UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	
	)	Chapter 11
DATA COOLING TECHNOLOGIES LLC, *et al.*,[1]	)	
	)	Case Nos. 17-52170 and 17-52177
	)	(Jointly Administered)
Debtors.	)	
	)	Judge Koschik
	)	

MOTION OF DATA COOLING TECHNOLOGIES LLC FOR AN ORDER (A) AUTHORIZING THE SALE OF THE DATA COOLING ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS; (B) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; (C) APPROVING THE EXPENSE REIMBURSEMENT; (D) APPROVING SETTLEMENT AND RELEASE OF CLAIMS WITH KYOTOCOOLING NORTH AMERICA LLC; AND (E) GRANTING RELATED RELIEF

Your rights may be affected. This motion is requesting that the Bankruptcy Court grant a release of claims and/or causes of action that may be asserted by Data Cooling Technologies LLC and its bankruptcy estate, the Official Committee of Unsecured Creditors, creditors and/or parties in interest against non-debtor third parties. You should read this motion and the Asset Purchase Agreement, Settlement Agreement and Release between Data Cooling Technologies LLC and KyotoCooling North America, LLC attached to the motion carefully and consult legal counsel regarding any potential impact upon your rights. If you do not have an attorney, you may wish to consult one. Further, please specifically review Section 5.11 of the proposed Asset Purchase Agreement relating to the releases being granted by Data Cooling Technologies LLC and its bankruptcy estate, the Official Committee of Unsecured Creditors, individual creditors and/or parties in interest to non-debtor third parties.

Data Cooling Technologies LLC ("DCT"), one of the above-captioned debtors and debtors in possession (collectively, the "Debtors"), hereby moves this Court (the "Motion"), pursuant to sections 105(a), 363, and 365 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"), and Rules 2002, 6004, 6006, and 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 9013-2 of the Local Rules of the

[1] The Debtors and the last four digits of each of the Debtors' tax identification numbers following in parentheses are: Data Cooling Technologies LLC (3425); and Data Cooling Technologies Canada LLC (3172).

United States Bankruptcy Court for the Northern District of Ohio (the "Local Rules"), for the entry of an order, the proposed form of which is attached as Exhibit A: (a) approving the terms of the sale of assets to and proposed settlement with KyotoCooling North America LLC ("KCNA"), including DCT's entry into that certain Asset Purchase Agreement, Settlement Agreement and Release dated November 8, 2017 with KCNA, together with all related documents, agreements, exhibits, schedules, and addenda thereto (as may be amended, the "APA"), which is attached hereto as Exhibit B, pursuant to which DCT has agreed to sell substantially all of its assets related to its business of selling cooling systems for data centers, located in Streetsboro, Ohio (the "Data Cooling Business"), free and clear of all liens, claims, encumbrances, and interests, to KCNA; (b) authorizing and approving the assumption and assignment of certain executory contracts and unexpired leases (the "Assumed Contracts"); (c) approving the Expense Reimbursement (as defined below); (d) approving the Estate Releases (as defined below); and (e) granting related relief.[2]

In support of this Motion, DCT respectfully states as follows:

Background

1. On September 8, 2017 (the "Petition Date"), DCT and Data Cooling Technologies Canada LLC each filed a voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors are continuing in possession of their property and are operating and managing their businesses, as debtors in possession, pursuant to sections 1107 and 1108 of the Bankruptcy Code.

[2] For the avoidance of doubt, the relief requested in this Motion relates to a separate transaction and does not alter the Debtors' request to sell the "Thermotech Assets" as set forth in the Motion of Data Cooling Technologies LLC for an Order (a) Authorizing the Sale of the Thermotech Assets Free and Clear of All Liens, Claims, Encumbrances and Interests; (b) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (c) Approving Expense Reimbursement; and (d) Granting Related Relief, Docket No. 156.

2. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. Consideration of this Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The venue of the Debtors' chapter 11 cases and this Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The factual background regarding the Debtors, including their business operations, their capital and debt structure, and the events leading to the filing of the chapter 11 cases, is set forth in detail in the Declaration of Gregory Gyllstrom in Support of Chapter 11 Petition and First Day Motions (the "Gyllstrom Declaration"), Docket No. 11, filed on the Petition Date and fully incorporated herein by reference.[3]

4. Pursuant to that certain License Agreement dated June 2, 2013 (the "License Agreement") DCT is the exclusive provider in North America of the KyotoCooling™ system. DCT acquired the exclusive North American rights to produce and sell the KyotoCooling™ system from KCNA under the License Agreement, paying $1.55 million in cash plus a stream of quarterly royalty payments that to date has totaled more than $4.8 million. Using the KyotoCooling™ system, DCT was able to provide water-free, environmentally friendly cooling for data centers. With exclusive rights to a product that competes in a dynamic market in an energy efficient and environmentally friendly manner, DCT had a promising business, growing from no revenue from the Data Cooling Business a few years ago to $58 million in revenue in the first six months of 2017.

5. Before and after the Petition Date, however, DCT and KCNA have been involved in significant legal disputes relating to the License Agreement, including but not limited to

[3] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Gyllstrom Declaration.

allegations of inappropriate contact with DCT's suppliers, customers, and potential customers; the alleged prepetition termination of the License Agreement; and other claims by the parties involving violation or breaches of the License Agreement. All of the foregoing contributed to DCT's filing for chapter 11 bankruptcy protection.

6. On October 12, 2017, KCNA filed an adversary proceeding against DCT in this Court, captioned *KyotoCooling North America, LLC v. Data Cooling Technologies LLC,* Case No. 17-5072, seeking a declaratory judgment that the License Agreement had been terminated (the "Declaratory Judgment Action"). DCT disputes the claims in the Declaratory Judgment Action and believes it has its own claims against KCNA.

7. Since the Petition Date, DCT, with the assistance of its professional advisors, has pursued a sale and marketing process for the global purchase of substantially all of the Debtors' assets. DCT and/or its advisors have discussed such prospects with multiple interested parties, including KCNA. On or about November 4, 2017, KCNA approached DCT, the Official Committee of Unsecured Creditors (the "Committee") and KeyBank, N.A. ("KeyBank") regarding an offer to purchase the Data Cooling Business. Notwithstanding the prior contentious disputes between DCT and KCNA relating to the License Agreement, the parties have determined to work together, and the proposed resolution of the numerous issues outlined above is set forth in the proposed sale and Estate Releases (as defined below) detailed in the APA and outlined below.

8. In its reasonable business judgment, DCT and its advisors have determined that KCNA's offer to purchase substantially all of assets associated with the Data Cooling Business (the "Data Cooling Assets") pursuant to the APA constitutes the highest and best offer at this time, and provides the best opportunity for DCT to realize the greatest return for the benefit of all

of its stakeholders. Accordingly, after arms' length, good faith negotiations, DCT and KCNA executed the APA that is conditioned on approval of the Court and includes the following material terms:[4]

(a) Purchase Price. (i) $1,300,000.00 in cash, payable at the closing of the transaction; plus (ii) assumption of certain Assumed Liabilities; plus (iii) payment of certain Cure Costs related to the Assumed Contracts; plus (iv) 50% of the net proceeds of the Nortek Action.[5]

(b) Deposit. $80,000.00 Deposit, credited against the purchase price listed above at Closing.

(c) Purchased Assets. The assets of the Data Cooling Business specifically set forth in Section 2.1 of the APA (and as referred to in this Motion as the Data Cooling Assets).

(d) Excluded Assets. The assets described as "Retained Assets" in Section 2.2 of the APA.

(e) KCNA's Assumed Liabilities. Only (i) all liabilities arising out of the Purchased Assets arising or incurred after the Closing; (ii) any purchase orders that are described in Schedule 2.3(b) to the APA; (iii) all obligations incurred after the Closing related to the Nortek Action; (iv) all obligations under the Assumed Contracts to the extent arising, occurring or to be performed under the Assumed Contract after the Closing Date; and (v) those accrued expenses of DCT arising out of the Data Cooling Business that are specifically described on Schedule 2.1(c) to the APA.

(f) Private Sale. The transaction contemplated by the APA is a private sale, but subject to the rights of DCT pursuant to its fiduciary duties to consider higher and better offers for the Data Cooling Assets.

[4] Capitalized but undefined terms shall have the meanings ascribed to them in the APA. This following is intended to provide a summary of certain key terms of the APA. To the extent there is any conflict between the contents of this Motion and the APA, the APA shall control.

[5] This action is a civil action for patent infringement pending the in the United States District Court for the Northern District of Texas, captioned *KyotoCooling North America LLC, et al. v. Nortek Air Solutions, LLC, et al.*, Case No. 3:16-cv-00381-N, in which DCT and KCNA are joint plaintiffs (the "Nortek Action").

(g) Mutual Release at Closing. Pursuant to Section 5.11(d) of the APA, upon the 15th day after entry of the Sale Order, DCT and KCNA shall be deemed to have mutually released each other as well as each other's officers, directors, employees, and such other parties more fully described in Section 5.11(d) of the APA from all claims and causes of action; (collectively, the "Estate Releases"). Any order approving this Motion shall provide that the License Agreement is deemed to have terminated prepetition.[6]

9. DCT submits that the terms of the APA represent the highest and best offer for the Data Cooling Assets, as KCNA's offer is currently the only viable offer to purchase the Data Cooling Assets under the current circumstances. The proposed transaction will maximize the value of the Data Cooling Assets for all interested parties and, once the sale closes, allow DCT to resolve a major issue in its case, enabling DCT to move toward a plan to exit its bankruptcy case effectively and efficiently.

Relief Requested

10. DCT respectfully requests that the Court enter an order: (a) authorizing the sale of the Data Cooling Assets to KCNA pursuant to the APA, free and clear of all liens, claims, encumbrances or other interests pursuant to sections 363(b), (f) and (m) and 365 of the Bankruptcy Code, with such liens, claims, rights, interests and encumbrances to attach to the sale proceeds of the Data Cooling Assets with the same validity, priority, extent and perfection as existed immediately prior to such sale; (b) approving the assumption and assignment of the Assumed Contracts under section 365 of the Bankruptcy Code; (c) approving the Expense Reimbursement (as defined below); (d) approving the Estate Releases; and (e) granting such other relief as may be necessary or appropriate.

[6] In the event that the relief requested in this Motion is not approved, nothing in this Motion, APA (or its exhibits) or the proposed sale order shall be deemed an admission by either DCT or KCNA, and the parties reserve all rights and claims.

Basis for Relief

11. In the exercise of its sound business judgment, DCT has determined that the sale of the Data Cooling Assets to KCNA, subject to the terms of the APA, is in the best interest of DCT's stakeholders, and will enable DCT to maximize the value of its estate under the current circumstances. Further, the value provided in the sale and the corresponding Estate Releases as a whole are beneficial to DCT's estate.

A. The Sale Was Negotiated in Good Faith and Made for Sound Business Reasons; the Purchase Price Is Fair and Reasonable

12. The Bankruptcy Code permits a debtor to sell all or substantially all of its assets outside the ordinary course of business and prior to confirmation of a chapter 11 plan. Section 363(b) of the Bankruptcy Code specifically authorizes asset sales outside the ordinary course of business. See 11 U.S.C. § 363(b)(1) ("[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate"). In approving the sale of assets outside the ordinary course of business and outside of a chapter 11 plan pursuant to section 363 of the Bankruptcy Code, courts, including those in the Sixth Circuit, have adopted the "sound business reason" test established by the Second Circuit in In re Lionel Corp., 722 F.2d 1063 (2d Cir. 1983); see also Stephens Industries, Inc. v. McClung, 789 F.2d 386, 391 (6th Cir. 1986); In re Nicole Energy Services, Inc., 385 B.R. 201, 230 (Bankr. S.D. Ohio 2008); In re Jillian's Entertainment Holdings, 327 B.R. 616, 617 (Bankr. W.D. Ky. 2005) (stating that the Lionel standard has been adopted by the vast majority of courts). Generally, courts examine four factors when determining whether a sale of a debtor's assets should be approved: (a) whether a sound business reason exists for the proposed transaction; (b) whether fair and reasonable consideration is provided; (c) whether the transaction has been proposed and negotiated in good

faith; and (d) whether adequate and reasonable notice is provided. See Lionel, 722 F.2d at 1071 (2d Cir. 1983) (setting forth the "sound business purpose" test).

13. A debtor's showing of a sound business purpose need not be unduly exhaustive; rather, a debtor is "simply required to justify the proposed disposition with sound business reasons." In re Baldwin United Corp., 43 B.R. 888, 906 (Bankr. S.D. Ohio 1984). Whether or not there are sufficient business reasons to justify a transaction depends upon the facts and circumstances of each case. Lionel, 722 F.2d at 1071 (2d Cir. 1983). In the instant case, the proposed sale of the Data Cooling Assets to KCNA serves a sound business purpose. The sale is designed to preserve and enhance the value of the Data Cooling Assets as a whole, and to ensure that the Assumed Contracts are assigned while they have their highest value and prior to any risk of a premature termination or forced liquidation of estate assets. A sale to KCNA will also return a greater benefit to DCT's estate than any of the alternatives, including a sale to an unknown third party through a plan or a piecemeal liquidation of the Data Cooling Assets, which would require a determination of the Declaratory Judgment Action. DCT believes that, absent a private sale pursuant to the APA that closes by November 30, 2017, it would have little other choice but to proceed with litigation with KCNA and liquidation of its assets, each of which would materially reduce the value of the Data Cooling Assets and delay DCT's ability to maximize value for all parties in interest.

14. The impact of DCT's bankruptcy to interested stakeholders will also be minimized by a sale. For example, the proposed sale under the APA will provide cash for the estate, certain executory contracts will be assumed, and significant litigation with KCNA will be resolved. Absent a sale, DCT's other options are not as attractive to DCT's business or creditors.

15. The APA is the product of good faith and arm's length negotiations and is on commercially reasonable terms. While KCNA is the licensor of the KyotoCooling™ technology that is utilized in DCT's products, it is not otherwise affiliated with DCT. DCT and KCNA have been in contact with KeyBank and the Committee during this process, and KeyBank supports the sale of the Data Cooling Assets. The Committee does not object to the sale as described herein.

16. Finally, no prejudice will result to any parties in interest because the sale of the Data Cooling Assets will be noticed in accordance with the notice provisions established by the Bankruptcy Rules. Such notice will: (a) afford all creditors and parties in interest with adequate and reasonable notice of the sale; (b) provide sufficient information regarding the sale of the Data Cooling Assets and the time for filing objections to the sale; and (c) meet the requirements of the Bankruptcy Code, the Bankruptcy Rules and legal due process.

17. The fairness and reasonableness of the consideration to be paid by KCNA is demonstrated by the efforts that DCT and KCNA engaged in to try to resolve their disputes in a manner that maximizes value to the estate and minimizes the time, uncertainty and expense of litigation. Ultimately, the sale will inure to the benefit of DCT's estate and creditors, as it will further DCT's efforts to proceed timely through its chapter 11 case and resolve a substantial issue in DCT's case. Therefore, the sale of the Data Cooling Assets represents the exercise of DCT's sound business judgment.

B. <u>The Sale Satisfies the Requirements of Section 363(f) of the Bankruptcy Code for a Sale Free and Clear of Liens, Claims, and Interests</u>

18. Pursuant to section 363(f) of the Bankruptcy Code, a debtor in possession may sell all or any part of its property free and clear of any and all liens, claims or interests in such property if (i) such a sale is permitted under applicable non-bankruptcy law; (ii) the party asserting such a lien, claim, or interest consents to such sale; (iii) the interest is a lien and the

purchase price for the property is greater than the aggregate amount of all liens on the property, (iv) the interest is the subject of a *bona fide* dispute; or (v) the party asserting the lien, claim or interest could be compelled, in a legal or equitable proceeding, to accept a money satisfaction for such interest. 11 U.S.C. § 363(f); see In re Elliot, 94 B.R. 343, 345 (E.D. Pa. 1988) (section 363(f) written in disjunctive; court may approve sale "free and clear" provided at least one of the subsections is met).

19. Section 363(f) of the Bankruptcy Code provides for the sale of assets "free and clear of any interests." The term "any interest," as used in section 363(f), is not defined in the Bankruptcy Code. Folger Adam Security v. DeMatteis/MacGregor, JV, 209 F. 3d 252, 259 (3d Cir. 2000). In Folger Adam Security, the Third Circuit specifically addressed the scope of the term "any interest" and observed that, while some courts have "narrowly interpreted that phrase to mean only *in rem* interests in Property," the trend in modern cases is towards "a broader interpretation which includes other obligations that may flow from ownership of the Property." Id. at 258; see also In re White Motor Credit Corp., 75 B.R. 944 (Bankr. N.D. Ohio 1987) (holding that section 363(f) precluded tort claims against asset purchaser). As the Fourth Circuit determined in In re Leckie Smokeless Coal Co., 99 F. 3d 573, 581-582 (4th Cir. 1996), section 363(f) is not limited to *in rem* interests. Therefore, a debtor "could sell [its] assets under § 363(f) free and clear of successor liability that otherwise would have arisen under federal statute." Leckie, 99 F. 3d at 581-582; see also In re Appalachia Fuels, LLC, 503 F.3d 538 (6th Cir. 2007) (approving a sale free and clear of "claims" arising as coal commission sales).

20. Moreover, section 363(f) of the Bankruptcy Code is drafted in the disjunctive. Consequently, satisfaction of any of the requirements enumerated therein will suffice to allow the sale of the Data Cooling Assets free and clear of all liens and encumbrances, except with

respect to any Assumed Liabilities or obligations related to the Assumed Contracts. See In re Gulf States Steel, Inc. of Alabama, 285 B.R. 497, 506 (Bankr. N.D. Ala. 2002); Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot), 94 B.R. 343, 345 (E.D. Pa. 1988). DCT submits that each lien or encumbrance that is not one of the Assumed Liabilities under the APA or is an Assumed Contract falls within at least one of the five conditions of section 363(f) of the Bankruptcy Code, and that any such lien or encumbrance will be adequately protected by either being paid in full at the time of closing, or attaching to the proceeds of the sale, subject to any claims and defenses DCT may possess with respect thereto. DCT therefore requests authority to convey the Data Cooling Assets to KCNA, free and clear of all liens and encumbrances (except any Assumed Liabilities under the APA or related to the Assumed Contracts), with such liens and encumbrances to attach to the proceeds from the sale of the Data Cooling Assets with the same validity, extent, priority and perfection as existed immediately prior to the sale, subject to the terms of the APA and the proposed sale order (attached hereto as Exhibit A). Upon information and belief, DCT believes that KeyBank consents to the sale to KCNA, thus satisfying section 363(f)(2) of the Bankruptcy Code.

21. Finally, DCT submits that the sale should not expose KCNA to any liability as a successor of DCT or its estate. Courts have also consistently held that a buyer of a debtor's assets pursuant to a Bankruptcy Code section 363 sale takes free and clear from successor liability relating to the debtor's business. See, e.g., In re Trans World Airlines, Inc., 322 F.3d 283, 288-90 (3d Cir. 2003) (sale of assets pursuant to section 363(f) barred successor liability claims for employment discrimination and rights under travel voucher program); In re Leckie Smokeless Coal Co., 99 F.3d at 585 (affirming the sale of debtors' assets free and clear of certain taxes); In re Insilco Techs., Inc., 351 B.R. 313, 322 (Bankr. D. Del. 2006) (stating that a 363 sale

permits a buyer to take ownership of property without concern that a creditor will file suit based on a successor liability theory); see also In re Chrysler LLC, 405 B.R. 84, 111 (Bankr. S.D.N.Y. 2009) ("[I]n personam claims, including any potential state successor or transferee liability claims against New Chrysler, as well as in rem interests, are encompassed by section 363(f) and are therefore extinguished by the Sale Transaction."). Accordingly, the Court should approve the sale of the Data Cooling Assets to KCNA free and clear of liens and encumbrances under section 363(f) of the Bankruptcy Code.

C. Sale Is in Good Faith Under Section 363(m) of the Bankruptcy Code; and Not in Violation of Section 363(n) of the Bankruptcy Code

22. Section 363(m) of the Bankruptcy Code provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). Section 363(n) of the Bankruptcy Code, among other things, provides, in turn, that a trustee may avoid a sale under such section if the sale price was controlled by an agreement among potential bidders at the sale. While the Bankruptcy Code does not define "good faith," the Third Circuit in In re Abbotts Dairies of Pennsylvania, Inc., 788 F. 2d 143 (3rd Cir. 1986) has held that:

> [t]he requirement that a Buyer act in good faith . . . speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a Buyer's good faith status at a judicial sale involves fraud, collusion between the Buyer and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.

788 F.2d at 147 (citations omitted); In re Made In Detroit, Inc., 414 F.3d 576, 581 (6th Cir. 2005) (following the Abbotts Dairies standard).

23. As explained above, the APA is the product of good faith and free from self-dealing. DCT intends to establish at the hearing on this Motion that the APA was a negotiated, arm's length transaction, in which KCNA has acted in good faith, without collusion or fraud of any kind, and in compliance with the Abbotts Dairies standard. As noted above, KCNA is not an insider or affiliate of DCT. Moreover, KeyBank and the Committee were included in the negotiation of the APA. The evidence at the hearing on this Motion will further establish that neither DCT nor KCNA has engaged in any conduct that would prevent the application of section 363(m) of the Bankruptcy Code or allow DCT to avoid the sale pursuant to section 363(n) of the Bankruptcy Code with respect to the consummation of the sale transaction or the transfer of the Data Cooling Assets and the assignment of the Assumed Contracts to KCNA.

24. In light of the foregoing, DCT requests that the Court find that KCNA has purchased the Data Cooling Assets in good faith within the meaning of section 363(m) of the Bankruptcy Code, and is entitled to the protections of sections 363(m) of the Bankruptcy Code.

D. Authorization of Assumption and Assignment of Executory Contracts

25. In order to enhance the value to DCT's estate, DCT requests approval of the assumption and assignment of the Assumed Contracts[7] to KCNA upon the closing of the transaction contemplated under the APA and payment of the cure costs for the Assumed Contracts (the "Cure Costs"). In accordance with the terms of the APA, KCNA is obligated to pay the Cure Costs of each of the Assumed Contracts to the extent KCNA wants them assumed and assigned to it. KCNA is also responsible for satisfying any requirements regarding adequate assurance of future performance that may be imposed under section 365(b) of the Bankruptcy Code in connection with the proposed assignment of any Assumed Contracts.

[7] The inclusion of any agreement as an Assumed Contract does not constitute an admission by DCT that such agreement actually constitutes an executory contract under section 365 of the Bankruptcy Code.

26. Contemporaneous with the filing of this Motion, DCT is also filing a Notice to Counterparties to Executory Contracts and Unexpired Leases That Will Be Assumed and Assigned (the "Notice"). The Notice will set forth (i) a list of the Assumed Contracts; (ii) the proposed Cure Cost for each of the Assumed Contracts; and (iii) the deadline for objecting to the same.

27. Subject to the payment of any Cure Costs, DCT requests that KCNA not be subject to any liability to a counterparty to an Assumed Contracts that accrued or arose before the closing of the sale of the Data Cooling Assets, and that DCT be relieved of all liability accruing or arising thereafter pursuant to section 365(k) of the Bankruptcy Code.

28. DCT further requests that the order approving the sale provide that the Assumed Contracts will be assigned to, and remain in full force and effect for the benefit of KCNA, notwithstanding any provisions in the Assumed Contracts, including those described in sections 365(b)(2) and (f)(1) and (3) of the Bankruptcy Code, that prohibit such assignment. Section 365(f) of the Bankruptcy Code provides, in pertinent part, that a debtor may assign an executory contract only if:

> (A) [the debtor] assumes such contract or lease in accordance with the provisions of this section; and
>
> (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2). Under Section 365(a) of the Bankruptcy Code, a debtor, "subject to the court's approval, may assume or reject any executory contract of the debtor." Section 365(b)(1), in turn, clarifies the requirements for assuming an executory contract of a debtor, providing that:

> (b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee --

> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default [ ];
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

29. Although section 365 of the Bankruptcy Code does not set forth standards for courts to apply in determining whether to approve a debtor in possession's decision to assume an executory contract, courts have consistently applied a "business judgment" test when reviewing such a decision. See In re Structurelite Plastics Corp., 86 B.R. 922 (Bankr. S.D. Ohio 1988). A debtor satisfies the "business judgment" test when it determines, in good faith, that assumption of an executory contract will benefit the estate and the unsecured creditors. In re Greektown Holdings, L.L.C., No. 08-53104, 2009 WL 1653461 (Bankr. E.D. Mich. May 13, 2009); In re FCX, Inc., 60 B.R. 405, 411 (Bankr. E.D.N.Y. 1986). The assumption and assignment of the Assumed Contracts is a negotiated and necessary part of the proposed sale to KCNA; therefore, it will benefit the estate of DCT.

30. However, KCNA is responsible for providing evidence of "adequate assurance of future performance" to the extent required in connection with the assumption and assignment of any Assumed Contracts. The meaning of "adequate assurance of future performance" for the purpose of the assumption of executory contracts and unexpired leases pursuant to section 365 of the Bankruptcy Code depends on the facts and circumstances of each case, but should be given "practical, pragmatic construction." See Carlisle Homes, Inc. v. Arrari (In re Carlisle Homes, Inc.), 103 B.R. 524, 538 (Bankr. D.N.J. 1989); see also In re Natco Indus., Inc., 54 B.R. 436, 440

(Bankr. S.D.N.Y. 1985) (adequate assurance of future performance does not mean an absolute assurance that the debtors will thrive and pay rent); In re Bon Ton Rest. & Pastry Shop, Inc., 53 B.R. 789, 803 (Bankr. N.D. Ill. 1985). As required, DCT believes that KCNA will be able to provide evidence of its ability to provide adequate assurances to counterparties of the Assumed Contracts at the hearing on this Motion.

31. DCT submits that the assumption and assignment of the Assumed Contracts to KCNA meets the business judgment standard and satisfies the requirements of section 365 of the Bankruptcy Code. The assumption and assignment of the Assumed Contracts will be necessary for KCNA to conduct the Data Cooling Business going forward; because KCNA would not have agreed to purchase the Data Cooling Assets without certain executory contracts and unexpired leases, the assumption and assignment of such agreements is essential to securing the highest and best offer for the Data Cooling Assets.

E. Approval of the Expense Reimbursement

32. In recognition of the value of providing an offer for the Data Cooling Assets – even while DCT considers higher and better offers for the Data Cooling Assets in accordance with its fiduciary duties – DCT and KCNA have negotiated a provision in the APA that provides for an expense reimbursement of actual and reasonable out of pocket expenses of up to $100,000 incurred by KCNA in the event that DCT enters into an Alternative Transaction (as defined below) for the Data Cooling Assets (the "Expense Reimbursement").

33. KCNA was unwilling to enter into the APA without the inducement of the Expense Reimbursement on these terms. Without KCNA's offer, DCT would not currently have any offers for the Data Cooling Assets, and would likely not be able to obtain a sale price of at least what is provided in the APA from any other interested parties. Therefore, the Expense

Reimbursement preserves the value of KCNA's offer for the Data Cooling Assets for DCT's estate. See Corradino v. Lamb (In re Lamb), 2002 WL 31508913, at *2 (Bankr. D. Md. 2002) (stating that a break-up fee should be in the best interest of the estate and necessary).

34. Bidding incentives such as break-up fees and expense reimbursement provisions are "carefully scrutinized" in asset sales under section 363(b) of the Bankruptcy Code to ensure that a debtor's estate "is not unduly burdened and that the relative rights of the parties are protected." See In re Hupp Indus. Inc., 140 B.R. 191, 195-6 (Bankr. N.D. Ohio 1992). In reviewing break-up fees, courts in the Sixth Circuit consider a totality of the circumstances in determining the reasonableness of a break-up fee. Nashville Senior Living, 2008 WL 5062366, at *2. Courts also look to whether (i) whether the subject break-up fee constitutes a fair and reasonable percentage of the proposed purchase price; (ii) whether the subject break-up fee is so substantial that it provides a "chilling effect" on other potential bidders; and (iii) whether there exists substantial adverse impact upon unsecured creditors. Id.

35. In this case, the Expense Reimbursement is reasonable because the APA does not involve a *per se* break-up fee; KCNA would simply be entitled to reimbursement of its actual reasonable expenses up to $100,000. First, the Expense Reimbursement is within the range of appropriate percentages granted by courts in the Sixth Circuit. See In re Wings of Medina Liquidation, et al., No. 15-52722 (N.D. Ohio Jan. 8, 2016) (approving a combined break-up fee and expense reimbursement of 4%); In re Schwab Indus., No. 10-60702, 2010 Bankr. LEXIS 5935, at *10-14, *25 (Bankr. N.D. Ohio May 28, 2010) (approving a break-up fee of $1,900,000.00, "which [was] inclusive of any expense reimbursement," and represented just under 4% of the proposed purchase price); In re Sumner Reg'l Health Sys., No. 3:10-bk-04766, 2010 Bankr. LEXIS 6173, at *5, *21-22 (Bankr. M.D. Tenn. May 18, 2010) (approving bid

procedures, including actual expenses of stalking horse bidder not to exceed $1,000,000.00 which, when added to break-up fee, constituted a total payment of 2.27% of the $154,108,687.00 purchase price); Hupp Indus., 140 B.R. at 195 (finding that a reimbursement for actual expenses of stalking horse bidder capped at $50,000 and a break-up fee of $100,000 for a transaction totaling $4,750,000.00 was reasonable, but denying debtor's motion on other grounds).

36. Second, the proposed Expense Reimbursement is a fair and reasonable percentage in relation to the proposed purchase price and the funds and efforts expended by KCNA to consummate this transaction. Hupp Indus., 140 B.R. at 194. KCNA's offer represents the best offer to preserve the Data Cooling Assets under the circumstances. The APA contemplates that DCT may consider other potential higher and better offers in accordance with its fiduciary duties, and the Expense Reimbursement provides KCNA potential compensation for DCT's consideration of other bids.

37. Finally, the Expense Reimbursement is the result of good faith, arm's length negotiations between DCT and KCNA. See In re Integrated Resources Inc., 147 B.R. 650, 658 (S.D.N.Y. 1992) ("A bankruptcy court should uphold a break-up fee which was not tainted by self-dealing and was the product of arm's-length negotiations."). Therefore, KCNA believes that the Expense Reimbursement is a fair, reasonable and necessary cost of the administration of the estate and should be approved.

F. Alternative Transaction

38. Notwithstanding DCT's desire to consummate the APA with KCNA, DCT has a duty to the estate to consider higher and better offers for the Data Cooling Assets prior to a hearing on this Motion (an "Alternative Transaction"). To conserve the resources of all parties involved, DCT is requiring that any other party interested in making a bid for the Data Cooling

Assets do so on or before November 27, 2017. Any party making such bid must make an offer that is (i) non-contingent; (ii) made in cash with a 10% deposit received by DCT prior to the hearing on this Motion; and (iii) based on the form of APA submitted with this Motion; and (iv) for a purchase price at least $125,000 greater than the KCNA purchase price described in the APA. DCT reserves the right to hold an auction for the Data Cooling Assets if another bid is timely received, and DCT will seek separate approval of the Alternative Transaction based on the nature of the Alternative Transaction. If such an Alternative Transaction is ultimately approved by this Court, DCT will also seek approval to pay the Expense Reimbursement to KCNA and return KCNA's Deposit.

G. Settlement of Claims and Causes of Action Between DCT and KCNA

39. As noted above, DCT and KCNA also seek to settle all claims and causes of action, including but not limited to the Declaratory Judgment Action, pursuant to the APA and proposed sale of the Data Cooling Assets. Bankruptcy Rule 9019 provides, in part, that "[o]n motion by the [debtor-in-possession] and after notice and a hearing, the court may approve a compromise or settlement." Bankruptcy Rule 9019(a). The decision whether to approve a compromise under Bankruptcy Rule 9019 is committed to the sound discretion of the bankruptcy court, which must determine if the compromise is fair, equitable, and in the best interests of the estate. See Olson v. Anderson (In re Anderson), 377 B.R. 865, 870 (B.A.P. 6th Cir. 2007); In re Bell & Beckwith, 93 B.R. 569, 574 (Bankr. N.D. Ohio 1988). In making such determination, the bankruptcy court is charged with an affirmative obligation to apprise itself "of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." Protective Comm. for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968); see also In re High Tech Packaging, Inc., 397 B.R. 369,

372 (Bankr. N.D. Ohio 2008). In TMT Trailer, the Supreme Court explained that "the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." TMT Trailer, 390 U.S. at 424.

40. Generally, courts in the Sixth Circuit apply the following factors when determining whether to approve a proposed settlement: (a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (d) the paramount interest of the creditors and a proper deference to their reasonable views. See Bard v. Sicherman (In re Bard), 49 Fed. Appx. 528, 530 (6th Cir. 2002); In re Bailey, 421 B.R. 841, 845 (Bankr. N.D. Ohio 2009); In re Nicole Energy Services, Inc., 385 B.R. 201, 211 (Bankr. S.D. Ohio 2008).

41. Further, approving a settlement does not require the Court to adjudicate definitively the underlying litigation. See, e.g., Florida Trailer & Equip. Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960) ("[T]he approval of a proposed settlement does not depend upon establishing as a matter of legal certainty that the subject claim or counterclaim is or is not worthless or valuable"). Rather, the Court need only canvass the issues to determine whether the settlement falls within the range of reasonableness. See, e.g., In re Vazquez, 325 B.R. 30, 36 (Bankr. S.D. Fla. 2005). If the proposed settlement does not fall below the lowest point in the range of reasonableness, it should be approved. See In re Mrs. Weinberg's Kosher Foods, Inc., 278 B.R. 358, 361 (Bankr. S.D.N.Y. 2002) ("A proposed settlement will pass muster provided it does not fall 'below the lowest point in the range of reasonableness.'") (citation omitted).

42. Application of each of the relevant factors to the proposed settlement between DCT and KCNA regarding the Estate Releases demonstrates that such a settlement falls within the range of reasonableness and, therefore, should be approved. The first factor for the Court to consider is the probability of success in litigation; here, the primary issue at stake relates to each party's claims surrounding the License Agreement. As set forth in the Declaratory Judgment Action, KCNA asserts that the License Agreement was terminated prior to the Petition Date. DCT disputes this claim, and intends to assert counterclaims against KCNA for certain breach of contract and tort claims. Under the current schedule in the Declaratory Judgment Action, DCT has until November 13 to answer or otherwise respond to the complaint.

43. DCT has also filed the Rule 2004 Motion in DCT's main bankruptcy case, seeking an examination of John Drossos and certain documents from KCNA pursuant to Bankruptcy Rule 2004, KCNA has disputed the timing and scope of the Rule 2004 Motion, and the Rule 2004 Motion and KCNA's objection are currently pending before this Court. Therefore, the factual investigation related to the Declaratory Judgment Action and any claims that may arise out of DCT's investigation pursuant to the Rule 2004 Motion are still at a relatively early stage. DCT and KCNA have yet to have a pretrial conference in the Declaratory Judgment Action, initiate depositions or proceed through formal written discovery. Because significant factual and legal development of the claims that have been or may be asserted in the Declaratory Judgment Action would have been necessary to prepare for trial, it is difficult to determine the probability of success in litigation. However, all of the foregoing will be resolved if the Estate Releases are approved as part of the APA. Moreover, both DCT and KCNA may possibly need to hire experts to support their respective positions. Therefore, given the difficulty in predicting

the probability of success for either party at this time, DCT believes that the settlement provided for in the APA constitutes a favorable outcome for the parties.

44. The second factor that the Court may consider pertains to any difficulties that the parties may encounter with respect to collection. A settlement between DCT and KCNA that resolves all claims at this stage of the chapter 11 case avoids the time, investigation, and expense of both litigation and collection. Indeed, there is uncertainty as to the sufficiency of funds for either party if the adjudication of claims in the Declaratory Judgment Action does not occur for an extended period of time. Moreover, KCNA has sufficient funds to purchase the Data Cooling Assets in accordance with the terms of the APA.

45. The third factor pertains to the complexity of the litigation and the expense, inconvenience, and delay involved. In absence of a settlement, DCT and KCNA would have incurred the expense of conducting formal discovery, hiring experts, and briefing the legal issues – all of which would consume significant estate resources. It is also conceivable that the parties would have had to move forward with a trial, given the factual issues at stake in the litigation. Such litigation could take several months and could potentially delay DCT's plans to exit from chapter 11. Therefore, because the outcome of this particular litigation is uncertain, there are no assurances that DCT could obtain a result more favorable than what is contained in the APA.

46. Finally, the settlement provisions in the APA provide an economic benefit to DCT's creditors. In exchange for the consideration provided in the APA, KCNA is agreeing to provide cash to the estate, assume certain contracts, and release other claims and causes of against DCT's estate (excluding its $1,700,000 general unsecured claim). A settlement at this stage of the bankruptcy case also negates continued and costly litigation expenses. Moreover,

KeyBank is supportive of the sale of the Data Cooling Assets to KCNA, and the Committee does not object to the sale.

47. In summary, the terms of the APA (and the Estate Releases contained therein) fully and expeditiously resolve all claims and causes of action between DCT and KCNA and falls well within the range of reasonableness. Moreover, the parties worked efficiently and effectively to achieve a rational resolution that both parties could support. Accordingly, DCT respectfully requests that the Court grant this Motion and approve the settlement terms between KCNA and DCT as outlined in the APA.

F. Waiver of Rules 6004 and 6006

48. Notwithstanding the possible applicability of Bankruptcy Rules 6004 and 6006, DCT requests the relief sought by this Motion be immediately effective and enforceable upon entry of the order requested hereby. In order to allow the immediate realization of value for the Data Cooling Assets, DCT requests that any order grating this Motion is effective immediately and not subject to the 14-day stay imposed by Bankruptcy Rules 6004(h) and 6006(d).

G. Waiver of Page Limit Restrictions

49. Local Rule 9013-2(a) provides that "No motion or response thereto . . . shall exceed 20 pages in length, exclusive of appendices, unless the party has sought and obtained leave of Court. . . [w]here such leave is granted, a table of contents containing a summary of all points raised shall be included with the brief or memorandum." DCT respectfully requests leave, retroactive to the date of this Motion and pursuant to Local Rule 9013-2(a), to exceed the 20 page limit and to waive the table of contents requirement with respect to this Motion. Given the size and complexity of DCT's bankruptcy case, the length of the factual and procedural

assertions set forth in the Motion, and the significant release requested herein, there is good cause for the Court to waive the requirements of Local Rule 9013-2(a) in this limited instance.

Notice

50. No trustee or examiner has been appointed in these chapter 11 cases. Notice of this Motion will be served on the following parties or, in lieu thereof, to their counsel, if known: (i) the United States Trustee for the Northern District of Ohio; (ii) the Committee; (iii) DCT's prepetition secured lender; (iv) the District Director of Internal Revenue; (v) any party asserting a lien on the Data Cooling Assets; (vi) KCNA; (vii) all known counterparties to the Assumed Contracts; (viii) all parties requesting notice in the chapter 11 cases; (ix) all parties asserting reclamation claims; and (x) all creditors of DCT. In light of the nature of the relief requested herein, DCT submits that no other or further notice need be given.

WHEREFORE, DCT respectfully requests that the Court enter an order: (a) (i) approving the sale of the Data Cooling Assets to KCNA, free and clear of all liens and encumbrances; and (ii) approving the assumption and assignment of the Assumed Contracts in accordance with the APA; (b) approving the Expense Reimbursement; (c) authorizing and approving the Estate Releases; and (d) granting such other and further relief as is just and proper.

November 9, 2017

Respectfully submitted,

/s/ Sean D. Malloy

Sean D. Malloy (0073157)
Michael J. Kaczka (0076548)
Maria G. Carr (0092412)
McDONALD HOPKINS LLC
600 Superior Avenue, E., Suite 2100
Cleveland, OH 44114
Telephone: (216) 348-5400
Facsimile: (216) 348-5474
E-mail: smalloy@mcdonaldhopkins.com
mkaczka@mcdonaldhopkins.com
mfcarr@mcdonaldhopkins.com

COUNSEL FOR DEBTORS
AND DEBTORS IN POSSESSION

EXHIBIT B

EXECUTION VERSION

ASSET PURCHASE AGREEMENT, SETTLEMENT AGREEMENT AND RELEASE

Dated as of November 9, 2017

By and Between

KyotoCooling North America, LLC

and

Data Cooling Technologies, LLC

ASSET PURCHASE AGREEMENT, SETTLEMENT AGREEMENT AND RELEASE

ASSET PURCHASE AGREEMENT, SETTLEMENT AGREEMENT AND RELEASE (this "**Agreement**"), is dated as of November 9, 2017, by and between KyotoCooling North America, LLC, a Delaware limited liability company ("**Purchaser**"), and Data Cooling Technologies, LLC, a Delaware company ("**Seller**").

W I T N E S S E T H:

WHEREAS, Seller is engaged in the business of selling cooling systems for data centers in North America (such business, and not the business conducted by Seller defined herein as the Thermotech Business, is hereinafter referred to as the "**Business**");

WHEREAS, Seller filed a petition (the "**Bankruptcy Petition**") on September 8, 2017 initiating a chapter 11 bankruptcy case under Case No. 17-52170 (the "**Chapter 11 Case**") in the United States Bankruptcy Court for the Northern District of Ohio (the "**Bankruptcy Court**");

WHEREAS, Seller desires to sell to Purchaser, and Purchaser desires to purchase and acquire from Seller, pursuant to a sale in accordance with Section 363 of title 11 of the United States Code (the "**Bankruptcy Code**"), upon the terms and subject to the conditions set forth in this Agreement, all of Seller's assets, property, rights and interests related to the Business (other than the Retained Assets (defined below)), in consideration of certain payments by the Purchaser and the assumption by Purchaser of certain Liabilities (defined below) and obligations of Seller specifically described in this Agreement; and

WHEREAS, Seller desires to retain all of its assets, property, rights, interests, Liabilities and obligations not transferred to, or assumed by, Purchaser under this Agreement; and

WHEREAS, Seller and Purchaser desire to settle all of the claims by and between them, and to release one another from liability in respect of such claims, on the terms and subject to the conditions set forth herein.

NOW, THEREFORE, in consideration of the premises and the mutual agreements and representations and upon the terms and subject to the conditions set forth in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

ARTICLE I

DEFINITIONS

§1. Definitions.

§1.1 Defined Terms. When used in this Agreement, the following terms shall have the respective meanings specified therefor below.

"**Ancillary Agreements**" shall mean the Bill of Sale, the Assignment and Assumption Agreement, and all other agreements, instruments or documents executed and delivered in connection herewith or therewith.

"**Affiliate**" shall mean, with respect to any Person, any other Person directly or indirectly controlling, controlled by or under common control with, such Person; provided, that, for the purposes of this definition, "control" (including, with correlative meanings, the terms "controlled by" and "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities, by contract or otherwise; and provided, further, that an Affiliate of any Person shall also include (i) any Person that directly or indirectly owns more than five percent (5%) of any class of capital stock or other equity interest of such Person, (ii) any officer, director, trustee or beneficiary of such Person, (iii) any spouse, parent, sibling or descendant of any Person described in clauses (i) or (ii) above, and (iv) any trust for the benefit of any Person described in clauses (i) through (iii) above or for any spouse, issue or lineal descendant of any Person described in clauses (i) through (iii) above.

"**Books and Records**" shall mean all books, records, manuals and other materials (in any form or medium and wherever held), including all records and materials held by Seller, advertising matter, catalogues, price lists, correspondence, mailing lists, lists of current and former customers and suppliers (and all data related thereto), distribution and other mailing lists, photographs, production data, computer data, all studies and research, sales and promotional materials and records, purchasing materials and records, personnel records, manufacturing and quality control records and procedures, facilities and/or equipment plans and specifications, blueprints, research and development files, data and laboratory books, Intellectual Property disclosures and tangible embodiments of Intellectual Property, media materials and plates, accounting records, sales order files and litigation files related to the Business or the Purchased Assets.

"**Business Day**" shall mean any day, other than a Saturday, Sunday or a day on which banks located in New York, New York shall be authorized or required by law to close.

"**Claim**" shall mean any claim, counterclaim, lawsuit, demand, suit, cause of action, inquiry made, hearing, investigation, notice of violation, litigation, proceeding, arbitration or other dispute, whether civil, criminal, administrative or otherwise.

"**Code**" shall mean the Internal Revenue Code of 1986, as amended from time to time, and the regulations promulgated and the rulings issued thereunder. Section references to the Code are to the Code as in effect at the date of this Agreement.

"**Declaratory Judgment Action**" shall mean that certain adversary proceeding styled *KyotoCooling North America LLC. v. Data Cooling Technologies, Inc.*, Adversary Proceeding No. 17-ap-5072 in the United States Bankruptcy Court for the Northern District of Ohio at Akron.

"**Employee Benefit Plan**" shall mean any employee benefit plan (as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended) or other health, welfare or fringe benefit plan maintained or contributed to or required to be contributed to by Seller or any of its Affiliates, with respect to any present or former employee of the Business.

"**Environmental Laws**" means any federal, state, or local statute, law, ordinance, code, or order; and any regulation promulgated thereunder, which regulates or controls (i) pollution, contamination, or the condition of groundwater, surface water, soil, sediment or air, or (ii) a spill, leak, emission, discharge, release or disposal into groundwater, surface water, soil, sediment or air, including without limitation the federal Comprehensive, Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq., as amended; the Federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq., as amended; the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. § 1801 et seq., as amended; the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 et seq., as amended; the Clean Air Act (CAA), 42 U.S.C. § 7401 et seq., as amended; the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq., as amended; the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f et seq., as amended; the Emergency Planning and Community Right to Know Act (EPCRA), 42 U.S.C. § 11001 et seq., as amended; the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq., as amended; the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., as amended; any similar state or local statutes or ordinances, and the regulations promulgated thereunder.

"**Governmental or Regulatory Authority**" shall mean any instrumentality, subdivision, court, administrative agency, commission, official or other authority of the United States or any other country, or any state, province, prefect, municipality, locality or other government or political subdivision thereof, or any quasi-governmental or private body exercising any regulatory, taxing, importing or other governmental or quasi-governmental authority.

"Insider" shall have the meaning set forth in section 101(31) of the Bankruptcy Code.

"**Intellectual Property**" shall mean (i) all inventions, whether patentable or unpatentable (and whether or not reduced to practice), all improvements thereto, and all patents including all patents and patent disclosures and applications, and registered design and registered design applications, together with all reissuance, continuations, continuations-in-part, revisions, extensions and reexaminations thereof, (ii) all trademarks, including registered or unregistered trademarks, registered or unregistered servicemarks, and all translations, adaptations, deviations, combinations, applications, registrations and renewals in connection with any registered or unregistered trademark or servicemark, and all trade names, trade dress and logos, (iii) all copyrights, meaning all registered copyrights, copyright applications, copyrightable works, and unregistered copyrights, and all applications, registrations, and renewals in connection therewith, (iv) all mask works and all applications, registrations, and renewals in connection therewith, (v) all Confidential Information, (vi) all computer software and software licenses (including data and related documentation), phone numbers, websites and domain names, (vii) all other similar proprietary rights, and (viii) all copies and tangible embodiments of the foregoing, in whatever

form or medium, owned or held by Seller or which have been or are used primarily in the operation of the Business, including without limitation those set forth on Schedule 2.1(g).

"**KCNA Claim**" shall mean KCNA's the claim for unpaid royalties payable by Seller to Purchaser in the amount of $1,700,000.

"**Knowledge**" shall mean to the actual knowledge of the officers and senior management of Seller or Purchaser, as applicable.

"**Liability**" shall mean any debt, liability, obligation, Claim, Lien, commitment, demand or expense of any nature or kind, whether known or unknown, asserted or unasserted, accrued or unaccrued, absolute, contingent or otherwise and whether due or to become due.

"**Liens**" shall mean liens, security interests, options, rights of first refusal, Claims, easements, mortgages, charges, indentures, deeds of trust, rights of way, restrictions on the use of real property, encroachments, licenses to third parties, leases to third parties, security agreements, or any other encumbrances and other restrictions or limitations on use of real or personal property or irregularities in title thereto.

"**Material Adverse Change**" shall mean, (i) when used with respect to the Business, any materially adverse change in or effect on the business, assets, Liabilities, results of operation, condition (financial or otherwise) (but only to the extent that such material adverse change or effect would continue to affect the Purchased Assets or Purchaser's operation of the Purchased Assets following the Closing); provided, however, that, except as expressly provided below, the filing, prosecution, pendency and disposition of the Chapter 11 Case and the consequences thereof shall not constitute any such a material adverse change or effect, and/or (ii) when used with respect to Purchaser or Seller, as the case may be, any materially adverse change in or effect on (including any material delay) the ability of Purchaser or Seller, as the case may be, to perform their respective obligations hereunder; provided, however, that the operations or sale of the Thermotech Business shall not be a Material Adverse Change.

"**Net Proceeds**" shall mean, in respect of the Nortek Action, the amount recovered post-Closing in the Nortek Action after first reimbursing expenses, including attorneys' fees, that have been paid in the Nortek Action.

"**Nortek Action**" shall mean that certain civil action styled *KyotoCooling North America LLC, et al. v. Nortek Air Solutions, LLC, et al.*, Case No. 3:16-cv-00381-N in the United States District Court for the Northern District of Texas.

"**Order**" shall mean any judgment, order, injunction, decree, writ, permit or license of any Governmental or Regulatory Authority or any arbitrator.

"**Permits**" shall mean all right, title and interest in and to Seller's permits, licenses, filings, authorizations, approvals, and indicia of authority as issued by any Governmental or Regulatory Authority (and all pending applications for approval or renewal of permits to own, construct, operate or maintain any of the Purchased Assets), necessary to conduct the Business including without limitation those permits set forth on Schedule 2.1(e).

"**Permitted Liens**" shall mean (i) Assumed Liabilities and Liens in respect of Assumed Liabilities; (ii) Liens that cannot be released or cured under the Bankruptcy Code pursuant to a sale of assets under Section 363 or 365 of the Bankruptcy Code and that either (A) individually or in the aggregate would not involve material costs to correct or remove or (B) do not individually or in the aggregate materially impair the use or operation of any material Purchased Asset; (iii) Liens that are caused by Purchaser; and (iv) Liens that will not survive the Closing.

"**Person**" shall mean and include an individual, a partnership, a joint venture, a corporation, a limited liability company, a limited liability partnership, a trust, an incorporated organization and a Governmental or Regulatory Authority.

"**Premises**" shall mean the manufacturing facilities, offices, lots and any other space used by the Business and located at 1777 Miller Parkway, Streetsboro, Ohio 44241

"**Rule 2004 Motion**" shall mean that certain motion filed by Seller in the Bankruptcy Case under Rule 2004 [Docket No. 107].

"**Subsidiary**" shall mean, with respect to any Person, (i) any corporation more than 50% of whose stock of any class or classes having by the terms thereof ordinary voting power to elect a majority of the directors of such corporation (irrespective of whether or not at the time stock of any class or classes of such corporation shall have or might have voting power by reason of the happening of any contingency) is owned by such Person directly or indirectly through one or more Subsidiaries of such Person and (ii) any partnership, association, joint venture or other entity in which such Person directly or indirectly through one or more Subsidiaries of such Person has more than a 50% equity interest.

"Thermotech Assets" shall mean all of the assets of Seller associated solely with the Thermotech Business, including the accounts receivable generated solely from the Thermotech Business and the assets subject to the sale of the Thermotech Business as described in the motion of Seller filed in Seller's bankruptcy case at Docket No. 156.

"Thermotech Business" shall mean the business that is a division of Seller operated in Tampa, Florida.

§1.2 Additional Defined Terms. In addition to the terms defined in Section 1.1, the following terms shall have the respective meanings assigned thereto in the sections indicated below.

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Purchaser	2
Retained Assets	9
Retained Liabilities	11
Seller	2

§1.3 Construction. In this Agreement, unless the context otherwise requires:

(a) any reference in this Agreement to "writing" or comparable expressions includes a reference to facsimile transmission or comparable means of communication;

(b) words expressed in the singular number shall include the plural and vice versa; words expressed in the masculine shall include the feminine and neuter gender and vice versa;

(c) references to Articles, Sections, Exhibits, Schedules and Recitals are references to articles, sections, exhibits, schedules and recitals of this Agreement;

(d) reference to "day" or "days" are to calendar days;

(e) this "Agreement" or any other agreement or document shall be construed as a reference to this Agreement or, as the case may be, such other agreement or document as the same may have been, or may from time to time be, amended, varied, novated or supplemented; and

(f) "include," "includes" and "including" are deemed to be followed by "without limitation," whether or not they are in fact followed by such words or words of similar import.

§1.4 Schedules and Exhibits. The Schedules and Exhibits to this Agreement are incorporated into and form an integral part of this Agreement. If an Exhibit is a form of agreement, such agreement, when executed and delivered by the parties thereto, shall constitute a document independent of this Agreement.

ARTICLE II

PURCHASE AND SALE OF ASSETS

§2. Purchase and Sale of Assets.

§2.1 Sale of Assets. Upon the terms and subject to the conditions of this Agreement, Purchaser agrees to purchase, assume and accept from Seller, and Seller agrees to sell, convey, transfer, assign and deliver to Purchaser, as a good faith purchaser for value within the meaning of Section 363(m) of the Bankruptcy Code, on the Closing Date, all of Seller's right, title and interest in and to all assets of any type or nature, whether tangible or intangible, or located on or off the Premises related to the Business, other than Retained Assets (the "**Purchased Assets**"), free and clear of all Liens, Claims and Liabilities of any nature whatsoever, other than Permitted Liens, and all as contemplated by Section 363(f) of the Bankruptcy Code, including, to the extent the same are related to the Business and not listed as Retained Assets:

(a) all fixed and tangible personal property, including all machinery, equipment, office equipment, furniture, furnishings, automobiles, trucks, vehicles, tools, dies, molds and parts and similar property, including the fixed and tangible personal property set forth on Schedule 2.1(a);

(b) all raw materials (whether previously purchased and in transit to Seller or already in possession of Seller), work-in-process, finished goods, supplies and inventory;

(c) those purchase orders and contracts set forth on Schedule 2.1(c), all deposits and rights related to such deposits, and all rights to receive payment for products sold or services rendered thereunder, all rights to receive goods and services and to leasehold interests pursuant thereto, and all rights to assert Claims and take other rightful actions in respect of breaches, defaults and other violations thereof (collectively, the "**Assumed Contracts**"); provided however, Purchaser shall have the right, but not the obligation, to add to or subtract from those contracts set forth on Schedule 2.1(c); In order to adjust the "Assumed Contracts" listed on Schedule 2.1(c), Purchaser must deliver a revised Schedule 2.1(c) to Seller on or before three (3) days prior to the Closing Date. Subject to Section 2.3(e)(iii), such revised schedule shall be deemed the final list of Assumed Contracts, unless the Bankruptcy Court does not approve the assumption and assignment of a contract, in which case it shall not be an Assumed Contract.

(d) all accounts receivable and notes receivable whether or not associated with an Assumed Contract;

(e) all rights of Seller under any commitments or Permits;

(f) all rights relating to any prepaid expenses;

(g) all Intellectual Property owned or licensed by Seller;

(h) the Books and Records;

(i) all rights to Claims of any nature available to or being pursued by Seller, including with respect to the ownership, use, function or value of any Purchased Asset, whether arising by way of counterclaim or otherwise, including without limitation the Nortek Action;

(j) those guarantees, warranties, indemnities and similar rights in favor of Seller with respect to any Purchased Asset, to the extent conveyable; and

(k) all other assets of Seller related to the Business (whether owned or leased, real or personal, or tangible or intangible), other than the Retained Assets.

§2.2 Retained Assets. Notwithstanding the foregoing and irrespective of any relationship to the Business, the Purchased Assets shall not include the following assets of Seller (the "**Retained Assets**"):

(a) all cash on hand, security deposits held by third parties under contracts not constituting Assumed Contracts, and all cash in financial institutions, cash equivalents, and marketable securities and bonds;

(b) the Thermotech Assets;

(c) all claims for refunds and/or credits for income taxes or for prepaid income taxes;

(d) all contracts other than the Assumed Contracts (collectively, the "**Excluded Contracts**");

(e) Seller's rights under any or all of this Agreement, the Ancillary Agreements or any other agreement, instrument or document executed in connection herewith, and the Approval Order;

(f) any Claims arising out of the Retained Assets, provided, however, for removal of any doubt the Nortek Action shall not be a Retained Asset;

(g) insurance proceeds and Claims with respect to or arising in connection with (A) any Excluded Contract, or (B) any Retained Asset;

(h) all preference or avoidance claims and actions of Seller, including, without limitation, any such preference and avoidance claims and actions arising under or brought pursuant to Sections 544, 547, 548, 549, and 550 of the Bankruptcy Code, including without limitation related to the sale of Air Enterprises assets that occurred in or around May and June 2017, and any other claim, including without limitation for breach of fiduciary duty, related to the sale of Air Enterprises assets that occurred in or around May and June 2017, but excluding any such preference or avoidance claims against (i) Purchaser, or (ii) any counterparty to an Assumed Contract, which shall not be sold to Purchaser but shall be deemed released at the Closing;

(i) any intracompany Claim or obligation from the Thermotech Business on Seller's books;

(j) any deposit, prepayment or escrow made prior to the Petition Date to any utility or landlord in connection with any real property leased for the Tampa, Florida operation of the Thermotech Business;

(k) any retainer, deposit, prepayment or escrow held by any estate professional as of the Petition Date or approved and payable pursuant to any order of the Bankruptcy Court authorizing the use of cash collateral;

(l) any Employee Benefit Plan and any assets thereof;

(m) any Claim, obligation from, or right to recover against any Affiliate, Insider or former Insider of the Seller; and

(n) all equity interests in Arborwear LLC shall be a Retained Asset.

§2.3 Assumption of Liabilities. At the Closing, Purchaser shall assume and be liable for, and shall pay, perform or, as the case may be, discharge when due, only those Liabilities of Seller (collectively, the "**Assumed Liabilities**") set forth below:

(a) all Liabilities arising out of, or in respect of, the Purchased Assets arising or incurred after the Closing;

(b) any purchase orders that are described on Schedule 2.3(b);

(c) all obligations incurred after the Closing related to the Nortek Action;

(d) all obligations under the Assumed Contracts to the extent arising, occurring or to be performed under the Assumed Contract after the Closing Date; and

(e) those accrued expenses of Seller arising out of, or in respect of, the Business in the ordinary course that are specifically described on Schedule 2.1(c) (such accrued expenses, the "**Accrued Expense Cure Amount**") which expenses must be paid in order to allow the assumption and assignment of the Assumed Contracts under Section 365 of the Bankruptcy Code. The Accrued Expense Cure Amount on Schedule 2.1(c) shall be calculated on a contract by contract basis as of the date hereof. The Accrued Expense Cure Amount may be adjusted as follows:

(i) To the extent that Schedule 2.1(c) is revised pursuant to Section 2.1(c), the proposed Accrued Expense Cure Amount shall be calculated on a contract by contract basis as of the Closing Date for all the Assumed Contracts on the revised schedule.

(ii) To the extent that the proposed cure amount for any proposed Assumed Contract is greater at the Closing Date than the amount listed on the

initial Schedule 2.1(c), the difference shall be paid by Purchaser (as part of the cure requirement under §365 of the Bankruptcy Code); provided, however, Purchaser may in such event elect to remove such Assumed Contract from Schedule 2.1(c).

(iii) To the extent that any proposed Assumed Contract is not originally included on Schedule 2.1(c) but is added to the revised Schedule 2.1(c) prior to the Closing Date, Seller shall provide a calculation of the proposed cure amount as of the date such proposed Assumed Contract is added to Schedule 2.1(c) of this Agreement and as of the Closing Date. To the extent that the proposed cure amount for any such proposed Assumed Contract is greater at the Closing Date than the amount set forth on Schedule 2.1(c) as amended, the difference shall be paid by Purchaser (as part of the cure requirement under §365 of the Bankruptcy Code); provided, however, Purchaser may in such event elect to remove such Assumed Contract from Schedule 2.1(c).

(iv) To the extent any executory lease or contract is removed from Schedule 2.1(c) as permitted by Section 2.1(c), Purchaser shall have no payment obligations related to such lease or contract and no amount related to such agreement shall be included in the Accrued Expense Cure Amount.

Notwithstanding anything herein, Seller shall have no obligation to pay any cure amounts associated with Assumed Contracts not funded by Purchaser, it being the intent of the parties that Purchaser be able to determine which contracts to have assumed and assigned after a determination of cure amounts.

Assumed Liabilities shall not, in any event, include any Retained Liabilities.

§2.4 Retention of Liabilities.

(a) Notwithstanding the foregoing, Seller shall retain, and shall be solely and exclusively liable for (subject to its defenses thereto), all Liabilities of Seller other than the Assumed Liabilities (the "**Retained Liabilities**"), including, but not limited to:

(i) any Liability under or with respect to an Employee Benefit Plan or arising in connection with the employment and pay practices of Seller or any of its Affiliates, including any obligations, costs or liabilities relating to compliance with the requirements of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) and including any liability that has been asserted or could be asserted under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 et seq. ("WARN Act"), including in *Albright v. Data Cooling Technologies LLC*, Adversary Proceeding No. 17-ap-05065 in the United States Bankruptcy Court for the Northern District of Ohio at Akron;

(ii) any Liability associated with the Retained Assets;

(iii) any taxes imposed on Seller or the income, assets or operations of Seller or the Purchased Assets for all periods prior to the Closing;

(iv) any product liability Claim arising out of or relating to products or components of products designed, sold or manufactured, in whole or in part, by Seller prior to the Closing Date;

(v) any costs or expenses incurred by Seller incident to its negotiation and preparation of this Agreement and the Ancillary Agreements, and its performance and compliance with the agreements and conditions contained herein; and

(vi) any Liability under any Environmental Law arising from facts, circumstances and conditions existing as of the Closing Date.

(b) Purchaser shall not assume, or otherwise be responsible for, any Liabilities of any Affiliates of Seller.

(c) Nothing herein shall be deemed an admission to any Liability by, or create any new Liability against, Seller (other than its obligations hereunder).

§2.5 Purchase Price and Deposit. Purchaser shall provide Seller a Deposit of $80,000 no later than November 17, 2017, provided that no later than November 15, 2017 or such other date(s) Purchaser requests prior to November 17, 2017, Seller shall provide diligence reasonably requested by Purchaser, including without limitation a tour of the Premises and access to all fixed assets and inventory related to the Business. In full consideration for the sale by Seller of the Purchased Assets, Purchaser shall, (i) on the Closing Date, (A) pay to Seller an aggregate of $1,300,000, in immediately available funds, subject to a credit in the amount of the Deposit, and (B) assume the Assumed Liabilities, (ii) timely pay the Accrued Expense Cure Amount such that any Assumed Contracts pursuant to which such Accrued Expense Cure Amounts are payable may be assigned to Purchaser in accordance with the provisions of Section 365 of the Bankruptcy Code, and (iii) within five (5) business days of receipt of any funds of the Nortek Action, disburse to (A) first to Purchaser, until paid in full, to reimburse all actual fees, costs and expenses advanced by Purchaser, (B) second to Seller, until paid in full, to reimburse all actual fees, costs and expenses advanced by Seller, and (C) after such actual costs and expenses have been reimbursed in full, fifty percent (50%) of the Net Proceeds of the Nortek Action (collectively, the "**Purchase Price**").

§2.6 Closing. The closing of the transactions contemplated by this Agreement (the "**Closing**") shall take place as soon as practicable after the last of the conditions set forth in Articles VI and VII hereof is satisfied or waived, but in no event later than the earlier of (i) the fifth (5^{th}) Business Day after the entry of the Approval Order, and (ii) or such other time and date (not later than November 30, 2017) as the parties hereto shall agree. Such date is herein referred to as the "**Closing Date**."

ARTICLE III

REPRESENTATIONS OF SELLER

§3. Representations of Seller. Seller represents, warrants and agrees as follows:

§3.1 Authority and Enforceability. Seller has the corporate power and authority to execute and deliver this Agreement and the other instruments and agreements to be executed and delivered by Seller as contemplated hereby. Subject to approval by the Bankruptcy Court, Seller has the corporate power and authority to consummate the transactions contemplated hereby and by the Ancillary Agreements, including the sale, assignment, transfer and conveyance of the Purchased Assets pursuant to this Agreement. The execution, delivery and performance of this Agreement, and all other instruments and agreements to be executed and delivered by Seller as contemplated hereby, and the consummation of the transactions contemplated hereby and thereby, have been duly authorized by Seller's Board of Directors and no other corporate action on the part of Seller is necessary to authorize the execution, delivery and performance of this Agreement and such other instruments and agreements by Seller, and the consummation of the transactions contemplated hereby and thereby. This Agreement and all other instruments and agreements to be executed and delivered by Seller as contemplated hereby, when delivered in accordance with the terms hereof, assuming the due execution and delivery of this Agreement and each such other document by the other parties hereto and thereto, have been, or, as the case may be, shall have been, duly executed and delivered by Seller and are or, as the case may be, will be valid and binding obligations of Seller, enforceable in accordance with their terms upon the entry by the Bankruptcy Court of an order approving this Agreement, the Ancillary Agreements and the transactions contemplated hereby and thereby, which order shall not have been stayed pending appeal, in a form and substance reasonably acceptable to Purchaser (the "**Approval Order**"). All of the tangible personal property used in the Business is, under the present circumstances (recognizing that Seller ceased normal business operations in August 2017), in good operating condition and repair, ordinary wear and tear excepted, and is adequate and suitable for the purposes for which it is presently being used. The Purchased Assets constitute all the properties, assets and rights sufficient to conduct the Business in all material respects as conducted as of the date of this Agreement.

§3.2 Existence and Good Standing of Seller. Seller is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware. Seller has all requisite corporate power and authority to own its property and to conduct the Business as it is now being conducted. Seller is duly qualified to do business and is in good standing in each jurisdiction in which the character or location of the properties owned, leased or operated by Seller or the nature of the Business makes such qualification necessary.

§3.3 Title to Assets. Seller has good title to or, in the case of leased assets, a valid leasehold interest in the Purchased Assets. Upon consummation of the transaction contemplated hereby, Purchaser will have acquired good and marketable title in and to, or a valid leasehold interest in, each of the Purchased Assets, free and clear of all Liens, except for Permitted Liens, to the maximum extent permitted by the Bankruptcy Code and the Approval Order.

§3.4 Litigation. Except as set forth in Schedule 3.4 and other than the Chapter 11 Case and the matters that may arise therein, as of the date hereof, there are no Claims pending or, to the Knowledge of Seller, threatened against or affecting the operations or conduct of the Business or the use of the properties of the Business.

ARTICLE IV

REPRESENTATIONS OF PURCHASER

§4. Representations of Purchaser. Purchaser represents, warrants and agrees as follows:

§4.1 Existence and Good Standing of Purchaser; Power and Authority. Purchaser is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware. Purchaser has the corporate power and authority to execute and deliver this Agreement and the other instruments and agreements to be executed and delivered by it as contemplated hereby. Purchaser has the corporate power and authority to consummate the transactions contemplated hereby. The execution, delivery and performance of this Agreement, and all other instruments and agreements to be executed and delivered by Purchaser as contemplated hereby, and the consummation of the transactions contemplated hereby and thereby, have been duly authorized by Purchaser's Board of Directors and no other corporate actions on the part of Purchaser are necessary to authorize the execution, delivery and performance of this Agreement and such other instruments and agreements by it and the consummation of the transactions contemplated hereby and thereby. This Agreement and all other instruments and agreements to be executed and delivered by Purchaser as contemplated hereby, when delivered in accordance with the terms hereof, assuming the due execution and delivery of this Agreement and each such other document by the other parties hereto and thereto, shall have been duly executed and delivered by Purchaser and shall be valid and binding obligations of Purchaser, enforceable against it in accordance with their terms, except to the extent that their enforceability may be subject to applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditors' rights generally and to general equitable principles.

§4.2 Litigation. There are no Claims pending, or, to Purchaser's Knowledge, threatened against or affecting Purchaser, which challenge or seek to prevent or impair Purchaser's ability to execute or perform its obligations under this Agreement.

ARTICLE V

COVENANTS, SETTLEMENT AND RELEASES

§5. Covenants.

§5.1 Review of the Business.

(a) Purchaser may, prior to the Closing Date, directly or through its representatives and at its sole cost and expense, review the properties, Books and Records of Seller and its financial and legal condition to the extent they reasonably believe necessary or advisable to familiarize themselves with such properties and other matters. Seller shall permit Purchaser and its representatives to have, after the date of execution of this Agreement, full access to the Premises and to all the Books and Records (including tax returns filed and tax returns in preparation to be filed) and Seller shall cause its officers, employees, counsel, accountants, consultants and other representatives to furnish

Purchaser with such financial and operating data and other information with respect to the business and properties of the Business as Purchaser shall from time to time reasonably request; provided, that such investigation and assistance shall not unreasonably disrupt the operations of the Business and that there shall be no obligation to provide: (i) attorney/client privileged communications; (ii) attorney work product; or (iii) any other documents associated with prior disputes between Purchaser and Seller. In addition, Seller shall use commercially reasonable efforts to facilitate discussions between Purchaser and Seller's suppliers and vendors prior to Closing, which discussions shall be in a form and manner reasonably acceptable to Purchaser and Seller and conducted at Purchaser's sole cost and expense.

(b) Any information regarding Seller obtained by Purchaser pursuant to paragraph (a) above shall be subject to that certain Confidentiality Agreement, dated July 18, 2017, by and between Seller and Purchaser, the terms of which are incorporated herein by reference (as amended from time to time, the "**Confidentiality Agreement**"). Effective upon, and only upon, the Closing, Purchaser's obligations under the Confidentiality Agreement shall terminate.

§5.2 Public Announcements. Seller shall not, nor shall any of its Affiliates, without the approval of Purchaser, issue any press releases or otherwise make any public statements with respect to the transactions contemplated by this Agreement, except as may be required by applicable law; provided, that in the event disclosure is required by law, Seller shall use its best efforts to obtain the approval of Purchaser prior to issuing such press release or making such public disclosure. The foregoing provision shall not apply to statements made or actions taken in connection with Seller's obligations in the Chapter 11 Case, including, without limitation, attaching a copy of this Agreement to the motion filed with the Bankruptcy Court seeking entry of the Approval Order, communication with parties that have filed an appearance in the Chapter 11 Case or other actions taken in furtherance of the events contemplated by the Approval Order. Seller agrees that Purchaser shall issue a public statement with respect to the transactions contemplated by this Agreement, which public statement shall be reasonably acceptable to Seller and shall enable Purchaser to comply with its obligations under International Financial Reporting Standards (IFRS) accounting rules.

§5.3 Notification of Certain Matters. Seller shall give prompt notice to Purchaser of any of the following which occurs, or of which it becomes aware, to the best of its Knowledge, following the date hereof: (i) any notice of, or other communication relating to, a default or event that, with notice or lapse of time or both, would become a default under any Assumed Contract; (ii) the occurrence or existence of any fact, circumstance or event which would reasonably be expected to result in (A) any representation or warranty made by Seller in this Agreement or in any Schedule, Exhibit or certificate or delivered herewith, to be untrue or inaccurate or (B) the failure of any condition precedent to Purchaser's obligations; and (iii) any notice or other communication from any third party alleging that the consent of such third party is or may be required in connection with the transactions contemplated by this Agreement. Such notice shall not affect the ability of Purchaser to terminate this Agreement and the ability of Purchaser to terminate this Agreement shall be governed by Article VIII.

§5.4 Interim Operations by Seller. Except as agreed to in writing by Purchaser or as may be required by the Bankruptcy Court, between the date of execution of this Agreement and the Closing, Seller shall, in the context of its Chapter 11 Case, conduct and operate the Business (including its working capital and cash management practices) only according to its ordinary course of Business consistent with past practice during the pendency of the Chapter 11 Case, and use its commercially reasonable efforts to (i) preserve and keep intact the Business, (ii) keep available the services of its current employees, including making all salary and benefit payments, (iii) preserve its relationships with customers, suppliers and others having business dealings with Seller, (iv) maintain the Purchased Assets in a state of repair and condition consistent with the normal conduct of the Business during the pendency of the Chapter 11 Case and not encumber or permit the incurrence of any Lien (other than Permitted Liens) on the Purchased Assets, and (v) conduct itself and the Business in accordance with the requirements of applicable laws, including the Bankruptcy Code and all orders of the Bankruptcy Court. Notwithstanding the immediately preceding sentence, prior to or on the Closing Date, except as may be first approved in writing by Purchaser, Seller shall refrain from the following:

(a) increasing the compensation payable (including, but not limited to, wages, salaries, bonuses or any other remuneration) or to become payable to any officer, employee or agent other than in the ordinary course of business;

(b) modifying, amending, renewing, extending or terminating any Assumed Contract or entering into or becoming subject to any contract of a type included in the Assumed Contracts or outside the ordinary course of business;

(c) selling, transferring, leasing, licensing, granting, waiving or otherwise disposing of any Purchased Assets or rights therein except for sales of inventory in the ordinary course of Business consistent with past practice;

(d) splitting, combining, subdividing or reclassifying any shares of its capital stock or other equity interests or declare, set aside or pay any dividend or other distribution (whether in cash, stock or property or any combination thereof) in respect of its capital stock;

(e) making any capital expenditure or commitment therefor or otherwise acquiring any assets or properties, other than inventory in the ordinary course of Business consistent with practice;

(f) writing-off as uncollectible any notes or accounts receivable, except write-offs in the ordinary course of Business consistent with past practice charged to applicable reserves;

(g) canceling or waiving any Claims or rights of substantial value relating to the Business; provided that Purchaser shall confer with Seller regarding any such proposed cancellation or waiver of Claims or rights not relating to the Business during the period prior to the Closing Date;

(h) making any change in any method of accounting or auditing practice;

(i) taking any other actions which, individually or in the aggregate, would have or would likely cause a Material Adverse Change with respect to the Business; or

(j) entering into any contract or letter of intent with respect to (whether or not binding), or otherwise committing or agreeing, whether or not in writing, to do any of the foregoing.

§5.5 Additional Matters.

(a) Seller shall use its commercially reasonable efforts to consummate the transactions contemplated by this Agreement and the Ancillary Agreements including by seeking, through an appropriate motion or motions, entry of an appropriate order or orders of the Bankruptcy Court approving this Agreement, the Ancillary Agreements and the transactions contemplated hereby and thereby; provided, that such motions and orders shall be in form and substance reasonably satisfactory to the Purchaser.

(b) Within one (1) Business Day following the date hereof, Seller shall file with the Bankruptcy Court (and arrange for the provision of service and notice to its creditors, equityholders and parties in interest as required by Purchaser with respect thereto) a motion seeking approval of the transactions contemplated by this Agreement and entry of an order from the Bankruptcy Court providing the relief specified in Subsection (c) below, and thereafter, Seller shall use its commercially reasonable efforts to obtain such orders in a timely fashion.

(c) An order entered at Seller's request will provide that:

(i) Seller agrees to pay to Purchaser an expense reimbursement of actual and reasonable out of pocket expenses of up to one hundred thousand dollars ($100,000) (the "**Expense Reimbursement**") promptly upon the conveyance of all or a substantial portion of the Purchased Assets to a Person other than Purchaser either through a sale pursuant to Section 363 of the Bankruptcy Code or in any other manner (an "**Alternate Transaction**"); provided, that at the earlier of the date that Seller abandons the Bankruptcy Code Section 363 sale process contemplated by this Agreement, or the conclusion of the Bankruptcy Code Section 363 sale hearing contemplated by this Agreement, Purchaser is ready, willing and able to consummate the transactions contemplated by this Agreement and the Ancillary Agreements subject to satisfaction of all of the conditions to Purchaser's obligations set forth in Article VI (it being understood that Purchaser shall be entitled to a rebuttable presumption that they were ready, willing and able to consummate the transactions contemplated by this Agreement and the Ancillary Agreements). Seller shall have no obligation to pay the Expense Reimbursement if Purchaser terminates this Agreement prior to the Closing.

(ii) The Expense Reimbursement (i) shall be paid by wire transfer to Purchaser at the closing of any Alternate Transaction and (ii) shall be payable from the proceeds of any Alternate Transaction.

(iii) The Expense Reimbursement shall be accorded administrative expense priority status.

(iv) In the event the Alternate Transaction includes a "credit bid" for all or a portion of such alternate purchaser's purchase price, the secured creditor making such "credit bid" must pay the Expense Reimbursement in cash at closing to Purchaser.

§5.6 No Assumption. Purchaser does not assume or agree to pay, or indemnify Seller, or any other Person against any Liability, obligation, or expense of Seller relating to the Purchased Assets in any way except, and only to the extent, expressly provided for herein or in the Ancillary Documents (including the Assumed Liabilities). Moreover and notwithstanding any other provision of this Agreement, Purchaser does not agree to assume any obligation of Seller, except with respect to the Assumed Liabilities.

§5.7 Seller's Employees.

(a) Except as otherwise provided herein, on the Closing Date, Seller will terminate Seller's employees who are associated solely with the Business. Seller agrees that, except as otherwise provided herein, Purchaser shall assume no Liability with respect to any of Seller's employees and shall have no obligation to hire any of Seller's employees.

(b) Purchaser shall have no obligation to make severance payments to any employee of Seller by virtue of said employee's termination of employment with or by Seller prior to or as of the Closing.

(c) Purchaser shall not have any responsibility or Liability under (i) any Employee Benefit Plan, (ii) any collective bargaining agreement with any representative of any employee, or (iii) any individual written agreement between Seller and any of its employees setting forth specific terms of employment duration or compensation or benefits, including, without limitation, any termination agreement, or any agreement for parachute payments.

(d) Nothing expressed or implied in this Agreement shall confer upon any of Seller's employees or any beneficiary, dependent, legal representative or collective bargaining agent of such employees any right or remedy of any nature or kind whatsoever under or by reason of this Agreement, including without limitation any right to employment or to continued employment for any specified period, at any specified location or under any specified job category, or any working condition, rule or practice.

(e) Seller shall be responsible for any notification that may be required under the Worker Adjustment and Retraining Notification Act of 1988 or such other federal, state or local laws

(f) No later than the Closing, Seller shall release any employee from any non-compete obligation, any confidentiality obligation, any non-disclosure obligation or any non-solicitation obligation (other than with respect to attorney/client privileged or attorney work product matters from prior to the Closing).

§5.8 Further Assurances. Following the Closing, Seller and Purchaser will use reasonable efforts, upon request of the other party, to do, execute, acknowledge, and deliver, or

cause to be done, executed, acknowledged, and delivered, all such further acts, assignments, transfers, conveyances, powers of attorney, and assurances necessary to consummate the transactions contemplated by this Agreement. Seller will, at Purchaser's request, use reasonable efforts to obtain all authorizations or consents that may reasonably be required for the conveyance, transfer, assignment, and delivery to Purchaser, or to its successors and assigns, or for aiding and assisting in collecting or reducing to possession, any or all of the Purchased Assets to be transferred hereunder, and all costs and expenses incurred in connection with this Section 5.9 shall be paid by Purchaser. Seller authorizes Purchaser to record the evidences of transfer of the Purchased Assets to Purchaser under this Agreement.

§5.9 Cooperation in Tax Proceedings. To the extent possible, the parties will provide each other with such assistance as may reasonably be requested by any of them in connection with the completion and filing of any form, preparation of any tax return, any audit or other examination by any taxing authority, or any judicial or administrative proceedings relating to Liability for taxes relating to the Purchased Assets or the transactions contemplated by this Agreement. Each party will retain and provide the others with any records or information that may be relevant to such return, audit, examination, proceedings, or determination. Such assistance shall include making employees available on a mutually convenient basis to provide additional information and explanation of any material provided hereunder and shall include providing copies of any relevant tax returns and supporting work schedules. At the Closing Seller and Purchaser shall compete and execute IRS Form 8594.

§5.10 Cooperation in the Nortek Action. To the extent possible, the parties will provide each other with such assistance as may reasonably be requested by Purchaser in connection with the Nortek Action, subject to Purchaser's obligation hereunder to pay for obligations incurred post-Closing under Section 2.3(c) hereof. Each party will retain and provide the other with any records or information that may be relevant to the Nortek Action. Such assistance shall include making employees available on a mutually convenient basis to provide additional information and explanation of any material provided hereunder.

§5.11 Settlement and Mutual Releases.

(a) Waiver of KCNA Claim. On the terms and subject to the conditions of this Agreement, Purchaser shall be deemed to waive the KCNA Claim in the Bankruptcy Case.

(b) Litigation Stay. Any and all litigation between Purchaser and Seller, including without limitation in the Declaratory Judgment Action and with respect to the Rule 2004 Motion, including without limitation any and all pending deadlines and any and all related discovery, shall be stayed pending the entry of the Approval Order. Purchaser and Seller shall jointly seek all appropriate orders from the Bankruptcy Court in order to effectuate such stays.

(c) Dismissals. Upon entry of the Approval Order by the Bankruptcy Court and the expiration of any applicable appeal periods, Purchaser and Seller to take any and all actions necessary to dismiss any and all litigation by and between them,

including without limitation the Declaratory Judgment Action and the Rule 2004 Motion, with prejudice, with each of the Purchaser and Seller to bear its own costs.

(d) Releases. The following releases shall be effective upon the fifteenth (15^{th}) day after the entry Approval Order:

(i) DCT Release. Seller (sometimes hereinafter, "DCT"), for itself, and for each of its past, present and future officers, directors, members, managers, employees, owners, affiliated parent or subsidiary entities, spouses, beneficiaries, heirs, representatives, partners, predecessors, successors, grantees, transferees, trusts, agents, employees, estates, attorneys, insurers and assigns, (hereinafter, collectively, the "DCT Releasors"), hereby fully and irrevocably releases, acquits, and discharges Purchaser (sometimes hereinafter, "KCNA"), and each of its past, present and future officers, directors, members, managers, employees, owners, affiliated parent or subsidiary entities, spouses, beneficiaries, heirs, representatives, predecessors, successors, grantees, transferees, trusts, agents, employees, estates, attorneys, insurers and assigns acting in such capacities (hereinafter, the "KCNA Releasees") of and from any and all liabilities, claims, causes of action, counts, cross-claims, counterclaims, rights, duties, requests, suits, administrative proceedings, damages, costs (including costs of suit and attorneys' fees and expenses), or demands of whatever nature, character, type, or description, whether known or unknown, existing or potential, matured or unmatured, liquidated or unliquidated, direct or consequential, suspected or unsuspected, foreseen or unforeseen (collectively, the "DCT Claims"), which the DCT Releasors, and each of them, have or assert, or may hereafter have or assert, against any of the KCNA Releasees, by reason of any act or omission on the part of KCNA Releasees, save and except for the obligations that arise under this Agreement.

(ii) KCNA Release. KCNA, for itself, and for each of its past, present and future officers, directors, members, managers, employees, owners, affiliated parent or subsidiary entities, spouses, beneficiaries, heirs, representatives, predecessors, successors, grantees, transferees, trusts, agents, employees, estates, attorneys, insurers and assigns, (hereinafter, the "KCNA Releasors"), hereby fully and irrevocably release, acquit, and discharge DCT and each of its past, present and future officers, directors, members, managers, employees, owners, affiliated parent or subsidiary entities, spouses, beneficiaries, heirs, representatives, predecessors, successors, grantees, transferees, trusts, agents, employees, estates, attorneys, insurers and assigns acting in such capacities (hereinafter, the "DCT Releasees") of and from any and all liabilities, claims, causes of action, counts, cross-claims, counterclaims, rights, duties, requests, suits, administrative proceedings, damages, costs (including costs of suit and attorneys' fees and expenses), or demands of whatever nature, character, type, or description, whether known or unknown, existing or potential, matured or unmatured, liquidated or unliquidated, direct or consequential, suspected or unsuspected, foreseen or unforeseen (collectively, the "KCNA Claims"), which any of the KCNA Releasors have or assert, or may hereafter have or assert,

against any of the DCT Releasees, by reason of any act or omission on the part of the DCT Releasees, save and except for the obligations that arise under this Agreement; provided, however, nothing herein shall release any claim comprising a Purchased Asset.

(iii) Other Release Provisions. Each of the Releasors warrant and represent that none of the Claims herein released has been assigned, in whole or in part, to any person or entity.

ARTICLE VI

CONDITIONS TO PURCHASER'S OBLIGATIONS

§6. Conditions to Purchaser's Obligations. The purchase of the Purchased Assets by Purchaser on the Closing Date is conditioned on the satisfaction or waiver by Purchaser, at or prior to the Closing, of the following conditions:

§6.1 Truth of Representations and Warranties. The representations and warranties of Seller contained in this Agreement or in any Schedule, Exhibit or certificate delivered pursuant to this Agreement shall be true and correct in all material respects when made and as of the Closing, and Seller shall have delivered to Purchaser a certificate of an executive officer of Seller, dated the Closing Date, to such effect.

§6.2 Performance of Agreements. All of the agreements and covenants of Seller to be performed prior to the Closing pursuant to this Agreement shall have been duly performed in all material respects, and Seller shall have delivered to Purchaser a certificate of an executive officer of Seller, dated the Closing Date, to such effect.

§6.3 Use of Premises. Seller shall assure that Purchaser shall have ten (10) days after Closing to remove the Assets from the Premises. To the extent that the real property lease for the Premises is not an Assumed Contract or Purchaser does not make arrangements for the use of the Premises with the owner of the Premises, Purchaser shall pay Seller one thousand dollars ($1,000.00) per day for each day Purchaser occupies the Premises for a period not to extend beyond December 31, 2017.

§6.4 No Material Adverse Change. There shall have been no Material Adverse Change with respect to the Business, and no events, facts or circumstances shall have occurred which could reasonably be expected to result, individually or in the aggregate, in a Material Adverse Change with respect to the Business.

§6.5 Bankruptcy Matters. The Bankruptcy Court shall have entered the Approval Order, which Approval Order shall not have been stayed, reversed or modified in a manner materially adverse to Purchaser without its consent.

§6.6 Bill of Sale. Seller shall have executed and delivered to Purchaser a Bill of Sale, substantially in the form of Exhibit C attached hereto (the "Bill of Sale"), confirming its receipt of the Purchase Price and transferring Seller's interest in each of the Purchased Assets to Purchaser.

§6.7 Assignment and Assumption Agreement. Seller shall have executed and delivered to Purchaser an Assignment and Assumption Agreement, substantially in the form of Exhibit D attached hereto (the "Assignment and Assumption Agreement"), regarding the assignment of the Purchased Assets by Seller and the assumption of the Assumed Liabilities by Purchaser.

§6.8 Physical Inventory. After conclusion of the sale approval hearing but at least one (1) day prior to the Closing Date, Purchaser shall have the right, but not the obligation, to conduct an on site physical inventory of the Purchased Assets hereto to confirm that the conditions set forth in Section 6.1 have been satisfied. Purchaser shall have the right, but not the obligation, to terminate this Agreement pursuant to Section 8.1(b) based on the results of the physical inventory if it demonstrates that the conditions of Section 6.1 have not been met. If Seller disputes that determination, the Bankruptcy Court will decide. Seller shall provide site access to Purchaser and shall provide commercially reasonable assistance (including the assistance of Seller's employees) to Purchaser to complete the physical inventory.

ARTICLE VII

CONDITIONS TO SELLER'S OBLIGATIONS

§7. Conditions to Seller's Obligations. The sale of the Purchased Assets by Seller on the Closing Date is conditioned on the satisfaction or waiver by Seller, at or prior to the Closing, of the following conditions:

§7.1 Truth of Representations and Warranties. The representations and warranties of Purchaser contained in this Agreement or in any Schedule, Exhibit or certificate delivered pursuant to this Agreement shall be true and correct in all material respects when made and as of the Closing, and Purchaser shall have delivered to Seller a certificate of an executive officer of Purchaser, dated the Closing Date, to such effect.

§7.2 Performance of Agreements. All of the agreements and covenants of Purchaser to be performed prior to the Closing pursuant to this Agreement shall have been duly performed in all material respects, and Purchaser shall have delivered to Seller a certificate of and executive officer of Purchaser, dated the Closing Date, to such effect.

§7.3 Bankruptcy Matters. The Bankruptcy Court shall have entered the Approval Order, which Approval Order shall not have been stayed, reversed or modified in a manner materially adverse to Seller without the consent of Seller.

§7.4 Purchase Price. Purchaser shall have paid the Purchase Price to Seller.

§7.5 Assignment and Assumption Agreement. Purchaser shall have executed and delivered to Seller the Assignment and Assumption Agreement.

ARTICLE VIII

TERMINATION

§8. Termination.

§8.1 Termination. This Agreement may be terminated and the transactions contemplated hereby may be abandoned, at any time prior to the Closing:

(a) by mutual consent of Seller, on the one hand, and Purchaser, on the other hand;

(b) by Seller, on the one hand, or Purchaser, on the other hand, if there has been a material breach of any covenant or a material breach of any representation or warranty of Purchaser or Seller, respectively, which breach would cause the failure of any condition precedent set forth in Article VI or VII, as the case may be;

(c) by the Purchaser or Seller, (i) if the Approval Order has not been entered by the Bankruptcy Court by November 29, 2017 (the "Outside Approval Order Date"), or (ii) if the Bankruptcy Court enters an order (a "Non-Conforming Approval Order") approving the sale of all or any portion of the Purchased Assets to Purchaser, which sale order does not satisfy in any material respect the definition of Approval Order set forth herein, unless the circumstances described in clause (i) or (ii) were due to failure of the party seeking to terminate this Agreement to perform in any material respect its obligations under this Agreement required to be performed by it at or prior to Outside Approval Order Date; provided, however, that any termination right under subsection 8(c)(i) must be exercised on or before the first Business Day after the Outside Approval Order Date, and any termination right under subsection 8(c)(ii) must be exercised on or before the conclusion of the hearing at which the Non-Conforming Approval Order is entered by the Bankruptcy Court;

(d) by Purchaser, if prior to the Closing the Chapter 11 Case is dismissed, converted to a case under chapter 7 of the Bankruptcy Code or a trustee is appointed in respect of the Chapter 11 Case;

(e) by Purchaser or Seller, if there shall be any law of any competent authority that makes consummation of the transactions contemplated hereby, illegal or otherwise prohibited or if any Order of any competent authority prohibiting such transactions is entered and such Order shall become final and non-appealable; or

(f) by Purchaser or Seller due to the failure of the Closing to occur on or before November 30, 2017 by reason of the failure of any condition precedent set forth in Article VI or Article VII, as applicable, which failure is not due to the fault of the party seeking to terminate.

(i) Effect of Termination. If this Agreement is terminated pursuant to Section 8.1 by Purchaser, on the one hand, or Seller, on the other hand, written notice thereof shall be given to the other party specifying the provision of Section 8.1 pursuant to which such

termination is made, and this Agreement shall be terminated and there shall be no Liability hereunder on the part of the Purchaser or Seller, except that the provisions of Section 5.1(b) (Review of the Business), Section 5.2 (Public Announcements), Section 5.5(c) (Expense Reimbursement), Section 8.1 (Termination), this Section 8.2, Section 9.1 (Expenses), Section 9.2 (Governing Law), Section 9.3 (Jurisdiction), Section 9.5 (Notices), Section 9.11 (Third Party Beneficiaries) and Section 9.13 (Waiver of Jury Trial) shall survive any termination of this Agreement. Nothing in this Section 8.2 shall relieve any party hereto of Liability for any willful breach of this Agreement.

(ii) Remedies. In the event that this Agreement is breached by Seller, Purchaser's remedies shall include but not be limited to return of the Deposit, money damages or the right to request specific performance of this Agreement. In the event that this Agreement is breached by Purchaser, Seller's remedies shall include, but not limited to retention of the Deposit, money damages, and the right to request specific performance of this Agreement.

ARTICLE IX

MISCELLANEOUS

§9. Miscellaneous.

§9.1 Time of Essence. Time is of the essence of this Agreement and all of the terms, provisions, covenants and conditions hereof.

§9.2 Expenses. Except for the payment of the Expense Reimbursement, the parties hereto shall pay all of their own expenses relating to the transactions contemplated by this Agreement, including the fees and expenses of their respective counsel and financial advisers.

§9.3 Governing Law. Except to the extent the Bankruptcy Code is applicable, the interpretation and construction of this Agreement, and all matters relating hereto, shall be governed by the laws of the State of Ohio applicable to agreements executed and to be performed solely within such State.

§9.4 Jurisdiction; Agents for Service of Process. Any judicial proceeding brought against any of the parties to this Agreement on any dispute arising out of this Agreement or any matter related hereto may be brought in the Bankruptcy Court, and, by execution and delivery of this Agreement, each of the parties to this Agreement accepts the exclusive jurisdiction of the Bankruptcy Court, and irrevocably agrees to be bound by any judgment rendered thereby in connection with this Agreement. Each of Seller and Purchaser agrees that service of any process, summons, notice or document by U.S. registered mail to such party's address set forth below shall be effective service of process for any action, suit or proceeding in Ohio with respect to any matters for which it has submitted to jurisdiction pursuant to this Section 9.3.

§9.5 Table of Contents; Captions. The table of contents and the Article and Section captions used herein are for reference purposes only, and shall not in any way affect the meaning or interpretation of this Agreement.

§9.6 Notices. Any notice or other communication required or permitted under this Agreement shall be deemed to have been duly given (i) five (5) Business Days following deposit in the mail if sent by registered or certified mail, postage prepaid, (ii) when sent, if sent by email transmission, if receipt thereof is confirmed by telephone, (iii) when delivered, if delivered personally to the intended recipient and (iv) two Business Days following deposit with a nationally recognized overnight courier service, in each case addressed as follows:

if to Seller, to

Data Cooling Technologies, LLC
1717 Miller Parkway
Streetsboro, Ohio 44241
Telephone: (216) 832-6977
Email: rszekelyi@phoenixmanagement.com
Attn: Richard Szekelyi, CRO

with a copy to

McDonald Hopkins LLC
600 Superior Ave. E, Suite 2100
Cleveland, OH 44114
Telephone: (216)348-5436
Email: smalloy@mcdonaldhopkins.com
Attn: Sean Malloy

and if to the Purchaser, to

KyotoCooling North America LLC
14160 Dallas Parkway, Suite 410
Dallas, Texas 75254
Telephone: (214) _____
Email:
Attn: Mr John Drossos

with a copy to

Hahn Loeser & Parks LLP
200 Public Square, Suite 2800
Cleveland, OH 44114-2316
Telephone: (216) 274-2432
Email: dad@hahnlaw.com
Attn: Daniel A. DeMarco

or such other address or number as shall be furnished in writing by any such party.

§9.7 Assignment; Parties in Interest. This Agreement may not be transferred, assigned, pledged or hypothecated by any party hereto without the express written consent of the other party, other than by operation of law; provided, that so long as Purchaser remains jointly and several liable for its obligations and liabilities hereunder and the Ancillary Agreements, (i) Purchaser may assign its rights, interests and obligations hereunder to any direct or indirect wholly owned Subsidiary or to any Affiliate of which Purchaser is a direct or indirect wholly owned Subsidiary, and (ii) Purchaser may grant its lenders a security interest in its rights under this Agreement. This Agreement shall be binding upon and shall inure to the benefit of each of the parties hereto and its respective heirs, executors, administrators, successors and permitted assigns.

§9.8 Counterparts. This Agreement may be executed in two (2) or more counterparts, all of which taken together shall constitute one (1) instrument. Any executed counterpart of this Agreement delivered by facsimile or other electronic transmission to a party hereto shall constitute and be deemed an original counterpart of this Agreement.

§9.9 Entire Agreement. This Agreement, including the other documents referred to herein which form a part hereof, and the Ancillary Agreements contain the entire understanding of the parties hereto with respect to the subject matter contained herein and therein. This Agreement and the Ancillary Agreements supersede all prior agreements and understandings between the parties with respect to such subject matter.

§9.10 Amendments. This Agreement, including the instant section, may not be changed, and any of the terms, covenants, representations, warranties and conditions cannot be waived, except pursuant to an instrument in writing signed by Purchaser and Seller or, in the case of a waiver, by the party waiving compliance.

§9.11 Severability. If any term, provision, agreement, covenant or restriction of this Agreement is held by a court of competent jurisdiction or other authority to be invalid, void or unenforceable, the remainder of the terms, provisions, agreements, covenants and restrictions of this Agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner materially adverse to any party hereto. Upon such a determination, the parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in a reasonably acceptable manner in order that the transactions contemplated hereby may be consummated as originally contemplated to the fullest extent possible.

§9.12 Third Party Beneficiaries. Each party hereto intends that this Agreement shall not benefit or create any right or cause of action in or on behalf of any Person other than the parties hereto.

§9.13 No Strict Construction. The parties hereto have participated jointly in the negotiation and drafting of this Agreement. In the event any ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by all parties hereto, and no presumption or burden of proof shall arise favoring or disfavoring any party hereto by virtue of the authorship of any provision of this Agreement.

§9.14 Waiver of Jury Trial. Each of Purchaser and Seller hereby waives, to the fullest extent permitted by applicable law, any right it may have to a trial by jury in respect of any litigation as between the parties directly or indirectly arising out of, under or in connection with this Agreement or the transactions contemplated hereby or disputes relating hereto. Purchaser and Seller (i) certify that no representative, agent or attorney of the other party has represented, expressly or otherwise that such other party would not, in the event of litigation, seek to enforce the foregoing waiver, and (ii) acknowledge that it and the other party have been induced to enter into this Agreement by, among other things, the mutual waivers and certifications in this Section 9.13.

§9.15 Survival of Representations and Warranties. The representations and warranties of Seller contained in this Agreement or in any agreement, document or instrument delivered pursuant to or in connection with this Agreement shall not survive the Closing

"AS-IS/WHERE IS". EXCEPT AS NOTED ABOVE AND AS OTHERWISE EXPRESSLY NOTED IN THIS AGREEMENT, THE PURCHASE AND SALE OF THE PURCHASED ASSETS IS "AS-IS" AND "WHERE-IS" WITH ALL FAULTS IN ALL RESPECTS. EXCEPT AS EXPRESSLY SET FORTH HEREIN, SELLER DISCLAIMS ANY AND ALL OTHER WARRANTIES WITH RESPECT TO THE PURCHASED ASSETS, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, THOSE OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

IN WITNESS WHEREOF, each of Purchaser and Seller has caused its corporate name to be hereunto subscribed by its officer thereunto duly authorized, all as of the day and year first above written.

KYOTOCOOLING NORTH AMERICA, LLC

By: _____
Name: John Drossos
Title: Chief Executive Officer

DATA COOLING TECHNOLOGIES, LLC

By: _____
Name: Richard Szekelyi Title: Chief Restructuring Officer