments consistent with past practice in accordance with existing bonus and profit sharing plans referred to in Part 3.18(b) of the Company Disclosure Schedule);

(x) other than in the ordinary course of business consistent with past practice, materially change any personnel policies or other business policies, or any of its methods of accounting (other than as required by Legal Requirements or GAAP) in any respect;

(xi) other than in the ordinary course of business consistent with past practice, make or change any material Tax election, change an annual Tax accounting period, adopt or change any Tax accounting period, adopt or change any Tax accounting method, file any amended Tax Return, enter into any closing agreement with respect to Taxes, settle any Tax claim or assessment relating to any of the Acquired Corporations, surrender any right to claim a refund of Taxes, destroy or dispose of any books and records with respect to Tax matters relating to periods beginning before the Effective Time and for which the statute of limitations is still open or under which a record retention agreement is in place with a Governmental Body, if such election, adoption, change, amendment, agreement, settlement, surrender, consent, destruction or disposal would have the effect of materially increasing the Tax liability of any of the Acquired Corporations for any period ending after the Effective Time or materially decreasing any Tax attribute of any of the Acquired Corporations existing at the Effective Time;

(xii) settle any Legal Proceeding other than Legal Proceedings (w) reserved against in the Company's financial statements, (x) with respect to which the settlement involves solely the payment by the Acquired Corporations of an amount less than $50 million individually and less than $200 million in the aggregate for all Legal Proceedings, (y) that are covered by existing insurance policies subject to the deductible of such insurance policies or (z) settled in the ordinary course of business; or

(xiii) agree or commit to take any of the actions described in clauses (i) through (xii) of this Section 5.2(b).

(c) The parties understand and agree that (i) nothing contained in this Agreement will give any Parent Entity, directly or indirectly, the right to control or direct any Acquired Corporation's operations prior to the Closing, and (ii) prior to the Closing, the Acquired Corporations will exercise complete control and supervision over their respective operations.

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5.3 No Solicitation

(a) Without limiting the provisions of Section 5.3(b), during the Pre-Closing Period, the Company may not directly or indirectly, and will cause the other Acquired Corporations not to and will instruct its and the other Acquired Corporations' Representatives not to directly or indirectly: (i) solicit, initiate, knowingly encourage or knowingly facilitate the making, submission or announcement of any offer, proposal, indication of interest, inquiry or request for information which constitutes or may reasonably be expected to lead to, any offer, proposal or indication of interest with respect to any Acquisition Transaction (any such offer, proposal, indication of interest, inquiry or request for information, collectively, an "**Acquisition Inquiry**"); (ii) furnish any nonpublic information regarding any of the Acquired Corporations to any Person in furtherance of any such Acquisition Inquiry; (iii) engage in discussions or negotiations with any Person with respect to any such Acquisition Inquiry, except to disclose the existence and terms of this Section 5.3; (iv) approve, endorse or recommend any such offer or proposal; or (v) enter into any letter of intent or similar document or any Contract with respect to any Acquisition Inquiry or Acquisition Transaction. Without limiting the generality of the foregoing, the Company acknowledges and agrees that any action taken by any Representative of any of the Acquired Corporations that, if taken by the Company, would constitute a breach of this Section 5.3, will be deemed to constitute a breach of this Section 5.3 by the Company.

(b) Notwithstanding anything to the contrary contained in Section 5.3(a), if (i) prior to the adoption of this Agreement by the Required Company Vote, the Company receives a bona fide, written offer or proposal for an Acquisition Transaction, which was not solicited by any of the Acquired Corporations or their respective Representatives in breach of (or otherwise a result of the breach of) any provision of this Section 5.3 and (ii) the Company Board has in good faith determined (after consultation with its outside legal counsel and its financial advisors) that (x) such offer or proposal is, or is reasonably likely to lead to, a Superior Offer and has not been withdrawn and (y) that the failure to take such action would be reasonably likely to constitute a breach of its fiduciary duties to the Company's stockholders under applicable Legal Requirements, then the Company may furnish, or cause to be furnished, nonpublic information to, and engage in discussions and negotiations with, the Person making such offer or proposal and its Representatives; *provided*, *however*, that (A) prior to furnishing, or causing to be furnished, any such nonpublic information to such Person, the Company (I) gives Parent written notice that it is furnishing such nonpublic information to such Person and (II) receives from such Person an executed confidentiality agreement containing customary limitations on the use and disclosure of all nonpublic written and oral information furnished to such Person and such Person's Representatives by or on behalf of the Company, the terms of which are at least as restrictive as the terms contained in the Confidentiality Agreement as in

effect immediately prior to the execution of this Agreement, and (B) contemporaneously with furnishing any such nonpublic information to such Person, the Company furnishes such nonpublic information to Parent (to the extent that such nonpublic information has not been previously so furnished).

(c) The Company will promptly (and in no event later than 24 hours after receipt) advise Parent orally and in writing of the receipt of any Acquisition Inquiry (including the identity of the Person making or submitting such Acquisition Inquiry and a summary of material terms thereof) received by the Company, and provide Parent with a copy of such Acquisition Inquiry if it is in writing. The Company will keep Parent reasonably informed with respect to: (i) the status of any such Acquisition Inquiry; and (ii) the status and terms of any material modification or proposed material modification thereto. The Company agrees that it will not enter any confidentiality agreement with any Person subsequent to the date of this Agreement that prohibits the Company from providing such information to Parent.

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(d) The Company immediately will, and will cause the other Acquired Corporations and will instruct each of their respective Representatives immediately to, cease and cause to be terminated any and all discussions or negotiations between the Company, any other Acquired Corporation or any of their respective Representatives, on the one hand, and any Person (other than the Parent Entities and their respective Representatives), on the other hand, with respect to any Acquisition Inquiry pending as of the date of this Agreement.

(e) The Company agrees not to release any Person from, or to amend or waive any provision of, any confidentiality, "standstill" or similar agreement to which the Company is or becomes a party in connection with an Acquisition Transaction, unless the Company Board has in good faith determined (after consultation with its outside counsel and financial advisors) that (x) the offer or proposal to which such agreement relates is, or is reasonably likely to lead to, a Superior Offer and (y) that the failure to take such action would reasonably be likely to constitute a breach of its fiduciary duties to the Company's stockholders under applicable Legal Requirements. The Company also will promptly request each Person that has executed a confidentiality agreement as of the date hereof in connection with its consideration of a possible Acquisition Transaction to return or destroy in accordance with the terms of such confidentiality agreement all confidential information heretofore furnished to such Person by or on behalf of the Company.

(f) Nothing contained in this Agreement will prohibit the Company or its board of directors from disclosing to its stockholders a position contemplated by Rule 14d-9, Rule 14e-2(a) or Item 1012(a) of Regulation M-A under the Exchange Act, or from issuing a "stop, look and listen" statement to the Company's stockholders pursuant to Rule 14d-9(f) under the Exchange Act or prohibit the Company from making any disclosure if the Company Board in good faith determines (after consultation with its outside legal counsel) that failure to do so would reasonably be expected to violate the Company's disclosure requirements under Legal Requirements; *provided*, *however*, that the Company Board will not be permitted to withdraw the Company Board Recommendation or modify the Company Board Recommendation in a manner adverse to Parent except to the extent that it is permitted to effect a Change in Company Board Recommendation as specifically provided in Section 5.5(c).

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5.4 Registration Statement; Prospectus/Proxy Statement.

(a) As promptly as practicable after the date of this Agreement, and in no event later than 45 days after the date hereof, Parent and the Company will prepare and cause to be filed with the SEC the Prospectus/Proxy Statement and Parent will prepare and cause to be filed with the SEC the Registration Statement, in which the Prospectus/Proxy Statement will be included as a prospectus; *provided*, *however*, that to the extent the Prospectus/Proxy Statement is required to include pro forma financial statements that take into account the Company's equity interest in Clearwire, and the information required in order to prepare such pro forma financial statements is not reasonably available within such 45-day period, such 45-day deadline will be extended to the extent reasonably necessary to receive and include such pro forma financial statements. Prior to the filing of the Prospectus/Proxy Statement and the Registration Statement, each of Parent and the Company will give the other a reasonable opportunity to review and comment on such documents in advance of filing and will consider in good faith the comments reasonably proposed by the other. Each of Parent and the Company will use its commercially reasonable efforts to cause the Registration Statement and the Prospectus/Proxy Statement to comply with the applicable rules and regulations promulgated by the SEC, to respond promptly to any comments of the SEC or its staff and to have the Registration Statement declared effective under the Securities Act as promptly as practicable after it is filed with the SEC. The Company will cause the Prospectus/Proxy Statement to be mailed to the Company's stockholders as promptly as practicable (and in any event within five Business Days) after the Registration Statement is declared effective under the Securities Act. The Company will promptly furnish to Parent all information concerning the Acquired Corporations

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and the Company's stockholders that may be required or reasonably requested in connection with any action contemplated by this Section 5.4.

(b) None of the information to be supplied by or on behalf of the Company for inclusion in the Registration Statement will, at the time the Registration Statement becomes effective under the Securities Act, contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances under which they are made, not misleading. None of the information to be supplied by or on behalf of the Company for inclusion in the Prospectus/Proxy Statement will, at the time the Prospectus/Proxy Statement is mailed to the stockholders of the Company or at the time of the Company Stockholders' Meeting (or any adjournment or postponement thereof), contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances under which they are made, not misleading. Notwithstanding the foregoing, no representation or warranty is made by the Company with respect to statements or information made or incorporated by reference in the Registration Statement or the Prospectus/Proxy Statement by or about the Parent Entities included by Parent or incorporated by reference by Parent in the Registration Statement or the Prospectus/Proxy Statement. If any event relating to any of the Acquired Corporations occurs, or if the Company becomes aware of any information, that should be disclosed in an amendment or supplement to the Registration Statement or the Prospectus/Proxy Statement, then the Company will promptly inform Parent thereof and will cooperate with Parent in filing such amendment or supplement with the SEC and, if appropriate, in mailing such amendment or supplement to the stockholders of the Company. Parent will promptly furnish to the Company all information concerning the

Parent Entities that may be required or reasonably requested in connection with the preparation of the Prospectus/Proxy Statement.

(c) None of the information to be supplied by or on behalf of Parent for inclusion in the Registration Statement (including information related to the Debt Financing) will, at the time the Registration Statement becomes effective under the Securities Act, contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances under which they are made, not misleading. None of the information to be supplied by or on behalf of Parent for inclusion in the Prospectus/Proxy Statement (including information related to the Debt Financing) will, at the time the Prospectus/Proxy Statement is mailed to the stockholders of the Company or at the time of the Company Stockholders' Meeting (or any adjournment or postponement thereof), contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances under which they are made, not misleading. The Registration Statement will comply as to form in all material respects with the provisions of the Securities Act and the rules and regulations promulgated by the SEC thereunder. Notwithstanding the foregoing, no representation or warranty is made by Parent with respect to statements or information made or incorporated by reference in the Registration Statement or the Prospectus/Proxy Statement by or about the Acquired Corporations supplied by the Company for inclusion or incorporation by reference in the Registration Statement or the Prospectus/Proxy Statement. If any event relating to any of the Parent Entities occurs, or if Parent becomes aware of any information, that should be disclosed in an amendment or supplement to the Prospectus/Proxy Statement, then Parent will promptly inform the Company thereof and will cooperate with the Company in filing such amendment or supplement with the SEC and, if appropriate, in mailing such amendment or supplement to the stockholders of the Company. Each of Parent and the Company will notify the other promptly upon the receipt of any written or oral comments from the SEC or its staff in connection with the filing of, or amendments or supplements to, the Registration Statement or the

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Prospectus/Proxy Statement and will provide the other with copies of all correspondence between it and its Representatives, on one hand, and the SEC, on the other hand.

(d) Each of Parent and the Company will cooperate and provide the other (and its counsel) with a reasonable opportunity to review and comment on any response to comments from the SEC or its staff or any amendment or supplement to the Registration Statement and Prospectus/Proxy Statement prior to delivering such response filing such amendment or supplement with the SEC, will consider in good faith the comments reasonably proposed by the other and will provide each other with a copy of all such responses to or filings made with the SEC. Without limiting Section 5.5, neither Parent nor the Company will make or file any amendment or supplement to the Prospectus/Proxy Statement or the Registration Statement without the approval of the other party (which will not be unreasonably withheld, conditioned or delayed), except to the extent such amendment or supplement is required by applicable Legal Requirements. Parent will advise the Company promptly after it receives notice of the Registration Statement being declared effective, the issuance of any stop order relating thereto or the suspension of the qualification of Parent Common Stock issuable in connection with the Merger for offering or sale in any jurisdiction, and Parent and the Company will use

reasonable best efforts to have any such stop order or suspension lifted, reversed, or otherwise terminated.

5.5 Company Stockholders' Meeting.

(a) The Company will take all action necessary under all applicable Legal Requirements and in accordance with its Charter Documents to call, give notice of and hold a meeting of the holders of Company Common Stock to vote on the adoption of this Agreement (the "**Company Stockholders' Meeting**"). The Company Stockholders' Meeting will be held not later than 40 days (subject to extension by mutual agreement of the Company and Parent) following the date on which the Prospectus/Proxy Statement is mailed to the Company's stockholders. The Company will cause all proxies solicited in connection with the Company Stockholders' Meeting to be solicited in compliance with all applicable Legal Requirements.

(b) Subject to Section 5.5(c): (i) the Prospectus/Proxy Statement will include a statement to the effect that the Company Board (A) has determined that the Merger and this Agreement are advisable and (B) recommends that the Company's stockholders vote to adopt this Agreement at the Company Stockholders' Meeting (collectively, the "**Company Board Recommendation**"); and (ii) the Company Board Recommendation will not be withdrawn or modified in a manner adverse to Parent, and no resolution by the Company Board or any committee thereof to withdraw or modify the Company Board Recommendation in a manner adverse to Parent will be adopted or proposed. The Company will cause the Prospectus/Proxy Statement to include the opinions of the Company Financial Advisors referred to in Section 3.25.

(c) Notwithstanding anything to the contrary contained in Section 5.5(b), at any time prior to the adoption of this Agreement by the Required Company Vote, (x) the Company Board Recommendation may be withdrawn or amended in a manner adverse to Parent (and the Company Board may publicly propose or publicly state that it intends to withdraw or modify in a manner adverse to Parent the Company Board Recommendation), (y) the Company may fail to include the Company Board Recommendation in the Prospectus/Proxy Statement, and (z) the Company may approve, adopt or recommend, or publicly propose to approve, adopt or recommend, any Acquisition Proposal (any action in clauses (x), (y) or (z) above, a "**Change in Company Board Recommendation**"), only if:

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(i) (A) a bona fide, written offer or proposal for an Acquisition Transaction, which was not solicited by any of the Acquired Corporations or their respective Representatives in breach of (or otherwise a result of the breach of) any provision of Section 5.3 (an "**Acquisition Proposal**"), is made to the Company and is not withdrawn; (B) the Company provides Parent, prior to any meeting at which the Company Board will consider and determine whether such Acquisition Proposal is a Superior Offer, with a written notice specifying the date and time of such meeting, the terms and conditions of the Acquisition Proposal that is the basis of the potential action by the Company Board (including a copy of the proposed acquisition agreement relating to the Acquisition Proposal to the extent that such an agreement exists) and the identity of the Person making the Acquisition Proposal; (C) the Company Board in good faith determines (after consultation with its outside legal counsel and financial advisors) (x) that such

Acquisition Proposal constitutes a Superior Offer and (y) that the failure to effect a Change in Company Board Recommendation (or if applicable, terminate this Agreement in accordance with Sections 5.5(e) and 8.1(j)) would be reasonably likely to constitute a breach of its fiduciary duties to the Company's stockholders under applicable Legal Requirements, and provides written notice of such determination to Parent; (D) the Company Board does not effect a Change in Company Board Recommendation (or terminate this Agreement in accordance with Sections 5.5(e) and 8.1(j)) at any time within the period of five Business Days after the Company delivers to Parent the written notice described in clause (C) above; (E) during the five Business Day period (or such shorter period as specified below) described in clause (D), if requested by Parent, the Company engages in good faith negotiations with Parent regarding any amendments to this Agreement proposed in writing by Parent; and (F) at the end of the five Business Day period described in clause (D), the Company Board in good faith determines (after consultation with its outside legal counsel and financial advisors) (x) that such Acquisition Proposal continues to constitute a Superior Offer and (y) that the failure to effect a Change in Company Board Recommendation (or if applicable, terminate this Agreement in accordance with Sections 5.5(e) and 8.1(j)) would still be reasonably likely to constitute a breach of its fiduciary duties to the Company's stockholders under applicable Legal Requirements (taking into account any amendments to the terms of this Agreement proposed by Parent in writing as a result of the negotiations required by clause (E) or otherwise); or

(ii) (A) there occurs or arises after the date of this Agreement a development, change in circumstance, event or occurrence that does not relate to any offer or proposal for an Acquisition Transaction (any such unrelated development or change in circumstances, event or occurrence, an "**Intervening Event**"); (B) the Company Board had no knowledge, as of the date of this Agreement, of such Intervening Event (or, if it had such knowledge, the consequences of such Intervening Event were not known or reasonably foreseeable); (C) the Company provides Parent, prior to any meeting at which the Company Board will consider and determine whether such Intervening Event would permit it to effect a Change in Company Board Recommendation, with a written notice specifying the date and time of such meeting and a description of such Intervening Event; (D) the Company Board in good faith determines (after consultation with its outside legal counsel and financial advisors) that, in light of such Intervening Event, the failure to effect a Change in Company Board Recommendation would be reasonably likely to constitute a breach of its fiduciary duties to the Company's stockholders under applicable Legal Requirements, and provides written notice of such determination to Parent; (E) the Company Board does not effect a Change in Company Board Recommendation at any time within the period of five Business Days the Company delivers to Parent the written notice described in clause (D) above; (F) during the five Business Day period described in clause (E), if requested by Parent, the Company engages in good faith negotiations with Parent regarding any amendments to this Agreement proposed in writing by Parent; and (G) at the end of the five Business Day period described in clause (E), the Company Board in good faith determines (after consultation with its outside legal counsel and financial advisors) that the failure to withdraw or modify the Company Board Recommendation would still be reasonably

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likely to constitute a breach of its fiduciary duties to the Company's stockholders under applicable Legal Requirements in light of such Intervening Event (taking into account any amendments to the terms of this Agreement proposed by Parent in writing as a result of the negotiations required by clause (F) or otherwise).

(d) Any material amendment or modification to any Acquisition Proposal that was previously the subject of the procedures set forth in Section 5.5(c)(i) will be deemed to be a new Acquisition Proposal for purposes of Section 5.5(c)(i); *provided*, *however*, that in the event the Company seeks to make a Change in Company Board Recommendation or terminate this Agreement, the notice period and the period during which the Company is required to negotiate, if requested by Parent, with Parent shall expire four Business Days, in the case of the first material amendment or modification, or three Business Days, in the case of any subsequent material amendment or modification, after the Company provides written notice of such material amendment or modification to Parent. The Company will ensure that any Change in Company Board Recommendation, in and of itself, (1) will not affect the validity of the original approval of this Agreement as of the date of this Agreement for the purposes of Section 17-6701(b) of the KGCC, and (2) will not have the effect of causing any state (including Kansas) corporate takeover statute or other similar statute to be applicable to the Merger, any of the other Contemplated Transactions, the Bond Purchase Agreement and the First Primary Investment.

(e) In addition to the Company's right to effect a Change in Company Board Recommendation under the circumstances described in Section 5.5(c)(i), the Company will be entitled to terminate this Agreement in connection with its receipt of a Superior Offer if, in connection with such Superior Offer, it complies with all of the requirements of Sections 5.5(c)(i), 8.1(j) and 8.3(e).

(f) Notwithstanding the terms of Section 5.5(a), if on a date for which the Company Stockholders' Meeting is scheduled (the "**Company Meeting Original Date**"), the Company has not received proxies representing a sufficient number of shares of Company Common Stock to adopt this Agreement, whether or not a quorum is present, the Company will cause the Company Stockholders' Meeting to be postponed or adjourned to a date that is the sooner of 20 Business Days after the Company Meeting Original Date and two Business Days prior to the End Date (as defined in Section 8.1(b)), or to such other date as Parent and the Company may mutually determine.

5.6 Employee Benefits.

(a) Following the Effective Time, except as otherwise contemplated or permitted by this Agreement, Parent will, or will cause the Affiliates of Parent and any successors thereto to, assume, honor, fulfill and discharge the Company's and its Subsidiaries' obligations under the Company Plans including those listed on Part 5.6(a) of the Company Disclosure Schedule as set forth thereon.

(b) Parent hereby acknowledges that a "change in control," "change of control" or term of similar import within the meaning of each Company Plan will occur upon the Effective Time.

(c) For a period beginning at the Effective Time and continuing through the later of December 31, 2014 or the eighteen month anniversary of the Effective Time, Parent will provide, or will cause an Affiliate of Parent to provide, to each group of similarly situated individuals employed by the Acquired Corporations as of the Effective Time (each such group of employees, a "**Covered Group**"), base salary, target bonus opportunities and long-term

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incentive opportunities that are, in each case, no less than the base salary, target bonus opportunities and long-term incentive opportunities provided to such Covered Group, in the aggregate, immediately prior to the Effective Time. For a period beginning at the Effective Time and continuing through the second anniversary of the Effective Time, Parent will provide, or will cause an Affiliate of Parent to provide, (i) employee benefits to each Covered Group that are no less favorable, in the aggregate, than the employee benefits provided to such Covered Group immediately prior to the Effective Time, and (ii) severance benefits to each individual employed by the Acquired Corporations as of the Effective Time (each such employee, a "**Covered Employee**") that are no less favorable than the severance benefits provided to such Covered Employee under the Company Plans listed on Part 5.6(c) of the Company Disclosure Schedule immediately prior to the Effective Time (the "**Severance Arrangements**"), and neither Parent nor any Affiliate of Parent will amend such Severance Arrangements in a manner adverse to any Covered Employee during such period; provided that nothing herein will preclude Parent or any of the Acquired Corporations from amending such Severance Arrangements to the extent required to comply with applicable law.

(d) As of the Effective Time, Parent will cause its third party insurance providers or third party administrators to waive all limitations as to any pre-existing condition or waiting periods in its applicable welfare plans with respect to participation and coverage requirements applicable to the Covered Employees under any welfare plans that such employees may be eligible to participate in after the Effective Time, other than limitations or waiting periods that are already in effect with respect to such employees and that have not been satisfied as of the Effective Time under any comparable employee benefit plan. In addition, Parent will, and will cause Parent's Affiliates to, give Covered Employees full credit for purposes of eligibility, vesting and level of benefits (including for purposes of paid-time off, severance and short-term disability benefits, but not for benefit accrual purposes under any defined benefit pension plan) under any employee benefit and compensation plans or arrangements maintained by Parent or any of its Affiliates for such Covered Employees' service with the Company or any of its Affiliates to the same extent that such service was credited for purposes of any comparable employee benefit plan immediately prior to the Effective Time and in no event will service prior to the Effective Time be required to be taken into account if such service credit would result in the duplication of benefits with respect to the same period.

(e) The Company will be permitted to (1) finally and conclusively determine, in good faith, the amounts earned, based on actual achievement, under the short-term incentive plan (the "**STIP**") in respect of the 2012 fiscal year, and pay such amounts in the ordinary course of business consistent with past practice, but no later than the Closing Date, (2) establish a STIP with respect to the 2013 fiscal year or parts thereof (the "**2013 STIP**") and the corresponding performance measures, targets, maximums, award levels, eligibility and payment dates under the 2013 STIP, including as described in Part 5.6(e) of the Company Disclosure Schedule.

(f) To the extent any employee notification or consultation requirements are imposed by applicable Legal Requirements with respect to the Merger or any of the other Contemplated Transactions, the Company will cooperate with Parent to ensure that such notification or consultation requirements are complied with prior to the Effective Time. Prior to the Effective Time, neither the Company nor any Company Affiliate will communicate

with Covered Employees regarding post-Closing employment matters, including post-Closing employee benefits and compensation, without the prior written approval of Parent, which will not be unreasonably withheld.

(g) Nothing in this Section 5.6 or elsewhere in this Agreement will be construed to create a right in any Covered Employee or other Company Associate to employment with any of the Parent Entities, the Surviving Corporation or any other Subsidiary of Parent. Except for Indemnified Persons to the extent of their respective rights pursuant to Section 5.7, no Company Associate, and no Covered Employee, will be deemed to be a third party beneficiary of

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this Agreement. Nothing in this Section 5.6(g) will limit the effect of Section 9.8. Nothing in this Section 5.6 or elsewhere in this Agreement will be construed as an amendment to any Company Plan or other compensation or benefit plan or arrangement for any purpose.

5.7 Indemnification of Officers and Directors.

(a) Parent and the Company agree that all rights to exculpation, indemnification and advancement of expenses existing as of the date of this Agreement in favor of the current or former directors, officers and employees of the Acquired Corporations and each person who served as a director, officer, member, trustee or fiduciary of another corporation, partnership, joint venture, trust, pension or other employee benefit plan or enterprise if such service was at the request or for the benefit of an Acquired Corporation (each, an "**Indemnified Person**") as provided in the Acquired Corporations' respective Charter Documents or in any Indemnification Agreement (as defined below) will survive the Merger and will continue in full force and effect, but only to the extent such rights to exculpation, indemnification and advancement of expenses are permitted under Kansas law. For a period of six years from the Effective Time, Parent will cause the Surviving Corporation to maintain in effect the exculpation, indemnification and advancement of expenses provisions of such Charter Documents as in effect as of the date of this Agreement or in any Indemnification Agreements, and will not amend, repeal or otherwise modify any such provisions in any manner that would adversely affect the rights thereunder of the Indemnified Persons. For purposes of this Agreement, "**Indemnification Agreement**" means any indemnification agreement between an Acquired Corporation and an Indemnified Person in his or her capacity with an Acquired Corporation, as such agreement is in effect as of the date of this Agreement.

(b) Parent will cause the Surviving Corporation to, to the fullest extent permitted under applicable Legal Requirements, indemnify, defend and hold harmless (and advance funds in respect of each of the foregoing) each Indemnified Person, in each case to the fullest extent permitted by Legal Requirements, including to the fullest extent authorized or permitted by any amendments to or replacements of the KGCC adopted after the date hereof that increase the extent to which a corporation may indemnify its officers and directors or any Indemnified Person against any costs or expenses (including attorneys' fees and expenses), judgments, fines, losses, claims, damages, liabilities, penalties and amounts paid in settlement or compromise in connection with any actual or threatened claim, action, suit, proceeding or investigation, whether civil, criminal, administrative, regulatory or investigative (an "**Action**"), wherever asserted, arising out of, relating to or in connection with any circumstances, developments or matters in existence or action or omission by such Indemnified Person occurring or alleged to have occurred at or prior to the Effective Time in connection with such

Indemnified Person serving in his or her capacity with any Acquired Corporation (including any Action relating to this Agreement or the Contemplated Transactions), whether asserted or claimed prior to, at or after the Effective Time.

(c) Prior to the Effective Time, the Company will be permitted to, and if the Company elects not to Parent will cause the Surviving Corporation as of the Effective Time to, purchase a six-year prepaid "tail" policy on terms and conditions providing substantially equivalent benefits and coverage levels as the current policies of directors' and officers' liability insurance and fiduciary liability insurance maintained by the Acquired Corporations (the "**Existing D&O Policies**") with respect to matters arising at or prior to the Effective Time for the persons who, as of the date of this Agreement, are covered by the Existing D&O Policies, covering, without limitation, the Merger and the other Contemplated Transactions (the "**Tail Policy**"); *provided*, *however*, that the maximum annual premium will not exceed 300% of the annual premium paid by the Company in 2012 for the Existing D&O Policies

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and *provided*, *further*, that if the premiums of such insurance coverage exceed such amount, Parent, the Surviving Corporation or the Company, as applicable, will purchase as much coverage as is available for such amount. Parent will cause the Tail Policy to be maintained in full force and effect, for its full term, and cause all obligations thereunder to be honored by the Surviving Corporation.

(d) The rights of each Indemnified Person hereunder are in addition to, and not in substitution or limitation of, any other rights such Indemnified Person may have under the Charter Documents of the Acquired Corporations or the Surviving Corporation, under any Indemnification Arrangement or any other agreement, under the Delaware General Corporation Law, the KGCC or otherwise. The provisions of this Section 5.7 will survive the consummation of the Merger and expressly are intended to benefit, and are enforceable by, each of the Indemnified Persons and their heirs or representatives and will be binding on Parent and the Surviving Corporation and its successors and assigns.

(e) In the event that the Surviving Corporation or any of its successors or assigns (i) consolidates with or merges into any other Person and is not the continuing or surviving corporation or entity of such consolidation or merger or (ii) transfers or conveys all or substantially all of its properties and assets to any Person, then, and in each such case, proper provision will be made so that the successors and assigns of the Surviving Corporation will assume all of the obligations thereof set forth in this Section 5.7.

5.8 Regulatory Approvals and Related Matters.

(a) Each party will use its reasonable best efforts to file, as soon as practicable after the date of this Agreement, all notices, reports and other documents as may be required to be filed by such party with any Governmental Body with respect to the Merger, the other Contemplated Transactions, the Bond Purchase Agreement and the First Primary Investment and to submit promptly any additional information requested by any such Governmental Body. Without limiting the generality of the foregoing, the Company and the Parent Entities will promptly, and in any event within 45 days after the date of this Agreement, prepare and file, in each case as may be required with respect to the Merger, the other Contemplated Transactions, the Bond Purchase Agreement and the First Primary Investment:

(i) the notification and report forms required to be filed under the HSR Act; (ii) all applications and notices required for authorization by the FCC and in connection with any State License; (iii) any notification or other document required to be filed under any applicable foreign Legal Requirement, including any relating to antitrust, regulatory or competition matters, as reasonably determined by the parties after consultation with each other; and (iv) any notification or report required by the NISPOM for facility and personnel security clearances. The Company and the Parent Entities will respond as promptly as practicable to any inquiries or requests received for additional information or documentation, in each case as may be required in connection with the Merger, the other Contemplated Transactions, the Bond Purchase Agreement and the First Primary Investment from (A) the Federal Trade Commission or the Department of Justice; (B) the FCC; (C) Team Telecom, CFIUS or DSS; (D) any State Commission or state attorney general; or (E) any foreign antitrust, regulatory or competition authority or other foreign Governmental Body.

(b) Without limiting the generality of Section 5.8(a), as soon as practicable after the date of this Agreement, the Company and Parent will prepare and file with CFIUS a draft joint voluntary notice pursuant to FINSA with respect to the Merger, the other Contemplated Transactions, the Bond Purchase Agreement and the First Primary Investment and will promptly provide CFIUS with any additional or supplemental information requested by CFIUS or its member agencies during such pre-filing consultation period, at the end of which the Company and Parent will

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prepare and file with CFIUS a final joint voluntary notice pursuant to FINSA with respect to the Merger, the other Contemplated Transactions, the Bond Purchase Agreement and the First Primary Investment. Following the submission of the final CFIUS joint voluntary notice, each of the Company and Parent will provide CFIUS with any additional or supplemental information requested by CFIUS or its member agencies during the CFIUS review process in accordance with 31 C.F.R. Part 800, and, in cooperation with each other, will take all steps advisable, necessary or desirable to finally and successfully complete the CFIUS review process as promptly as practicable, which steps with respect to Parent and the Company will include agreeing to any action, restriction or condition proposed by CFIUS or any other agency or branch of the U.S. government as a condition to obtaining the approval of CFIUS. The Company and Parent will make any other submissions under FINSA that are requested by CFIUS or its member agencies to be made or that the Company and Parent mutually agree should be made in connection with the Merger or the other Contemplated Transactions, the Bond Purchase Agreement and the First Primary Investment.

(c) Without limiting the generality of Section 5.8(a), to the extent any of the following have not been completed prior to the date hereof, as soon as practicable after the date of this Agreement, the Company and Parent will submit to DSS and, to the extent applicable, any other Governmental Body, notification of the Merger pursuant to the NISPOM and any other applicable national or industrial security regulations, and submit and request approval under any foreign ownership, control or influence ("**FOCI**") related requirements and similar requirements included in any Government Contract, or where any FOCI may, in the opinion of any Governmental Body, adversely impact security requirements, and obtain DSS approval pursuant to such requirements. Without limiting any other obligations of Parent or the Company hereunder, Parent and the Company will accept (i) all restrictions or conditions imposed or requested by DSS on (A) the conduct or structure of any business or operations of any of the Acquired Corporations and Clearwire (including any requirement by any Governmental Body to

sell, hold separate or otherwise dispose of any assets of any of the Acquired Corporations) or (B) access by the Parent Entities to technology, operations, products or other activities of any of the Acquired Corporations and Clearwire and (ii) such other restrictions or conditions imposed or requested by DSS on the operations of any of the Acquired Corporations, Clearwire or on Parent's control of the Company or any of the other Acquired Corporations or Clearwire.

(d) Subject to Section 5.8(e), each party will cooperate with each other and use, and will cause its Subsidiaries to use, its reasonable best efforts to take or cause to be taken all actions, and do or cause to be done, all things necessary, proper or advisable on its part under this Agreement and applicable Legal Requirements to satisfy the conditions to the Merger and the other Contemplated Transactions set forth in Section 6 and Section 7 as promptly as reasonably practicable, including: (i) making all filings (if any) and giving all notices (if any) required to be made and given by such party or any of its Subsidiaries in connection with the Merger, the other Contemplated Transactions, the Bond Purchase Agreement and the First Primary Investment (other than the filings and notices contemplated by Section 5.8(a), Section 5.8(b) and Section 5.8(c), which will be governed by such Sections); (ii) using its reasonable best efforts to obtain each Consent (if any) required to be obtained (pursuant to any applicable Legal Requirement or Material Contract, or otherwise) by such party or any of its Subsidiaries in connection with the Merger, the other Contemplated Transactions, the Bond Purchase Agreement and the First Primary Investment; and (iii) using its reasonable best efforts to lift (and oppose and defend against any Legal Proceeding seeking to impose) any restraint, injunction or other legal bar to the Merger, the other Contemplated Transactions, the Bond Purchase Agreement and the First Primary Investment or challenging any of the foregoing. Each of the Parent Entities and the Company will provide the other party with a copy of each proposed filing with or other submission to any Governmental Body relating to the Merger, the other Contemplated Transactions, the Bond

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Purchase Agreement and the First Primary Investment, and will give the other party a reasonable time prior to making such filing or other submission in which to review and comment on such proposed filing or other submission. Each of the Parent Entities and the Company will promptly deliver to the other a copy of each such filing or other submission made hereunder, each notice given and each Consent obtained by any of the Acquired Corporations during the Pre-Closing Period. The Parent Entities and the Company may, as each deems advisable and necessary, reasonably designate any competitively sensitive material to be provided to the other under this Section 5.8(d) as "Antitrust Counsel Only Material." Such materials and the information contained therein will be given only to the outside antitrust counsel of the recipient and will not be disclosed by such outside legal counsel to employees, officers or directors of the recipient unless express permission is obtained in advance from the source of the materials (the Parent Entities or the Company, as the case may be) or its legal counsel. No party will agree to participate in any meeting with any Governmental Body in respect of any filings, investigation or other inquiry relating to the Merger, the other Contemplated Transactions, the Bond Purchase Agreement or the First Primary Investment, unless it consults with the other parties in advance and, to the extent permitted by such Governmental Body, gives the other parties the opportunity to attend and participate at such meeting. No party may consent to any voluntary extension of any statutory deadline or waiting period or to any voluntary delay of the Merger, the other Contemplated Transactions, the Bond Purchase Agreement and the First Primary Investment at the behest of any Governmental Body without the consent of the other parties to this Agreement.

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(e) Notwithstanding anything to the contrary contained in this Section 5.8 or elsewhere in this Agreement (other than the obligations in Section 5.8(b) and Section 5.8(c), which will not be limited by this Section 5.8(e)), "reasonable best efforts" requires that each Parent Entity will take or commit to taking any of the following actions (and that the Company cooperate in the taking of the following actions to the extent requested by Parent): (i) licensing, divesting, disposing of or transferring, or causing any of its Subsidiaries to license, divest, dispose of or transfer, any portion of its assets, spectrum or Licenses or committing to cause any of the Acquired Corporations (or Clearwire) to license, divest, dispose of or transfer any portion of its assets; (ii) discontinuing, or causing any of its Subsidiaries to discontinue, offering any product or service, or committing to cause any of the Acquired Corporations (or Clearwire) to discontinue offering any product or service; (iii) licensing or otherwise making available, or causing any of its Subsidiaries to license or otherwise make available, to any Person any technology, software or other Intellectual Property, or committing to cause any of the Acquired Corporations (or Clearwire) to license or otherwise make available to any Person any technology, software or other Intellectual Property; (iv) holding separate, or causing any of its Subsidiaries to hold separate, any assets or operations (either before or after the Effective Time), or committing to cause any of the Acquired Corporations (or Clearwire) to hold separate any assets or operations; (v) making, or causing any of its Subsidiaries to make, or accept any condition, limitation, obligation, commitment or requirement, or committing to cause any of the Acquired Corporations (or Clearwire) to make or accept any condition, limitation, obligation, commitment or requirement (to any Governmental Body or otherwise) regarding its future operations or the future operations of any of the Acquired Corporations (or Clearwire); (vi) agreeing to any other prohibition of, or any limitation on, the acquisition, ownership, operation, effective control or exercise of full rights of ownership of any asset or business (including any of the Acquired Corporations, or Clearwire); or (vii) expending or paying any funds or to give any other consideration in order to obtain any Consent, or commit any of the Parent Entities, any of Parent's Subsidiaries or any of the Acquired Corporations (or Clearwire) to take such actions, unless, in each case of clauses (i) through (vii) above, such actions would reasonably be expected, individually or in the aggregate, to have a material adverse effect on the Acquired Corporations (and Clearwire), taken as a whole, or a material adverse effect on the Parent Entities and their Subsidiaries, taken as a whole. A Parent Entity shall only be required to take an action with respect to Clearwire

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(and the Company shall only be required to cooperate with such action) if any party to this Agreement has the power and authority to take such action.

(f) Without the prior written consent of the other parties hereto, no party will enter into a voluntary agreement with the Federal Trade Commission or the Department of Justice pursuant to which such party agrees not to consummate the Merger for any period of time.

5.9 Notification of Certain Matters.

(a) During the Pre-Closing Period, the Company will promptly notify Parent in writing of: (i) the Company obtaining Knowledge of any event, condition, fact or circumstance that caused or constitutes an inaccuracy in any representation or warranty made by the Company in this Agreement, to the extent that such inaccuracy would reasonably be expected to cause any of the conditions to the obligations of the Parent Entities to effect the Merger and consummate the other Contemplated Transactions set forth in Section 6.1 to fail to be satisfied;

(ii) any breach of any covenant or obligation of the Company, to the extent that such breach would reasonably be expected to cause any of the conditions to the obligations of the Parent Entities to effect the Merger and consummate the other Contemplated Transactions set forth in Section 6.2 to fail to be satisfied; and (iii) any event, condition, fact or circumstance that has had or would reasonably be expected to have or result in a Company Material Adverse Effect. Without limiting the generality of the foregoing, the Company will promptly advise Parent in writing of any Legal Proceeding or material claim threatened, commenced or asserted against or with respect to any of the Acquired Corporations challenging the Merger or any of the other Contemplated Transactions. No notification given to Parent pursuant to this Section 5.9(a) will limit or otherwise affect any of the representations, warranties, covenants or obligations of the Company contained in this Agreement. The notification obligations in this Section 5.9(a) shall not constitute a covenant or obligation for purposes of Section 6.2.

(b) During the Pre-Closing Period, Parent will promptly notify the Company in writing of: (i) any Parent Entity obtaining Knowledge of any event, condition, fact or circumstance that caused or constitutes an inaccuracy in any representation or warranty made by the Parent Entities in this Agreement, to the extent that such inaccuracy would reasonably be expected to cause any of the conditions to the obligation of the Company to effect the Merger and consummate the other Contemplated Transactions set forth in Section 7.1 to fail to be satisfied; and (ii) any breach of any covenant or obligation of any of the Parent Entities, to the extent that such breach would reasonably be expected to cause any of the conditions to the obligations of the Company to effect the Merger and consummate the other Contemplated Transactions set forth in Section 7.2 to fail to be satisfied. Without limiting the generality of the foregoing, Parent will promptly advise the Company in writing of any Legal Proceeding or material claim threatened, commenced or asserted against or with respect to any of the Parent Entities challenging the Merger or any of the other Contemplated Transactions. No notification given to the Company pursuant to this Section 5.9(b) will limit or otherwise affect any of the representations, warranties, covenants or obligations of the Parent Entities contained in this Agreement. The notification obligations in this Section 5.9(b) shall not constitute a covenant or obligation for purposes of Section 7.2.

5.10 Public Announcements. The initial press release with respect to the execution of this Agreement and the Bond Purchase Agreement will be a joint press release to be reasonably agreed upon by Parent and the Company. Following such initial press release, Parent and the Company: (a) will consult with each other before issuing, and provide each other the opportunity to review and comment upon and will use their respective commercially reasonable efforts to agree on, any press release or other public statement with respect to the Merger, any of the

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other Contemplated Transactions, the Bond Purchase Agreement or the First Primary Investment; and (b) except for press releases and public statements required by applicable Legal Requirements or by obligations pursuant to any listing agreement with any national securities exchange, will not issue any such press release or make any such public statement prior to such consultation, opportunity to review and comment and agreement. Notwithstanding anything herein to the contrary, the restrictions set forth in this Section 5.10 will not apply to any release or public statement made or proposed to be made by Company in accordance with Section 5.3 or by any of the parties in connection with any dispute between the parties regarding this Agreement, the Merger or the Contemplated Transactions, the Bond Purchase Agreement or the First Primary Investment.

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5.11 Listing. Parent will use its reasonable best efforts to cause the shares of Parent Common Stock being issued in the Merger to be approved for listing (subject to notice of issuance) on the NYSE at or prior to the Effective Time.

5.12 Certain Efforts. During the Pre-Closing Period, (a) each party hereto shall use its commercially reasonable efforts to cause the exchanges that occur pursuant to the Merger, taken together, to qualify as exchanges described in Section 351 of the Code, and not take any action reasonably likely to cause the exchanges not to so qualify; and (b) each of the Company, on the one hand, and HoldCo and Parent, on the other hand, shall use its reasonable best efforts to obtain the opinion referred to in Section 7.11, including by executing letters of representation that are customary for the transactions contemplated by this Agreement and that are in form and substance acceptable to Skadden, Arps, Slate, Meagher & Flom LLP (or if applicable, the Alternate Tax Counsel).

5.13 Financing.

(a) SoftBank acknowledges and agrees that, other than the obligations expressly set forth in this Agreement, the Company, its Affiliates and their respective Representatives have no responsibility for any financing that SoftBank may raise in connection with the Contemplated Transactions. Each of SoftBank and the Company acknowledges and agrees, without limiting any other provision of this Agreement (including any provisions that relate to the Reverse Termination Fee or the circumstances under which it is payable), that SoftBank's obligation to consummate the Merger and the other Contemplated Transactions is not subject to a financing condition under Section 6 or otherwise. SoftBank will use its reasonable best efforts to obtain, or cause its Subsidiaries to obtain, the Debt Financing on the terms and conditions described in the Commitment Letters, including using its reasonable best efforts to (i) negotiate definitive financing documents with respect thereto on the terms and conditions contained therein, (ii) satisfy on a timely basis all conditions to the Debt Financing set forth therein that are applicable to SoftBank and to any Subsidiary of SoftBank, (iii) cause its Representatives to cooperate in the preparation of all documents (including offering memoranda, private placement memoranda, prospectuses and road show presentations, if any) and the making of all filings in connection with the Debt Financing and the other transactions contemplated by the Commitment Letters, and in executing and delivering all documents and instruments related to the Commitment Letters), (iv) comply with its obligations under the Commitment Letters and (v) consummate the Debt Financing at or prior to the time the Closing is required to occur pursuant to Section 2.3, including using its reasonable best efforts to cause the Financing Parties and the other persons committing to fund the Debt Financing to fund the Debt Financing no later than at or prior to the time the Closing is required to occur pursuant to Section 2.3.

(b) SoftBank will keep the Company informed on a regular basis and in reasonable detail of the status of its efforts to arrange the Debt Financing (including providing the Company with copies of all definitive financing documents related to the Debt Financing). Without limiting the generality of the foregoing, SoftBank will give the Company prompt notice (i) of any material breach or default by any party to any of the Commitment Letters or definitive

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financing documents related to the Debt Financing of which SoftBank becomes aware, (ii) of the receipt of any written notice or other written communication, in each case from any Financing Party with respect to (A) any material actual or potential breach or default, or any termination or

repudiation by any party to any of the Commitment Letters or definitive financing documents related to the Debt Financing of any provisions of the Commitment Letters or definitive financing documents related to the Debt Financing or (B) any material dispute or disagreement between or among any parties to any of the Commitment Letters or definitive financing documents related to the Debt Financing with respect to the obligation to fund the Debt Financing or the amount of the Debt Financing to be funded at Closing, and (iii) if at any time for any reason SoftBank in good faith determines that it will not be able to obtain all or any material portion of the Debt Financing on the terms and conditions, in the manner or from the sources contemplated by any of the Commitment Letters or definitive agreements related to the Debt Financing. As soon as practicable after the Company delivers to SoftBank a written request, SoftBank will provide any information reasonably requested by the Company relating to any circumstance referred to in clause (i), clause (ii) or clause (iii) of the immediately preceding sentence; *provided*, *however*, that SoftBank need not provide any information which, after consultation with its legal counsel, it has determined to be privileged.

(c) SoftBank will have the right from time to time to amend, replace, supplement or otherwise modify, or waive any of its rights under the Commitment Letters, or substitute other debt or equity financing for all or any portion of the Debt Financing from the same or alternative Financing Parties; *provided*, *however*, that any such amendment, replacement, supplement, modification or waiver will not without the consent of the Company (not to be unreasonably withheld, conditioned or delayed) (i) impose additional conditions precedent to the Debt Financing or otherwise expand upon the conditions precedent to the Debt Financing as set forth in the Commitment Letters in any material way, (ii) be reasonably expected to prevent, impede or cause any delay of the consummation of the Merger (taking into account any market flex provisions), (iii) adversely and materially impact the ability of SoftBank to enforce its rights against the Financing Parties or the definitive financing documents with respect thereto or (iv) reduce the aggregate amount of the Debt Financing under the Commitment Letters. SoftBank will promptly deliver to Company copies of any such amendment, replacement, supplement, modification or waiver, *provided* that SoftBank may reduce the aggregate amount of the Debt Financing under the Commitment Letters to the extent that SoftBank secures or receives such amount of cash proceeds as is necessary to consummate the Merger and the other Contemplated Transactions (through the Debt Financing or other cash sources).

(d) In the event any portion of the Debt Financing becomes unavailable on the terms and conditions (including the flex provisions) contemplated in the Commitment Letters, SoftBank will promptly so notify the Company and will use its reasonable best efforts to promptly seek to obtain alternative financing on financial terms not more favorable to SoftBank and subject to conditions not less favorable to SoftBank (in each case as determined in the reasonable judgment of SoftBank) and in an amount sufficient to consummate the Merger and the other Contemplated Transactions, as promptly as practicable following the occurrence of such event (the "**Alternative Financing**"). In the event any Alternative Financing is obtained, any reference in this Agreement to "**Debt Financing**" shall be deemed to include the Alternative Financing. SoftBank shall deliver to the Company true and complete copies of all agreements pursuant to which any such alternative source shall have committed to provide SoftBank with any portion of the Debt Financing substantially concurrently with the execution thereof.

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(e) During the Pre-Closing Period, upon the request of SoftBank, the Company will, and will instruct and cause the other Acquired Corporations and will use reasonable best efforts to cause each of their respective legal, tax, regulatory and accounting representatives and advisors and other Representatives to, at the sole cost and expense of SoftBank, provide all reasonable cooperation requested by SoftBank and the Financing Parties in connection with SoftBank's financing of the Merger and the other Contemplated Transactions by obtaining the Debt Financing (including any Alternative Financing), to the extent not unreasonably interfering with the business of Company or any of the other Acquired Corporations, including by:

(i) making senior management of the Company reasonably available to participate in a reasonable number of meetings, road shows, presentations and due diligence sessions (including accounting due diligence sessions and sessions with rating agencies), in each case, upon reasonable advance notice;

(ii) providing information reasonably requested by SoftBank relating to the Debt Financing;

(iii) preparing in a timely manner business projections and financial statements (including pro forma financial statements as required by Article 11 of the Exchange Act), including delivery to SoftBank of balance sheets, income statements and statements of cash flows in accordance with GAAP for the Company for any fiscal year that has ended at least 90 days prior to the Effective Time and for any fiscal quarter since the most recently ended fiscal year that has ended at least 45 days prior to the Effective Time;

(iv) providing audited consolidated financial statements for the most recently ended fiscal year of the Company for which audited consolidated financial statements are available and unaudited interim consolidated financial statements for each quarterly period of the Company ended thereafter and ended at least 45 days prior to the Effective Time;

(v) assisting in a timely manner in the preparation of appropriate and customary offering memoranda, private placement memoranda, prospectuses and similar documents; and

(vi) providing such assistance as SoftBank may reasonably require in procuring a corporate credit rating for Parent from Standard & Poor's Rating Services and a corporate family credit rating for SoftBank from Moody's Investor Services, Inc.

(f) If at any time from the date of this Agreement until the Effective Time, (x) the Company publicly announces any intention to restate any material financial information included in the information provided to SoftBank or the Financing Parties or that any such restatement is under consideration, (y) to the Knowledge of the Company, such information would not be Compliant or (z) upon written notice from SoftBank that such information is not Compliant, then in each case, the Company will use its commercially reasonable efforts to promptly provide SoftBank and the Financing Parties with equivalent information that is Compliant.

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(g) SoftBank will promptly, upon request by the Company, reimburse the Company for all of its and the other Acquired Corporations' reasonable out-of-pocket costs and expenses (including accountants' fees and reasonable attorneys' fees) incurred by the Company and the other Acquired Corporations in connection with the Company's and the Acquired Corporations' compliance with, and cooperation contemplated by, this Section 5.13. Notwithstanding anything in this Agreement to the contrary, neither the Company nor any of the Acquired Corporations shall be required to pay any commitment or other similar fee or incur any other liability or obligation in connection with the Debt Financing (including any Alternative Financing) prior to the Effective Time for which it is not reimbursed or indemnified by SoftBank. If the Effective Time does not occur, the Company and the other

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Acquired Corporations will be entitled to reimbursement for all reasonable costs and expenses incurred by them in connection with the Company complying with its covenants in this Agreement relating to the Debt Financing.

(h) At the Effective Time, SoftBank will cause HoldCo to contribute to Parent not less than $17,040,000,000 (of which amount (x) the amount of Aggregate Cash Consideration ($12,140,000,000) will be paid to the Company's stockholders subject to the terms and conditions set forth in this Agreement and (y) $4,900,000,000 will remain in the cash balances of Parent as of immediately following the Effective Time).

(i) SoftBank will use its reasonable best efforts to (i) obtain all requisite consents or waivers under its existing Indebtedness for borrowed money as to which any default or event of default or any prepayment right or prepayment obligation will occur as a result of the execution and delivery of this Agreement or the consummation any of the transactions contemplated hereby (including, without limitation, the purchase of the Bond, the consummation of the Merger and the incurrence of the Financing) or (ii) repay any such Indebtedness for which the consent or waiver described in clause (i) is not obtained.

5.14 Stockholder Litigation. Each of the Company, on the one hand, and the Parent Entities, on the other hand, will (a) promptly advise the other party in writing of any Legal Proceeding threatened, commenced or asserted against it or any of its stockholders, directors, officers or Affiliates relating to this Agreement, the Merger or any of the other Contemplated Transactions and (b) give the other party the opportunity to reasonably participate in the defense or settlement of any such Legal Proceeding, and no compromise or full or partial settlement of any such Legal Proceeding will be agreed without the other party's prior written consent, which will not be unreasonably withheld, conditioned or delayed.

5.15 Section 16 Matters. Prior to the Effective Time, Parent and the Company will take all such steps as may be required (to the extent permitted under applicable Legal Requirements and no-action letters issued by the SEC) to cause any dispositions of Company Common Stock (including derivative securities with respect to Company Common Stock) resulting from the Merger and the other Contemplated Transactions by each individual who is subject to the reporting requirements of Section 16(a) of the Exchange Act with respect to the Company, and the acquisition of Parent Common Stock (including derivative securities with respect to Parent Common Stock) by each individual who is or will be subject to the reporting requirements of Section 16(a) of the Exchange Act with respect to Parent, to be exempt under Rule 16b-3 under the Exchange Act. At least 30 days prior to the Closing Date, the Company

will furnish the following information to Parent for each individual who, immediately after the Effective Time, will become subject to the reporting requirements of Section 16(a) of the Exchange Act with respect to Parent: (a) the number of shares of Company Common Stock held by such individual and expected to be exchanged for shares of Parent Common Stock pursuant to the Merger; (b) the number of Company Options and Company RSUs held by such individual and expected to be converted into options to purchase or rights to be issued shares of Parent Common Stock in connection with the Merger; and (c) the number of other derivative securities (if any) with respect to Company Common Stock held by such individual and expected to be converted into shares of Parent Common Stock or derivative securities with respect to Parent Common Stock in connection with the Merger.

5.16 Resignation of Officers and Directors. The Company will use its commercially reasonable efforts to obtain and deliver to Parent at or prior to the Effective Time the resignation of each director of the Company and, to the extent requested by Parent, each officer of the Company, and each such resignation of an officer shall be effective as of, and conditioned on, such individual becoming a corresponding officer of Parent.

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Section 6. Conditions Precedent to Obligations of Parent Entities

The obligations of the Parent Entities to effect the Merger and consummate the other Contemplated Transactions that are to occur contemporaneously with the Merger are subject to the satisfaction or waiver by Parent (to the extent legally permissible), at or prior to the Closing, of each of the following conditions:

6.1 Accuracy of Representations.

(a) Each of the representations and warranties of the Company contained in this Agreement, other than the Designated Representations, shall have been accurate in all respects as of the date of this Agreement and will be accurate in all respects as of the Closing Date as if made on and as of the Closing Date (other than any such representation and warranty made as of a specific earlier date, which shall have been accurate in all respects as of such earlier date), other than such failures to be accurate that have not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect; *provided*, *however*, that, for purposes of determining the accuracy of such representations and warranties, (i) all "**Company Material Adverse Effect**" and other materiality qualifications limiting the scope of such representations and warranties will be disregarded; and (ii) any update of or modification to the Company Disclosure Schedule made or purported to have been made on or after the date of this Agreement will be disregarded.

(b) Each of the Designated Representations shall have been accurate in all material respects as of date of this Agreement and will be accurate in all material respects as of the Closing Date as if made on and as of the Closing Date (other than any Designated Representation made as of a specific earlier date, which shall have been accurate in all material respects as of such earlier date); *provided*, *however*, that, for purposes of determining the accuracy of such Designated Representations, (i) all "**Company Material Adverse Effect**" and other materiality qualifications limiting the scope of such Designated Representations will be

disregarded; and (ii) any update of or modification to the Company Disclosure Schedule made or purported to have been made on or after the date of this Agreement will be disregarded.

6.2 Performance of Covenants. The covenants and obligations in this Agreement that the Company is required to comply with or to perform at or prior to the Closing shall have been complied with and performed in all material respects. The transactions described on Part 6.2 of the Company Disclosure Schedule shall have been consummated.

6.3 Effectiveness of Registration Statement. The Registration Statement shall have become effective in accordance with the provisions of the Securities Act; no stop order will have been issued with respect to the Registration Statement that remains in effect; no proceeding seeking a stop order with respect to the Registration Statement shall have been initiated by the SEC that remains pending; and neither Parent nor the Company shall have received any written communication from the SEC that remains outstanding in which the SEC indicates a material likelihood that it will initiate a proceeding seeking a stop order with respect to the Registration Statement.

6.4 Stockholder Approval. This Agreement shall have been duly adopted by the Required Company Vote.

6.5 Closing Certificate. Parent shall have received a certificate executed by the Chief Executive Officer and Chief Financial Officer of the Company confirming that the conditions set forth in Sections 6.1, 6.2, 6.6 and 6.12 have been duly satisfied:

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6.6 No Company Material Adverse Effect. Since the date of this Agreement, there shall not have been any Company Material Adverse Effect.

6.7 Regulatory Matters.

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

(b) Any waiting period applicable to the consummation of the Merger under any applicable foreign antitrust or competition law or regulation, or any Consent under any other foreign Legal Requirement, shall have expired or been terminated or received, as applicable, except where the failure of any particular waiting period to have expired or to have been terminated, or Consent to have been received, as applicable, prior to the Closing would not reasonably be expected to materially and adversely affect the business of the Parent Entities (taken as a whole) or the Acquired Corporations (taken as a whole).

(c) The Consent of the FCC and all Consents from State Commissions required for consummation of the Merger shall have been obtained.

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(d) Parent shall have received written confirmation by CFIUS that it has completed its review (or, if applicable, investigation) under FINSA and determined that there are no unresolved national security concerns with respect to the Contemplated Transactions.

(e) If required by DSS, DSS shall have approved a plan to operate the business of the Acquired Corporations pursuant to a FOCI mitigation agreement, or shall have accepted a commitment from the parties to implement such FOCI mitigation agreement following the Closing.

6.8 Listing. The shares of Parent Common Stock to be issued pursuant to the Merger shall have been approved for listing (subject to notice of issuance) on the NYSE.

6.9 No Restraints. No temporary restraining order, preliminary or permanent injunction or other Order preventing the consummation of the Merger shall have been issued by any court of competent jurisdiction or other Governmental Body and remain in effect, and there shall not be any Legal Requirement enacted or deemed applicable to the Merger that makes consummation of the Merger illegal.

6.10 No Governmental Litigation. There shall not be pending any Legal Proceeding instituted by a Governmental Body challenging or seeking to restrain or prohibit the consummation of the Merger or any of the other Contemplated Transactions, and no threat by any U.S. Federal Governmental Body to institute any Legal Proceeding challenging or seeking to restrain or prohibit the consummation of the Merger or any of the other Contemplated Transactions shall remain outstanding.

6.11 Credit Ratings; Certain Indebtedness.

(a) With respect to any outstanding Indebtedness for borrowed money as to which any default, event of default or prepayment right or obligation could occur as a result of the consummation of the Merger and any ratings downgrade (i) either of Moody's Investors Service, Inc. (or any successor to the rating agency business thereof) or

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Standard & Poor's Rating Services, a division of the McGraw-Hill Companies, Inc. (or any successor to the rating agency business thereof) shall have advised Parent or the Company that the rating of the Company (or its Indebtedness, as applicable), after giving effect to the Merger (and if applicable consolidating Clearwire), will be no less than the rating as of the date of this Agreement assigned by such rating agency to the Company (or its outstanding Indebtedness, as applicable), as of the date of this Agreement (the "**Ratings Determination**"), (ii) Parent or the Company shall have obtained a consent or waiver to the consummation of the Merger, or (iii) the Company shall have sufficient cash and cash equivalents (assuming the Closing occurs in accordance with the terms of this Agreement) or arranged financing that, collectively, is sufficient to pay in full all such Indebtedness (assuming that each holder of such Indebtedness with a prepayment right exercises such prepayment right); *provided*, *however*, that the requirements of this clause (a) shall not apply to any Indebtedness described in clause (b) below.

(b) With respect to any Indebtedness for borrowed money as to which any default or event of default or any prepayment right or prepayment obligation will occur solely as a result of the change of control that will result upon the consummation of the Merger,

prior to the consummation of the Merger and with respect to each such issue of outstanding Indebtedness, (a) if the obligation to repay such Indebtedness is a right of prepayment or otherwise determined solely by the relevant creditor(s) after the consummation of the Merger, the Company will have cash and cash equivalents (assuming the Closing occurs in accordance with the terms of this Agreement) or committed financing that, collectively, is sufficient to repay in full all such Indebtedness (assuming that each relevant creditor exercises its prepayment right), and (b) with respect to all other such Indebtedness, the Company (i) will have repaid such Indebtedness or (ii) will have obtained the consent or waiver to such change of control from the requisite holders of such Indebtedness.

6.12 Limitation on Dissenting Shares. The number of Dissenting Shares shall represent less than 10% in the aggregate of the number of shares of Company Common Stock outstanding immediately prior to the Closing (excluding for the avoidance of doubt the Bond Shares).

6.13 Frustration of Closing Conditions. None of the Parent Entities may rely on the failure of any condition set forth in this Section 6 to be satisfied if such failure was principally caused by such party's breach of any material provisions of this Agreement, such party's failure to act in good faith or such party's failure to perform fully its obligations under Section 5.8 or Section 5.13.

Section 7. Conditions Precedent to Obligation of the Company

The obligation of the Company to effect the Merger and consummate the other Contemplated Transactions that are to occur contemporaneously with the Merger is subject to the satisfaction or waiver by the Company (to the extent legally permissible), at or prior to the Closing, of the following conditions:

7.1 Accuracy of Representations. Each of the representations and warranties of the Parent Entities contained in this Agreement shall have been accurate in all respects as of the date of this Agreement and will be accurate in all respects as of the Closing Date as if made on and as of the Closing Date (other than any representation and warranty made as of a specific earlier date, which shall have been accurate in all respects as of such earlier date), except where the failure of the representations and warranties of the Parent Entities to be accurate would not reasonably be expected to have a material adverse effect on the ability of Parent to consummate the Merger; *provided*, *however*, that, for purposes of determining the accuracy of such representations and warranties: (i) all "material adverse

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effect" and materiality qualifications limiting the scope of such representations and warranties will be disregarded; and (ii) any update of or modification to the Parent Disclosure Schedule made or purported to have been made on or after the date of this Agreement will be disregarded.

7.2 Performance of Covenants. All of the covenants and obligations in this Agreement that the Parent Entities are required to comply with or to perform at or prior to the Closing shall have been complied with and performed in all material respects (*provided* that in no event will any failure of any of the Parent Entities to have complied with any of the Financing Covenants constitute a failure of the condition set forth in this Section 7.2 to be satisfied if the

Debt Financing shall otherwise be available to SoftBank to enable it and the other Parent Entities to consummate the Merger).

7.3 Effectiveness of Registration Statement. The Registration Statement shall have become effective in accordance with the provisions of the Securities Act, no stop order shall have been issued with respect to the Registration Statement that remains in effect, no proceeding seeking a stop order with respect to the Registration Statement shall have been initiated by the SEC that then remains pending and neither Parent nor the Company shall have received any written communication from the SEC that remains outstanding in which the SEC indicates a material likelihood that it will initiate a proceeding seeking a stop order with respect to the Registration Statement.

7.4 Stockholder Approval. This Agreement shall have been duly adopted by the Required Company Vote.

7.5 Closing Certificate. The Company shall have received a certificate executed by an officer of Parent confirming that the conditions set forth in Sections 7.1 and 7.2 have been duly satisfied.

7.6 Regulatory Matters.

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

(b) Any waiting period applicable to the consummation of the Merger under any applicable foreign antitrust or competition law or regulation, or any Consent under any other foreign Legal Requirement, shall have expired or been terminated or received, as applicable, except where the failure of any particular waiting period to have expired or to have been terminated, or Consent to have been received, as applicable, prior to the Closing would not reasonably be expected to materially and adversely affect the business of the Parent Entities (taken as a whole) or the Acquired Corporations (taken as a whole).

(c) The Consent of the FCC and all Consents from State Commissions required for consummation of the Merger shall have been obtained.

(d) Parent shall have received written confirmation by CFIUS that it has completed its review (or, if applicable, investigation) under FINSA and determined that there are no unresolved national security concerns with respect to the Contemplated Transactions.

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(e) If required by DSS, DSS shall have approved a plan to operate the business of the Acquired Corporations pursuant to a FOCI mitigation agreement, or shall have accepted a commitment from the parties to implement such FOCI mitigation agreement following the Closing.

7.7 Listing. The shares of Parent Common Stock to be issued pursuant to the Merger shall have been approved for listing (subject to notice of issuance) on the NYSE.

7.8 No Restraints. No temporary restraining order, preliminary or permanent injunction or other Order preventing the consummation of the Merger shall have been issued by any Governmental Body and remain in effect, and there shall not be any Legal Requirement enacted or deemed applicable to the Merger that makes consummation of the Merger illegal.

7.9 No Governmental Litigation. There shall not be pending any Legal Proceeding instituted by a Governmental Body challenging or seeking to restrain or prohibit the consummation of the Merger or any of the other Contemplated Transactions, and no threat by any U.S. Federal Governmental Body to institute any Legal Proceeding challenging or seeking to restrain or prohibit the consummation of the Merger or any of the other Contemplated Transactions shall remain outstanding.

7.10 Funding of Parent. SoftBank will have caused HoldCo to contribute to Parent not less than $17,040,000,000 (of which amount (x) the amount of Aggregate Cash Consideration ($12,140,000,000) will be paid to the Company's stockholders subject to the terms and conditions set forth in this Agreement and (y) $4,900,000,000 will remain in the cash balances of Parent as of immediately following the Effective Time).

7.11 Tax Opinion. The Company shall have received an opinion of Skadden, Arps, Slate, Meagher & Flom LLP, on the basis of certain facts, representations and assumptions set forth in such opinion, dated the Closing Date, to the effect that for U.S. federal income tax purposes the exchanges that occur pursuant to the Merger, taken together, will constitute exchanges described in Section 351 of the Code; *provided*, *however*, that if Skadden, Arps, Slate, Meagher & Flom LLP is unable to deliver such an opinion, the condition set forth in this Section 7.11 will be deemed to have been satisfied in full if another nationally recognized law firm experienced in tax matters (excluding, for this purpose, Morrison & Foerster LLP) selected by Parent and reasonably acceptable to the Company (the "**Alternate Tax Counsel**") delivers such an opinion.

7.12 Bond Purchase. Parent shall have purchased the Bond from the Company pursuant to the terms of the Bond Purchase Agreement.

7.13 Frustration of Closing Conditions. The Company may not rely on the failure of any condition set forth in this Section 7 to be satisfied if such failure was principally caused by the Company's breach of any material provisions of this Agreement, the Company's failure to act in good faith or the Company's failure to perform fully its obligations under Section 5.8 or Section 5.13.

Section 8. Termination

8.1 Termination. This Agreement may be terminated:

(a) by mutual written consent of Parent and the Company at any time prior to the Effective Time;

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(b) by either Parent or the Company, upon written notice to the other party, if the Merger shall not have been consummated by 5:00 p.m. New York City time on October 15, 2013 (the "**End Date**"); *provided*, *however*, that a party will not be permitted to terminate this Agreement pursuant to this Section 8.1(b) if the failure to consummate the Merger by the End Date has principally been caused by, or has resulted from, a failure on the part of such party to perform any covenant or obligation in this Agreement required to be performed by such party pursuant to this Agreement; *provided*, *further*, that if the Merger is not consummated by the End Date as a result of a Financing Failure, then, notwithstanding the first proviso to this Section 8.1(b), Parent may terminate this Agreement pursuant to this Section 8.1(b);

(c) by either Parent or the Company, upon written notice to the other party, at any time prior to the End Date if any U.S. court of competent jurisdiction or other U.S. Governmental Body shall have issued a final and nonappealable Order, or shall have taken any other action, having the effect of permanently restraining, enjoining or otherwise prohibiting the Merger; *provided*, *however*, that the party to this Agreement seeking to terminate this Agreement pursuant to this Section 8.1(c) shall have complied with its obligations under Section 5.8;

(d) by either Parent or the Company, upon written notice to the other party, if: (i) the Company Stockholders' Meeting (including any adjournments and postponements thereof) shall have been held and completed and the Company's stockholders shall have taken a final vote on a proposal to adopt this Agreement; and (ii) this Agreement shall not have been adopted at the Company Stockholders' Meeting (or any adjournment or postponement thereof) by the Required Company Vote;

(e) by Parent (at any time prior to the adoption of this Agreement by the Required Company Vote), upon written notice to the Company, if a Triggering Event shall have occurred;

(f) by Parent, upon written notice to the Company, if there shall have been a breach of any representation, warranty, covenant or agreement on the part of the Company contained in this Agreement or any representation or warranty of the Company shall have become untrue after the date hereof, which breach or untrue representation or warranty (i) would, individually or in the aggregate with all other such breaches and untrue representations and warranties, give rise to the failure of a condition set forth in Section 6.1(a) or Section 6.1(b) and (ii) is incapable of being cured prior to the End Date by the Company or is not cured within 30 days of written notice of such breach from Parent to the Company;

(g) by the Company, upon written notice to Parent, if there shall have been a breach of any representation, warranty, covenant or agreement on the part of any Parent Entity contained in this Agreement or any representation or warranty of a Parent Entity shall have become untrue after the date hereof, which breach or untrue representation or warranty (i) would, individually or in the aggregate with all other such breaches and untrue representations and warranties, give rise to the failure of a condition set forth in Section 7.1 or Section 7.2 and (ii) is incapable of being cured prior to the End Date by such Parent Entity or is not cured within 30 days of written notice of such breach from the Company to Parent;

(h) by the Company, upon written notice to Parent, if (i) all of the conditions set forth in Section 6 (other than conditions that by their nature are to be satisfied at the Closing) have been satisfied, (ii) the Company has irrevocably confirmed in such written notice to Parent that all of the conditions set forth in Section 7 have been satisfied or that the Company has agreed to waive any unsatisfied conditions in Section 7 and (iii) the Merger shall not have been consummated within 11 Business Days after the delivery of such notice by the Company to

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Parent; *provided*, *however*, that the Company will not be permitted to terminate this Agreement pursuant to this Section 8.1(h) if the failure of the Merger to have been consummated during the period set forth in clause (iii) above results from a failure on the part of the Company to perform in any material respect any covenant or obligation in this Agreement required to be performed by the Company during such 11 Business Day period and up to the Effective Time;

(i) by the Company, during the period of thirty (30) Business Days that commences on the date that is six months after the date of this Agreement, upon not less than two Business Days' written notice to Parent, if at the time of such termination (A) SoftBank is not a party to one or more Commitment Letters that provide for Debt Financing that is available to be borrowed subject to conditions precedent set forth therein during a period of time that begins on or prior to the date that is six months after the date of this Agreement and ends no earlier than the End Date and (B) SoftBank is not a party to one or more definitive financing documents that provide for Debt Financing that is available to be borrowed subject to conditions precedent set forth therein during a period of time that begins on or prior to the date that is six months after the date of this Agreement and ends no earlier than the End Date;

(j) by the Company (at any time prior to the adoption of this Agreement by the Required Company Vote), upon written notice to Parent, in order to enter into a definitive agreement with a Third Party providing for a Superior Offer in accordance with Section 5.5(e); or

(k) by the Company, upon written notice to Parent, if the Bond Purchase Agreement shall have been validly terminated by the Company pursuant to, and in accordance with the terms of, Section 13.1(d) of the Bond Purchase Agreement.

Notwithstanding anything to the contrary contained in this Section 8.1, this Agreement may not be terminated by any party unless any fee required to be paid (or caused to be paid) by such party pursuant to Section 8.3 at or prior to the time of such termination shall have been paid in full.

8.2 Effect of Termination. In the event of the termination of this Agreement as provided in Section 8.1, this Agreement will be of no further force or effect; *provided*, *however*, that (i) Section 5.13(g), this Section 8.2, Section 8.3 and Section 9 (and the Confidentiality Agreement) will survive the termination of this Agreement and will remain in full force and effect, (ii) except as provided in Section 8.3(g), the termination of this Agreement will not relieve any party from any liability for any fraud or Willful Breach by such party and (iii) no termination of this Agreement will in any way affect any of the parties' rights or obligations under the Bond Purchase Agreement.

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8.3 Expenses; Termination Fees.

(a) Except as set forth in Section 5.13 and in this Section 8.3, all fees and expenses incurred in connection with this Agreement, the Merger and the other Contemplated Transactions will be paid by the party incurring such expenses, whether or not the Merger is consummated; *provided*, *however*, that Parent and the Company will share equally all fees and expenses, other than attorneys' fees, incurred in connection with the filing, printing and mailing of the Registration Statement and the Prospectus/Proxy Statement and any amendments or supplements thereto.

(b) If (i) this Agreement is terminated by Parent or the Company pursuant to Section 8.1(b), (ii) at or prior to the time of the termination of this Agreement a proposal or offer for a Specified Acquisition Transaction shall have been publicly disclosed, announced, commenced, submitted or made and not publicly withdrawn, (iii) at the time of the termination of this Agreement, the conditions set forth in Sections 6.7 and 7.6 shall have been satisfied but a final

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vote by the holders of Company Common Stock on the adoption of this Agreement shall not have taken place, and (iv) on or prior to the first anniversary of such termination, either (A) a Specified Acquisition Transaction is consummated or (B) a definitive agreement relating to a Specified Acquisition Transaction is entered into and, following such first anniversary, the Specified Acquisition Transaction to which such definitive agreement relates (or any other Specified Acquisition Transaction among or involving the parties to such definitive agreement or any of such parties' Affiliates) is consummated, then the Company will pay to Parent a nonrefundable fee in the amount of $600,000,000 in cash (it being understood that in no event shall the Company be required to pay a fee of $600,000,000 on more than one occasion pursuant to this Section 8.3), *minus* any amount actually previously paid by the Company to Parent pursuant to Section 8.3(c)(ii), on or prior to the date of consummation of such Specified Acquisition Transaction. For purposes of this Agreement, the term "**Specified Acquisition Transaction**" has the same meaning as the term "**Acquisition Transaction**," except that, solely for purposes of the definition of Specified Acquisition Transaction, all references to "20%" in the definition of "**Acquisition Transaction**" will be deemed to refer instead to "50%."

(c) If this Agreement is terminated by Parent or the Company pursuant to Section 8.1(d), then the Company will, within two Business Days after the termination of this Agreement (in the case of a termination by Parent) or prior to termination of this Agreement (in the case of a termination by the Company), (i) if prior to such termination there shall have been a Triggering Event, pay to Parent a nonrefundable fee in the amount of $600,000,000 in cash (it being understood that in no event shall the Company be required to pay a fee of $600,000,000 on more than one occasion pursuant to this Section 8.3), and (ii) without limiting Section 8.3(d), in any circumstance not described in clause (i) of this Section 8.3(c), reimburse Parent for all documented fees and expenses (including all attorneys' fees, accountants' fees, financial advisory fees, financing fees and filing fees) that have been incurred or paid or that may become payable by or on behalf of the Parent Entities or any of their Subsidiaries (x) in connection with the preparation, negotiation and performance of this Agreement, the Commitment Letters and all related agreements and documents, (y) in connection with the due diligence investigation conducted with respect to the Acquired Corporations, and (z) in connection with the Merger and the other Contemplated Transactions, the Bond Purchase Agreement, the First Primary

Investment and the Debt Financing, *provided* that amounts payable pursuant to clause (ii) shall not exceed $75,000,000 in the aggregate.

(d) If (i) this Agreement is terminated by Parent or the Company pursuant to Section 8.1(d), (ii) prior to the adoption of this Agreement by the Required Company Vote a proposal or offer for a Specified Acquisition Transaction shall have been publicly disclosed, announced, commenced, submitted or made and not publicly withdrawn at least five Business Days prior to the date of the Company Stockholders' Meeting, and (iii) on or prior to the first anniversary of such termination, either (A) a Specified Acquisition Transaction is consummated or (B) a definitive agreement relating to a Specified Acquisition Transaction is entered into and, following such first anniversary, the Specified Acquisition Transaction to which such definitive agreement relates is consummated, then the Company will pay to Parent, on or prior to the date of consummation of such Specified Acquisition Transaction, a nonrefundable fee in the amount of $600,000,000 in cash (it being understood that in no event shall the Company be required to pay a fee of $600,000,000 on more than one occasion pursuant to this Section 8.3), *minus* any amount actually previously paid by the Company to Parent pursuant to Section 8.3(c)(ii).

(e) If this Agreement is terminated by Parent pursuant to Section 8.1(e) or the Company pursuant to Section 8.1(j), then the Company will pay to Parent a nonrefundable fee in the amount of $600,000,000 in cash prior to termination of this Agreement (in the case of a termination by the Company) (it being understood that in no event shall the

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Company be required to pay a fee of $600,000,000 on more than one occasion pursuant to this Section 8.3) or within two Business Days after the termination of this Agreement (in the case of a termination by Parent).

(f) If this Agreement is terminated by Parent or the Company pursuant to Section 8.1(b) or by the Company pursuant to Section 8.1(g) and at the time of such termination (A) each of the conditions set forth in Sections 6 and 7 (other than the conditions set forth in Sections 6.5 and 7.5) has been satisfied and (B) there exists an uncured Financing Failure, or if this Agreement is terminated by the Company pursuant to Section 8.1(h) or Section 8.1(i), then Parent will pay to the Company in cash, at the time specified in the next sentence, a nonrefundable fee in the amount of $600,000,000 in cash (the "**Reverse Termination Fee**"). In the case of termination of this Agreement by the Company pursuant to Section 8.1(b) or Section 8.1(g), in each case under the circumstances set forth in the first sentence of this Section 8.3(f), or by the Company pursuant to Section 8.1(h) or Section 8.1(i), the Reverse Termination Fee will be paid by Parent within two Business Days after such termination, and in the case of termination of this Agreement by Parent pursuant to Section 8.1(b) under the circumstances set forth in the first sentence of this Section 8.3(f), the Reverse Termination Fee will be paid by Parent at or prior to the time of such termination.

(g) Notwithstanding anything to the contrary in this Agreement (including Sections 8.2 and 9.11), if this Agreement is terminated as set forth in the first sentence of Section 8.3(f), the Company's right to receive the Reverse Termination Fee pursuant to Section 8.3(f) will be the sole and exclusive remedy of the Acquired Corporations and their respective stockholders and Affiliates against the Parent Entities or any of their Related Persons for, and the Acquired Corporations (on their own behalf and on behalf of their respective

stockholders and Affiliates) will be deemed to have waived all other remedies (including equitable remedies) with respect to, (i) any failure of the Merger to be consummated, and (ii) any breach by any of the Parent Entities of its obligation to consummate the Merger or any other covenant, obligation, representation or other provision set forth in this Agreement. Upon payment by Parent of the Reverse Termination Fee pursuant to Section 8.3(f) none of the Parent Entities nor any of their Related Persons will have any further liability or obligation (under this Agreement or otherwise) relating to or arising out of this Agreement, the Merger or any of the other Contemplated Transactions, and in no event will any of the Acquired Corporations (and the Company will ensure that the Acquired Corporations' controlled Affiliates do not) seek to recover any money damages or losses, or seek to pursue any other recovery, judgment, damages or remedy (including any equitable remedy) of any kind, in connection with this Agreement, the Merger or any of the other Contemplated Transactions. The parties agree that the Reverse Termination Fee and the agreements contained in Section 8.3(f) are an integral part of the Merger and the other Contemplated Transactions and that the Reverse Termination Fee constitutes liquidated damages and not a penalty. In addition, notwithstanding anything to the contrary contained in this Agreement if and when a Reverse Termination Fee becomes payable by Parent to the Company pursuant to Section 8.3(f):

(i) neither any of the Parent Entities nor any of their Related Persons will have any liability (x) for any inaccuracy in any representation or warranty set forth in Section 4.9 or any other representation or warranty relating to the Debt Financing (regardless of whether such representation or warranty refers specifically to the Debt Financing), or (y) any breach of any of the Financing Covenants;

(ii) neither Parent nor any of Parent's Related Persons will have any liability of any nature (for any breach of this Agreement or otherwise) to any of the Acquired Corporations or to any stockholder or Affiliate of any Acquired Corporation, other than the payment of the Reverse Termination Fee; and

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(iii) in no event will any of the Acquired Corporations (and the Company will ensure that the Acquired Corporations' controlled Affiliates do not) seek to recover any money damages or losses of any kind, in connection with any inaccuracy or breach of the type referred to in the preceding sentence or in connection with any Financing Failure (except that the Company may recover the Reverse Termination Fee if and when such Reverse Termination Fee becomes payable by Parent to the Company pursuant to Section 8.3(f) and except pursuant to Section 5.13(g)).

(h) Each of the Parent Entities acknowledges and agrees on behalf of itself and its Affiliates that its right to receive the fees specified in Section 8.3(b), Section 8.3(c)(i), Section 8.3(d) or Section 8.3(e), and reimbursement of expenses pursuant to Section 8.3(c)(ii), if any, shall constitute the sole and exclusive remedy under this Agreement of any Parent Entity and each of its Affiliates, and such receipt shall be deemed to be liquidated damages (and not a penalty) for any and all losses or damages suffered or incurred by any Parent Entity, each of its Affiliates and any other Person in connection with this Agreement (and the termination hereof), the Merger and the other Contemplated Transactions (and the abandonment or termination thereof) or any matter forming the basis for such termination, and no Parent Entity, Affiliate of any Parent Entity or any other Person shall be entitled to bring or maintain any Legal

Proceeding against the Company or its Affiliates arising out of or in connection with this Agreement, the Merger or any of the other Contemplated Transactions (or the abandonment or termination thereof).

(i) If a party fails to pay when due any amount payable under this Section 8.3, then: (i) such party will reimburse the other party for all costs and expenses (including fees and disbursements of counsel) incurred in connection with the collection of such overdue amount and the enforcement by the other party of its rights under this Section 8.3; and (ii) such party will pay to the other party interest on such overdue amount (for the period commencing as of the date such overdue amount was originally required to be paid and ending on the date such overdue amount is actually paid to other party in full) at a rate per annum of the "prime rate" (as announced by Bank of America, N.A. or any successor thereto) in effect on the date such overdue amount was originally required to be paid.

Section 9. Miscellaneous Provisions

9.1 Amendment. This Agreement may be amended or supplemented by the parties hereto by action taken or authorized by or on behalf of their respective boards of directors at any time prior to the Effective Time (whether before or after the adoption of this Agreement by the Company's stockholders); *provided*, *however*, that after any such adoption of this Agreement by the Company's stockholders, no amendment will be made which under applicable Legal Requirements or the rules of the NYSE requires further approval of the stockholders of the Company without the further approval of such stockholders. This Agreement may not be amended or supplemented except by an instrument in writing executed and delivered by duly authorized officers on behalf of each of the parties hereto.

9.2 Extension; Waiver.

(a) At any time prior to the Effective Time, any party may, to the extent permitted by applicable Legal Requirements (i) extend the time for the performance of any of the obligations or other acts of any other party hereto, (ii) waive any inaccuracies in the representations and warranties of any other party contained herein or in any document delivered pursuant hereto or (iii) waive compliance by any other party with any of the agreements or conditions contained herein. Any agreement on the part of a party hereto to any such extension or waiver shall be valid only if

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set forth in a written instrument executed and delivered by a duly authorized officer of the party against which such waiver or extension is to be enforced.

(b) No failure on the part of any party to exercise any power, right, privilege or remedy under this Agreement, and no delay on the part of any party in exercising any power, right, privilege or remedy under this Agreement, will operate as a waiver of such power, right, privilege or remedy; and no single or partial exercise of any such power, right, privilege or remedy will preclude any other or further exercise thereof or of any other power, right, privilege or remedy. No party will be deemed to have waived any claim arising out of this Agreement, or any power, right, privilege or remedy under this Agreement, unless the waiver of such claim, power, right, privilege or remedy is expressly set forth in a written instrument duly executed and delivered on behalf of such party; and any such waiver will not be applicable or have any effect except in the specific instance in which it is given.

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9.3 No Survival of Representations and Warranties; Survival of Covenants. None of the representations and warranties contained in this Agreement or in any certificate delivered pursuant to this Agreement will survive the Effective Time. Except for any covenant or agreement that by its terms contemplates performance after the Effective Time, none of the covenants or agreements of the parties contained in this Agreement shall survive the Effective Time. Both the Confidentiality Agreement and, for the avoidance of doubt, Sections 1.2(a), 1.4, 2, 5.6, 5.7, 5.13(g), 8.3(a), 8.3(i) and 9 shall survive the Effective Time.

9.4 Entire Agreement; Counterparts. This Agreement, the Company Disclosure Schedule, the Parent Disclosure Schedule and the Confidentiality Agreement constitute the entire agreement and supersede all prior agreements and understandings, both written and oral, among or between any of the parties with respect to the subject matter hereof and thereof; *provided*, *however*, that the provisions of the Confidentiality Agreement have not been superseded and will remain in full force and effect. This Agreement may be executed in several counterparts, including by facsimile or electronic delivery, each of which will be deemed an original and all of which will constitute one and the same instrument. The exchange of a fully executed Agreement (in counterparts or otherwise) by facsimile or by electronic delivery will be sufficient to bind the parties to the terms of this Agreement.

9.5 Applicable Law; Jurisdiction.

(a) Except to the extent required to be governed by, or construed in accordance with, the laws of the State of Kansas under the internal affairs doctrine as generally applied by the federal and state courts located in the State of Delaware, this Agreement will be governed by, and construed in accordance with, the laws of the State of Delaware, regardless of the laws that might otherwise govern under applicable principles of conflicts of laws thereof.

(b) Each of the parties (i) irrevocably and unconditionally consents and agrees that any Legal Proceeding involving any dispute arising out of or relating to this Agreement, the Merger or the Contemplated Transactions (whether in contract, tort or otherwise) (a "**Dispute**") shall be brought, tried and determined exclusively in the Delaware Court of Chancery and any state appellate court therefrom within the State of Delaware (or, only if the Delaware Court of Chancery declines to accept jurisdiction over a particular matter, any state or federal court within the State of Delaware); (ii) with respect to any Dispute, irrevocably and unconditionally consents and submits itself and its property to the exclusive general jurisdiction of and venue in the Delaware Court of Chancery and any state appellate court therefrom within the State of Delaware (or, only if the Delaware Court of Chancery declines to accept jurisdiction over a particular matter, any state or federal court within the State of Delaware); (iii) with respect to any Dispute, irrevocably waives, and agrees not to assert, by way of motion, as a defense, counterclaim or otherwise, (A) any claim that it is not personally subject to the jurisdiction of the above-named courts for any reason

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other than the failure to serve process in accordance with Section 9.9 or this Section 9.5, (B) that its property is exempt or immune from jurisdiction of any such court or from any legal process commenced in such courts in or in respect of such Dispute (whether through service of notice, attachment prior to judgment, attachment in aid of execution of judgment, execution of judgment or otherwise), (C) to the fullest extent permitted by applicable Legal Requirements, that the suit, action or proceeding in any such court is brought in an inconvenient forum or venue, or (D) that this Agreement, or the subject matter hereof, may

not be enforced in or by such courts; (iv) without prejudice to the foregoing, further irrevocably and unconditionally consents and agrees that a Legal Proceeding involving the recognition or enforcement of a judgment or order in or arising from an Action (a "**Post-Judgment Enforcement Proceeding**") may, in addition to the above-mentioned courts, be brought in the courts of any country or state, and irrevocably waives, to the fullest extent permitted by applicable Legal Requirements, any defense or claim that its assets located in such jurisdiction are exempt or immune from jurisdiction or otherwise not capable of being subject to attachment or execution in such Post-Judgment Enforcement Proceeding; (v) agrees that it shall not bring any action against any of the other parties or their Affiliates relating to this Agreement, Merger or Contemplated Transactions (other than a Post-Judgment Enforcement Proceeding) in any court other than the courts specified in sub-paragraphs (i) through (ii); and (vi) without prejudice to paragraph (c) hereof, irrevocably consents to the service of process out of any of the aforementioned courts in any Dispute or Post-Judgment Enforcement Proceeding), by the mailing of copies thereof by registered mail or airmail, postage prepaid, to such party at its address set forth in this Agreement, such service of process to be effective upon acknowledgement of receipt of such registered mail and nothing herein shall affect the right of any party to serve process in any other manner permitted by Legal Requirements;

(c) Each Parent Entity irrevocably appoints, as its agent for receiving service of process of any papers or process in any Dispute or Post-Judgment Enforcement Proceeding (including but not limited in all such cases any summons, complaint, judicial process, subpoena, attachment or enforcement notice or other legal papers in connection with such Dispute or Post-Judgment Enforcement Proceeding), Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808 (the "**Service Agent**"), and agrees that the Service Agent may be so served by mail, Federal Express or such further means as are authorized by rules of court, authorizes and directs the Service Agent to accept such service, and for the avoidance of doubt agrees that the Service Agent shall continue to have such authority after the Effective Time.

(d) EACH OF THE PARTIES ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY WHICH MAY ARISE UNDER THIS AGREEMENT IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES, AND THEREFORE EACH SUCH PARTY HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT SUCH PARTY MAY HAVE TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT, THE MERGER OR THE CONTEMPLATED TRANSACTIONS. EACH PARTY CERTIFIES AND ACKNOWLEDGES THAT (I) NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF A LEGAL PROCEEDING, SEEK TO ENFORCE THE FOREGOING WAIVER, (II) EACH PARTY UNDERSTANDS AND HAS CONSIDERED THE IMPLICATIONS OF THIS WAIVER, (III) EACH PARTY MAKES THIS WAIVER VOLUNTARILY AND (IV) EACH PARTY HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION 9.5.

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9.6 Disclosure Schedules.

(a) The fact that any item of information is disclosed in the Company Disclosure Schedule or the Parent Disclosure Schedule will not be construed to mean that such information is required to be disclosed by this Agreement. Inclusion of any item in the Company Disclosure Schedule or the Parent Disclosure Schedule will not be deemed an admission that such item is material, and inclusion of any item in the Company Disclosure Schedule will not be deemed an admission that such item constitutes or is reasonably likely to result in a Company Material Adverse Effect. The Company Disclosure Schedule will be arranged in separate parts corresponding to the sections contained in Section 3, and the Parent Disclosure Schedule will be arranged in separate parts corresponding to the sections contained in Section 4. Nothing contained in the Company Disclosure Schedule or the Parent Disclosure Schedule will be construed as an admission of liability or responsibility in connection with any pending, threatened or future matter or proceeding. Matters disclosed in the Company Disclosure Schedules or the Parent Disclosure Schedules are not necessarily limited to matters that are required by this Agreement to be disclosed therein. Any additional matters are set forth for informational purposes only and do not necessarily include other matters of a similar nature or impose any duty or obligation to disclose any information beyond what is required by this Agreement. The information contained in these Company Disclosure Schedules is as of the date of this Agreement. Without limiting the parties' respective obligations under Section 5.9, each party expressly disclaims, and does not undertake, any duty or obligation to update or modify information disclosed in the Company Disclosure Schedules and the Parent Disclosure Schedules. The information contained therein is in all events subject to the terms of this Agreement and the Confidentiality Agreement.

(b) The representations and warranties in this Agreement are the product of negotiations among the parties and are for the sole benefit of the parties. Any inaccuracies in such representations and warranties are subject to waiver by the parties in accordance with Section 9.2 without notice or liability to any other Person. In some instances, the representations and warranties in this Agreement may represent an allocation among the parties of risks associated with particular matters regardless of the Knowledge of any of the parties. Consequently, Persons other than the parties may not rely upon the representations and warranties in this Agreement as characterizations of actual facts or circumstances as of the date hereof or as of any other date.

9.7 Transfer Taxes. All transfer, documentary, sales, use, stamp, registration, value added and other similar Taxes and fees incurred in connection with the Contemplated Transactions will be paid by the Company or Parent when due.

9.8 Assignability; Third Party Beneficiaries. This Agreement will be binding upon and will be enforceable by and inure solely to the benefit of, the parties hereto and their respective successors and assigns, except for: (i) following the Effective Time, the right of (A) Company's stockholders to receive the Merger Consideration in respect of their shares of Company Common Stock pursuant to Sections 2.5 and 2.6 of this Agreement and (B) the holders of Company Options, Company RSUs and Company ESPP Options to receive the consideration in respect of their Company Options, Company RSUs, Company Performance Units and Company ESPP Options pursuant to Section 2.10 of this Agreement; and (ii) the right of the

Indemnified Persons to enforce the provisions of Section 5.7. Neither this Agreement nor any of the rights or obligations hereunder may be assigned by any party, in whole or in part (whether by operation of law or otherwise) hereto without the prior written consent of the other parties, and any attempted assignment of this Agreement or any of such rights or obligations by any party without such consent will be void and of no effect.

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9.9 Notices. Each notice, request, demand or other communication under this Agreement will be in writing and will be deemed to have been duly given or made as follows: (a) if sent by registered or certified mail in the United States, return receipt requested, then such communication will be deemed duly given and made upon receipt; (b) if sent by nationally recognized overnight air courier (such as DHL or Federal Express), then such communication will be deemed duly given and made two (2) Business Days after being sent; (c) if sent by facsimile transmission before 5:00 p.m. (based on the time zone of the receiving party) on any Business Day, then such communication will be deemed duly given and made when receipt is confirmed; (d) if sent by facsimile transmission on a day other than a Business Day and receipt is confirmed, or if sent after 5:00 p.m. (based on the time zone of the receiving party) on any Business Day and receipt is confirmed, then such communication will be deemed duly given and made on the Business Day following the date which receipt is confirmed; and (e) if otherwise personally delivered to a duly authorized representative of the recipient, then such communication will be deemed duly given and made when delivered to such authorized representative; *provided* that, in all cases, such notices, requests, demands and other communications are delivered to the address set forth below, or to such other address as any party will provide by like notice to the other parties to this Agreement:

if to the Parent Entities:

SOFTBANK CORP.
Tokyo Shiodome Bldg.
1-9-1, Higashi-Shimbashi
Minato-ku, Tokyo 105-7303
Japan
Attention: Masato Suzaki
Facsimile: +81 3 6215 5001

with a copy (which does not constitute notice) to:

Morrison & Foerster LLP
Shin-Marunouchi Building, 29th Floor
5-1, Marunouchi 1-Chome
Chiyoda-ku, Tokyo 100-6529
Japan
Attention: Kenneth A. Siegel
Facsimile: +81 3 3214 6512

and to:

Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105-2482
USA
Attention: Robert S. Townsend
David A. Lipkin
Brandon C. Parris
Facsimile: +1 415 268 7522

if to the Company:

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Sprint Nextel Corporation
6200 Sprint Parkway
Overland Park, Kansas 66251
USA
Attention: Charles R. Wunsch
Michael E. Ragsdale
Facsimile: +1 913 794 1432

with a copy (which does not constitute notice) to:

Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, New York 10036
USA
Attention: Thomas H. Kennedy
Jeremy D. London
Facsimile: +1 212 735 2000

9.10 Severability. Any term or provision of this Agreement that is invalid or unenforceable in any application in any jurisdiction will not affect the validity or enforceability of the remaining terms and provisions hereof or the validity or enforceability of the offending term or provision in any other application or in any other jurisdiction. If any term or provision or the application thereof is determined by a court of competent jurisdiction to be so invalid or unenforceable, a suitable and equitable provision shall be substituted therefor in order to carry out, so far as may be valid and enforceable, the intent and purpose of such invalid or unenforceable term or provision.

9.11 Enforcement.

(a) Except as set forth in Section 8.3(g) as it may apply after termination of the Agreement and except as set forth in Section 9.11(b), in the event of any breach or threatened breach by any party of any covenant or obligation of such party contained in this Agreement, the other party will be entitled to seek: (i) a decree or order of specific performance to enforce the observance and performance of such covenant or obligation; and (ii) an injunction restraining such breach or threatened breach. Subject to the foregoing, SoftBank acknowledges and agrees that the Company's entitlement to an injunction or

injunctions to prevent breaches or threatened breaches of the Financing Covenants by SoftBank and to specifically enforce the terms and provisions of the Financing Covenants shall include the right of the Company to seek to require SoftBank to issue a borrowing certificate, borrowing notice or similar document pursuant to any definitive finance documents entered into pursuant to the Debt Financing (subject to the satisfaction of the conditions to borrowing set forth in such definitive finance documents) in order to permit the Closing to occur if all of the conditions set forth in Sections 6 and Section 7 are satisfied or waived as provided herein.

(b) Notwithstanding anything to the contrary contained in this Agreement (including Section 9.11), (i) upon delivery by SoftBank of such borrowing certificate, borrowing notice or similar document as contemplated by the final sentence of Section 9.11(a) and in accordance with the definitive finance documents entered into pursuant to the Debt Financing, the Company shall not be further entitled to seek or obtain any injunction or injunctions to prevent breaches or threatened breaches of any of the Financing Covenants by the Parent Entities or to specifically enforce the terms and provisions of any of the Financing Covenants, and (ii) in the event of a Financing Failure, the

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Company shall not be entitled to seek or obtain (or to continue to seek or obtain) either: (x) a decree or order of specific performance to cause the Parent Entities to further comply with any of the Financing Covenants or to consummate the Merger or any of the other Contemplated Transactions; or (y) an injunction restraining such breach or ordering the Parent Entities to consummate the Merger or any of the other Contemplated Transactions.

(c) The parties' right of specific enforcement is an integral part of the transactions contemplated by this Agreement and each party hereby waives any objections to the grant of the equitable remedy of specific performance to prevent or restrain breaches or threatened breaches of this Agreement by any other parties to this Agreement (including any objection on the basis that there is an adequate remedy at law or that an award of specific performance is not an appropriate remedy for any reason at law or equity), and each party shall be entitled to an injunction or injunctions and to specifically enforce the terms and provisions of this Agreement to prevent or restrain breaches or threatened breaches of, or to enforce compliance with, the covenants and obligations of such party under this Agreement all in accordance with the terms of this Section 9.11. In the event any party seeks an injunction or injunctions to prevent breaches or threatened breaches of this Agreement and to enforce specifically the terms and provisions of this Agreement, such party shall not be required to provide any bond or other security in connection with such order or injunction all in accordance with the terms of this Section 9.11.

9.12 Construction.

(a) For purposes of this Agreement, whenever the context requires: the singular number includes the plural, and vice versa; the masculine gender includes the feminine and neuter genders; the feminine gender includes the masculine and neuter genders; and the neuter gender includes masculine and feminine genders.

(b) The parties hereto have participated jointly in the negotiation and drafting of this Agreement and, in the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as jointly drafted by the parties hereto and no

presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any provision of this Agreement.

(c) As used in this Agreement, the words "include" and "including," and variations thereof, will not be deemed to be terms of limitation, but rather will be deemed to be followed by the words "without limitation."

(d) Except as otherwise indicated, all references in this Agreement to "Sections," "Exhibits" and "Schedules" are intended to refer to Sections of this Agreement and Exhibits or Schedules to this Agreement.

(e) All terms defined in this Agreement shall have the defined meanings when used in any certificate or other document made or delivered pursuant hereto unless otherwise defined therein.

(f) Any agreement, instrument or statute defined or referred to herein or in any agreement or instrument that is referred to herein means such agreement, instrument or statute as from time to time amended, modified or supplemented, including (in the case of agreements or instruments) by waiver or consent and (in the case of statutes) by succession of comparable successor statutes and references to all attachments thereto and instruments incorporated therein.

(g) All references to "dollars" or "$" refer to currency of the United States of America.

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[Signature page follows.]

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date first above written.

SOFTBANK CORP.

By: /s/ Masayoshi Son
Name: Masayoshi Son
Title: Chairman & CEO

STARBURST I, INC.

By: /s/ Ronald D. Fisher
Name: Ronald D. Fisher
Title: President

STARBURST II, INC.

By: /s/ Ronald D. Fisher
Name: Ronald D. Fisher
Title: President

STARBURST III, INC.

By: /s/ Ronald D. Fisher
Name: Ronald D. Fisher
Title: President

SPRINT NEXTEL CORPORATION

By: /s/ Daniel R. Hesse
Name: Daniel R. Hesse
Title: Chief Executive Officer

SIGNATURE PAGE
TO
AGREEMENT AND PLAN OF MERGER

Exhibit A
Certain Definitions

For purposes of the Agreement (including this Exhibit A):

"**Acquired Corporations**" means the Company and any Entity that is one of the Company's Subsidiaries.

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"**Acquisition Inquiry**" has the meaning set forth in Section 5.3(a) of the Agreement.

"**Acquisition Proposal**" has the meaning set forth in Section 5.5(c)(i) of the Agreement.

"**Acquisition Transaction**" means any transaction or series of transactions with any Person other than the Parent Entities or any of their respective Subsidiaries involving:

(a) any merger, consolidation, amalgamation, share exchange, business combination, reorganization, recapitalization, tender offer, exchange offer or other similar transaction in which (i) the Company is a constituent corporation; (ii) a Person or "group" (as defined in the Exchange Act and the rules thereunder) of Persons directly or indirectly acquires beneficial or record ownership of securities representing more than 20% of the outstanding shares of Company Common Stock or any other class of voting securities of the Company; or (iii) in which the Company issues securities representing more than 20% of the outstanding securities of any class of voting securities of the Company; and

(b) any sale, lease, exchange, transfer, license, disposition of any business or businesses or assets of the Acquired Corporations that constitute or account for 20% or more of the consolidated net revenues, consolidated net income or consolidated assets of the Acquired Corporations and its Subsidiaries taken as a whole.

"**Action**" has the meaning set forth in Section 5.7(b) of the Agreement.

"**Affiliate**" of any Person means another Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such first Person, and, for purposes of this definition, "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise; *provided* that, unless expressly stated in the Agreement, Clearwire shall not be considered an Affiliate of the Company.

"**Aggregate Cash Consideration**" has the meaning set forth in Section 2.6(a) of the Agreement.

"**Aggregate Exercise Price**" has the meaning set forth in Section 1.2(b) of the Agreement.

"**Aggregate Option Shares**" has the meaning set forth in Section 1.2(b) of the Agreement.

"**Aggregate Share Consideration**" has the meaning set forth in Section 2.10(e) of the Agreement.

"**Agreement**" means the Agreement and Plan of Merger to which this Exhibit A is attached, as it may be amended from time to time.

"**Alternate Tax Counsel**" has the meaning set forth in Section 7.11 of the Agreement.

"**Alternative Financing**" has the meaning set forth in Section 5.13(d) of the Agreement.

"**Antitrust Laws**" has the meaning set forth in Section 3.4(b) of the Agreement.

"**Award Exchange Ratio**" has the meaning set forth in Section 2.10(e) of the Agreement.

"**Bond**" has the meaning set forth in the Recitals to the Agreement.

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"**Bond Purchase Agreement**" has the meaning set forth in the Recitals to the Agreement.

"**Bond Shares**" has the meaning set forth in the Recitals to the Agreement.

"**Book-Entry Share**" means shares of Company Common Stock that are held in book-entry form.

"**Business Day**" means any day, other than a Saturday, Sunday and any day which is a legal holiday under the laws of the State of New York or Kansas, or is a day on which banking institutions located in the State of New York or Kansas are authorized or required by law or other governmental action to close.

"**Cash Electing Share**" has the meaning set forth in Section 2.6(a) of the Agreement.

"**Cash Exchange Ratio**" has the meaning set forth in Section 2.10(e) of the Agreement.

"**Cash Proration Fraction**" has the meaning set forth in Section 2.6(a) of the Agreement.

"**Cash Share Number**" has the meaning set forth in Section 2.6(a) of the Agreement.

"**Certificates**" has the meaning set forth in Section 2.8(b) of the Agreement.

"**Certifications**" has the meaning set forth in Section 3.6(a) of the Agreement.

"**CFIUS**" has the meaning set forth in Section 3.4(b) of the Agreement.

"**Change in Company Board Recommendation**" has the meaning set forth in Section 5.5(c) of the Agreement.

"**Charter Documents**" of an Entity means the certificate of incorporation and bylaws or similar organizational documents of such Entity.

Exhibit A-2

"**Clearwire**" means Clearwire Corporation, a Delaware corporation, Clearwire Communications LLC, a Delaware limited liability company, and their respective Subsidiaries.

"**Closing**" has the meaning set forth in Section 2.3 of the Agreement.

"**Closing Date**" has the meaning set forth in Section 2.3 of the Agreement.

"**Code**" means the Internal Revenue Code of 1986, as amended.

"**Commitment Letters**" means those certain commitment letters between SoftBank and the Financing Parties with respect to the Debt Financing, including all exhibits, schedules, annexes and amendments to such letters in effect as of the date of the Agreement and the related fee letters with respect thereto (with only fee amounts, pricing caps and certain economic terms (none of which would adversely affect the amount or availability of the Debt Financing) redacted), and includes such documents as permitted to be amended, replaced, supplemented or otherwise modified by Section 5.13(c) of the Agreement.

"**Communications Licenses**" has the meaning set forth in Section 3.15(b) of the Agreement.

"**Company**" has the meaning set forth in the preamble to the Agreement.

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"**Company Affiliate**" means any Person under common control with the Company within the meaning of Sections 414(b), (c), (m) and (o) of the Code or Section 4001 of ERISA, and the regulations thereunder.

"**Company Associate**" means any current or former employee, independent contractor, consultant or director of or to any of the Acquired Corporations or any Company Affiliate or the beneficiary or dependent of such Person.

"**Company Board**" means the board of directors of the Company.

"**Company Board Recommendation**" has the meaning set forth in Section 5.5(b) of the Agreement.

"**Company Common Stock**" has the meaning set forth in the Recitals to the Agreement.

"**Company Contract**" means any Contract to which any of the Acquired Corporations is a party, or by which any of the Acquired Corporations or any assets of any of the Acquired Corporations are bound (other than Company Plans).

"**Company Disclosure Schedule**" means the disclosure schedule that has been delivered by the Company to Parent on or prior to the date of the Agreement.

"**Company Equity Award**" means any option, restricted stock unit, restricted stock award or other award relating to Company Common Stock, whether granted under any of the Company Equity Plans or otherwise and whether vested or unvested.

Exhibit A-3

"**Company Equity Plan**" means any of the following Company Plans, in each case as amended: (i) the 2007 Omnibus Incentive Plan; (ii) the 1997 Long-Term Incentive Program; (iii) the Nextel Incentive Equity Plan; and (iv) the Management Incentive Stock Option Plan.

"**Company ESPP**" means the Company's Employee Stock Purchase Plan.

"**Company ESPP Offering Period**" means an "Offering Period" under the Company ESPP.

"**Company ESPP Option**" means an option to purchase Company Common Stock pursuant to the terms of the Company ESPP and applicable Company ESPP Subscription Agreement.

"**Company ESPP Purchase Date**" means the last day of each Company ESPP Offering Period.

"**Company ESPP Subscription Agreement**" means a subscription agreement that has been completed by a Company Associate and accepted by the Company, pursuant to which such Company Associate has become a participant in the Company ESPP in accordance with the terms of the Company ESPP.

"**Company Financial Advisors**" means Citigroup Global Markets Inc., UBS Securities LLC and Rothschild Inc.

"**Company Material Adverse Effect**" means any effect, change, event or occurrence that, individually or in the aggregate with all other effects, changes, events and occurrences, has or would reasonably be expected to have a material adverse effect on, (a) the business, financial condition or results of operations of the Acquired Corporations taken as a whole, or (b) the ability of the Company to consummate the Merger or any of the other Contemplated Transactions, *provided* that no effect, change, event, or occurrence shall be deemed to constitute, nor shall any effect, change, event or occurrence be taken into account in determining whether there has been, a Company Material Adverse Effect, to the extent that such effect, change, event or occurrence results from, arises out of, or

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relates to: (i) any (A) changes since the date of the Agreement in general economic, political, regulatory or legislative conditions or the securities, credit, debt, financial or other capital markets in the United States, Japan or worldwide, (B) changes since the date of the Agreement in conditions generally affecting the industry in which the Acquired Corporations operate, (C) changes since the date of the Agreement in generally accepted accounting principles or the interpretation thereof, (D) changes since the date of the Agreement in Legal Requirements applicable to the Acquired Corporations, (E) the outbreak or escalation of hostilities, any acts of war, sabotage or terrorism, or any escalation or worsening of any such acts of war, sabotage or terrorism threatened or underway as of the date hereof, or (F) any Legal Proceeding commenced after the date of this Agreement against any of the Acquired Corporations or any of their respective officers or directors arising out of or relating to this Agreement, the Contemplated Transactions, the Bond Purchase Agreement or the First Primary Investment (including any litigation arising from allegations of a breach of fiduciary duty or violation of applicable Legal Requirements relating to this Agreement or the Merger, the other Contemplated Transactions, the Bond Purchase Agreement or the First Primary Investment or

Exhibit A-4

any solicitation of written consents or proxies of the stockholders of Company opposing the Required Company Vote); (ii) the execution and delivery of this Agreement or the announcement and pendency of this Agreement or the Merger (including any adverse impact on the Company's or its Subsidiaries' relationships with employees, customers and suppliers); (iii) any failure to meet the Acquired Corporation's estimates, projections or forecasts for any period; (iv) any action required to be taken or required to be omitted to be taken by any of the Acquired Corporations by the terms of this Agreement or required by Parent; (v) any hurricane, earthquake, flood or other natural disasters, acts of God or any change resulting from weather condition; or (vi) any decline in the market price or trading volume of Company Common Stock. Notwithstanding anything to the contrary contained in the previous sentence or elsewhere in the Agreement: (x) effects resulting from effects, changes, events or occurrences of the type described in clauses (i)(A), (i)(B) (i)(D) and (i)(E) of the preceding sentence may be taken into account in determining whether there has been or would be a Company Material Adverse Effect if, to the extent and only to the extent, such effects, changes, events or occurrences have, in any material respect, a disproportionate impact on the Acquired Corporations, taken as a whole, relative to other companies in the industry in which the Acquired Corporations operate; and (y) it is understood that clauses (iii) and (vi) of the preceding sentence shall not preclude Parent from asserting that the facts or occurrences giving rise to the failure described in clause (iii) or the decline described in clause (vi) that are not otherwise excluded from the definition of Company Material Adverse Effect should be deemed to constitute, or should be taken into account in determining whether there has been, or would reasonably be expected to be, a Company Material Adverse Effect.

"**Company Meeting Original Date**" has the meaning set forth in Section 5.5(f) of the Agreement.

"**Company Non-Voting Common Stock**" means the non-voting common stock, $0.01 par value per share, of the Company.

"**Company Option**" means each option to purchase shares of Company Common Stock from the Company, whether granted by the Company pursuant to a Company Equity Plan, assumed by the Company in connection with any merger, acquisition or similar transaction or otherwise issued or granted and whether vested or unvested.

"**Company Performance Unit**" means each performance unit payable in cash upon the achievement of specified performance goals granted by the Company pursuant to a Company Equity Plan.

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"**Company Plan**" means each employment, consulting, salary, bonus, vacation, deferred compensation, incentive compensation, stock purchase, stock option or other equity-based, severance, termination, retention, change-in-control, death and disability benefits, hospitalization, medical, life or other insurance, flexible benefits, supplemental unemployment benefits, other welfare fringe benefits, profit-sharing, pension or retirement plan, program, practice, agreement or commitment and each other employee benefit plan or arrangement (other than any employment agreement, offer letter, or similar Contract which is terminable "at will" without any obligation on the part of any of the Acquired Corporations or any Company Affiliate to make any severance, change in control or similar payment or provide any benefit), whether

Exhibit A-5

written, unwritten or otherwise, funded or unfunded, including but not limited to each "employee benefit plan," within the meaning of Section 3(3) of ERISA (whether or not subject to ERISA): under which any Company Associate has any present or future right to benefits and (a) that is or has been maintained, sponsored or contributed to, or required to be maintained, sponsored or contributed to, by any of the Acquired Corporations or any Company Affiliate; or (b) with respect to which any of the Acquired Corporations or any Company Affiliate has or may incur or become subject to any liability or obligation.

"**Company Preferred Stock**" means the Preferred Stock, no par value per share, of the Company.

"**Company Privacy Policy**" means each external or internal, current privacy policy of any of the Acquired Corporations, including any policy relating to: (a) the privacy of any user of any Company Product or any user of any website of any of the Acquired Corporations; or (b) the collection, storage, disclosure or transfer of any Personal Data including any employee information that constitutes Personal Data.

"**Company Product**" means any product or service that any of the Acquired Corporations has manufactured, marketed, distributed, leased (as lessor), licensed (as licensor) or sold.

"**Company Real Property**" means the Owned Real Property and the Leased Real Property.

"**Company RSU**" means each restricted stock unit representing the right to vest in and be issued shares of Company Common Stock by the Company, whether granted by the Company pursuant to any of the Company Equity Plans, assumed by the Company in connection with any merger, acquisition or similar transaction or otherwise issued or granted and whether vested or unvested.

"**Company SEC Documents**" has the meaning set forth in Section 3.6(a) of the Agreement.

"**Company Series 2 Common Stock**" means the Series 2 common stock, $2.00 par value per share, of the Company.

"**Company Stockholders' Meeting**" has the meaning set forth in Section 5.5(a) of the Agreement.

"**Compliant**" means, with respect to any information, that (i) such information, taken as a whole, does not contain any untrue statement of a material fact or omit to state any material fact necessary in order to make such information, in light of the circumstances under which it was made or disclosed, not misleading, (ii) the Company's auditors have not withdrawn any audit opinion with respect to any financial statements contained in such information and (iii) the financial statements and other financial information included in such information are, and remain until the Effective Time, compliant with GAAP in all material respects.

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Exhibit A-6

"**Confidentiality Agreement**" means that certain Non-Disclosure Agreement between SoftBank and the Company dated July 23, 2012.

"**Consent**" means any approval, consent, ratification, permission, waiver or authorization (including any authorization of Governmental Bodies).

"**Contemplated Transactions**" means all actions and transactions contemplated by the Agreement, excluding, for avoidance of doubt, the Bond Purchase Agreement and the First Primary Investment and any transactions contemplated thereby.

"**Contract**" means any written or oral agreement, contract, subcontract, lease, instrument, note, debenture, indenture, guaranty, guarantee, license or sublicense, in each case that is legally binding, and any material supplements, amendments or other modifications to any of the foregoing.

"**Covered Employees**" has the meaning set forth in Section 5.6(c) of the Agreement.

"**Covered Group**" has the meaning set forth in Section 5.6(c) of the Agreement.

"**DC Accounts**" has the meaning set forth in Section 2.10(j) of the Agreement.

"**Debt Financing**" has the meaning set forth in Section 4.9(a) of the Agreement.

"**Default Cash Fraction**" has the meaning set forth in Section 2.6(a) of the Agreement.

"**Default Stock Fraction**" has the meaning set forth in Section 2.6(a) of the Agreement.

"**Designated Representations**" means the representations and warranties of the Company contained in Sections 3.3, 3.5, 3.23 and 3.25 of the Agreement.

"**Dispute**" has the meaning set forth in Section 9.5(b) of the Agreement.

"**Dissenting Share**" has the meaning set forth in Section 2.9(a) of the Agreement.

"**DSS**" has the meaning set forth in Section 3.4(b) of the Agreement.

"**EDGAR**" means the SEC's Electronic Data Gathering, Analysis and Retrieval system.

"**Effective Time**" has the meaning set forth in Section 2.3 of the Agreement.

"**Election**" has the meaning set forth in Section 2.7(a) of the Agreement.

"**Election Deadline**" has the meaning set forth in Section 2.7(b) of the Agreement.

"**Election Record Date**" has the meaning set forth in Section 2.7(a) of the Agreement.

"**End Date**" has the meaning set forth in Section 8.1(b) of the Agreement.

Exhibit A-7

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"**Entity**" means any corporation (including any non-profit corporation), general partnership, limited partnership, limited liability partnership, joint venture, estate, trust, company (including any company limited by shares, limited liability company or joint stock company), firm, society or other enterprise, association, organization or entity.

"**Environmental Law**" means any federal, state, local or foreign Legal Requirement relating to pollution or protection of occupational health as it relates to exposure to Materials of Environmental Concern or the environment (including ambient air, surface water, ground water, land surface or subsurface strata), including any Legal Requirement relating to emissions, discharges, releases or threatened releases of Materials of Environmental Concern, or otherwise relating to the generation, use, treatment, disposal or handling of Materials of Environmental Concern.

"**ERISA**" means the Employee Retirement Income Security Act of 1974, as amended.

"**Exchange Act**" means the Securities Exchange Act of 1934, as amended.

"**Exchange Agent**" has the meaning set forth in Section 2.7(a) of the Agreement.

"**Exchange Agent Agreement**" has the meaning set forth in Section 2.7(d) of the Agreement.

"**Exchange Fund**" has the meaning set forth in Section 2.8(a) of the Agreement.

"**Existing D&O Policies**" has the meaning set forth in Section 5.7(c) of the Agreement.

"**FAA**" has the meaning set forth in Section 3.15(c) of the Agreement.

"**FCC**" means the Federal Communications Commission.

"**FCC Act**" means the federal Communications Act of 1934, as amended, and the rules and regulations promulgated thereunder.

"**FCC Licenses**" has the meaning set forth in Section 3.15(b) of the Agreement.

"**Financing Covenants**" means the covenants and obligations of SoftBank in Section 5.13 of the Agreement and all other covenants and obligations of SoftBank in the Agreement that relate to the Debt Financing, regardless of whether such covenants and obligations refer specifically to the Debt Financing.

"**Financing Failure**" means a refusal or other failure, for any reason, on the part of any Person that has executed any Commitment Letters or any definitive financing document relating to the Debt Financing, or on the part of any other Person obligated or expected at any time to provide a portion of the Debt Financing, to provide a portion of such Debt Financing after being notified (if such Person is a party to definitive agreements related to the Debt Financing and as provided in such definitive agreements) of the proposed Closing.

"**Financing Parties**" means the lenders that are or may become parties to the Debt Financing.

"**FINSA**" has the meaning set forth in Section 3.4(b) of the Agreement.

"**First Primary Investment**" means the sale and issuance of the Bond contemplated by the Bond Purchase Agreement.

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"**FOCI**" has the meaning set forth in Section 5.8(c) of the Agreement.

"**Foreign Plan**" means each Company Plan that has been adopted or maintained by the Company or any Company Affiliate, whether informally or formally, or with respect to which the Company or any Company Affiliate will or may have any liability, for the benefit of Company Associates who perform services outside the United States.

"**Form of Election**" has the meaning set forth in Section 2.7(a) of the Agreement.

"**Funded Foreign Plan**" has the meaning set forth in Section 3.18(j) of the Agreement.

"**GAAP**" means U.S. generally accepted accounting principles.

"**Government Contract**" means any Company Contract with the United States Government or any other Governmental Body to which any of the Acquired Corporations is a party, or by which any of the Acquired Corporations or any assets of any of the Acquired Corporations are bound, pursuant to which the applicable Acquired Corporation is providing goods or services for annual consideration in excess of $100 million.

"**Governmental Body**" means any: (a) nation, state, commonwealth, province, territory, county, municipality, district or other governmental jurisdiction of any nature; (b) federal, state, local, municipal, foreign or other government; (c) governmental or quasi-governmental authority of any nature (including any governmental division, department, agency, commission, instrumentality, official, and any court or other tribunal); or (d) self-regulatory organization (including the New York Stock Exchange, the Tokyo Stock Exchange and the Financial Industry Regulatory Authority).

"**HoldCo**" has the meaning set forth in the preamble to the Agreement.

"**HoldCo Number**" has the meaning set forth in Section 1.2(b) of the Agreement.

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

"**In the Money Multiplier**" has the meaning set forth in Section 1.2(b) of the Agreement.

"**In the Money Options**" has the meaning set forth in Section 1.2(b) of the Agreement.

"**Indebtedness**" means, with respect to any Person, (a) such Person's indebtedness for borrowed money, (b) amounts owing by such Person as deferred purchase price for property or

services (excluding accrued expenses and trade payables), (c) indebtedness of such Person evidenced by any note, bond, debenture, mortgage or other debt instrument or debt security, (d) commitments or obligations by which such Person assures a creditor against Loss (including contingent reimbursement obligations with respect to letters of credit), (e) indebtedness of such Person secured by a lien on any assets or properties of such Person, (f) obligations of such Person under any interest rate, currency or other hedging agreement, (g) indebtedness of such Person under leases required to be accounted for as capital leases under GAAP, and (h) guarantees of such Person with respect to any indebtedness, amounts owing, commitments or obligations of any other Person of a type described in clauses (a) through (g) above.

"**Indemnification Agreement**" has the meaning set forth in Section 5.7(a) of the Agreement.

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"**Indemnified Person**" has the meaning set forth in Section 5.7(a) of the Agreement.

"**Intellectual Property**" means (a) all rights of the following types, which may exist or be created under the laws of any jurisdiction in the world: (i) rights associated with works of authorship, including exclusive exploitation rights, copyrights, moral rights and mask works; (ii) trademark, service mark and trade name rights and similar rights; (iii) trade secret rights; (iv) patent and industrial property rights; and (v) rights in or relating to registrations, renewals, extensions, combinations, divisions and reissues of, and applications for, any of the rights referred to in clauses (i) through (iv) above; and (b) all rights in software, designs, schematics, protocols, documentation, works of authorship, databases, interfaces, web sites, domain names, trademarks, service marks, trade names, algorithms, methods, processes, inventions, proprietary information, and other technology.

"**Intervening Event**" has the meaning set forth in Section 5.5(c)(ii) of the Agreement.

"**IRS**" means the United States Internal Revenue Service.

"**KGCC**" means the Kansas General Corporation Code.

"**Knowledge**" means, with respect to a party to the Agreement and a particular fact or other matter, that any of such party's representatives listed on Part A of the Company Disclosure Schedule or the Parent Disclosure Schedule, as applicable, has actual knowledge of such fact or other matter. A party shall be deemed to have Knowledge of any fact or other matter communicated in a notice properly given under Section 9.9.

"**KSA**" means Kansas Statutes Annotated.

"**Leased Real Property**" has the meaning set forth in Section 3.10(b) of the Agreement.

"**Legal Proceeding**" means any action, suit, litigation, arbitration, dispute, proceeding (including any civil, criminal, administrative, investigative or appellate proceeding), hearing, inquiry, audit, examination or investigation commenced, brought, conducted or heard by or before, or otherwise involving, any court or other Governmental Body or any arbitrator or arbitration panel.

"**Legal Requirement**" means any federal, state, local, municipal, foreign or other law, statute, constitution, principle of common law, resolution, ordinance, code, edict, decree, rule, regulation, order, ruling or requirement issued, enacted, adopted, promulgated, implemented or otherwise put into effect by or under the authority of any Governmental Body.

"**Letter of Transmittal**" has the meaning set forth in Section 2.8(b) of the Agreement.

"**License**" means any: (a) permit, license, certificate, franchise, permission, variance, clearance, registration, qualification or authorization issued, granted, given or otherwise made available by or under the authority of any Governmental Body or pursuant to any Legal Requirement; or (b) right under any Contract with any Governmental Body.

"**Liens**" means any mortgage, option, deed of trust, lien, pledge, security interest, title retention device, lease, license, conditional sale or other security arrangement, collateral assignment, claim, charge, adverse claim of title, ownership or right to use, right of first refusal, servitude, proxy, hypothecation, equitable interest, preference, right of possession, tenancy, encroachment, infringement, interference, community property interest, defect, exception,

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reservation, impairment, imperfection of title, condition or restriction of any nature or other encumbrance of any kind, other than: (w) statutory liens for Taxes that are not yet due and payable or liens for Taxes being contested in good faith by any appropriate proceedings for which adequate reserves have been established (in accordance with GAAP); (x) statutory liens to secure obligations to landlords, lessors or renters under leases or rental agreements; (y) deposits or pledges made in connection with, or to secure payment of, workers' compensation, unemployment insurance or similar programs mandated by Legal Requirements; and (z) statutory liens in favor of carriers, warehousemen, mechanics and materialmen, to secure claims for labor, materials or supplies and other like liens arising in the ordinary course of business consistent with past practice. For the avoidance of doubt, the term "**Lien**" shall not include a license of Intellectual Property.

"**Made Available**" means, with respect to any information, document or other material, that such information, document or material was made available by the Company to Parent or by Parent to the Company, as applicable, for review prior to the execution and delivery of the Agreement, by either (i) physically delivering such information to the recipient, (ii) delivering such information to the recipient in electronic format, whether via email or facsimile or contained in a disc or other memory device, or (iii) by making such information available to the recipient in a virtual or physical data room maintained by such party or otherwise in connection with the Merger and the other Contemplated Transactions. In addition Made Available shall include information, documents or other materials reasonably available through EDGAR.

"**Material Contract**" has the meaning set forth in Section 3.13(a) of the Agreement.

"**Material Licenses**" has the meaning set forth in Section 3.15(b) of the Agreement.

"**Materials of Environmental Concern**" includes chemicals, pollutants, contaminants, wastes, toxic substances, hazardous substances and wastes, petroleum and petroleum products and any other substance that is regulated by any Environmental Law.

"**Merger**" has the meaning set forth in the Recitals to the Agreement.

"**Merger Consideration**" means the shares of Parent Common Stock and cash issuable and payable to holders of Company Common Stock pursuant to Sections 2.5(a)(iii) and 2.6 of the Agreement.

"**Merger Sub**" has the meaning set forth in the preamble to the Agreement.

"**NISPOM**" has the meaning set forth in Section 3.4(b) of the Agreement.

"**Non-Electing Shares**" has the meaning set forth in Section 2.6(a) of the Agreement.

"**NYSE**" means the New York Stock Exchange.

"**Order**" means any order, writ, injunction, judgment or decree issued, entered or otherwise promulgated by a court of competent jurisdiction or other Governmental Body.

"**Owned Real Property**" has the meaning set forth in Section 3.10(a) of the Agreement.

"**Parent**" has the meaning set forth in the preamble to the Agreement.

"**Parent Bylaws**" has the meaning set forth in Section 1.2(a) of the Agreement.

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"**Parent Charter**" has the meaning set forth in Section 1.2(a) of the Agreement.

"**Parent Class B Common Stock**" has the meaning set forth in Section 1.1(b) of the Agreement.

"**Parent Common Stock**" has the meaning set forth in Section 1.1(b) of the Agreement.

"**Parent Common Stock Fair Market Value**" means the fair market value of Parent Common Stock as determined in accordance with the method set forth in the Company ESPP.

"**Parent Disclosure Schedule**" means the disclosure schedule that has been delivered by Parent to the Company on or prior to the date of the Agreement.

"**Parent Entities**" has the meaning set forth in the Recitals to the Agreement.

"**Parent Financial Advisors**" means The Raine Group LLC, Mizuho Securities Co., Ltd. and Deutsche Bank.

"**PBGC**" means the United States Pension Benefit Guaranty Corporation.

"**Pension Plan**" has the meaning set forth in Section 3.18(f) of the Agreement.

"**Per Share Amount**" has the meaning set forth in the Recitals to the Agreement.

"**Per Share Cash Portion**" has the meaning set forth in Section 2.10(e) of the Agreement.

"**Person**" means any individual, Entity or Governmental Body.

Exhibit A-12

"**Personal Data**" includes any information that allows the identification of a natural person, including (a) a natural person's name, street address, telephone number, e-mail address, photograph, social security number, driver's license number, passport number and customer or account number, (b) any other piece of information that allows the identification of a natural person and (c) any other data or information collected by or on behalf of the Company from users of Company Products or any website of the Company.

"**Post-Judgment Enforcement Proceeding**" has the meaning set forth in Section 9.5(b) of the Agreement.

"**Pre-Closing Period**" has the meaning set forth in Section 5.1(a) of the Agreement.

"**Prospectus/Proxy Statement**" means the prospectus/proxy statement to be sent to the Company's stockholders in connection with the Company Stockholders' Meeting.

"**Ratings Determination**" has the meaning set forth in Section 6.11(a) of the Agreement.

"**Registration Statement**" means the registration statement on Form S-4 to be filed with the SEC by Parent in connection with the issuance of Parent Common Stock pursuant to the Merger, as said registration statement may be amended prior to the time it is declared effective by the SEC.

"**Related Persons**" means: (a) the former, current and future directors, officers, employees, agents, stockholders, Representatives, Subsidiaries, Affiliates and assignees of Parent; and (b) any former, current or future director, officer, Affiliate or assignee of any Person described in clause (i) of Section 8.3(g) of the Agreement.

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"**Release**" means any spilling, leaking, emitting, discharging, depositing, escaping, leaching, dumping or other releasing into the environment, whether intentional or unintentional.

"**Representatives**" means directors, officers, other employees, agents, attorneys, accountants, advisors (including financial advisors) and other representatives.

"**Required Company Vote**" means the affirmative vote of the holders of a majority of the outstanding shares of Company Common Stock in favor of the adoption of the Agreement and the approval of the Merger.

"**Reverse Termination Fee**" has the meaning set forth in Section 8.3(f) of the Agreement.

"**Sarbanes-Oxley Act**" means the Sarbanes-Oxley Act of 2002.

"**SEC**" means the United States Securities and Exchange Commission.

"**Section 409A**" has the meaning set forth in Section 2.10(a) of the Agreement.

"**Securities Act**" means the Securities Act of 1933, as amended.

"**Service Agent**" has the meaning set forth in Section 9.5(c) of the Agreement.

Exhibit A-13

"**Severance Arrangements**" has the meaning set forth in Section 5.6(c) of the Agreement.

"**Share Exchange Ratio**" has the meaning set forth in Section 2.10(e) of the Agreement.

"**SoftBank**" has the meaning set forth in the preamble to the Agreement.

"**Specified Acquisition Transaction**" has the meaning set forth in Section 8.3(b) of the Agreement.

"**Spectrum Lease**" means any written agreement, together with all amendments, waivers and notices to these written agreements, under which any of the Acquired Corporations is the lessor of or leases the right to use the transmission capacity associated with an FCC License that confers an exclusive right to use spectrum.

"**State Commissions**" means any state public utility commission, public service commission or similar state regulatory authority having jurisdiction over the Acquired Corporations.

"**State Licenses**" has the meaning set forth in Section 3.15(b) of the Agreement.

"**STIP**" has the meaning set forth in Section 5.6(e) of the Agreement.

"**Stock Electing Share**" has the meaning set forth in Section 2.6(a) of the Agreement.

"**Stock Electing Shares Number**" has the meaning set forth in Section 2.6(a) of the Agreement.

"**Stock Proration Fraction**" has the meaning set forth in Section 2.6(a) of the Agreement.

"**Stock Share Number**" has the meaning set forth in Section 2.6(a) of the Agreement.

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"**Subsidiary**" means, with respect to Person, any Entity with respect to which such Person directly or indirectly owns or purports to own, beneficially or of record, (a) an amount of voting securities or other interests in such Entity that is sufficient to enable such Person to elect at least a majority of the members of such Entity's board of directors or other governing body, or (b) at least 50% of the outstanding equity, voting or financial interests in such Entity; *provided*, *however*, that, unless otherwise set forth in the Agreement, Clearwire shall not be considered a Subsidiary of the Company.

"**Superior Offer**" means an unsolicited bona fide written offer by a Third Party for a transaction (a) described in clause (a) of the definition of Acquisition Transaction (except substituting 50% for 20% therein) or providing for such Third Party's acquisition of all or substantially all of the consolidated assets of the Company and its Subsidiaries taken as a whole, (b) that is on terms and conditions that the Company Board (or a committee thereof) in good faith determines (after consultation with its outside legal counsel and financial advisors), after taking into account all relevant factors as the Company Board considers to be appropriate

Exhibit A-14

(including all material legal, financial and regulatory aspects of the transaction contemplated by such Superior Offer), to be more favorable from a financial point of view to the Company's stockholders than the Merger and the other Contemplated Transactions (taken as a whole), (d) that the Company Board determines, if it involves financing, only involves financing that is fully committed or reasonably determined to be available by the Company Board, and (e) is otherwise reasonably capable of being consummated on the terms proposed.

"**Surviving Corporation**" has the meaning set forth in Section 2.1 of the Agreement.

"**Tail Policy**" has the meaning set forth in Section 5.7(c) of the Agreement.

"**Tax**" or "**Taxes**" means all taxes, however denominated, including any interest, penalties or other additions to tax that may become payable in respect thereof, imposed by any federal, territorial, state, local or foreign government or any agency or political subdivision of any such government, which taxes include, without limiting the generality of the foregoing, all income or profits taxes (including, but not limited to, U.S. federal income taxes and state income taxes), payroll and employee withholding taxes, unemployment insurance, social security taxes, sales and use taxes, ad valorem taxes, excise taxes, franchise taxes, gross receipts taxes, business license taxes, occupation taxes, real and personal property taxes, stamp taxes, environmental taxes, transfer taxes, workers' compensation, and other governmental charges, and other obligations of the same or of a similar nature to any of the foregoing.

"**Tax Return**" means any return (including any information return), report, declaration, schedule, notice, form, election, certificate or other document or information filed or required to be filed with or submitted to any Governmental Body relating to Taxes.

"**Team Telecom**" means, collectively, the U.S. government agencies participating in any national security review of a Federal Communications Commission notified transaction involving potential foreign ownership of U.S. telecommunications assets, including the Department of Justice, Federal Bureau of Investigation, Department of Homeland Security, and Department of Defense.

"**Third Party**" means any Person other than the Acquired Corporations.

"**Triggering Event**" means any of the following: (a) the Company Board shall have failed to include in the Prospectus/Proxy Statement, or shall have amended the Prospectus/Proxy Statement to exclude, the Company Board Recommendation; (b) the Company Board shall have effected or publicly announced a Change in Company Board

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Recommendation; (c) the Company shall have entered into any letter of intent or similar document or any Company Contract contemplating any Acquisition Transaction (other than a confidentiality agreement contemplated by Section 5.3(b)) or any offer or proposal with respect to any Acquisition Transaction; or (d) a tender or exchange offer relating to the outstanding Company Common Stock shall have been commenced and the Company shall not have sent to its stockholders, within ten Business Days after the commencement of such tender or exchange offer, a statement disclosing that the Company recommends rejection of such tender or exchange offer.

Exhibit A-15

"**Treasury Regulations**" means any current or future final or temporary regulations that have been issued by the U.S. Department of Treasury pursuant to its authority under the Code and any successor regulations.

"**Unaudited Interim Balance Sheet**" means the unaudited consolidated balance sheet of the Company and its consolidated Subsidiaries as of June 30, 2012, included in the Company's Report on Form 10-Q for the fiscal quarter ended June 30, 2012.

"**U.S. Plan**" has the meaning set forth in Section 3.18(b) of the Agreement.

"**Warrant Agreement**" has the meaning set forth in the Recitals to the Agreement.

"**Willful Breach**" means (i) with respect to any breach of a representation or warranty contained in this Agreement, that the breaching party (A) committed a material breach of such representation or warranty and (B) had Knowledge at the time of such breach that the representation or warranty was being breached, or upon later acquiring Knowledge that such representation or warranty had been breached, failed to use commercially reasonable efforts to cure such breach, provided that such breach was reasonably capable of being cured, and (ii) with respect to any breach of a covenant or obligation contained in this Agreement, that the breaching party (x) committed a material breach of such covenant or obligation, and (y) at the time of such breach, had Knowledge that the covenant or obligation was being breached, or upon later acquiring Knowledge that such covenant or obligation had been breached, failed to use commercially reasonable efforts to cure such breach, provided that such breach was reasonably capable of being cured.

"**2013 STIP**" has the meaning set forth in Section 5.6(e).

Exhibit A-16

Exhibit B
Form of Parent Charter

AMENDED AND RESTATED CERTIFICATE OF INCORPORATION
OF
SPRINT CORPORATION

Pursuant to Sections 242 and 245 of the
General Corporation Law of the State of Delaware

Starburst II, Inc., a corporation organized and existing under the laws of the State of Delaware (the "Corporation"), hereby certifies as follows:

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1. The name of the Corporation is Starburst II, Inc. The date of filing of its original certificate of incorporation with the Secretary of State of the State of Delaware was October 5, 2012.

2. This Amended and Restated Certificate of Incorporation (this "Certificate of Incorporation") restates and integrates and also further amends the provisions of the Certificate of Incorporation of the Corporation, as heretofore amended, and has been duly adopted and approved in accordance with Sections 242 and 245 of the General Corporation Law of the State of Delaware (the "DGCL"), and has been duly approved by the written consent of the stockholders of the corporation in accordance with Section 228 of the DGCL.

3. The text of the Certificate of Incorporation of the Corporation, as heretofore amended, is hereby amended and restated to read in its entirety as follows:

ARTICLE I
NAME

The name of the corporation is Sprint Corporation (the "Corporation").

ARTICLE II
REGISTERED OFFICE AND AGENT

The address of the Corporation's registered office in the State of Delaware is 1209 Orange Street, in the City of Wilmington, 19801, County of New Castle. The name of its registered agent at such address is The Corporation Trust Company.

ARTICLE III
PURPOSE

The nature of the business of the Corporation and the objects or purposes to be transacted, promoted or carried on by it are as follows: To engage in any lawful act or activity for which corporations may be organized under the DGCL.

ARTICLE IV
CAPITAL STOCK

Section 4.1 Authorized Shares. The total number of shares of all classes of capital stock that the Corporation is authorized to issue is **[**—**]** (**[**—**]**) shares, consisting of (i) **[**—**]** (**[**—**]**) shares of Common Stock, $**[**—**]** par value per share ("Common Stock"), (ii) **[**—**]** (**[**—**]**) shares of Non-Voting Common Stock, $**[**—**]** par value per share ("Non-Voting Common Stock" and collectively with Common Stock, "Collective Common Stock"), and (iii) **[**—**]** (**[**—**]**) shares of Preferred Stock, $**[**—**]** par value per share ("Preferred Stock").

Section 4.2 Reclassification. Immediately upon this Amended and Restated Certificate of Incorporation becoming effective pursuant to the DGCL (the "Amendment Effective Time"), each share of Class B Common Stock issued and outstanding immediately prior to the Amendment Effective Time shall automatically be reclassified into a number of shares of Common Stock equal to the HoldCo Number divided by the total number of shares of Class B Common Stock issued and outstanding immediately prior to the Amendment Effective Time, without any further action by the holder of such share of Class B Common Stock. Each certificate that, immediately prior to the

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Amendment Effective Time, represented shares of Class B Common Stock (each, an "Old Class B Certificate") shall from and after the Amendment Effective Time represent that number of shares of Common Stock into which the shares of Class B Common Stock represented by the Old Class B Certificate shall have been reclassified. For purposes of this Section 4.2 only, capitalized terms used but not defined in this Section 4.2 shall have the meanings ascribed to such terms in that certain Agreement and Plan of Merger dated as of October 15, 2012, by and among SoftBank, Starburst I, Inc., the Corporation, Starburst III, Inc., and Sprint Nextel Corporation; *provided* that references to "Parent Common Stock" in the definitions of such terms therein shall be deemed to be references to Common Stock for purposes of this this Section 4.2.

Section 4.3 Increase or Decrease. In addition to any vote of the holders of shares of one or more series of Preferred Stock that may be required by the terms of the Certificate of Incorporation, the number of authorized shares of any class or classes of capital stock of the Corporation may be increased or decreased (but not below the number of shares thereof then outstanding) by the affirmative vote of the holders of at least a majority of the voting power of all of the then issued and outstanding shares of the capital stock of the Corporation entitled to vote generally in the election of directors, voting together as a single class, irrespective of the provisions of Section 242(b)(2) of the DGCL.

Section 4.4 Common Stock. Except as provided in this Certificate of Incorporation, each holder of shares of Common Stock shall be entitled to attend all special and annual meetings of the stockholders of the Corporation and, together with the holders of shares of all other classes or series of stock entitled to attend such meetings and to vote together with the shares of Common Stock on such matter or thing, to cast one vote for each outstanding share of Common Stock held of record by such stockholder upon any matter or thing upon which stockholders are entitled to vote generally. The holders of shares of Common Stock shall have the exclusive voting power of the Collective Common Stock of the Corporation.

Section 4.5 Non-Voting Common Stock.

(a) No Voting Rights. Except as otherwise required by the DGCL, shares of Non-Voting Common Stock shall have no voting power and the holders thereof, as such, shall not be entitled to vote on any matter that is submitted to a vote or for the consent of the stockholders of the Corporation.

(b) Dividends. Subject to the rights and preferences applicable to any series of Preferred Stock, if any, outstanding at any time, the holders of shares of Non-Voting Common Stock shall be entitled to receive, on a per share basis, the same form and amount of dividends and other distributions of cash, property, or shares of stock of the Corporation as may be declared by the Board of Directors of the Corporation (the "Board of Directors") from time to time with respect to shares of Common Stock out of assets or funds of the Corporation legally available therefor; *provided*, *however*, that in the event that such dividend is paid in the form of shares of Common Stock or rights to acquire shares of Common Stock, the holders of shares of Non-Voting Common Stock shall receive shares of Non-Voting Common Stock or rights to acquire shares of Non-Voting Common Stock, as the case may be.

(c) Conversion upon Liquidation. Immediately prior to the earlier of (i) any distribution of assets of the Corporation to the holders of shares of Common Stock in connection with a voluntary or involuntary liquidation, dissolution, distribution of assets or winding up of the Corporation; or (ii) any record date established to determine the holders of shares of capital stock of the Corporation entitled to receive such distribution of assets, each outstanding share of Non-Voting Common Stock shall automatically, without any further action, convert into and become one (1) fully paid and nonassessable share of Common Stock. The Corporation shall at all times reserve and keep available out of

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its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of Non-Voting Common Stock pursuant to this Section 4.5(c), such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of Non-Voting Common Stock into shares of Common Stock.

(d) Subdivision or Combinations. If the Corporation in any manner subdivides or combines the outstanding shares of Common Stock, the outstanding shares of Non-Voting Common Stock will be subdivided or combined in the same manner. The Corporation shall not subdivide or combine the outstanding shares of Non-Voting Common Stock unless a subdivision or combination is made in the same manner with respect to the shares of Common Stock.

(e) Equal Status. Except as expressly provided in this Article IV, shares of Non-Voting Common Stock shall have the same rights and privileges and rank equally, share ratably, and be identical in all respects to shares of Common Stock as to all matters. Without limiting the generality of the foregoing, (i) in the event of a merger, consolidation, or other business combination of the Corporation requiring the approval of the holders of shares of the Corporation's capital stock entitled to vote thereon (whether or not the Corporation is the surviving entity), the holders of shares of Non-Voting Common Stock shall receive the same amount and form of consideration, if any, on a per share basis as the consideration, if any, received by holders of shares of Common Stock in connection with such merger, consolidation, or combination (provided that if holders of shares of Common Stock are entitled to make an

election as to the amount or form of consideration such holders shall receive in any such merger, consolidation, or combination with respect to their shares of Common Stock, the holders of shares of Non-Voting Common Stock shall be entitled to make the same election as to their shares of Non-Voting Common Stock), and (ii) in the event of (x) any tender or exchange offer to acquire any shares of Common Stock by any third party pursuant to an agreement to which the Corporation is a party or (y) any tender or exchange offer by the Corporation to acquire any shares of Common Stock, pursuant to the terms of the applicable tender or exchange offer, the holders of shares of Non-Voting Common Stock shall be entitled to participate in such tender or exchange offer on the same terms as holders of shares of Common Stock and shall be entitled to receive the same amount and form of consideration on a per share basis as the holders of shares of Common Stock (provided that if holders of shares of Common Stock are entitled to make an election as to the amount or form of consideration such holders shall receive in any such tender or exchange offer with respect to their shares of Common Stock, the holders of shares of Non-Voting Common Stock shall be entitled to make the same election as to their shares of Non-Voting Common Stock).

Section 4.6 Preferred Stock.

(a) The shares of Preferred Stock of the Corporation may be issued from time to time in one or more series thereof, the shares of each series to have such voting powers, full or limited, or no voting powers, and such designations, powers, preferences, and relative, participating, optional or other special rights, and qualifications, limitations, or restrictions thereof, as are stated and expressed herein or in the resolution or resolutions providing for the issue of such series adopted by the Board of Directors as hereinafter provided.

(b) Authority is hereby expressly granted to the Board of Directors, subject to the provisions of this Article IV and to the limitations prescribed by the DGCL, to provide for and designate, out of the unissued shares of Preferred Stock that have not been designated as to series, one or more series of Preferred Stock and, with respect to each such series, to fix by resolution or resolutions providing for the issue of each series the powers (including voting powers, full or limited, if any) of the shares of such series and the designations, preferences, and relative, participating,

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optional, or other special rights, and qualifications, limitations, or restrictions thereof. The authority of the Board of Directors with respect to each series shall include, but not be limited to, the determination or fixing of the following:

(i) the maximum number of shares to constitute such series (which may subsequently be increased or decreased by resolutions of the Board of Directors unless otherwise provided in the resolution providing for the issue of such series), the distinctive designation thereof, and the stated value thereof if different than the par value thereof;

(ii) the dividend rate of such series, the conditions and dates upon which such dividends shall be payable, the relation that such dividends shall bear to the dividends payable on any other class or classes of stock or any other series of any class of stock of the Corporation, and whether such dividends shall be cumulative or noncumulative;

(iii) whether the shares of such series shall be subject to redemption, in whole or in part, and if made subject to such redemption, the times, prices, and other terms and

conditions of such redemption, including whether or not such redemption may occur at the option of the Corporation or at the option of the holder or holders thereof or upon the happening of a specified event;

(iv) the terms and amount of any sinking fund established for the purchase or redemption of the shares of such series;

(v) whether or not the shares of such series shall be convertible into or exchangeable for shares of any other class or classes of stock of the Corporation or any other series of any class of stock of the Corporation, and, if provision is made for conversion or exchange, the times, prices, rates, adjustments, and other terms and conditions of such conversion or exchange;

(vi) the extent, if any, to which the holders of shares of such series shall be entitled to vote with respect to the election of directors or on any other matter, including, without limitation, the extent to which holders of shares of such series shall be entitled to more or less than one vote per share and the extent to which holders of shares of such series shall be entitled to vote for the election of one or more directors who shall serve for such term (which may be greater or less than the terms of any other directors or class of directors) and have such voting powers (which may be greater or less than the voting powers of any other directors or class of directors) as shall be provided in the resolution or resolutions providing for the issue of such series;

(vii) the restrictions, if any, on the issue or reissue of any additional Preferred Stock;

(viii) the rights of the holders of the shares of such series upon the dissolution of, or upon the subsequent distribution of assets of, the Corporation; and

(ix) the manner in which any facts ascertainable outside the resolution or resolutions providing for the issue of such series shall operate upon the voting powers, designations, preferences, rights, and qualifications, limitations, or restrictions of such series.

(c) Any shares of any class or series of Preferred Stock purchased, exchanged, converted, or otherwise acquired by the Corporation, in any manner whatsoever, shall be retired and cancelled promptly after the acquisition thereof. All such shares shall upon their cancellation become authorized but unissued shares of Preferred Stock, without designation as to series, and may be reissued as part of any series of Preferred Stock created by resolution or

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resolutions of the Board of Directors, subject to the conditions and restrictions on issuance set forth in the Certificate of Incorporation or in such resolution or resolutions.

ARTICLE V
BOARD OF DIRECTORS

Section 5.1 General. The business and affairs of the Corporation shall be managed by, or under the direction of, the Board of Directors.

Section 5.2 Number of Directors. The number of directors of the Corporation shall be such as from time to time shall be fixed by, or in the manner provided in the Bylaws of the Corporation (the "Bylaws").

Section 5.3 Election of Directors. Election of directors of the Corporation need not be by written ballot except and as to the extent provided in the Bylaws.

Section 5.4 Removal. Except as otherwise provided for or fixed pursuant to (x) the provisions of Article IV hereof relating to the rights of the holders of shares of any one or more series of Preferred Stock to elect additional directors and remove such directors or (y) pursuant to Section 3.6 of the Bylaws, (a) any director, or the entire Board of Directors, may be removed, with or without cause, by the holders of shares of capital stock having a majority of the voting power of the shares entitled to vote in the election of directors and (b) any SoftBank Designee may be removed, with or without cause, by the SoftBank Stockholder upon written notice to the Board of Directors.

Section 5.5 Powers of the Board of Directors. The following provisions are inserted for the management of the business and for the conduct of the affairs of the Corporation, and for further definition, limitation, and regulation of the powers of the Corporation and its directors and stockholders:

(a) The Board of Directors shall have power without the assent or vote of the stockholders to fix and vary the amount of shares to be reserved for any proper purpose; to authorize and cause to be executed mortgages and liens upon all or any part of the property of the Corporation; to determine the use and disposition of any surplus or net profits; and to fix the times for the declaration and payment of dividends.

(b) The Board of Directors in its discretion may submit any contract or act for approval or ratification at any annual meeting of the stockholders or at any meeting of the stockholders called for the purpose of considering any such act or contract, and any contract or act that shall be approved or be ratified by the vote of the holders of a majority of the stock of the Corporation which is represented in person or by proxy at such meeting and entitled to vote thereat (provided that a lawful quorum of stockholders be represented in person or by proxy at such meeting) shall be as valid and binding upon the Corporation and upon all stockholders as though it had been approved or ratified by every stockholder of the Corporation, whether or not the contract or act would otherwise be open to legal attack because of directors' interest, or for any other reason.

(c) In addition to the powers and authorities hereinbefore or by statute expressly conferred upon them, the Board of Directors is hereby empowered to exercise all such powers and do all such acts and things as may be exercised or done by the Corporation; subject, nevertheless, to applicable law, of this Certificate of Incorporation, and to the Bylaws; *provided*, *however*, that no bylaw so made shall invalidate any prior act of the directors which would have been valid if such bylaw had not been made.

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ARTICLE VI
RELATIONSHIP WITH SOFTBANK

Section 6.1 Relationship with SoftBank. Because SoftBank, through its Controlled Affiliates, is currently the majority stockholder of the Corporation, and in anticipation that the Corporation and SoftBank may engage in similar activities or lines of business and have an interest in the same areas of corporate opportunities, and in recognition of (i) the benefits to be derived by the Corporation through its continued contractual, corporate and business relations with SoftBank and its Controlled Affiliates (including service of officers and directors of SoftBank and its Controlled Affiliates as directors of the Corporation) and (ii) the difficulties attendant to any director, who desires and endeavours fully to satisfy such director's fiduciary duties, in determining the full scope of such duties in any particular situation, the provisions of this Article VI are set forth to regulate, define and guide the conduct of certain affairs of the Corporation as they may involve SoftBank and its Controlled Affiliates and their respective officers and directors, and the powers, rights, duties and liabilities of the Corporation and its officers, directors and stockholders in connection therewith.

Section 6.2 Business Activities.

(a) Subject to Section 6.2(b), neither SoftBank nor any of its Affiliates shall have a duty to refrain from engaging, directly or indirectly in the same or similar business activities or lines of business as the Corporation or any of the Corporation's Controlled Affiliates, other than in a Competing Business. Without limiting Section 6.2(b), to the fullest extent permitted by law neither SoftBank nor any Controlled Affiliate of SoftBank nor any of their respective officers or directors shall be liable to the Corporation or its stockholders or to any Controlled Affiliate of the Corporation for breach of any fiduciary duty by reason of any such activities of SoftBank or its Controlled Affiliates or of such Person's participation therein.

(b) Neither SoftBank nor any of its Controlled Affiliates (other than the Corporation or any Person that is also a Controlled Affiliate of the Corporation) shall conduct, prior to the date on which SoftBank's Voting Interest falls below 10% for 90 consecutive days (the "Expiration Date"), any Competing Business. In addition, until the Expiration Date, neither SoftBank nor any of its Controlled Affiliates shall acquire, directly or indirectly, any equity interests of any Person that conducts a Competing Business (an "Acquired Entity"); *provided*, *however*, that neither SoftBank nor any Controlled Affiliate of SoftBank shall be prohibited from:

(i) acquiring an interest in any Person and maintaining its interest in such Person if the purchase price for such interest at the time of acquisition is $100 million or less (or the Corporation otherwise waives such prohibition);

(ii) acquiring, merging or combining with or otherwise participating in any business combination or similar transaction with any Person that engages through a subsidiary, segment or division in a Competing Business where the reasonable value attributable to such subsidiary, segment or division is $100 million or less (or the Corporation otherwise waives such prohibition); or

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(iii) acquiring, merging or combining with or otherwise participating in any business combination or similar transaction with any Person that engages through a subsidiary, segment or division in a Competing Business where the reasonable value attributable to such subsidiary, segment or division is greater than $100 million and less than or equal to $500 million (or the Corporation otherwise waives such prohibition) if SoftBank or its Controlled Affiliate,

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as applicable, commits to the Corporation to sell, and does in fact sell, the Acquired Entity's relevant subsidiary, segment or division (or a portion thereof sufficient to reduce its value to $100 million or less) within 12 months after the relevant acquisition, merger or combination.

(c) To the fullest extent permitted by law, neither SoftBank nor any of its Controlled Affiliates shall have a duty to refrain from doing business with any client, customer or vendor of the Corporation or any of its Subsidiaries, and without limiting Section 6.3 below, neither SoftBank nor any of its Controlled Affiliates nor any of their respective officers, directors or employees shall be deemed to have breached its or his fiduciary duties, if any, to the Corporation solely by reason of SoftBank or any of its Controlled Affiliates engaging in any such activity.

Section 6.3 Corporate Opportunities.

(a) Subject to Section 6.3(b) below, in the event that SoftBank or any of its Controlled Affiliates or any of their respective officers, directors or employees acquires knowledge of a potential transaction or other matter which may be a corporate opportunity for both SoftBank (or any of its Controlled Affiliates) and the Corporation (or any of its Controlled Affiliates), neither SoftBank nor any of its Controlled Affiliates shall have any duty to communicate or offer such corporate opportunity to the Corporation or any of its Controlled Affiliates and to the fullest extent permitted by law, none of them shall be liable to the Corporation or its stockholders or any of the Corporation's Controlled Affiliates for breach of any fiduciary or other duty as a stockholder of the Corporation or otherwise by reason of the fact that SoftBank or any of its Controlled Affiliates acquires, pursues or obtains such corporate opportunity for itself, directs such corporate opportunity to another Person, or otherwise does not communicate information regarding such corporate opportunity to the Corporation or any of its Controlled Affiliates, and the Corporation (on behalf of itself and its Controlled Affiliates) to the fullest extent permitted by law hereby waives and renounces any claim that such business opportunity constituted a corporate opportunity that should have been presented to the Corporation or any of its Controlled Affiliates.

(b) In the event that an individual who is a director or officer of the Corporation (or any of its Controlled Affiliates) and who is also a director, officer or employee of SoftBank (or any of its Controlled Affiliates) acquires knowledge of a potential transaction or other matter which would be a corporate opportunity for both the Corporation (or any of its Controlled Affiliates) and SoftBank (or any of its Controlled Affiliates) (a "Mutual Corporate Opportunity"), such director or officer shall to the fullest extent permitted by law have fully satisfied and fulfilled his fiduciary duty to the Corporation or any of its Controlled Affiliates with respect to such Mutual Corporate Opportunity, and the Corporation (on behalf of itself and its Controlled Affiliates) hereby waives and renounces any claim that such Mutual Corporate Opportunity constituted a corporate opportunity that should have been presented to the

Corporation (or any of its Controlled Affiliates), and agrees that a Mutual Corporate Opportunity offered to any individual who is an officer or director of the Corporation (or any of its Controlled Affiliates), and who is also an officer, director or employee of SoftBank (or any of its Controlled Affiliates), shall belong to SoftBank, unless such Mutual Corporate Opportunity (i) relates solely to a corporate opportunity that would constitute a Competing Business within the United States of America and (ii) was expressly offered to such individual in (and as a direct result of) his or her capacity as a director or officer of the Corporation (or any of its Controlled Affiliates) (a "Sprint Opportunity"), in which case such Sprint Opportunity shall not be taken by SoftBank (or any of its Controlled Affiliates) without the written consent of the Corporation.

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Section 6.4 Deemed Consent of Stockholders. Any Person purchasing or otherwise acquiring any interest in any shares of capital stock of the Corporation shall be deemed to have notice of and to have consented to the provisions of this Article VI.

Section 6.5 Purchase of Corporation Stock by SoftBank. In the event that SoftBank's Voting Interest equals or exceeds 85%, then, on a date to be determined by SoftBank in its sole discretion (the "Relevant Date") that is not more than 120 days following the date upon which SoftBank's Voting Interest first equals or exceeds 85%, either SoftBank or a Controlled Affiliate of SoftBank or the Corporation shall commence a tender offer to acquire all shares of Common Stock not owned by SoftBank (the "Minority Shares") at a price not less than the volume-weighted average closing price per share of Common Stock, as reported on the New York Stock Exchange (or, if applicable, such other national securities exchange on which the Common Stock is listed), as reported by Bloomberg, L.P., for the twenty (20) consecutive trading days immediately preceding (but not including) the trading day immediately preceding the Relevant Date (the "Buyout Price"). In the alternative, at any time on or before the Relevant Date, SoftBank may, but is not obligated to, cause the Corporation to effect a merger or other business combination pursuant to which the holders of the Minority Shares are entitled to receive an amount at least equal to the Buyout Price in exchange for each of their Minority Shares. The actions of the Corporation in respect of a tender offer or business combination pursuant to this Section 6.5 shall require, in addition to any approval required by law, (a) the approval of the Board of Directors and (2) the affirmative vote of at least a majority of the Independent Directors who do not have a material interest in the matter (other than as a director and, as applicable, stockholder of the Corporation)

Section 6.6 Termination; Binding Effect. Notwithstanding anything in this Certificate of Incorporation to the contrary, the provisions of Sections 6.3(b) and 6.5 above shall expire on the date that SoftBank's Voting Interest is first reduced below 20%. Neither such expiration, nor the alteration, amendment, change or repeal of any provision of this Article VI nor the adoption of any provision of this Certificate of Incorporation inconsistent with any provision of this Article VI shall eliminate or reduce the effect of this Article VI in respect of any matter occurring, or any cause of action, suit or claim that, but for this Article VI, would accrue or arise, prior to such expiration, alteration, amendment, repeal or adoption.

Section 6.7 Article VII. The provisions of this Article VI are in addition to the provisions of Article VII.

ARTICLE VII
TRANSACTIONS WITH SOFTBANK

Section 7.1 Affiliate Transactions; Contracts Not Void. No contract, agreement, arrangement or transaction (or any amendment, modification or termination thereof) between the Corporation, on the one hand, and SoftBank or any of its Controlled Affiliates, on the other hand, shall be void or voidable solely for the reason that SoftBank or one or more of its Controlled Affiliates is a party thereto, or solely because any directors or officers of the Corporation or any of its Controlled Affiliates who are affiliated with SoftBank or any of its Controlled Affiliates are present at or participate in the meeting of the Board of Directors or committee thereof which authorizes the contract, agreement, arrangement, transaction, amendment, modification or termination or solely because his or their votes are counted for such purpose, and subject to the foregoing, any such contract, agreement, arrangement or transaction (or any amendment, modification or termination thereof) shall be governed by the provisions of this Certificate of Incorporation, the Bylaws, the DGCL and other applicable law.

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Section 7.2 Quorum. Directors of the Corporation who are also directors or officers of SoftBank may be counted in determining the presence of a quorum at a meeting of the Board of Directors or of a committee that authorizes or approves any such contract, agreement, arrangement or transaction (or amendment, modification or termination thereof). Shares of Common Stock owned by SoftBank and its Controlled Affiliates may be counted in determining the presence of a quorum at a meeting of stockholders that authorizes or approves any such contract, agreement, arrangement or transaction (or amendment, modification or termination thereof).

Section 7.3 No Liability for Good Faith Actions. To the fullest extent permitted by law, neither SoftBank nor any of its Controlled Affiliates, nor any of their respective officers or directors, shall be liable to the Corporation or its stockholders or any of its Controlled Affiliates for breach of any fiduciary duty or duty of loyalty or failure to act in (or not opposed to) the best interests of the Corporation or any of its Controlled Affiliates or the derivation of any improper personal benefit by reason of the fact that SoftBank or any of its Controlled Affiliates or any of their respective officers or directors thereof in good faith takes any action or exercises any rights or gives or withholds any consent in connection with any contract, agreement, arrangement or transaction between the Corporation or any of its Controlled Affiliates, on the one hand, and SoftBank or any of its Controlled Affiliates, on the other hand. No vote cast or other action taken by any individual who is an officer, director or other representative of SoftBank, which vote is cast or action is taken by such individual in his capacity as a director of the Corporation or any of its Controlled Affiliates, shall constitute an action of or the exercise of a right by or a consent of SoftBank or any of its Controlled Affiliates for the purpose of any such contract, agreement, arrangement or transaction.

Section 7.4 Deemed Consent by Stockholders. Any Person purchasing or otherwise acquiring any interest in any shares of capital stock of the Corporation shall be deemed to have notice of and to have consented to the provisions of this Article VII.

Section 7.5 Contracts Covered. For purposes of this Article VII, any contract, agreement, arrangement or transaction with the Corporation or any of its Controlled Affiliates shall be deemed to be a contract, agreement, arrangement or transaction with the Corporation.

Section 7.6 Binding Effect. Neither the alteration, amendment, change or repeal of any provision of this Article VII nor the adoption of any provision inconsistent with any provision of this Article VII shall eliminate or reduce the effect of this Article VII in respect of any matter occurring, or any cause of action, suit or claim that, but for this Article VII, would accrue or arise, prior to such alteration, amendment, change, repeal or adoption.

Section 7.7 Article VI. The provisions of this Article VII are in addition to the provisions of Article VI.

ARTICLE VIII
REDEMPTION OF SHARES HELD BY ALIENS

Notwithstanding any other provision of this Certificate of Incorporation to the contrary, outstanding shares of capital stock beneficially owned by Aliens may be redeemed by the Corporation, by action duly taken with the approval of (i) the Board of Directors and (ii) the affirmative vote of at least a majority of the Independent Directors of the Corporation in its sole discretion as provided in this Article VIII. The terms and conditions of such redemption shall be as follows, subject in any case to any other rights of a particular Alien or of the Corporation pursuant to any contract or agreement between such Alien and the Corporation.

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Section 8.1 Redemption at Fair Value. The Board of Directors shall pay in consideration for the capital stock to be redeemed an amount in cash (the "Redemption Price") equal to such price as is mutually determined by the holders of the capital stock to be redeemed and the Corporation, or, if no mutually acceptable agreement can be reached, equal to 100% of the "Capital Stock Fair Market Value", which shall be determined as follows:

(a) if the relevant class or series of capital stock is publicly traded at the time of determination, the average of the closing prices for such capital stock on all domestic securities exchanges on which such capital stock may at the time be listed, or, if there have been no sales of such capital stock on any such exchange on such day, the average of the highest bid and lowest asked prices for such capital stock on all such exchanges at the end of such day, or, if on any day such capital stock is not so listed, the average of the representative bid and asked prices for such capital stock quoted on the NASDAQ system as of the close of trading on such day, or if on any day such security is not quoted in the NASDAQ system, the average of the highest bid and lowest asked prices for such capital stock on such day in the domestic over-the-counter market as reported by the Pink Sheets, LLC, or any similar successor organization, in each such case averaged over the 30-day period ending three days prior to the Redemption Date (as defined in Section 8.2 of this Article VIII); and

(b) if the relevant class or series of capital stock is not publicly traded at the time of determination, then the fair value of such capital stock as determined in good faith by the disinterested and independent members of the Board of Directors.

Section 8.2 Redemption Date; Redemption Notice. At least five but no more than 30 days prior to any date on which capital stock is to be redeemed (a "Redemption Date"), written notice shall be sent by mail, first class postage prepaid, overnight mail, facsimile, or electronic mail to each holder of record (at the close of business on the business day next preceding the day on which notice is given) of the shares of capital stock to be redeemed, at the address last shown on the records of the Corporation for such holder, notifying such holder of the redemption to be effected, specifying the number of shares to be redeemed from such stockholder, the Redemption Date, the Redemption Price, the place at which payment may be obtained and calling upon such holder to surrender to the Corporation, in the manner and at the place designated, his, her or its certificate or certificates representing the shares to be redeemed (the "Redemption Notice"). Except as provided in Section 8.3 of this Article VIII, on or after the Redemption Date, each holder of shares of capital stock to be redeemed shall surrender to the Corporation the certificate or certificates representing such shares, in the manner and at the place designated in the Redemption Notice, and thereupon the Redemption Price of such shares shall be payable to the order of the person whose name appears on such certificate or certificates as the owner thereof and each surrendered certificate shall be canceled. In the event less than all the shares represented by any such certificate are redeemed, a new certificate shall be issued representing the unredeemed shares.

Section 8.3 Effect of Redemption. From and after the Redemption Date, unless there shall have been a default in payment of the Redemption Price, all rights of the holders of shares of capital stock designated for redemption in the Redemption Notice as holders of such shares of capital stock (except the right to receive the Redemption Price without interest upon surrender of their certificate or certificates) shall cease with respect to such shares, and such shares shall not thereafter be transferred on the books of the Corporation or be deemed to be outstanding for any purpose whatsoever. If the funds of the Corporation legally available for redemption of shares of capital stock on any Redemption Date are insufficient to redeem the total number of shares of capital stock to be redeemed on such date, those funds which are legally available will be used to redeem the maximum possible number of such shares ratably among the holders of such shares to be redeemed based upon their holdings of capital stock to be redeemed. The shares of capital stock not redeemed shall remain outstanding and entitled to all the rights and preferences

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provided herein. At any time thereafter when additional funds of the Corporation are legally available for the redemption of shares of capital stock, such funds will immediately be used to redeem the balance of the shares which the Corporation has become obligated to redeem on any Redemption Date but which it has not redeemed.

Section 8.4 Prior Notice; Cooperation. Prior to effecting any such redemption, the Corporation shall provide any holder of capital stock to be redeemed with reasonable prior written notice of the reason giving rise to the Corporation's redemption right and, if requested to do so by such holder, the Corporation shall reasonably cooperate with such affected holder in arranging another method to minimize or eliminate the reason giving rise to the Corporation's redemption right, including, but not limited to and not in any particular order of priority, preparing and filing waiver requests with the Federal Communications Commission (the "FCC"), developing alternative ownership structures, assisting with a sale of such holders' interest in the Corporation, amending the Corporation's Certificate of Incorporation and obtaining FCC approvals for such transaction.

Section 8.5 No Application to SoftBank. The provisions of this Article VIII shall not apply to SoftBank or any of its Controlled Affiliates, any acquisition of shares of Common Stock or other capital stock of the Corporation by SoftBank or any of its Controlled Affiliates, or any ownership of such shares otherwise attributed to SoftBank or any of its Controlled Affiliates, and the Corporation shall not have the authority under this Article VIII to redeem any shares of Common Stock or other capital stock of the Corporation beneficially owned, directly or indirectly, by SoftBank or any of its Controlled Affiliates, in each case notwithstanding anything to the contrary therein. In the event that any waivers or approvals are required from the FCC in order for SoftBank or any of its Controlled Affiliates to acquire or hold Common Stock or other capital stock of the Corporation, SoftBank and its Controlled Affiliates shall cooperate to secure such waivers or approvals and abide by any conditions related to such waivers or approvals.

ARTICLE IX
LIMITATION OF DIRECTOR LIABILITY

No director of the Corporation shall be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, for any act or omission, except that a director may be liable (i) for breach of the director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the DGCL, or (iv) for any transaction from which the director derived an improper personal benefit. If the DGCL is amended to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of the directors shall be eliminated or limited to the fullest extent permitted by the DGCL, as so amended. The elimination and limitation of liability provided herein shall continue after a director has ceased to occupy such position as to acts or omissions occurring during such director's term or terms of office. Any amendment, repeal or modification of this Article IX shall not adversely affect any right of protection of a director of the Corporation existing at the time of such repeal or modification.

ARTICLE X
EXCLUSIVE FORUM

Unless the Corporation (through approval of the Board of Directors) consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any actual or purported derivative action or proceeding brought on behalf of the Corporation against directors or officers

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of the Corporation alleging breaches of fiduciary duty or other wrongdoing by such directors or officers, (ii) any action asserting a claim for breach of a fiduciary duty owed by any director or officer of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim against the Corporation or any director or officer of the Corporation arising pursuant to any provision of the DGCL or the Certificate of Incorporation or the Bylaws, (iv) any action to interpret, apply, enforce, or determine the validity of the Certificate of Incorporation or the Bylaws, or (v) any action asserting a claim against the Corporation or any director or officer of the Corporation governed by the internal affairs doctrine. Any Person purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and to have consented to the provisions in this Article X.

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ARTICLE XI
AMENDMENT OF BYLAWS

Section 11.1 Powers to Amend. In furtherance of, and not in limitation of, the powers conferred by statute, the Board of Directors is expressly authorized, and shall have power without the assent or vote of the stockholders, to adopt, alter, amend, change, add to, repeal, and rescind the Bylaws (to the extent not inconsistent with this Article XI). Unless otherwise provided in the Certificate of Incorporation, any adoption, alteration, amendment, change, addition to, repeal, or rescission of the Bylaws by the Board of Directors shall require the approval of a majority of the votes entitled to be cast by all members of the Board of Directors. The stockholders shall also have power to adopt, alter, amend, change, add to, repeal, and rescind the Bylaws (to the extent not inconsistent with this Article XI) and, unless otherwise provided in the Certificate of Incorporation, the affirmative vote of holders of capital stock of the Corporation representing at least a majority of the voting power of the then outstanding shares of capital stock of the Corporation entitled to vote thereon shall be required for the stockholders to adopt, alter, amend, change, add to, repeal, or rescind any provision of the Bylaws.

Section 11.2 Limitation of Powers to Amend. Notwithstanding the foregoing Section 11.1 or any other provision herein to the contrary:

(a) Sections 2.4, 2.6(a), 2.14 and 3.2 of the Bylaws and Section 7.7 of the Bylaws (as it relates to the foregoing Sections) and with respect to each such Section, the defined terms used therein, may be altered, amended, changed, added to, repealed, rescinded or new Bylaws of the Corporation may be made that are inconsistent with such Sections only by the affirmative vote of holders of capital stock of the Corporation representing at least a majority of the voting power of the then outstanding shares of capital stock of the Corporation entitled to vote thereon;

(b) Section 3.3(d) of the Bylaws and Section 7.7 of the Bylaws (as it relates to the foregoing Section) and with respect to each such Section, the defined terms used therein, may be altered, amended, changed, added to, repealed, rescinded or new Bylaws of the Corporation may be made that are inconsistent with such Sections only by the affirmative vote of holders of capital stock of the Corporation representing more than 90% of the voting power of the then outstanding shares of capital stock of the Corporation entitled to vote thereon;

(c) Sections 3.3(a) and 3.3(b), Section 3.3(c) of the Bylaws, Section 3.17(c) of the Bylaws and Section 7.7 of the Bylaws (as it relates to the foregoing Sections) and with respect to each such Section, the defined terms used therein, may be altered, amended, changed, added to, repealed, rescinded or new Bylaws of the Corporation may be made that are inconsistent with such Sections only by (A) prior to the first occurrence of a Triggering Event, the affirmative vote of (1) holders of capital stock of the Corporation representing at least a majority of the voting power of the then outstanding shares of capital stock of the Corporation entitled to vote thereon and (2) holders of capital

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stock of the Corporation representing at least a majority of the then outstanding shares of capital stock of the Corporation other than the SoftBank Owned Shares or (B) after the first occurrence of a Triggering Event, the affirmative vote of holders of capital stock of the Corporation representing more than 80% of the voting power of the then outstanding shares of capital stock of the Corporation entitled to vote thereon;

(d) Section 2.3 of the Bylaws (as it relates to the nomination of directors) and Section 7.7 of the Bylaws (as it relates to the foregoing Section) and with respect to each such Section, the defined terms used therein, may be altered, amended, changed, added to or repealed or rescinded or new Bylaws of the Corporation may be made that are inconsistent with such Sections only by the affirmative vote of (A) holders of capital stock of the Corporation representing at least a majority of the voting power of the then outstanding shares of capital stock of the Corporation entitled to vote thereon and (B) holders of capital stock of the Corporation representing at least a majority of the then outstanding shares of capital stock of the Corporation other than the SoftBank Owned Shares; and

(e) Section 3.19 of the Bylaws and Section 7.7 of the Bylaws (as it relates to the foregoing Section) and with respect to each such Section, the defined terms used therein, may be altered, amended, changed, added to or repealed or rescinded or new Bylaws of the Corporation may be made that are inconsistent with such Sections only by (A) the Board of Directors in accordance with the provisions of Sections 3.19 and 7.7 of the Bylaws or (B) the affirmative vote of (x) holders of capital stock of the Corporation representing at least a majority of the voting power of the then outstanding shares of capital stock of the Corporation entitled to vote thereon and (y) holders of capital stock of the Corporation representing at least a majority of the then outstanding shares of capital stock of the Corporation other than the SoftBank Owned Shares.

ARTICLE XII
AMENDMENT OF CERTIFICATE OF INCORPORATION

Section 12.1 Reservation of Right to Amend Certificate of Incorporation. The Corporation reserves the right, subject to any express provisions or restrictions contained in the Certificate of Incorporation, from time to time, to amend the Certificate of Incorporation or any provision hereof in any manner now or hereafter provided by law, and all rights and powers of any kind conferred upon a director or stockholder of the Corporation by the Certificate of Incorporation or any amendment thereof are conferred subject to such right.

Section 12.2 Stockholder Vote Required For Amendments.

(a) Subject to Section 12.2(d) of this Certificate of Incorporation, Sections 11.1 and 11.2(a) and Articles VI and VII of this Certificate of Incorporation and, with respect to each such Section or Article, the defined terms used therein, may only be altered, amended, changed, added to, repealed, or rescinded by the affirmative vote of holders of capital stock of the Corporation entitled to vote thereon representing more than 66 2/3% of the shares entitled to be voted thereon.

(b) Section 11.2(b) of this Certificate of Incorporation and the defined terms used therein may only be altered, amended, changed, added to, repealed, or rescinded by the affirmative vote of holders of capital stock of the Corporation entitled to vote thereon representing more than 90% of the shares entitled to be voted thereon.

(c) Section 11.2(c) of this Certificate of Incorporation and the defined terms used therein may only be altered, amended, changed, added to, repealed, or rescinded by (i) prior

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to the first occurrence of a Triggering Event, the affirmative vote of (A) holders of capital stock of the Corporation representing at least a majority of the voting power of the then outstanding shares of capital stock of the Corporation entitled to vote thereon and (B) holders of capital stock of the Corporation representing at least a majority of the then outstanding shares of capital stock of the Corporation other than the SoftBank Owned Shares or (ii) after the first occurrence of a Triggering Event, the affirmative vote of holders of capital stock of the Corporation representing more than 80% of the voting power of the then outstanding shares of capital stock of the Corporation entitled to vote thereon.

(d) Sections 6.2, 6.3, 6.5, 11.2(d) and 11.2(e) and this Section 12.2 of this Certificate of Incorporation and, with respect to each such Section or Article, the defined terms used therein, may only be altered, amended, changed, added to, repealed, or rescinded by the affirmative vote of (i) holders of capital stock of the Corporation representing at least a majority of the voting power of the then outstanding shares of capital stock of the Corporation entitled to vote thereon and (ii) holders of capital stock of the Corporation representing at least a majority of the then outstanding shares of capital stock of the Corporation other than the SoftBank Owned Shares.

ARTICLE XIII
DEFINITIONS

As used herein, except as may otherwise be provided in Section 4.2 hereof, the following terms shall have the following meanings:

"Affiliate" has the meaning set forth in rule 12b-2 under the Securities Exchange Act of 1934, as amended.

"Alien" means "aliens," "their representatives," "a foreign government or representatives thereof" or "any corporation organized under the laws of a foreign country" as such terms are used in Section 310(b)(4) of the Communications Act of 1934, as amended, or as hereafter may be amended, or any successor provision of law.

"Competing Business" means any business that, at the time of determination (which in the case of a business acquired by Starburst or its Controlled Affiliates shall be the date such business is acquired), offers products or services in the United States of America that are the same as (or substantially similar to) products or services offered in the United States of America by the Corporation or any Person that is a Controlled Affiliate of the Corporation, if such product or service as offered in the United States of America generates revenue greater than 5% of the combined consolidated revenues of the Corporation and the Persons who are its Controlled Affiliates at the time of such determination over the most recently completed four fiscal quarters.

"Controlled Affiliate" of a Person shall mean an Affiliate of such Person controlled, directly or indirectly, by such Person.

"Person" means any individual, corporation (including not-for-profit), general or limited partnership, limited liability company, joint venture, estate, trust, association, organization, governmental entity or other entity of any kind or nature.

"SoftBank" means SOFTBANK CORP., a Japanese kabushiki kaisha.

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"SoftBank Designee" means any Person nominated by the SoftBank Stockholder pursuant to the Bylaws and (a) elected by the stockholders of the Corporation as a director of the Corporation or (b) appointed by the Board of Directors as a director of the Corporation in accordance with the Bylaws.

"SoftBank Owned Shares" means the aggregate amount of shares of capital stock of the Corporation owned by SoftBank and its Controlled Affiliates.

"SoftBank Stockholder" means SoftBank or the Controlled Affiliate of SoftBank that holds a majority of SoftBank's Voting Interest.

"SoftBank's Voting Interest" means the percentage of the outstanding Common Stock of the Corporation owned of record by SoftBank and its Controlled Affiliates.

"Subsidiary" means, with respect to any Person, any corporation, partnership, joint venture, association or other entity in which such Person beneficially owns (directly or indirectly) fifty percent or more of the outstanding voting stock, voting power or similar voting interests.

"Triggering Event" means SoftBank's Voting Interest falling and remaining below 50% for ninety (90) consecutive days.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the Corporation has caused this Amended and Restated Certificate of Incorporation to be executed by its [ ] this day of , .

Starburst II, Inc.

By _____

Name:

Title:

Exhibit C
Form of Parent Bylaws

AMENDED AND RESTATED BYLAWS
OF
SPRINT CORPORATION

ARTICLE I
OFFICES

1.1 Registered Office. The registered office of the Corporation shall be in the State of Delaware.

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1.2 Other Offices. The Corporation may have offices at such other places both within and without the State of Delaware as the Board of Directors may from time to time determine or as may be necessary or convenient to the business of the Corporation.

ARTICLE II
MEETINGS OF STOCKHOLDERS

2.1 Place of Stockholders' Meetings. All meetings of the stockholders of the Corporation shall be held at such place or places in the continental United States of America, within or without the State of Delaware, as may be fixed by the Board of Directors from time to time; *provided* that in lieu of holding an annual or special meeting of stockholders at a designated place, the Board of Directors may, in its sole discretion, determine that any meeting of stockholders may be held solely by means of remote communication.

2.2 Date and Hour of Annual Meetings of Stockholders. An annual meeting of stockholders shall be held each year at such place (if any), on such date, and at such time as shall be designated by the Board of Directors and stated in the Corporation's notice of the meeting.

2.3 Purposes of Annual Meetings; Election of Directors. At each annual meeting, the stockholders shall elect the members of the Board of Directors for the succeeding year. Directors shall be nominated for election at the annual meeting in accordance with Article III of these Bylaws and shall be elected by stockholders by ballot at the annual meeting, unless they are elected by written consent in lieu of an annual meeting as may be permitted under the General Corporation Law of the State of Delaware. At any such annual meeting any further proper business may be transacted.

2.4 Special Meetings of Stockholders. Except as required by applicable law and subject to the rights of holders of any series of Preferred Stock of the Corporation established pursuant to provisions of the Certificate of Incorporation, special meetings of the stockholders of the Corporation shall be called only by or at the direction of the Board of Directors, pursuant to a resolution approved by a majority of the entire Board of Directors.

2.5 Notice of Meetings of Stockholders.

(a) The Corporation shall give notice of any annual or special meeting of stockholders. Notices of meetings of the stockholders shall state the place, if any, date, and hour of the meeting, the record date for determining stockholders entitled to vote at the meeting, if such record date is different from the record date for determining stockholders entitled to notice of the meeting, and the means of remote communication, if any, by which stockholders and proxyholders may be deemed to be present in person and vote at such meeting. In the case of a special meeting, the notice shall state the purpose or purposes for which the meeting is called. No business other than that specified in the notice thereof shall be transacted at any special meeting. Unless otherwise provided by applicable law or the Certificate of Incorporation, notice shall be given to each stockholder entitled to receive notice of such meeting not fewer than ten days or more than sixty days before the date of the meeting.

(b) Notice to stockholders may be given by personal delivery, mail, or, with the consent of the stockholder entitled to receive notice, by facsimile or other means of electronic transmission. If mailed, such notice shall be delivered by postage prepaid envelope directed to each stockholder at such stockholder's address as it appears in the records of the Corporation and shall be deemed given when deposited in the United States mail. Notice given by electronic transmission pursuant to this subsection shall be deemed given: (i) if by facsimile telecommunication, when directed

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to a facsimile telecommunication number at which the stockholder has consented to receive notice; (ii) if by electronic mail, when directed to an electronic mail address at which the stockholder has consented to receive notice; (iii) if by posting on an electronic network together with separate notice to the stockholder of such specific posting, upon the later of (A) such posting and (B) the giving of such separate notice; and (iv) if by any other form of electronic transmission, when directed to the stockholder. An affidavit of the secretary or an assistant secretary or of the transfer agent or other agent of the Corporation that the notice has been given by personal delivery, by mail, or by a form of electronic transmission shall, in the absence of fraud, be prima facie evidence of the facts stated therein.

(c) Notice of any meeting of stockholders need not be given to any stockholder if waived by such stockholder either in a writing signed by such stockholder or by electronic transmission, whether such waiver is given before or after such meeting is held. If such a waiver is given by electronic transmission, the electronic transmission must either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the stockholder.

2.6 Quorum of Stockholders; Adjournment.

(a) Unless otherwise provided by the Certificate of Incorporation or these Bylaws, at any meeting of the stockholders, the presence in person or by proxy of the holders of a majority of the voting power of the outstanding shares of the Corporation entitled to vote at the meeting, represented in person or by proxy, shall constitute a quorum at a meeting of stockholders.

(b) At any meeting of the stockholders at which a quorum shall be present, a majority of those present in person or by proxy may adjourn the meeting from time to time

without notice other than announcement at the meeting. In the absence of a quorum, the officer or director presiding thereat pursuant to Section 2.7 of these Bylaws shall have power to adjourn the meeting from time to time until a quorum shall be present. Notice of any adjourned meeting, other than announcement at the meeting, shall not be required to be given, except as provided in paragraph (d) below and except where expressly required by law.

(c) At any reconvened meeting of the stockholders at which a quorum shall be present, any business may be transacted which could have been transacted at the meeting originally called but only those stockholders entitled to vote at the meeting as originally noticed shall be entitled to vote at any adjournment or adjournments thereof, unless a new record date is fixed by the Board of Directors.

(d) If an adjournment is for more than thirty days, or if after the adjournment a new record date is fixed for determining the stockholders entitled to vote at the adjourned meeting, a notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the meeting.

2.7 Presiding Officer and Secretary.

(a) The Chairperson of the Board shall preside at all meetings of the stockholders. In the absence of the Chairperson of the Board, the Vice Chairperson of the Board and, in his or her absence, the Chief Executive Officer shall preside at all meetings of the stockholders. In the absence of each of the Chairperson of the Board, the Vice Chairperson of the Board, and the Chief Executive Officer, any director or officer designated by the Board of Directors shall preside at all meetings of the stockholders.

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(b) The Secretary of the Corporation shall act as secretary of all meetings of the stockholders, but, in the absence of the Secretary, the Assistant Secretary designated in accordance with Section 4.9 of these Bylaws shall act as secretary of all meetings of the stockholders. In the absence of the Secretary and any designated Assistant Secretary, the presiding officer of the meeting may appoint any person to act as secretary of the meeting.

2.8 Voting by Stockholders. Except as otherwise provided by law, the Certificate of Incorporation, or these Bylaws:

(a) directors shall be elected by a plurality in voting power of the shares present in person or represented by proxy at a meeting of the stockholders and entitled to vote in the election of directors; and

(b) whenever any corporate action other than the election of directors is to be taken, it shall be authorized by a majority in voting power of the shares present in person or represented by proxy at a meeting of stockholders and entitled to vote on the subject matter.

At each meeting of stockholders, each stockholder having the right to vote shall be entitled to vote in person or by proxy. Each stockholder shall be entitled to vote each share of stock having voting power and registered in such stockholder's name on the books of the Corporation on the record date fixed for determination of stockholders entitled to vote at such meeting.

2.9 Proxies. Each person entitled to vote at a meeting of stockholders or to express consent or dissent to corporate action in writing without a meeting may authorize another person or persons to act for such stockholder by proxy, but no such proxy shall be voted or acted upon after three years from its date, unless the proxy provides for a longer period. A proxy shall be irrevocable if it states that it is irrevocable and if, and only so long as, it is coupled with an interest sufficient in law to support an irrevocable power. Proxies need not be filed with the Secretary of the Corporation until the meeting is called to order, but shall be filed before being voted. Any copy, facsimile telecommunication, or other reliable reproduction of a writing or electronic transmission authorizing a person or persons to act as proxy for a stockholder may be substituted or used in lieu of the original writing or electronic transmission for any and all purposes for which the original writing or electronic transmission could be used; *provided*, *however*, that such copy, facsimile telecommunication, or other reproduction shall be a complete reproduction of the entire original writing or electronic transmission.

2.10 Inspectors. The Corporation may, and shall if required by law, in advance of any meeting of stockholders, appoint one or more inspectors of election, who may be employees of the Corporation, to act at the meeting or any adjournment thereof and to make a written report thereof. The Corporation may designate one or more persons as alternate inspectors to replace any inspector who fails to act. If no inspector so appointed or designated is able to act at a meeting of stockholders, the person presiding at the meeting shall appoint one or more inspectors to act at the meeting. Each inspector, before entering upon the discharge of his or her duties, shall take and sign an oath to execute faithfully the duties of inspector with strict impartiality and according to the best of his or her ability. The inspector or inspectors so appointed or designated shall (i) ascertain the number of shares of capital stock of the Corporation outstanding and the voting power of each such share, (ii) determine the shares of capital stock of the Corporation represented at the meeting and the validity of proxies and ballots, (iii) count all votes and ballots, (iv) determine and retain for a reasonable period a record of the disposition of any challenges made to any determination by the inspectors, and (v) certify their determination of the number of shares of capital stock of the Corporation represented at the meeting and such inspectors' count of all votes and ballots. Such certification and report shall specify such other information as may be required by law. In determining the validity and counting of proxies and ballots cast at any meeting of stockholders of the Corporation, the inspectors may consider such

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information as is permitted by applicable law. No person who is a candidate for an office at an election may serve as an inspector at such election.

2.11 Procedure at Stockholders' Meetings. At each meeting of stockholders, the officer or director presiding thereat pursuant to Section 2.7 of these Bylaws shall fix and announce the date and time of the opening and the closing of the polls for each matter upon which the stockholders will vote at the meeting and shall determine the order of business and all other matters of procedure. The Board of Directors may adopt by resolution such rules, regulations, and procedures for the conduct of the meeting of stockholders as it shall deem appropriate. Except to the extent inconsistent with any such rules and regulations adopted by the Board of Directors, the officer or director presiding thereat pursuant to Section 2.7 of these Bylaws shall have the right and authority to convene and to adjourn the meeting and to establish rules, regulations, and procedures, which need not be in writing, for the conduct of the meeting and to maintain order and safety. Without limiting the foregoing, he or she may:

(a) restrict attendance at any time to bona fide stockholders of record and their proxies and other persons in attendance at the invitation of the presiding officer or Board of Directors;

(b) place restrictions on entry to the meeting after the time fixed for the commencement thereof;

(c) restrict dissemination of solicitation materials and use of audio or visual recording devices at the meeting;

(d) adjourn the meeting without a vote of the stockholders, whether or not there is a quorum present; and

(e) make rules governing speeches and debate, including time limits and access to microphones.

The officer or director presiding at the meeting pursuant to Section 2.7 of these Bylaws shall act in his or her absolute discretion, and his or her rulings shall not be subject to appeal.

2.12 Remote Communication. For the purposes of these Bylaws, if authorized by the Board of Directors in its sole discretion, and subject to such guidelines and procedures as the Board of Directors may adopt, stockholders and proxyholders may, by means of remote communication:

(a) participate in a meeting of stockholders; and

(b) be deemed present in person and vote at a meeting of stockholders whether such meeting is to be held at a designated place or solely by means of remote communication, *provided* that (i) the Corporation shall implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of remote communication is a stockholder or proxyholder, (ii) the Corporation shall implement reasonable measures to provide such stockholders and proxyholders a reasonable opportunity to participate in the meeting and to vote on matters submitted to the stockholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings, and (iii) if any stockholder or proxyholder votes or takes other action at the meeting by means of remote communication, a record of such vote or other action shall be maintained by the Corporation.

2.13 Action by Consent Without a Meeting.

(a) Except as otherwise provided by law or by the Certificate of Incorporation, any action required to be taken at any meeting of stockholders of the Corporation, or any action that may be taken at any annual or special meeting of such

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stockholders, may be taken without a meeting, without prior notice, and without a vote, if a consent or consents in writing setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted and shall be delivered to the Corporation by delivery to its registered office in the State of Delaware, its principal place of business, or an officer or agent of the Corporation having custody of the book or books in which

meetings of stockholders are recorded; *provided*, *however*, that delivery made to the Corporation's registered office in the State of Delaware shall be by hand or by certified or registered mail, return receipt requested. Prompt notice of the taking of the corporate action without a meeting by less than unanimous written consent shall be given to those stockholders who have not consented in writing and who, if the action had been taken at a meeting, would have been entitled to notice of the meeting if the record date for such meeting had been the date that written consents signed by a sufficient number of the holders to take the action were delivered to the Corporation.

(b) To the extent permitted by applicable law, a telegram, cablegram, or other electronic transmission consenting to action to be taken by stockholders shall be deemed to be written, signed, and dated for purposes of these Bylaws so long as it is reduced to paper form (if required by applicable law), sets forth or is delivered with such information as may be required by applicable law, and is transmitted or delivered to the Corporation in the manner provided by applicable law or in any resolutions adopted by the Board of Directors governing the submission of stockholder consents by electronic transmission.

(c) Any copy, facsimile, or other reliable reproduction of a consent in writing (or reproduction in paper form of a consent by telegram, cablegram, or electronic transmission) may be substituted or used in lieu of the original writing (or original reproduction in paper form of a consent by telegram, cablegram, or electronic transmission) for any and all purposes for which the original consent could be used, *provided* that such copy, facsimile, or other reproduction shall be a complete reproduction of the entire original writing (or original reproduction in paper form of a consent by telegram, cablegram, or electronic transmission).

2.14 Notice of Stockholder Business and Nominations.

(a) Annual Meetings of Stockholders.

(i) Nominations of persons for election to the Board of Directors and the proposal of business to be considered by the stockholders may be made at an annual meeting of stockholders only (1) pursuant to the Corporation's notice of meeting (or any supplement thereto), (2) by or at the direction of the Board of Directors, or (3) by any stockholder of the Corporation (x) who was a stockholder of record of the Corporation (and, with respect to any beneficial owner, if different, on whose behalf such business is proposed or such nomination or nominations are made, only if such beneficial owner was the beneficial owner of shares of the Corporation) both at the time the notice provided for in Sections 2.14(a)(ii) and 2.14(a)(iii) is delivered to the Secretary of the Corporation and on the record date for the determination of stockholders entitled to vote at the meeting, (y) who is entitled to vote at the meeting upon such election of directors or upon such business, as the case may be, and (z) who complies with the notice procedures set forth in Sections 2.14(a)(ii) and 2.14(a)(iii). Except for proposals properly made in accordance with Rule 14a-8 under the Securities Exchange Act of 1934, as amended, and the rules and regulations thereunder (as so amended and inclusive of such rules and regulations, the "Exchange Act"), and included in the notice of meeting given by or at the direction of the Board of Directors, the foregoing clause (z) shall be the exclusive means for a stockholder to

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propose business to be brought before an annual meeting of stockholders. In addition, for business (other than the nomination of persons for election to the Board of

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Directors) to be properly brought before an annual meeting by a stockholder, such business must be a proper matter for stockholder action pursuant to the Certificate of Incorporation, these Bylaws, and applicable law.

(ii) For nominations or other business to be properly brought before an annual meeting of stockholders by a stockholder pursuant to clause (z) of Section 2.14(a)(i), the stockholder (1) must have given timely notice thereof in writing and in proper form to the Secretary at the principal executive offices of the Corporation, and (2) must provide any updates or supplements to such notice at such times and in the forms required by this Section 2.14. To be timely, a stockholder's notice relating to an annual meeting shall be delivered to, or mailed to and received by, the Secretary at the principal executive offices of the Corporation not later than the close of business on the ninetieth (90th) day and not earlier than the close of business on the one hundred twentieth (120th) day before the date of the one-year anniversary of the immediately preceding year's annual meeting (*provided*, *however*, that if the date of the annual meeting is more than thirty (30) days before or more than thirty (30) days after such anniversary date, notice by the stockholder must be so delivered, or mailed and received, not earlier than the close of business on the one hundred twentieth (120th) day before such annual meeting and not later than the close of business on the later of the ninetieth (90th) day before such annual meeting or the tenth (10th) day following the day on which public announcement (as defined below) of the date of such meeting is first made by the Corporation). In no event shall the public announcement of an adjournment or postponement of an annual meeting of stockholders commence a new time period (or extend any time period) for the giving of a stockholder's notice as described above.

(iii) To be in proper form for purposes of this Section 2.14, a stockholder's notice to the Secretary (whether pursuant to this Section 2.14(a) or Section 2.15(b)) must set forth:

(1) as to each Proposing Person (as defined below), (x) the name and address of such Proposing Person (including, if applicable, the name and address that appear on the Corporation's books and records); (y) the class or series and number of shares of capital stock of the Corporation that are, directly or indirectly, owned of record or beneficially owned (within the meaning of Rule 13d-3 under the Exchange Act) by such Proposing Person (*provided* that such Proposing Person shall in all events be deemed to beneficially own any shares of any class or series and number of shares of capital stock of the Corporation as to which such Proposing Person has a right to acquire beneficial ownership at any time in the future);

(2) as to each Proposing Person, (i) any derivative, swap, or other transaction or series of transactions engaged in, directly or indirectly, by such Proposing Person, the purpose or effect of which is to give such Proposing Person economic risk similar to ownership of shares of any class or series of capital stock of the Corporation, including due to the fact that the value of such derivative, swap, or other transactions are determined by reference to the price, value, or volatility of any shares of any class or series of capital stock of the Corporation, or which derivative, swap, or other transactions provide, directly or indirectly, the opportunity to profit from any increase in the price or value of shares of any class or series of capital stock of the Corporation ("Synthetic Equity

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Interests"), which Synthetic Equity Interests shall be disclosed without regard to whether (x) the derivative, swap, or other transactions convey any voting rights in such shares to such Proposing Person, (y) the derivative, swap, or other transactions are required to be, or are capable of being, settled through delivery of such shares, or (z) such Proposing Person may have entered into other transactions that hedge or mitigate the economic effect of such

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derivative, swap, or other transactions; (ii) any proxy (other than a revocable proxy or consent given in response to a solicitation made pursuant to, and in accordance with, Section 14(a) of the Exchange Act by way of a solicitation statement filed on Schedule 14A), agreement, arrangement, understanding, or relationship pursuant to which such Proposing Person has or shares a right to vote any shares of any class or series of capital stock of the Corporation (including the number of shares and class or series of capital stock of the Corporation that are subject to such proxy, agreement, arrangement, understanding, or relationship); (iii) any agreement, arrangement, understanding, or relationship, including any repurchase or similar so-called "stock borrowing" agreement or arrangement, engaged in, directly or indirectly, by such Proposing Person, the purpose or effect of which is to mitigate loss to, reduce the economic risk (of ownership or otherwise) of shares of any class or series of capital stock of the Corporation by, manage the risk of share price changes for, or increase or decrease the voting power of, such Proposing Person with respect to the shares of any class or series of capital stock of the Corporation, or that provides, directly or indirectly, the opportunity to profit from any decrease in the price or value of the shares of any class or series of the Corporation ("Short Interests"); (iv) any rights to dividends on the shares of any class or series of capital stock of the Corporation owned beneficially by such Proposing Person that are separated or separable from the underlying shares of the Corporation; (v) any performance related fees (other than an asset based fee) to which such Proposing Person is entitled based on any increase or decrease in the price or value of shares of any class or series of the capital stock of the Corporation, or any Synthetic Equity Interests or Short Interests, if any; and (vi) any other information relating to such Proposing Person that would be required to be disclosed in a proxy statement or other filing required to be made in connection with solicitations of proxies or consents by such Proposing Person in support of the nominations or business proposed to be brought before the meeting pursuant to Regulation 14A under the Exchange Act (the disclosures to be made pursuant to the foregoing clauses (i) through (vi) are referred to as "Disclosable Interests"); *provided*, *however*, that Disclosable Interests shall not include any such disclosures with respect to the ordinary course business activities of any broker, dealer, commercial bank, trust company, or other nominee who is a Proposing Person solely as a result of being the stockholder directed to prepare and submit the notice required by these Bylaws on behalf of a beneficial owner;

(3) if such notice pertains to the nomination by the stockholder of a person or persons for election to the Board of Directors (each, a "nominee"), as to each nominee, (i) the name, age, business and residence address, and principal occupation or employment of the nominee; (ii) all other information relating to the nominee that would be required to be disclosed about such nominee if proxies were being solicited for the election of the nominee as a director in an election contest (whether or not such proxies are or will be solicited), or that is otherwise required, in each case pursuant to and in accordance with Regulation 14A under the Exchange Act; (iii) such nominee's written consent to being named in the proxy statement, if any, as a nominee and to serving as a director if elected;

and (iv) all information with respect to such nominee that would be required to be set forth in a stockholder's notice pursuant to this Section 2.14 if such nominee were a Proposing Person;

(4) if the notice relates to any business (other than the nomination of persons for election to the Board of Directors) that the stockholder proposes to bring before the meeting, (i) a reasonably brief description of the business desired to be brought before the meeting, (ii) the text of the proposal or business (including the text of any resolutions proposed for consideration and if such business includes a proposal to amend the Bylaws of the Corporation, the language of the proposed amendment), (iii) the reasons for conducting such business at the meeting, and (iv) any material interest in such business of each Proposing Person;

(5) a representation that the stockholder giving the notice is a holder of record of stock of the Corporation entitled to vote at such meeting and intends to appear in person or by proxy at the meeting to propose such business or nomination; and

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(6) a representation whether any Proposing Person intends or is part of a group that intends (a) to deliver a proxy statement and/or form of proxy to holders of at least the percentage of the Corporation's outstanding capital stock required to approve or adopt the proposal or elect the nominee and/or (b) otherwise to solicit proxies from stockholders in support of such proposal or nomination.

The Corporation may require any proposed nominee to furnish such other information as it may reasonably require to determine (x) the eligibility of such proposed nominee to serve as a director of the Corporation, and (y) whether such nominee qualifies as an "independent director" or "audit committee financial expert" under applicable law, securities exchange rule or regulation, or any publicly disclosed corporate governance guideline or committee charter of the Corporation.

(iv) Notwithstanding anything in the second sentence of Section 2.14(a)(ii) to the contrary, if the number of directors to be elected to the Board of Directors of the Corporation at an annual meeting is increased and there is no public announcement by the Corporation naming all of the Board of Directors' nominees for director or specifying the size of the increased Board of Directors at least one hundred (100) days before the first anniversary of the preceding year's annual meeting, a stockholder's notice required by this Section 2.14 shall also be considered timely, but only with respect to nominees for any new positions created by such increase, if it shall be delivered to, or mailed to and received by, the Secretary at the principal executive offices of the Corporation not later than the close of business on the tenth (10th) day following the day on which such public announcement is first made by the Corporation.

(v) Only such persons who are nominated in accordance with the procedures set forth in Section 2.14(a) (including those persons nominated by or at the direction of the Board of Directors) shall be eligible to be elected at an annual meeting of stockholders of the Corporation to serve as directors. Only such business shall be conducted at an annual meeting of stockholders as shall have been brought before the meeting in accordance with the

procedures set forth in Section 2.14(a). Except as otherwise provided by law, the chairman of an annual meeting of stockholders shall have the power and duty (A) if the facts warrant, to determine that a nomination or any business proposed to be brought before the annual meeting was not made or was not proposed, as the case may be, in accordance with the procedures set forth in Section 2.14(a), and (B) if any proposed nomination or business was not made or was not proposed in compliance with Section 2.14(a), to declare that such nomination shall be disregarded or that such proposed business shall not be transacted.

(b) Special Meetings of Stockholders.

(i) Only such business shall be conducted at a special meeting of stockholders as shall have been brought before the meeting pursuant to the Corporation's notice of meeting pursuant to Section 2.4. Stockholders shall not be permitted to propose business to be brought before a special meeting of the stockholders. Nominations of persons for election to the Board of Directors may be made at a special meeting of stockholders at which directors are to be elected pursuant to the Corporation's notice of meeting only (A) by or at the direction of the Board of Directors or (B) if a purpose for such meeting as stated in the Corporation's notice for such meeting is the election of one or more directors, by any stockholder of the Corporation (x) who was a stockholder of record of the Corporation (and, with respect to any beneficial owner, if different, on whose behalf such nomination or nominations are made, only if such beneficial owner was the beneficial owner of shares of the Corporation) both at the time the notice provided for in Section 2.14(b)(ii) is delivered to the Secretary of the Corporation and on the record date for the determination of stockholders entitled to vote at the special meeting, (y) who is entitled to vote at the meeting and upon such election, and (z) who complies with the notice procedures set forth in Section 2.14(b)(ii); *provided*, *however*, that a

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stockholder may nominate persons for election at a special meeting only to such position(s) as specified in the Corporation's notice of the meeting.

(ii) If a special meeting has been called in accordance with Section 2.4 for the purpose of electing one or more directors to the Board of Directors, then for nominations of persons for election to the Board of Directors to be properly brought before such special meeting by a stockholder pursuant to clause (B) of Section 2.14(b)(i), the stockholder (A) must have given timely notice thereof in writing and in the proper form to the Secretary of the Corporation at the principal executive offices of the Corporation, and (B) must provide any updates or supplements to such notice at such times and in the forms required by this Section 2.14. To be timely, a stockholder's notice relating to a special meeting shall be delivered to, or mailed to and received by, the Secretary at the principal executive offices of the Corporation not earlier than the close of business on the one hundred twentieth (120th) day before such special meeting and not later than the close of business on the later of the ninetieth (90th) day before such special meeting or the fifteenth (15th) day following the day on which public announcement is first made of the date of the special meeting and of the nominees proposed by the Board of Directors to be elected at such meeting. In no event shall the public announcement of an adjournment or postponement of a special meeting commence a new time period (or extend any time period) for the giving of a stockholder's notice as described above. To be in proper form for purposes of this Section 2.14(b), such notice shall set forth the information required by clauses (1), (2), (3), (5) and (6) of Section 2.14(a)(iii).

(iii) Only such persons who are nominated in accordance with the procedures set forth in this Section 2.14(b) (including those persons nominated by or at the direction of the Board of Directors) shall be eligible to be elected at a special meeting of stockholders of the Corporation to serve as directors. Except as otherwise provided by law, the chairman of a special meeting of stockholders shall have the power and duty (A) if the facts warrant, to determine that a nomination proposed to be made at the special meeting was not made in accordance with the procedures set forth in this Section 2.14(b), and (B) if any proposed nomination was not made in compliance with this Section 2.14(b), to declare that such nomination shall be disregarded.

(c) General.

(i) A stockholder providing notice of nominations of persons for election to the Board of Directors at an annual or special meeting of stockholders or notice of business proposed to be brought before an annual meeting of stockholders shall further update and supplement such notice so that the information provided or required to be provided in such notice pursuant to Sections 2.14(a)(iii)(1) through 2.14(a)(iii)(6) shall be true and correct both as of the record date for the determination of stockholders entitled to notice of the meeting and as of the date that is ten (10) business days before the meeting or any adjournment or postponement thereof, and such updated and supplemental information shall be delivered to, or mailed and received by, the Secretary at the principal executive offices of the Corporation (A) in the case of information that is required to be updated and supplemented to be true and correct as of the record date for the determination of stockholders entitled to notice of the meeting, not later than the later of five (5) business days after such record date or five (5) business days after the public announcement of such record date, and (B) in the case of information that is required to be updated and supplemented to be true and correct as of ten (10) business days before the meeting or any adjournment or postponement thereof, not later than eight (8) business days before the meeting or any adjournment or postponement thereof (or if not practicable to provide such updated and supplemental information not later than eight (8) business days before any adjournment or postponement, on the first practicable date before any such adjournment or postponement).

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(ii) Notwithstanding the foregoing provisions of this Section 2.14, unless otherwise required by law, if the stockholder (or a qualified representative of the stockholder) does not appear at the annual or special meeting of stockholders of the Corporation to present a nomination or proposed business, such nomination shall be disregarded and such proposed business shall not be transacted, notwithstanding that proxies in respect of such vote may have been received by the Corporation. For purposes of this Section 2.14, to be considered a qualified representative of the stockholder, a person must be authorized by a writing executed by such stockholder or an electronic transmission delivered by such stockholder to act for such stockholder as proxy at the meeting of stockholders and such person must produce such writing or electronic transmission, or a reliable reproduction of the writing or electronic transmission, at the meeting of stockholders.

(iii) For purposes of this Section2.14, (A) "public announcement" shall mean disclosure in a press release reported by the Dow Jones News Service, Associated Press, or comparable national news service or in a document publicly filed by the Corporation with the

Securities and Exchange Commission pursuant to Section 13, 14, or 15(d) of the Exchange Act; (B) "Proposing Person" shall mean (x) the stockholder giving the notice required by Section 2.14(a) or Section 2.14(b), (y) the beneficial owner or beneficial owners, if different, on whose behalf such notice is given, and (z) any affiliates or associates (each within the meaning of Rule 12b-2 under the Exchange Act for purposes of these Bylaws) of such stockholder or beneficial owner.

(iv) Section 2.14(a) is expressly intended to apply to any business proposed to be brought before an annual meeting of stockholders other than any proposal made pursuant to Rule 14a-8 under the Exchange Act. Nothing in this Section 2.14 shall be deemed to (A) affect any rights of stockholders to request inclusion of proposals in the Corporation's proxy statement pursuant to Rule 14a-8 (or any successor thereto) promulgated under the Exchange Act, (B) confer upon any stockholder a right to have a nominee or any proposed business included in the Corporation's proxy statement, or (C) affect any rights of the holders of any class or series of Preferred Stock to nominate and elect directors pursuant to and to the extent provided in any applicable provisions of the certificate of incorporation.

2.15 Record Dates.

(a) In order that the Corporation may determine the stockholders entitled to notice of any meeting of stockholders or any adjournment thereof, the Board of Directors may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted by the Board of Directors, and which record date shall not be more than sixty or fewer than ten days before the date of such meeting. If the Board of Directors so fixes a record date for determining the stockholders entitled to notice of any meeting of stockholders, such date shall also be the record date for determining the stockholders entitled to vote at such meeting, unless the Board of Directors determines, at the time it fixes the record date for determining the stockholders entitled to notice of such meeting, that a later date on or before the date of the meeting shall be the record date for determining the stockholders entitled to vote at such meeting. If no record date is fixed by the Board of Directors, the record date for determining stockholders entitled to notice of and to vote at any meeting of stockholders or any adjournment thereof shall be at the close of business on the day next preceding the day on which notice is given, or, if notice is waived, at the close of business on the day next preceding the day on which the meeting is held. A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of such meeting; *provided*, *however*, that the Board of Directors may fix a new record date for determination of stockholders entitled to vote at the adjourned meeting, and in such case shall also fix as the record date for stockholders entitled

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to receive notice of such adjourned meeting the same or an earlier date as that fixed for determining the stockholders entitled to vote at such adjourned meeting in accordance with the foregoing provisions of this Section 2.15(a).

(b) In order that the Corporation may determine the stockholders entitled to consent to corporate action in writing without a meeting, the Board of Directors may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted by the Board of Directors, and which record date shall not be more than 10 days after the date upon which the resolution fixing the record date is adopted by the Board of Directors. Any stockholder of record seeking to have the stockholders authorize or take

corporate action by written consent shall, by written notice to the Secretary, request the Board of Directors to fix a record date. The Board of Directors shall promptly, but in all events within 10 days after the date on which such a request is received, adopt a resolution fixing the record date. If no record date has been fixed by the Board of Directors within 10 days after the date on which such a request is received, the record date for determining stockholders entitled to consent to corporate action in writing without a meeting, when no prior action by the Board of Directors is required by applicable law, shall be the first date on which a signed written consent setting forth the action taken or proposed to be taken is delivered to the Corporation in the manner set forth in Section 2.13. If no record date has been fixed by the Board of Directors and prior action by the Board of Director is required by applicable law, the Certificate of Incorporation, or these Bylaws, the record date for determining stockholders entitled to consent to corporate action in writing without a meeting shall be at the close of business on the date on which the Board of Directors adopts the resolution taking such prior action.

(c) In order that the Corporation may determine the stockholders entitled to receive payment of any dividend or other distribution, or allotment of any rights, or the stockholders entitled to exercise any rights in respect of any change, conversion, or exchange of capital stock, or for the purpose of any other lawful action, except as may otherwise be provided in these Bylaws, the Board of Directors may fix a record date. Such record date shall not precede the date upon which the resolution fixing such record date is adopted, and shall not be more than sixty days prior to such action. If no record date is fixed, the record date for determining stockholders for any such purpose shall be the close of business on the day on which the Board of Directors adopts the resolution relating thereto.

2.16 English Language. All meetings of stockholders will be conducted in the English language and all notices, consents, proxies, documents and other materials provided to stockholders shall be written in English; *provided* that nothing herein shall preclude the Corporation from also providing or making available to stockholders copies of any such documents or materials translated into a foreign language; provided, further, in the event there are any discrepancies between the English and foreign language version of any notice, consent, proxy, document or any other material, the English version of such document shall prevail.

ARTICLE III
DIRECTORS

3.1 Powers. Subject to any limitations set forth in the Certificate of Incorporation and to any provision of the General Corporation Law of the State of Delaware relating to powers or rights conferred upon or reserved to the stockholders or the holders of any class or series of the Corporation's issued and outstanding stock, the business and affairs of the corporation shall be managed, and all corporate powers shall be exercised, by or under the direction of the Board of Directors.

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3.2 Number. Subject to the other provisions of these Bylaws, the Board of Directors shall consist of ten (10) members.

3.3 Composition.

(a) Subject to Section 3.3(d) hereof (as it exists at the Effective Time), during the period from the adoption of these Bylaws until [ ], 201[5][1], (the "Initial Period"), the members of Board of Directors shall consist of (i) the Chief Executive Officer of the Corporation, (ii) three Independent Directors, (iii) three Continuity Directors and (iv) three additional directors who are SoftBank Designees. Notwithstanding anything in the Bylaws to the contrary, in the event that a vacancy arises from the resignation, retirement, death or disability of a Continuity Director during the Initial Period, such vacancy shall only be filled by an Independent Director, by action of the affirmative vote of a majority of the remaining directors then in office.

(b) Subject to Section 3.3(d) hereof (as it exists at the Effective Time), commencing on the last day of the Initial Period and continuing until the first anniversary of such date, the Board of Directors shall consist of (i) the Chief Executive Officer of the Corporation, (ii) six Independent Directors and (iii) three additional directors who are SoftBank Designees.

(c) Subject to Section 3.3(d) hereof (as it exists at the Effective Time) hereof, following the end of the period described in Section 3.3(b) hereof and continuing until the first occurrence of a Triggering Event, the Board of Directors shall at all times include not less than three Independent Directors or such greater number of Independent Directors as may be required by applicable law or applicable rules of any stock exchange on which the Corporation's equity securities are traded.

(d) Following the first occurrence of a Triggering Event, Sections 3.3(a), 3.3(b) and 3.3(c) hereof shall be of no further force or effect and this Section 3.3(d) shall instead apply. At all times after the first occurrence of a Triggering Event and prior to the first occurrence of a Termination Event, the Board of Directors shall include a number of SoftBank Designees that is proportional to SoftBank's Voting Interest, rounded up to the nearest whole number. If the number of SoftBank Designees is required to be reduced under this Section 3.3(d) following the first occurrence of a Triggering Event, SoftBank shall cause one or more SoftBank Designees to resign promptly such that the number of SoftBank Designees following such resignation(s) is in compliance with such requirement and the replacement(s) for such resigning SoftBank Designee(s) (and their successors) shall be appointed by the affirmative vote of a majority of the remaining directors then in office, even if less than a quorum.

(e) For purposes of these Bylaws, the following terms shall have the following meanings:

"Affiliate" has the meaning set forth in Rule 12b-2 under the Securities Exchange Act of 1934, as amended.

"Continuity Directors" means the three individuals proposed by Sprint Nextel Corporation, and reasonably acceptable to the SoftBank Stockholder, from the members of the board of directors of Sprint Nextel Corporation immediately prior to the Effective Time.

[1] Insert date that is two years after the Effective Time (as defined in the Merger Agreement)

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"Controlled Affiliate" of a person shall mean an Affiliate controlled, directly or indirectly, by such person.

"Effective Time" means **[ ]**.[2]

"Independent Director" means any person nominated in accordance with these Bylaws and elected by the stockholders of the Corporation who qualifies as an "Independent Director" as such term is defined in Rule 303A (or any successor rule) of the rules promulgated by the New York Stock Exchange which apply to issuers whose common stock is listed on the New York Stock Exchange.

"SoftBank Affiliate Director" means any SoftBank Designee other than an Independent Director.

"SoftBank Designee" means any Person nominated by the SoftBank Stockholder pursuant to these Bylaws and (a) elected by the stockholders of the Corporation as a director of the Corporation or (b) appointed by the Board of Directors as a director of the Corporation in accordance with these Bylaws. For the avoidance of doubt, the Continuity Directors and the Chief Executive Officer of the Corporation shall not be considered SoftBank Designees.

"SoftBank Stockholder" means SoftBank or the Controlled Affiliate of SoftBank that holds a majority of SoftBank's Voting Interest.

"SoftBank's Voting Interest" means the percentage of the outstanding voting common stock of the Corporation owned of record by SoftBank and its Controlled Affiliates.

"Termination Event" means SoftBank's Voting Interest falling and remaining below ten percent (10%) for ninety (90) consecutive days.

"Triggering Event" means SoftBank's Voting Interest falling and remaining below fifty percent (50%) for ninety (90) consecutive days.

3.4 Terms. The directors of the Corporation shall be nominated as provided in these Bylaws, and each director shall hold office until his successor is duly elected or appointed and qualified or until the earlier of his death, resignation or removal in accordance with the Certificate of Incorporation and these Bylaws. Directors need not be stockholders.

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[2] Insert date of the Effective Time (as defined in the Merger Agreement)

3.5 FCC Eligibility. The Corporation, to the extent necessary to comply with the reporting or disclosure requirements of the Federal Communications Commission, shall obtain from each existing and proposed director information relating to the citizenship and foreign affiliations, if any, of the director and such other information regarding the director as is reasonable to ensure the Corporation is in compliance with applicable law.

3.6 Resignations and Removal.

(a) Any director may resign at any time by giving notice in writing or by electronic transmission to the Board of Directors or the Secretary; *provided*, *however*, that if such notice is given by electronic transmission, such electronic transmission must either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the director. Such resignation shall take effect at the date of receipt of

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such notice or at any later time specified therein. Acceptance of such resignation shall not be necessary to make it effective.

(b) Without limiting and subject to the provisions of Section 3.3 of these Bylaws, except as otherwise may be provided in the Certificate of Incorporation, (i) any director or the entire Board of Directors may be removed, with or without cause, by the holders of capital stock having a majority in voting power of the then-outstanding shares entitled to vote in the election of directors and (ii) any Starburst Designee may be removed, with or without cause, by the Starburst Stockholder upon written notice to the Board of Directors.

3.7 Vacancies and Newly-Created Directorships. Subject to Section 3.3 of these Bylaws, any vacancy on the Board of Directors, howsoever resulting, including through an increase in the number of directors, shall only be filled (i) prior to the first occurrence of a Triggering Event, by the affirmative vote of stockholders holding of record capital stock of the Corporation representing at least a majority of the voting power of the then outstanding shares of capital stock of the Corporation entitled to vote in the election of directors and (ii) after the first occurrence of a Triggering Event, by the affirmative vote of a majority of the remaining directors then in office, even if less than a quorum, or by the sole remaining director, in accordance with these Bylaws. Any director elected to fill a vacancy shall hold office for the same remaining term as that of his or her predecessor and until such director's successors have been duly elected and qualified or until such director's earlier resignation, death, or removal. Any director elected to fill a newly-created directorship shall serve until the next annual meeting of stockholders and until such director's successors have been duly elected and qualified or until such director's earlier resignation, death, or removal.

3.8 Quorum and Action.

(a) Unless provided otherwise by law, a quorum for any meeting of the Board of Directors, whether regular or special, shall require the presence of a number of directors equal to a majority of the total number of directors constituting the whole Board of Directors. If there shall be less than a quorum at any meeting of the Board of Directors as determined under this Section 3.8, a majority of those present may adjourn the meeting from time to time.

(b) Subject to Section 3.19 of these Bylaws, the vote of a majority of the directors present at any meeting at which a quorum is present shall be necessary to constitute the act of the Board of Directors; *provided, however*, that prior to the first occurrence of a Triggering Event, at each meeting of the Board of Directors, each SoftBank Affiliate Director present at such meeting shall have, and be entitled to cast at such meeting, a number of votes equal to the quotient determined by *dividing* (i) the total number of SoftBank Affiliate Directors on the Board of Directors, *by* (ii) the total number of SoftBank Affiliate Directors present at such meeting; and the vote of a majority of the votes of directors present at any meeting at which a quorum is present shall be necessary to constitute the act of the Board of Directors.

3.9 Presiding Officer and Secretary of Meeting. Meetings of the Board of Directors shall be presided over by the Chairperson of the Board, if any, or in his or her absence by the Vice Chairperson of the Board, if any, or in his or her absence by a presiding person chosen at the meeting by the vote of a majority of the directors present at such meeting, or prior to the first occurrence of a Triggering Event, by the vote of a majority of the votes of the directors present at such meeting in accordance with Section 3.8(b) of these Bylaws. The Secretary shall act as secretary of the meeting, but in his or her absence the presiding person at the meeting may appoint any person to act as secretary of the meeting.

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3.10 Annual Meetings. The Board of Directors shall meet each year as soon as practicable following the annual meeting of stockholders, at the place (if any) where such meeting of stockholders has been held, or at such other place (if any) in the continental United States of America as shall be fixed by the Board of Directors (or if not previously fixed by the Board of Directors, by the person presiding over the meeting of the stockholders), for the purpose of election of officers and consideration of such other business as the Board of Directors considers relevant to the management of the Corporation. If in any year directors are elected by written consent in lieu of an annual meeting of stockholders, the Board of Directors shall meet in such year as soon as practicable after receipt of such written consent by the Corporation at such time and place as shall be fixed by the Chairperson of the Board, for the purpose of election of officers and consideration of such other business as the Board of Directors considers relevant to the management of the Corporation.

3.11 Regular Meetings. Regular meetings of the Board of Directors shall be held on such dates and at such times and places, within or without the State of Delaware, as shall from time to time be determined by the Board of Directors, such determination to constitute the only notice of such regular meetings to which any director shall be entitled. In the absence of any such determination, such meetings shall be held, upon notice to each director in accordance with Section 3.12, at such times and places, within or without the State of Delaware, as shall be designated by the Chairperson of the Board.

3.12 Special Meetings. Special meetings of the Board of Directors shall be held at the call of the Chairperson of the Board at such times and places, within or without the State of Delaware, as he or she shall designate, upon notice to each director in accordance with Section 3.12. Special meetings shall be called by the Chief Executive Officer or Secretary on like notice at the written request of any two directors then in office.

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3.13 Notice. Notice of any regular (if required) or special meeting of the Board of Directors may be given by personal delivery, mail, telegram, courier service (including, without limitation, Federal Express), facsimile transmission (directed to the facsimile transmission number at which the director has consented to receive notice), electronic mail (directed to the electronic mail address at which the director has consented to receive notice), or other form of electronic transmission pursuant to which the director has consented to receive notice. If notice is given by personal delivery, by facsimile transmission, by telegram, by electronic mail, or by other form of electronic transmission pursuant to which the director has consented to receive notice, then such notice shall be given on not less than twenty-four (24) hours' notice to each director. If written notice is delivered by mail, then it shall be given on not less than five (5) calendar days' notice to each director. If written notice is delivered by courier service, then it shall be given on not less than three (3) calendar days' notice to each director.

3.14 Waiver of Notice. Notice of any meeting of the Board of Directors, or any committee thereof, need not be given to any member if waived by him or her in writing or by electronic transmission, whether before or after such meeting is held, or if he or she shall sign the minutes of such meeting or attend the meeting, except that if such director attends a meeting for the express purpose of objecting at the beginning of the meeting to the transaction of any business because the meeting is not lawfully called or convened, then such director shall not be deemed to have waived notice of such meeting. If waiver of notice is given by electronic transmission, such electronic transmission must either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the director.

3.15 Action by Telephonic Conference. Members of the Board of Directors, or any committee thereof, may participate in any meeting of the Board of Directors or such committee by means of conference telephone or other

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communications equipment by means of which all persons participating therein can hear each other, and participation in a meeting by such means shall constitute presence in person at such meeting.

3.16 Action by Consent Without Meeting. Any action required or permitted to be taken at any meeting of the Board of Directors or any committee thereof may be taken without a meeting if all members of the Board of Directors or such committee, as the case may be, consent thereto in writing or by electronic transmission, and the writing or writings or electronic transmission or transmissions are filed with the minutes of proceedings of the Board of Directors or such committee; *provided*, *however*, that such electronic transmission or transmissions must either set forth or be submitted with information from which it can be determined that the electronic transmission or transmissions were authorized by the director. Such filing shall be in paper form if the minutes are maintained in paper form and shall be in electronic form if the minutes are maintained in electronic form.

3.17 Committees.

(a) The Board of Directors shall designate (i) an Audit Committee, (ii) a Compensation Committee, (iii) a Nominating and Corporate Governance Committee, and (iv) a Finance Committee, and one or more other committees as the Board of Directors may by resolution or resolutions designate. Subject to the provisions of Sections 3.17(c), (d) and (e),

each committee shall consist of one (1) or more of the directors of the Corporation who shall be appointed by the affirmative vote of a majority of the Board of Directors, or prior to the first occurrence of a Triggering Event, by the vote of a majority of the votes of the directors present at such meeting in accordance with Section 3.8(b) of these Bylaws. No action by any such committee shall be valid unless taken at a meeting for which adequate notice has been given or duly waived by the members of such committee.

(b) Any committee of the Board of Directors, to the extent provided in the resolution or resolutions of the Board of Directors, or in these Bylaws, shall have and may exercise all the powers and authority of the Board of Directors in the management of the business and affairs of the Corporation, and may authorize the seal of the Corporation to be affixed to all papers which may require it; provided, however, that no such committee shall have the power of authority in reference to (i) adopting, amending or repealing any bylaw of the Corporation, (ii) adopting or approving, or recommending to the stockholders of the Corporation, any action or matter expressly required by the DGCL to be submitted to the stockholders for approval (other than recommending the election or removal of directors), and (iii) unless the resolution, these Bylaws, or the Certificate of Incorporation expressly so provide, declare a dividend or to authorize the issuance of stock, and, provided, further, that no such committee shall have the power or authority to approve any action described in Section 3.19 of these Bylaws. Special meetings of any committee shall be held whenever called by direction of the chairman of such committee or at the written request of any one member of such committee.

(c) Prior to the first occurrence of a Triggering Event, each committee of the Board of Directors (other than the Finance Committee or any special committee exempted from this Section 3.17(c) by the Board of Directors (collectively, "Exempt Committees")) shall include at least one Independent Director. At all times following the first occurrence of a Triggering Event and prior to the first occurrence of a Termination Event, each committee that is not an Exempt Committee shall include at least a number of SoftBank Designees that is proportional to SoftBank's Voting Interest, rounded up to the nearest whole number. Each Independent Director or SoftBank Designee serving on any committee may designate as his or her alternate to such committee, for one or more meetings of such committee, another Independent Director or SoftBank Designee, as applicable. Prior to the first occurrence of a

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Triggering Event, the chairman of each committee of the Board of Directors (other than a committee comprised solely of Independent Directors that may be constituted from time to time by the Board of Directors) shall be a SoftBank Designee.

(d) The Audit Committee shall at all times be comprised solely of Independent Directors.

(e) The Finance Committee shall, at all times prior to the first occurrence of a Triggering Event, be comprised solely of individuals selected by the Starburst Stockholder from among the SoftBank Designees.

(f) A quorum for any meeting of any committee of the Board of Directors, whether regular or special, shall require the presence, in person, of a majority of the total number of directors appointed to such committee. If there shall be less than a quorum at any meeting of a committee of the Board of Directors, a majority of those present may adjourn the meeting from

time to time. The vote of a majority of the votes present or otherwise able to be cast at any committee meeting at which a quorum is present shall be necessary to constitute the act of such committee of the Board of Directors; *provided*, *however*, that prior to the first occurrence of a Triggering Event, at each meeting of any committee of the Board of Directors (other than Exempt Committees), each SoftBank Affiliate Director present at such meeting shall have, and be entitled to cast at such meeting, a number of votes equal to the quotient determined by *dividing* (i) the total number of SoftBank Affiliate Directors on such committee, *by* (ii) the total number of SoftBank Affiliate Directors present at such meeting.

3.18 Compensation of Directors. Directors (other than Affiliate Directors) shall receive such reasonable compensation for their service on the Board of Directors or any committees thereof, whether in the form of salary or a fixed fee for attendance at meetings, or both, with expenses, if any, as the Board of Directors may from time to time determine; *provided* that (i) such compensation shall not be less than as was provided prior to the date of these Bylaws, (ii) Affiliate Directors shall be reimbursed only for their expenses incurred in connection with their service on the Board of Directors or any committees thereof and (iii) to the extent that there exists any requirement or policy of the Corporation or under applicable law that directors of the Corporation own shares of the Corporation's common stock, then each of the SoftBank Designees then serving on the Board of Directors shall be entitled to receive, as compensation for their services, the same amount of compensation as is paid to Independent Directors, which shall be payable solely in shares of the Corporation's common stock, until such time as such SoftBank Designee holds the required number of shares of the Corporation's common stock. For purposes hereof, "Affiliate Directors" means any director who is an employee of any of the Corporation or any of its Subsidiaries or SoftBank or any of its Controlled Affiliates. Nothing herein contained shall be construed to preclude any director from serving in any other capacity and receiving compensation therefor.

3.19 Approval of Certain Matters.

(a) During the Initial Period, the approval of any of the following matters shall require, in addition to any approval required by law, (1) the approval of the Board of Directors pursuant to Section 3.8(b) of these Bylaws and (2) the affirmative vote of at least a majority of the Independent Directors who have no interest in the particular matter being voted upon (other than as a director and, as applicable, stockholder of the Corporation):

(i) the declaration and payment of any dividend in respect to the capital stock of the Corporation;

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(ii) any transaction or agreement between the Corporation or any of its Controlled Affiliates, on the one hand, and SoftBank or any of its Controlled Affiliates, on the other hand, including any merger, business combination or similar transaction involving such parties;

(iii) any merger, business combination or similar transaction as to the Corporation in which the SoftBank Stockholder receives consideration for its shares of the common stock of the Corporation that is greater in value on a per share basis than that received by the other stockholders of the Corporation for their shares of the common stock of the

Corporation, or represents a different form of consideration from the form of consideration received by the other stockholders of the Corporation for their shares of the common stock of the Corporation;

(iv) waiver of the provisions of Section 203 of the DGCL with respect to any transaction involving a sale of voting common stock by Starburst or its Controlled Affiliates;

(v) the settlement of any claim between SoftBank and the Corporation;

(vi) any waiver under, or amendment to, Article VI of the Certificate of Incorporation;

(vii) any corporate action necessary to maintain compliance with the requirements of any law, rule or regulation of the United States of America related to national security as it relates to SoftBank or any of its Controlled Affiliates; or

(viii) any amendment to the provisions of this Section 3.19 of these Bylaws.

(b) Unless SoftBank's Voting Interest equals or exceeds 85%, the approval of any action that is designed to, or would have the immediate effect of, causing the Corporation to no longer satisfy the listing requirements of the New York Stock Exchange, as then in effect, shall require (1) the approval of the Board of Directors pursuant to Section 3.8(b) of these Bylaws and (2) the affirmative vote of at least a majority of the Independent Directors; *provided*, *however*, this Section 3.19(b) shall not apply to (i) any action pursuant to which or after which (giving effect to all actions to be taken at the same time) the Corporation's common stock will be listed on another national securities exchange, (ii) any action subject to one or more of the other subsections of this Section 3.19 that has been approved by the Board of Directors as required herein, or (iii) any action that, pursuant to the DGCL or the Certificate of Incorporation, would require the approval of the stockholders of the Corporation.

3.20 Communication with Independent Directors. If a majority of the Independent Directors so elect, the Corporation shall maintain procedures by which stockholders may communicate issues or concerns with respect to matters related to the Corporation in a manner which will be referred, from time to time and in a reasonable manner, to the Independent Directors (or a designee thereof).

3.21 English Language. All meetings of the Board of Directors and the committees thereof, whether regular or special, will be conducted in the English language and all notices, consents, documents and other materials provided to the directors shall be written in English; *provided* that nothing herein shall preclude the Corporation from also providing or making available to directors copies of any such documents or materials translated into a foreign language; *provided*, *further*, in the event there is any discrepancies between the English and foreign language version of any notice, consent, proxy, document or any other material, the English version of such document shall prevail.

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ARTICLE IV
OFFICERS

4.1 Number. The officers of the Corporation shall include a Chief Executive Officer, a Chief Financial Officer, a Chairperson of the Board, a Vice Chairperson of the Board and a Secretary. The Board of Directors may elect or appoint at any time, and from time to time, additional officers or agents, including without limitation, one or more Presidents, a Treasurer, a one or more Assistant Secretaries and one or more Vice Presidents, with such duties as the Board of Directors may deem necessary or desirable.

4.2 Election of Officers, Term, and Qualifications. The officers of the Corporation shall be elected from time to time by the Board of Directors and shall hold office at the pleasure of the Board of Directors. A vacancy in any office because of death, resignation, removal, disqualification, or any other cause shall be filled in the manner prescribed in this Section 4.2 for the regular election to such office. Except for the Chairperson of the Board and the Vice Chairperson of the Board, none of the officers of the Corporation needs to be a director of the Corporation. Any two or more offices may be held by the same person to the extent permitted by the General Corporation Law of the State of Delaware and other applicable law.

4.3 Removal. Any officer may be removed at any time, either with or without cause, by resolution adopted at any regular or special meeting of the Board of Directors by majority of the directors then in office, or prior to the first occurrence of a Triggering Event, by the vote of a majority of the votes of the directors present at such meeting in accordance with Section 3.8(b) of these Bylaws.

4.4 Resignations. Any officer of the Corporation may resign at any time by giving notice in writing or by electronic transmission to the Board of Directors or to the Chairperson of the Board. If such notice is given by electronic transmission, such electronic transmission must either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the officer. Such resignation shall take effect at the date of the receipt of such notice or at any later time specified therein and, unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

4.5 Compensation of Officers. The salaries and other compensation of all officers of the Corporation shall be fixed by or in the manner directed by the Board of Directors from time to time, and no officer shall be prevented from receiving such salary by reason of the fact that he or she also is a director of the Corporation.

4.6 The Chief Executive Officer. The Chief Executive Officer of the Corporation shall exercise such duties as customarily pertain to the office of Chief Executive Officer, and shall have decision-making authority and general and active management of the property, business and affairs of the Corporation, subject to the supervision and control of the Board of Directors. He or she shall perform such other duties as prescribed from time to time by the Board of Directors.

4.7 The Chairperson of the Board. The Chairperson of the Board shall have the powers and duties customarily and usually associated with the office of the Chairperson of the Board, as

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well as such additional powers and duties as may be from time to time assigned to him or her by the Board of Directors. The Chairperson of the Board shall preside at meetings of the stockholders and of the Board of Directors.

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4.8 The Vice Chairperson of the Board. The Vice Chairperson of the Board shall have the powers and duties customarily and usually associated with the office of the Vice Chairperson of the Board, as well as such additional powers and duties as may be from time to time assigned to him or her by the Board of Directors. In the case of absence or disability of the Chairperson of the Board, the Vice-Chairperson of the Board shall perform the duties and exercise the powers of the Chairperson of the Board.

4.9 The Secretary and Assistant Secretaries.

(a) The Secretary shall attend meetings of the Board of Directors and meetings of the stockholders and record all votes and minutes of all such proceedings in a book or books kept for such purpose. The Secretary shall have all such further powers and duties as are customarily and usually associated with the position of Secretary or as may from time to time be assigned to him or her by the Board of Directors, the Chairperson of the Board, or the Chief Executive Officer.

(b) Each Assistant Secretary shall have such powers and perform such duties as may from time to time be assigned to him or her by the Board of Directors, the Chairperson of the Board, the Chief Executive Officer, or the Secretary. In the case of absence or disability of the Secretary, the Assistant Secretary designated by the Chief Executive Officer (or, in the absence of such designation, by the Secretary) shall perform the duties and exercise the powers of the Secretary.

4.10 Duties. Except as otherwise provided in this Article IV, the officers of the Corporation shall have such powers and perform such duties incident to each of their respective offices and such other duties as may from time to time be conferred upon or assigned to them by the Board of Directors.

ARTICLE V
STOCK

5.1 Stock Certificates.

(a) The shares of capital stock of the Corporation shall be represented by certificates, unless the Certificate of Incorporation otherwise provides or unless the Board of Directors provides by resolution or resolutions that some or all of the shares of any class or classes, or series thereof, of the Corporation's capital stock shall be uncertificated.

(b) Every holder of capital stock of the Corporation represented by certificates shall be entitled to a certificate representing such shares. Certificates for shares of stock of the Corporation shall be issued under the seal of the Corporation, or a facsimile thereof, and shall be numbered and shall be entered in the books of the Corporation as they are issued. Each certificate shall bear a serial number, shall exhibit the holder's name and the number of shares evidenced thereby, and shall be signed by the Chairperson of the Board or a Vice Chairperson, if

any, or the Chief Executive Officer or any Vice President, and by the Secretary or an Assistant Secretary or the Treasurer or an Assistant Treasurer. Any or all of the signatures on the certificate may be a facsimile. If any officer, transfer agent, or registrar who has signed or whose facsimile signature has been placed upon a certificate shall have ceased to be such officer, transfer agent, or registrar before such certificate is issued, the certificate may be issued by the Corporation with the same effect as if such person or entity were such officer, transfer agent, or registrar at the date of issue.

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5.2 Transfer of Record Ownership. Transfers of stock of the Corporation shall be made on the books of the Corporation only by direction of the person named in the certificate or his attorney, lawfully constituted in writing, and only upon the surrender of the certificate therefor and a written assignment of the shares evidenced thereby or by a transfer agent subject to Section 5.3. Whenever any transfer of stock shall be made for collateral security, and not absolutely, it shall be so expressed in the entry of the transfer if, when the certificates are presented to the Corporation for transfer, both the transferor and transferee request the Corporation to do so.

5.3 Transfer Agent; Registrar; Rules Respecting Certificates. The Corporation may maintain one or more transfer offices or agencies where stock of the Corporation shall be transferable. The Corporation may also maintain one or more registry offices where such stock shall be registered. The Board of Directors may make such rules and regulations as it may deem expedient concerning the issue, transfer and registration of stock certificates.

5.4 Lost, Stolen, or Destroyed Certificates. Any person claiming a certificate of stock to be lost, stolen, or destroyed shall make an affidavit or an affirmation of that fact, and shall give the Corporation a bond of indemnity in satisfactory form and with one or more satisfactory sureties, whereupon a new certificate (if requested) may be issued of the same tenor and for the same number of shares as the one alleged to be lost, stolen, or destroyed.

5.5 Registered Stockholders. The names and addresses of the holders of record of the shares of each class and series of the Corporation's capital stock, together with the number of shares of each class and series held by each record holder and the date of issue of such shares, shall be entered on the books of the Corporation. Except as otherwise required by the General Corporation Law of the State of Delaware or other applicable law, the Corporation shall be entitled to recognize the exclusive right of a person registered on its books as the owner of shares of capital stock of the Corporation as the person entitled to exercise the rights of a stockholder, including, without limitation, the right to vote in person or by proxy at any meeting of the stockholders of the Corporation. The Corporation shall not be bound to recognize any equitable or other claim to or interest in any such shares on the part of any other person, whether or not it shall have express or other notice thereof, except as otherwise expressly required by the General Corporation Law of the State of Delaware or other applicable law.

5.6 Fractional Shares. The Corporation may, but shall not be required to, issue fractional shares of its capital stock if necessary or appropriate to effect authorized transactions. If the Corporation does not issue fractional shares, it shall (i) arrange for the disposition of fractional interests on behalf of those that otherwise would be entitled thereto, (ii) pay in cash the fair value of fractions of a share as of the time when those who otherwise would be entitled

to receive such fractions are determined, or (iii) issue scrip or warrants in registered form (either represented by a certificate or uncertificated) or in bearer form (represented by a certificate), which scrip or warrants shall entitle the holder to receive a full share upon surrender of such scrip or warrants aggregating a full share. Fractional shares shall, but scrip or warrants for fractional shares shall not (unless otherwise expressly provided therein), entitle the holder to exercise voting rights, to receive dividends thereon, to participate in the distribution of any assets in the event of liquidation, and otherwise to exercise rights as a holder of capital stock of the class or series to which such fractional shares belong.

5.7 Dividends. Subject to the provisions of the Certificate of Incorporation and Section 3.19 of these Bylaws, the Board of Directors may, out of funds legally available therefor at any regular or special meeting, declare dividends upon the capital stock of the Corporation as and when they deem expedient. Before declaring any dividend there may be set apart out of any funds of the Corporation available for dividends, such sum or sums as the Board of Directors from time to time in their discretion deem proper for working capital or as a reserve fund to meet

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contingencies or for equalizing dividends or for such other purposes as the Board of Directors shall deem conducive to the interests of the Corporation.

5.8 Additional Powers of the Board.

(a) In addition to, and without limiting, those powers set forth in Section 3.3, the Board of Directors shall have power and authority to make all such rules and regulations as it shall deem expedient concerning the issue, transfer, and registration of certificates for shares of stock of the Corporation, including the use of uncertificated shares of stock, subject to the provisions of the General Corporation Law of the State of Delaware, other applicable law, the Certificate of Incorporation, and these Bylaws.

(b) The Board of Directors may appoint and remove transfer agents and registrars of transfers, and may require all stock certificates to bear the signature of any such transfer agent and/or any such registrar of transfers.

ARTICLE VI
INDEMNIFICATION

6.1 Indemnification.

(a) Subject to Section 6.3, the Corporation shall indemnify, to the full extent that it shall have power under applicable law to do so and in a manner permitted by such law, any person who is made or threatened to be made a party to or is otherwise involved (as a witness or otherwise) in any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative (hereinafter, a "Proceeding"), by reason of the fact that such person is or was a director or officer of the Corporation, or while serving as a director or officer of the Corporation, is or was serving at the request of the Corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise, including service with respect to an employee benefit plan (collectively, "Another Enterprise"), against expenses (including attorneys' fees), judgments, fines (including ERISA excise taxes or penalties) and amounts paid in settlement actually and reasonably incurred by

him or her in connection with such Proceeding if he or she acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the Corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful.

(b) The Corporation may indemnify, to the full extent that it shall have power under applicable law to do so and in a manner permitted by such law, any person who is made or threatened to be made a party to or is otherwise involved (as a witness or otherwise) in any threatened, pending, or completed Proceeding, by reason of the fact that such person is or was an employee or agent of the Corporation, or while not serving as a director or officer of the Corporation, is or was serving at the request of the Corporation as a director, officer, employee, or agent of Another Enterprise, against expenses (including attorneys' fees), judgments, fines (including ERISA excise taxes or penalties) and amounts paid in settlement actually and reasonably incurred by him or her in connection with such Proceeding if he or she acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the Corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful.

(c) To the extent that a present or former director or officer of the Corporation has been successful on the merits or otherwise in defense of any threatened, pending, or completed Proceeding referred to in Section 145(a) or (b) of the

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General Corporation Law of the State of Delaware, or in defense of any claim, issue, or matter therein, he or she shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him or her in connection therewith.

(d) The termination of any Proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendre or its equivalent, shall not, of itself, create a presumption that the person seeking indemnification did not act in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the Corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his or her conduct was unlawful.

6.2 Advancement of Expenses.

(a) Subject to Section 6.3, with respect to any person who is made or threatened to be made a party to or is otherwise involved (as a witness or otherwise) in any threatened, pending, or completed Proceeding, by reason of the fact that such person is or was a director or officer of the Corporation or while serving as a director or officer of the Corporation, is or was serving at the request of the Corporation as a director, officer, employee, or agent of Another Enterprise, the Corporation shall pay the expenses (including attorneys' fees) incurred by such person in defending any such Proceeding in advance of its final disposition (hereinafter an "advancement of expenses"); *provided*, *however*, that any advancement of expenses shall be made only upon receipt of an undertaking (hereinafter an "undertaking") by such person to repay all amounts advanced if it shall ultimately be determined by final judicial decision from which there is no further right to appeal that such person is not entitled to be indemnified for such expenses under this Article VI or otherwise.

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(b) With respect to any person who is made or threatened to be made a party to or is otherwise involved (as a witness or otherwise) in any threatened, pending, or completed Proceeding, by reason of the fact that such person is or was an employee or agent of the Corporation, or while not serving as a director or officer of the Corporation, is or was serving at the request of the Corporation as a director, officer, employee, or agent of Another Enterprise, the Corporation may, in its discretion and upon such terms and conditions, if any, as the Corporation deems appropriate, pay the expenses (including attorneys' fees) incurred by such person in defending any such Proceeding in advance of its final disposition.

6.3 Actions Initiated Against The Corporation. Anything in Sections 6.1(a) or 6.2(a) to the contrary notwithstanding, except as provided in Section 6.5(b), with respect to a Proceeding initiated against the Corporation by a person who is or was a director or officer of the Corporation (whether initiated by such person in or by reason of such capacity or in or by reason of any other capacity, including as a director, officer, employee, or agent of Another Enterprise), the Corporation shall not be required to indemnify or to advance expenses (including attorneys' fees) to such person in connection with prosecuting such Proceeding (or part thereof) or in defending any counterclaim, cross-claim, affirmative defense, or like claim of the Corporation in such Proceeding (or part thereof) unless such Proceeding was authorized by the Board of Directors of the Corporation.

6.4 Contract Rights. The rights to indemnification and advancement of expenses conferred upon any current or former director or officer of the Corporation pursuant to this Article VI (whether by reason of the fact that such person is or was a director or officer of the Corporation, or while serving as a director or officer of the Corporation, is or was serving at the request of the Corporation as a director, officer, employee, or agent of Another Enterprise) shall be contract rights, shall vest when such person becomes a director or officer of the Corporation, and shall continue as vested contract rights even if such person ceases to be a director or officer of the Corporation. Any

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amendment, repeal, or modification of, or adoption of any provision inconsistent with, this Article VI (or any provision hereof) shall not adversely affect any right to indemnification or advancement of expenses granted to any person pursuant hereto with respect to any act or omission of such person occurring prior to the time of such amendment, repeal, modification, or adoption (regardless of whether the Proceeding relating to such acts or omissions, or any proceeding relating to such person's rights to indemnification or to advancement of expenses, is commenced before or after the time of such amendment, repeal, modification, or adoption), and any such amendment, repeal, modification, or adoption that would adversely affect such person's rights to indemnification or advancement of expenses hereunder shall be ineffective as to such person, except with respect to any threatened, pending, or completed Proceeding that relates to or arises from (and only to the extent such Proceeding relates to or arises from) any act or omission of such person occurring after the effective time of such amendment, repeal, modification, or adoption.

6.5 Claims.

(a) If (X) a claim under Section 6.1(a) with respect to any right to indemnification is not paid in full by the Corporation within sixty days after a written demand has been received by the Corporation or (Y) a claim under Section 6.2(a) with respect to any right to the advancement of expenses is not paid in full by the Corporation within twenty days after a written

demand has been received by the Corporation, then the person seeking to enforce a right to indemnification or to an advancement of expenses, as the case may be, may at any time thereafter bring suit against the Corporation to recover the unpaid amount of the claim.

(b) If successful in whole or in part in any suit brought pursuant to Section 6.5(a), or in a suit brought by the Corporation to recover an advancement of expenses (whether pursuant to the terms of an undertaking or otherwise), the person seeking to enforce a right to indemnification or an advancement of expenses hereunder or the person from whom the Corporation sought to recover an advancement of expenses, as the case may be, shall be entitled to be paid by the Corporation the reasonable expenses (including attorneys' fees) of prosecuting or defending such suit.

(c) In any suit brought by a person seeking to enforce a right to indemnification hereunder (but not a suit brought by a person seeking to enforce a right to an advancement of expenses hereunder), it shall be a defense that the person seeking to enforce a right to indemnification has not met any applicable standard for indemnification under applicable law. With respect to any suit brought by a person seeking to enforce a right to indemnification or right to advancement of expenses hereunder or any suit brought by the Corporation to recover an advancement of expenses (whether pursuant to the terms of an undertaking or otherwise), neither (i) the failure of the Corporation to have made a determination prior to commencement of such suit that indemnification of such person is proper in the circumstances because such person has met the applicable standards of conduct under applicable law, nor (ii) an actual determination by the Corporation that such person has not met such applicable standards of conduct, shall create a presumption that such person has not met the applicable standards of conduct or, in a case brought by such person seeking to enforce a right to indemnification, be a defense to such suit.

(d) In any suit brought by a person seeking to enforce a right to indemnification or to an advancement of expenses hereunder, or by the Corporation to recover an advancement of expenses (whether pursuant to the terms of an undertaking or otherwise), the burden shall be on the Corporation to prove that the person seeking to enforce a right to indemnification or to an advancement of expenses or the person from whom the Corporation seeks to recover an

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advancement of expenses is not entitled to be indemnified, or to such an advancement of expenses, under this Article VI or otherwise.

6.6 Determination of Entitlement to Indemnification. Any indemnification required or permitted under this Article VI (unless ordered by a court) shall be made by the Corporation only as authorized in the specific case upon a determination that indemnification of the present or former director, officer, employee or agent is proper in the circumstances because he or she has met all applicable standards of conduct set forth in this Article VI and Section 145 of the General Corporation Law of the State of Delaware. Such determination shall be made, with respect to a person who is a director or officer of the Corporation at the time of such determination, (i) by a majority vote of the directors who are not parties to such Proceeding, even though less than a quorum; (ii) by a committee of such directors designated by majority vote of such directors, even though less than a quorum; (iii) if there are no such directors, or if such directors so direct, by independent legal counsel in a written opinion; or (iv) by the stockholders. Such determination shall be made, with respect to any person who is not a director or officer of the Corporation at the time of such determination, in the manner

determined by the Board of Directors (including in such manner as may be set forth in any general or specific action of the Board of Directors applicable to indemnification claims by such person) or in the manner set forth in any agreement to which such person and the Corporation are parties.

6.7 Non-Exclusive Rights. The indemnification and advancement of expenses provided in this Article VI shall not be deemed exclusive of any other rights to which any person may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors, or otherwise, both as to action in such person's official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be such director, officer, employee, or agent and shall inure to the benefit of the heirs, executors, and administrators of such person.

6.8 Insurance. The Corporation may purchase and maintain insurance on behalf of any person who is or was a director, officer, employee, or agent of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee, or agent of Another Enterprise against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the Corporation would have the power to indemnify such person against such liability under the provisions of this Article VI or otherwise.

6.9 Severability. If any provision or provisions of this Article VI shall be held to be invalid, illegal, or unenforceable for any reason whatsoever: (1) the validity, legality, and enforceability of the remaining provisions of this Article VI (including, without limitation, each portion of any paragraph or clause containing any such provision held to be invalid, illegal, or unenforceable, that is not itself held to be invalid, illegal, or unenforceable) shall not in any way be affected or impaired thereby; and (2) to the fullest extent possible, the provisions of this Article VI (including, without limitation, each such portion of any paragraph or clause containing any such provision held to be invalid, illegal, or unenforceable) shall be construed so as to give effect to the intent manifested by the provision held invalid, illegal, or unenforceable.

6.10 General. For purposes of this Article VI: (a) references to serving at the request of the Corporation as a director or officer of Another Enterprise shall include any service as a director or officer of the Corporation that imposes duties on, or involves services by, such director or officer with respect to an employee benefit plan; (b) references to serving at the request of the Corporation as an employee or agent of Another Enterprise shall include any service as

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an employee or agent of the Corporation that imposes duties on, or involves services by, such employee or agent with respect to an employee benefit plan; (c) a person who acted in good faith and in a manner such person reasonably believed to be in the interest of the participants and beneficiaries of an employee benefit plan shall be deemed to have acted in a manner not opposed to the best interests of the Corporation; and (d) references to a director of Another Enterprise shall include, in the case of any entity that is not managed by a board of directors, such other position, such as manager or trustee or member of the governing body of such entity, that entails responsibility for the management and direction of such entity's affairs, including, without limitation, general partner of any partnership (general or limited) and manager or managing member of any limited liability company.

ARTICLE VII
MISCELLANEOUS

7.1 Books and Records.

(a) Any books or records maintained by the Corporation in the regular course of its business, including its stock ledger, books of account, and minute books, may be kept on, or by means of, or be in the form of, any information storage device or method; *provided*, *however*, that the books and records so kept can be converted into clearly legible paper form within a reasonable time. The Corporation shall so convert any books or records so kept upon the request of any person entitled to inspect such records pursuant to the Certificate of Incorporation, these Bylaws, or the provisions of the General Corporation Law of the State of Delaware.

(b) It shall be the duty of the Secretary or other officer of the Corporation who shall have charge of the stock ledger to prepare and make, at least ten days before every meeting of the stockholders, a complete list of the stockholders entitled to vote thereat, arranged in alphabetical order, and showing the address of each stockholder and the number of shares registered in the stockholder's name; *provided*, *however*, if the record date for determining the stockholders entitled to vote at the meeting is fewer than 10 days before the meeting date, the list shall reflect the stockholders entitled to vote as of the tenth day before the meeting date. Nothing contained in this subsection (b) shall require the Corporation to include electronic mail addresses or other electronic contact information on such list. Such list shall be open to the examination of any stockholder, for any purpose germane to the meeting for a period of at least 10 days prior to the meeting: (i) on a reasonably accessible electronic network, *provided* that the information required to gain access to such list is provided with the notice of the meeting, or (ii) during ordinary business hours, at the principal place of business of the Corporation. If the Corporation determines to make the list available on an electronic network, the Corporation may take reasonable steps to ensure that such information is available only to stockholders of the Corporation. If the meeting is to be held at a place, then the list shall be produced and kept at the time and place of the meeting during the whole time thereof, and may be inspected by any stockholder who is present. If the meeting is to be held solely by means of remote communication, then the list shall also be open to the examination of any stockholder during the whole time of the meeting on a reasonably accessible network, and the information required to access such list shall be provided with the notice of the meeting. The stock ledger shall be the only evidence of the identity of the stockholders entitled to examine such list.

(c) Except to the extent otherwise required by law, or by the Certificate of Incorporation, or by these Bylaws, the Board of Directors shall determine from time to time whether and, if allowed, when and under what conditions and regulations the stock ledger, books, records, and accounts of the Corporation, or any of them, shall be open to inspection by the stockholders and the stockholders' rights, if any, in respect thereof. Except as otherwise provided by law, the stock ledger shall be the only evidence of the identity of the stockholders entitled to examine the stock ledger, the books, records, or accounts of the Corporation.

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7.2 Voting Shares in Other Business Entities. The Chief Executive Officer, any Vice President, or any other officer or officers of the Corporation designated by the Board of Directors or the Chief Executive Officer may vote, and otherwise exercise on behalf of the

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Corporation any and all rights and powers incident to the ownership of, any and all shares of stock or other equity interest held by the Corporation in any other corporation or other business entity. The authority herein granted may be exercised either by any such officer in person or by any other person authorized to do so by proxy or power of attorney duly executed by any such officer.

7.3 Execution of Corporate Instruments.

(a) The Board of Directors may in its discretion determine the method and designate the signatory officer or officers, or other person or persons, to execute, sign, or endorse any corporate instrument or document, or to sign the corporate name without limitation, except where otherwise provided by law, and such execution or signature shall be binding upon the Corporation.

(b) Unless otherwise specifically determined by the Board of Directors or otherwise required by law, formal contracts of the Corporation, promissory notes, deeds of trust, mortgages, and other evidences of indebtedness of the Corporation, and other corporate instruments or documents requiring the corporate seal, shall be executed, signed, or endorsed by the Chairperson of the Board, the Chief Executive Officer, any Vice President, the Secretary, the Treasurer, or any Assistant Secretary or Assistant Treasurer. All other instruments and documents requiring a corporate signature but not requiring the corporate seal may be executed as aforesaid or in such other manner and by such other person or persons as may be determined from time to time by the Board of Directors or the Chief Executive Officer.

(c) All checks and drafts drawn on banks or other depositaries on funds to the credit of the Corporation or in special accounts of the Corporation shall be executed, signed, or endorsed by the Treasurer, any Assistant Treasurer, or in such other manner and by such other person or persons as may be determined from time to time by the Board of Directors.

(d) Unless otherwise specifically determined by the Board of Directors or otherwise required by law, the execution, signing, or endorsement of any corporate instrument or document may be effected manually, by facsimile, or (to the extent permitted by applicable law and subject to such policies and procedures as the Corporation may have in effect from time to time) by electronic signature.

7.4 Gender/Number. As used in these Bylaws, the masculine, feminine, or neuter gender, and the singular and plural number, shall each include the other whenever the context so indicates.

7.5 Section Titles. The titles of the sections and subsections have been inserted as a matter of reference only and shall not control or affect the meaning or construction of any of the terms and provisions hereof.

7.6 Electronic Transmission. For purposes of these Bylaws, “electronic transmission” means any form of communication, not directly involving the physical transmission of paper, that creates a record that may be retained, retrieved, and reviewed by a recipient thereof, and that may be directly reproduced in paper form by such a recipient through an automated process.

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7.7 Amendment. Subject to and except as may be provided in the Certificate of Incorporation:

(a) these Bylaws, or any of them, may be altered, amended, or repealed, and new Bylaws may be made, (i) at any annual or regular meeting of the Board of Directors or at any special meeting of the Board of Directors if notice of the proposed alteration, amendment, or repeal be contained in written notice of such special meeting; or (ii) at any annual meeting of the stockholders (subject to Section 2.14 of these Bylaws) or at any special meeting of the stockholders of the Corporation if noticed of the proposed alteration, amendment, or repeal is contained in the Corporation's notice of such special meeting of stockholders (and subject to Section 2.4 of these Bylaws);

(b) any alteration, amendment, or repeal of these Bylaws, or the making of any new Bylaw, by the stockholders shall require the affirmative vote of the holders of not less than a majority of the voting power represented by the issued and outstanding shares of the Corporation entitled to vote thereon; and

(c) any Bylaws altered, amended, or made by the stockholders may be altered, amended, or repealed by either the Board of Directors or the stockholders, in the manner set forth in this Section 7.7, except a Bylaw amendment adopted by the stockholders that specifies the votes that shall be necessary for the election of directors shall not be amended or repealed by the Board of Directors.

7.8 Certificate of Incorporation. Anything herein to the contrary notwithstanding, if any provision contained in these Bylaws is inconsistent with or conflicts with a provision of the Certificate of Incorporation, such provision of these Bylaws shall be superseded by the inconsistent provision in the Certificate of Incorporation to the extent necessary to give effect to such provision in the Certificate of Incorporation.

7.9 Forum Selection. The Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any actual or purported derivative action or proceeding brought on behalf of the Corporation against directors or officers of the Corporation alleging breaches of fiduciary duty or other wrongdoing by such directors or officers, (ii) any action asserting a claim for breach of a fiduciary duty owed by any director or officer of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim against the Corporation or any director or officer of the Corporation arising pursuant to any provision of the DGCL or the Certificate of Incorporation or these Bylaws, (iv) any action to interpret, apply, enforce, or determine the validity of the Certificate of Incorporation or these Bylaws, or (v) any action asserting a claim against the Corporation or any director or officer of the Corporation governed by the internal affairs doctrine.

7.10 Fiscal Year. The fiscal year of the Corporation shall be such fiscal year as the Board of Directors from time to time by resolution shall determine.

END OF BYLAWS

Exhibit D
Form of Warrant Agreement

THIS WARRANT AND THE SHARES PURCHASABLE HEREUNDER HAVE BEEN ACQUIRED FOR INVESTMENT AND HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR QUALIFIED UNDER ANY STATE SECURITIES LAWS. SUCH SECURITIES MAY NOT BE SOLD OR TRANSFERRED IN THE ABSENCE OF SUCH REGISTRATION OR QUALIFICATION OR AN EXEMPTION THEREFROM UNDER SAID ACT AND ANY APPLICABLE STATE SECURITIES LAWS.

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Dated: [—], 2013

WARRANT TO PURCHASE

SHARES OF COMMON STOCK OF

STARBURST II, INC.

This certifies that Starburst I, Inc., or its assigns (collectively, the "Holder"), for value received, is entitled to purchase, at the Stock Purchase Price (as defined below), from Starburst II, Inc., a Delaware corporation (the "Company"), up to 54,579,924 fully paid and nonassessable shares (the "Warrant Shares") of Common Stock, $0.01 par value per share (the "Common Stock") (subject to adjustment pursuant to Section 4 hereof).

This Warrant will be exercisable from time to time, in whole or in part, from and after the date hereof (the "Initial Exercise Date") up to and including 5:00 p.m. (Pacific Time) on [—], 2018[1] (the "Expiration Time"), upon surrender to the Company at its principal office of this Warrant properly endorsed with (i) the Form of Exercise Notice attached hereto as Appendix A duly completed and executed, and (ii) payment, made in accordance with Section 2, of the aggregate Stock Purchase Price for the number of shares for which this Warrant is being exercised, as determined in accordance with the provisions hereof. For purposes hereof, the "Stock Purchase Price" equals $5.25 per share of the Warrant Shares (subject to adjustment pursuant to Section 4 hereof).

1. Exercise; Delivery; Acknowledgement.

(i) Exercise. This Warrant is exercisable at the option of the Holder, at any time or from time to time from or after the Initial Exercise Date up to the Expiration Time for all or any part of the Warrant Shares which may be purchased hereunder. The Company agrees that the Warrant Shares purchased under this Warrant will be and are deemed to be issued to the Holder as the record owner of such shares as of the close of business on the date on which (x) this Warrant is surrendered, properly endorsed, (y) the completed, executed Form of Exercise Notice is delivered, and (z) payment is made for such shares.

[1] The fifth (5th) year anniversary of the date hereof.

(ii) Delivery. Upon exercise of this Warrant, the Company will, (x) within three (3) Business Days after the rights represented by this Warrant have been so exercised, issue and deliver certificates for the Warrant Shares so purchased, at the Company's expense, to the Holder or, (y) if available and upon request of the Holder, within three (3) Business Days after the rights represented by this Warrant have been so exercised, electronically deliver the Warrant Shares so purchased to the Holder's account at The Depository Trust Company ("DTC") or similar organization; provided, however that delivery will be made of any other securities or property to which the Holder may be entitled upon such exercise. Each certificate issued and delivered pursuant to (x) above will be in such denominations of the Warrant Shares as may be requested by the Holder and will be registered in the name of the Holder.

"Business Day" means any day, other than a Saturday, Sunday and any day which is a legal holiday under the Laws of the State of New York or Kansas, or is a day on which banking institutions located in the State of New York or Kansas are authorized or required by law or other governmental action to close.

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(iii) Acknowledgement. In the case of a purchase of less than all the Warrant Shares, the Company will execute and deliver to the Holder, within ten (10) days after the rights represented by this Warrant have been exercised, an Acknowledgement in the form attached hereto as Appendix B indicating the number of Warrant Shares which remain subject to this Warrant, if any.

2. Payment for Shares. The aggregate purchase price for Warrant Shares being purchased hereunder may be paid by (i) cash or wire transfer of immediately available funds to a bank account specified by the Company, or (ii) certified or bank cashier's check. The Holder may also, in its sole discretion, satisfy its obligation to pay the aggregate purchase price for Warrant Shares through a "cashless exercise," in which event the Company shall issue to the Holder the number of Warrant Shares determined as follows:

$$X = \frac{Y(A-B)}{A}$$

where:

X = the number of Warrant Shares to be issued to the Holder.

Y = the total number of Warrant Shares with respect to which this Warrant is being exercised.

A = the Closing Sale Price for the Trading Day immediately prior to the date of receipt of the Form of Exercise Notice by the Company.

B = the Stock Purchase Price then in effect for the applicable Warrant Shares at the time of such exercise.

"Trading Day" means a day on which (a) the New York Stock Exchange or, if the Common Stock is not listed on the New York Stock Exchange, the principal other United States national or regional securities exchange on which the Common Stock is then listed is open for

trading, in each case, with a scheduled closing time of 4:00 p.m. (New York City time) or the then-standard closing time for regular trading on the relevant exchange or market and (b) a Closing Sale Price for the Common Stock is available on such securities exchange or market. If the Common Stock is not so listed, a "Trading Day" means any day on which banking institutions in the State of New York are open for business.

"Closing Sale Price" of the Common Stock on any date means the closing per share sale price (or, if no closing sales price is reported, the average of the bid and ask prices or, if more than one in either case, the average of the average bid and the average ask prices) at 4:00 p.m. (New York City time) on such date as reported in composite transactions for the principal United States national or regional securities exchange on which the Common Stock is traded or, if the Common Stock is not listed on a United States national or regional securities exchange, as reported by OTC Markets Group Inc. or a similar organization. If the Common Stock is not so quoted, the "Closing Sales Price" shall be the average of the mid-point of the last bid and ask prices for the Common Stock on the relevant date from each of at least three nationally recognized independent investment banking firms selected by the Company for this purpose.

For purposes of Rule 144 promulgated under the Securities Act of 1933 ("Rule 144"), it is intended, understood and acknowledged that the provisions above permitting "cashless exercise" are intended, in part, to ensure that a full or partial exchange of this Warrant pursuant to such provisions will qualify as a conversion, within the meaning of paragraph (d)(3)(ii) of Rule 144, and the holding period for the Warrant Shares shall be deemed to have commenced as to such original Holder on the date this Warrant was originally issued.

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3. Shares to be Fully Paid; Reservation of Shares. All Warrant Shares which may be issued upon the exercise of the rights represented by this Warrant will, upon issuance, be duly authorized, validly issued, fully paid and nonassessable and free from all preemptive rights of any stockholder and free of all taxes, liens, charges and other encumbrances other than restrictions imposed by applicable securities laws, with respect to the issue thereof. The Company further covenants and agrees that during the period within which the rights represented by this Warrant may be exercised, the Company will at all times have authorized and reserved, solely for the purpose of enabling it to issue Warrant Shares upon exercise of this Warrant, a sufficient number of shares of authorized but unissued Warrant Shares (together with the number of shares of Common Stock issuable upon conversion of such Warrant Shares), or other securities and property, when and as required to provide for the exercise of the rights represented by this Warrant. The Company will take all such action as may be reasonably necessary to assure that such shares of Common Stock may be issued as provided herein without violation of any applicable law or regulation, or of any requirements of any securities exchange or automated quotation system, if applicable, upon which the Common Stock may be listed.

4. Adjustment of Stock Purchase Price and Number of Shares. The Stock Purchase Price and the number of shares purchasable upon the exercise of this Warrant shall be subject to adjustment from time to time upon the occurrence of certain events described in this Section 4. Upon each adjustment of the Stock Purchase Price, the Holder shall thereafter be entitled to purchase, at the Stock Purchase Price resulting from such adjustment, the number of shares obtained by multiplying the Stock Purchase Price in effect immediately prior to such adjustment by the number of shares purchasable pursuant hereto immediately prior to such adjustment, and

dividing the product thereof by the Stock Purchase Price resulting from such adjustment.

(i) Subdivisions, Combinations and Dividends. If the Company (x) pays a dividend or makes a distribution, in shares of Common Stock, on any all or substantially all shares of Common Stock, (y) splits or subdivides its outstanding Common Stock into a greater number of shares, or (z) combines its outstanding Common Stock into a smaller number of shares, then in each such case the Stock Purchase Price in effect immediately prior thereto shall be adjusted so that the Holder shall be entitled to receive the number of shares of Common Stock that such Holder would have owned or would have been entitled to receive after the occurrence of any of the events described above had this Warrant been exercised immediately prior to the occurrence of such event. An adjustment made pursuant to this Section 4(i) shall become effective immediately after the close of business on the dividend or distribution date in the case of a dividend or distribution and shall become effective immediately after the close of business on the effective date in the case of such subdivision, split or combination, as the case may be. In the event that, as a result of an adjustment made pursuant to this Section 4(i), the Holder is entitled to receive any shares of the Company other than shares of Common Stock, thereafter the number of such other shares so receivable upon exercise of this Warrant shall be subject to adjustment from time to time in a manner and on terms as nearly equivalent as practicable to the provisions contained in this Section 4 with respect to the Common Stock.

(ii) Reclassification. If any reclassification of the capital stock of the Company, by merger, consolidation, reorganization or otherwise, is effected in such a way that holders of Common Stock are entitled to receive stock, securities, or other assets or property, then, as a condition of such reclassification, lawful and adequate provisions shall be made whereby the Holder shall thereafter have the right to purchase and receive (in lieu of the shares of Common Stock purchasable and receivable upon the exercise of this Warrant immediately prior to such reclassification) such shares of stock, securities or other assets or property as may be issued or payable with respect to or in exchange for a number of outstanding shares of such Common Stock equal to the number of shares of such Common Stock purchasable and receivable upon the exercise of this Warrant immediately prior to such

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reclassification. If the Company is acquired in an all cash transaction, the Holder shall thereafter have the right to receive cash equal to the value of the Warrant Shares issuable upon a cashless exercise of this Warrant immediately prior to the closing of such transaction. In any reclassification described above, appropriate provision shall be made with respect to the rights and interests of the Holder such that the provisions hereof (including, without limitation, provisions for adjustments of the Stock Purchase Price and of the number of shares purchasable and receivable upon the exercise of this Warrant) shall continue to apply in relation to any shares of stock, or other securities or assets thereafter deliverable upon the exercise hereof.

(iii) Pro Rata Distributions. If the Company, at any time while this Warrant is outstanding, distributes to all holders of Common Stock for no consideration (w) evidences of its indebtedness, (x) any security (other than a distribution of Common Stock covered by the preceding paragraphs), (y) rights or warrants to subscribe for or purchase any security, or (z) any other asset, including cash (in each case, "Distributed Property"), then, upon any exercise of this Warrant that occurs after the record date for determination of stockholders entitled to receive such distribution, the Holder shall be entitled to receive, in addition to the Warrant Shares otherwise issuable upon such exercise (if applicable), the Distributed Property that such Holder

would have been entitled to receive in respect of such number of Warrant Shares had the Holder been the record holder of such Warrant Shares immediately prior to such record date.

(iv) Notice of Adjustment. Upon any adjustment of the Stock Purchase Price or any increase or decrease in the number of shares purchasable upon the exercise of this Warrant, the Company shall give, as promptly as possible, written notice thereof, by first class mail postage prepaid, addressed to the registered Holder at the address of such Holder as shown on the books of the Company. The notice shall be signed by the Company's chief financial officer and shall state the Stock Purchase Price resulting from such adjustment and the increase or decrease, if any, in the number of shares purchasable at such price upon the exercise of this Warrant, setting forth in reasonable detail the method of calculation and the facts upon which such calculation is based. For the avoidance of doubt, the Company acknowledges that the Holder shall be entitled to the benefit of all adjustments in the number of shares of Common Stock of the Company issuable upon conversion of the Common Stock which occur prior to the exercise of this Warrant, including without limitation, any increase in the number of shares of Common Stock issuable upon conversion as a result of a dilutive issuance of capital stock.

(v) Other Notices. If at any time:

(1) the Company declares any cash dividend upon its shares of Common Stock;

(2) there is any capital reorganization or reclassification of the capital stock of the Company;

(3) the Company is acquired in an all cash transaction; or

(4) there is a voluntary or involuntary dissolution, liquidation or winding-up of the Company,

then, in any one or more of such cases, the Company shall give, by first class mail, postage prepaid, addressed to the Holder at the address of such Holder as shown on the books of the Company unless otherwise waived by the Holder, (a) at least twenty (20) days prior written notice of the date on which the books of the Company will close, or the record date for such dividend, cash payment or for determining rights to vote in respect of any such reorganization or reclassification, and (b) in the case of any such reorganization or reclassification, at least twenty (20) days prior written notice of the date when the same shall take place. Any notice given in accordance with the foregoing clause

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(a) shall also specify, in the case of any such dividend, the date of payment. Any notice given in accordance with the foregoing clause (b) shall also specify the date on which the holders of Common Stock shall be entitled to exchange their Common Stock for securities or other property deliverable upon such reorganization or reclassification.

5. No Voting or Dividend Rights. Nothing contained in this Warrant shall be construed as conferring upon the Holder the right to vote or to consent to receive notice as a stockholder of the Company or any other matters or any rights whatsoever as a stockholder of the Company prior to the exercise of this Warrant. No dividends or interest shall be payable or accrued in respect of this Warrant or the interest represented hereby or the shares purchasable hereunder until, and only to the extent that, this Warrant is exercised.

6. Warrants Transferable. Subject to compliance with applicable federal and state securities laws, this Warrant and all rights hereunder may be transferred, in whole or in part, without charge to the Holder upon surrender of this Warrant properly endorsed. Each taker and holder of this Warrant, by taking or holding the same, consents and agrees that this Warrant, when endorsed in blank, shall be deemed negotiable, and that the holder hereof, when this Warrant shall have been so endorsed, may be treated by the Company, at the Company's option, and all other persons dealing with this Warrant as the absolute owner hereof for any purpose and as the person entitled to exercise the rights represented by this Warrant, or to the transfer hereof on the books of the Company and notice to the contrary notwithstanding; but until such transfer on such books, the Company may treat the registered owner hereof as the owner for all purposes.

7. Transfer Taxes. The issuance of any shares or other securities upon the exercise of this Warrant, and the delivery of certificates or other instruments representing such shares or other securities, shall be made without charge to the Holder for any transfer taxes. The Company shall not, however, be required to pay any tax which may be payable in respect of any transfer involved in the issuance and delivery of any certificate in a name other than that of the Holder and the Company shall not be required to issue or deliver any such certificate unless and until the person or persons requesting the issuance thereof shall have paid to the Company the amount of such tax or shall have established to the satisfaction of the Company that such tax has been paid.

8. Lost or Mutilated Warrants. Upon receipt of evidence reasonably satisfactory to the Company of the loss, theft, destruction, or mutilation of this Warrant and, in the case of any such loss, theft or destruction, upon receipt of an indemnity reasonably satisfactory to the Company, or in the case of any such mutilation upon surrender and cancellation of such Warrant, the Company, at its expense, will make and deliver a new Warrant, of like tenor, in lieu of the lost, stolen, destroyed or mutilated Warrant.

9. Modification and Waiver. Any term of this Warrant may be amended by a writing signed by the Company and the Holder. The observance of any term of this Warrant may be waived (either generally or in a particular instance and either retroactively or prospectively) only by a writing signed by the party against whom such waiver is to be enforced.

10. Remedies. The Holder, in addition to being entitled to exercise all rights granted by law, including recovery of damages, may be entitled to specific performance of its rights under this Warrant.

11. Successors and Assigns. Subject to applicable securities laws, this Warrant and the rights and obligations evidenced hereby shall inure to the benefit of and be binding upon the successors of the Company and the successors and permitted assigns of the Holder. The provisions of this Warrant are intended to be for the benefit of all Holders from time to time of this Warrant and shall be enforceable by any such Holder.

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12. Severability. Wherever possible, each provision of this Warrant shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Warrant shall be prohibited by or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provisions or the remaining provisions of this Warrant.

13. Notices. All notices, requests and other communications hereunder shall be in writing and shall be given and shall be deemed to have been duly given if delivered personally or via a messenger service (notice deemed given upon receipt), telecopied or faxed (notice deemed given upon confirmation of receipt), sent by a nationally recognized overnight courier service such as Federal Express (notice deemed given upon receipt of proof of delivery) or mailed by registered or certified mail, return receipt requested (notice deemed given upon receipt) to the respective parties' corporate addresses or other addresses on record with the other parties.

14. Governing Law. This Warrant is to be construed in accordance with and governed by the laws of the State of Delaware without regard to any conflicts of law provisions thereof.

[Signature Page Follows]

IN WITNESS WHEREOF, the Company has caused this Warrant to be duly executed by its officers, thereunto duly authorized as of the date first above written.

STARBURST II, INC.

By: _____
Name:
Title:

Appendix A

FORM OF EXERCISE NOTICE

[To be executed by the Holder to purchase shares of Common Stock under the Warrant]

Ladies and Gentlemen:

(1) The undersigned is the Holder of that certain Warrant to Purchase Shares of Common Stock (the "Warrant") issued by Starburst II, Inc., a Delaware corporation (the "Company"). Capitalized terms used herein and not otherwise defined herein have the respective meanings set forth in the Warrant.

(2) The undersigned hereby exercises its right to purchase _____ Warrant Shares pursuant to the Warrant.

(3) The Holder intends that payment of the Stock Purchase Price shall be made as (check one):

☐ Cash Exercise

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☐ "Cashless Exercise" under Section 2 of the Warrant

(4) If the Holder has elected a Cash Exercise, the Holder shall pay the sum of $____ in immediately available funds to the Company in accordance with the terms of the Warrant.

(5) Pursuant to this Exercise Notice, the Company shall deliver to the Holder Warrant Shares determined in accordance with the terms of the Warrant.

Dated: _____

Name of Holder: _____

By: _____
Name: _____
Title: _____

(Signature must conform in all respects to name of Holder as specified on the face of the Warrant)

Appendix B

ACKNOWLEDGMENT

To: [name of Holder]

The undersigned hereby acknowledges that as of the date hereof, _____ (_____) shares of Common Stock remain subject to the right of purchase in favor of [name of Holder] pursuant to that certain Warrant to Purchase Shares of Common Stock of Starburst II, Inc., dated as of [—], 2012.

DATED: _____

STARBURST II, INC.

By: _____
Name:
Title:

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