

TRANSFER AGREEMENT

between

KODAK IMAGING NETWORK, INC.

EASTMAN KODAK COMPANY

and

SHUTTERFLY, INC.

dated

MARCH 1, 2012

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## TRANSFER AGREEMENT

This Transfer Agreement ("Agreement") is made this 1st day of March, 2012 ("the Effective Date") between Kodak Imaging Network, Inc. ("KIN") and Eastman Kodak Company ("Kodak" and, together with KIN, "Sellers") and Shutterfly, Inc. ("Transferee" and, together with Sellers, the "Parties"). Capitalized terms are used with the meaning given to them in Section 1.1 of this Agreement.

**WHEREAS**, KIN is engaged in the business of online sharing, storing and merchandising of images through the "Kodak Gallery" websites (the "Business" or the "Gallery");

**WHEREAS**, on January 19, 2012 (the "Petition Date"), Kodak, KIN and their affiliated debtors-in-possession filed petitions under Chapter 11 of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (as in effect on the date hereof and as may be amended from time to time, the "Bankruptcy Code") in the U.S. Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), commencing their Chapter 11 bankruptcy cases (the "Bankruptcy Cases");

**WHEREAS**, Sellers desire to transfer to Transferee certain rights of KIN in the data and content associated with the customers of the Gallery, and Transferee desires to acquire from Sellers such data and content, upon the terms and conditions hereinafter set forth;

**WHEREAS**, Sellers and Transferee intend to effectuate the Transactions through a sale of the Acquired Assets pursuant to section 363 of the Bankruptcy Code; and

**WHEREAS**, Sellers' ability to consummate the transactions set forth in this Agreement is subject, among other things, to the entry of the Sale Order.

**NOW, THEREFORE**, in consideration of the premises and the mutual promises herein made, and in consideration of the representations, warranties and covenants herein contained, the parties agree as follows:

### **ARTICLE I.** **DEFINITIONS**

**SECTION 1.1. Definitions.** In this Agreement, the following terms have the meanings specified or referred to in this Section 1.1 and shall be equally applicable to both the singular and plural forms.

"Acquired Assets" means all of KIN's rights to the User Data and the Archives of the Transferable Users and, solely with respect to the Business, Kodak's rights to the User Data.

"Action" means any legal action, suit or arbitration, or any inquiry, proceeding or investigation, by or before any Governmental Authority.

"Administrative Expense" means an expense of administration in the Bankruptcy Cases of the type described in section 503(b) of the Bankruptcy Code and with the priority described in section 507(a)(2) of the Bankruptcy Code.

“Alternative Transaction” means any one of the following transactions with or by any person or group other than Transferee: (a) a merger, consolidation or similar transaction involving KIN in which any unaffiliated person or group acquires direct control of KIN, (b) a sale, lease or other disposition directly or indirectly by merger, consolidation, tender offer, share exchange or otherwise of a material portion of the Acquired Assets, or (c) reorganization of KIN other than a reorganization solely within the group of the Affiliates of Sellers including all of the Sellers.

“Affiliate” means, as to any person, any other person which directly or indirectly controls, or is under common control with, or is controlled by, such person. As used in this definition, “control” (including, with its correlative meanings, “controlled by” and “under common control with”) shall mean possession, directly or indirectly, of the power to direct or cause the direction of management or policies (whether through ownership of securities or partnership or other ownership interests, by contract or otherwise) of such person.

“Agreement” has the meaning specified in the preamble.

“Allocation Schedule” has the meaning specified in Section 2.3(d).

“Archives” has the meaning specified in Section 2.1(a).

“Auction” has the meaning specified in the Bidding Procedures.

“Avoidance Actions” means any and all claims for relief of Sellers under chapter 5 of the Bankruptcy Code.

“Bankruptcy Cases” has the meaning specified in the recitals.

“Bankruptcy Code” has the meaning specified in the recitals.

“Bankruptcy Court” has the meaning specified in the recitals.

“Bankruptcy Rules” means the United States Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules for the U.S. Bankruptcy Court for the Southern District of New York.

“Bidding Procedures” means the procedures for the submission, evaluation, and qualification of competing bids on the Acquired Assets, and for the Auction among qualified bidders for the purchase of the Acquired Assets, in substantially the form attached hereto as Exhibit B, and with any changes thereto as Sellers and Transferee may approve (such approval not to be unreasonably withheld, conditioned or delayed).

“Bidding Procedures and Sale Motion” means a motion seeking approval of the Bidding Procedures and entry of the Bidding Procedures Order and the Sale Order.

“Bidding Procedures Order” means an order of the Bankruptcy Court, in substantially the form attached hereto as Exhibit C and with any changes thereto as Sellers and Transferee may

approve (such approval not to be unreasonably withheld, conditioned or delayed), approving the Bidding Procedures and authorizing payment of the Break-Up Fee.

“Break-Up Fee” has the meaning specified in Section 7.2.

“Business” has the meaning specified in the recitals.

“Business Day” means any day of the year on which national banking institutions in New York are open to the public for conducting business and are not required or authorized to close.

“Claim” has the meaning ascribed to the term “claim” in Section 101(5) of the Bankruptcy Code.

“Closing” has the meaning specified in Section 6.4.

“Closing Date” has the meaning specified in Section 6.4.

“Closing Price” has the meaning specified in Section 2.3(a)(i).

“Code” means the United States Internal Revenue Code of 1986, as amended.

“Copyrights” means all United States and foreign copyrights, whether registered or unregistered, including all United States copyright registrations and applications for registration and foreign equivalents, all moral rights, all common-law copyright rights, and all rights to register and obtain renewals and extensions of copyright registrations, together with all other copyright rights accruing by reason of any international copyright convention.

“Deposit” has the meaning specified in Section 2.4.

“Effective Date” has the meaning specified in the preamble.

“Encumbrances” means all Liens, encumbrances, easements, encroachments, retentions of title, conditional sale arrangements, restrictive covenants, licenses, rights of first offer, rights of first refusal, options or any other limitations, restrictions, or interests of any kind.

“Escrow Agent” has the meaning specified in Section 2.4.

“Escrow Agreement” has the meaning specified in Section 2.4.

“Final Order” means an order of the Bankruptcy Court or other court of competent jurisdiction (a) as to which no appeal, notice of appeal, motion for leave to appeal, motion to amend, vacate or make additional findings of fact, motion to alter or amend judgment, motion for rehearing, amendment, vacatur, additional findings or alteration or amendment of judgment or motion for new trial has been timely filed or, if any of the foregoing has been timely filed, it has been disposed of in a manner that upholds and affirms the subject order, and without the possibility for further appeal or rehearing thereon; and (b) as to which the time for instituting or filing an appeal shall have expired.

“Gallery Users” has the meaning specified in Section 2.1(a).

“Governmental Authority” means any federal, state, local or foreign, governmental entity or any subdivision, agency, instrumentality, authority, department, commission, board, bureau, official or other regulatory, administrative or judicial authority thereof or any federal, state, local or foreign court, tribunal or arbitrator or any self-regulatory organization, agency or commission.

“Indemnified Parties” has the meaning specified in Section 8.8.

“Law” means any applicable law, including common law, statute, ordinance, rule, regulation, code, order, judgment, injunction, decree or judicial or administrative binding interpretation that is promulgated or issued by any Governmental Authority, including without limitation the Bankruptcy Code and the Bankruptcy Rules.

“Lien” means any lien (statutory, contractual, or otherwise), pledge, mortgage, deed of trust, security interest, hypothecation, charge, or similar interest, right, restriction, or limitation.

“Migration” means the transfer by KIN of User Data and Archives of Transferable Users from their existing location to Transferee’s storage sites.

“Migration Completion Notice” has the meaning specified in Section 5.4(c).

“Opted-out Users” has the meaning specified in Section 2.1(c).

“Ordinary Course of Business” means the ordinary and usual course of day-to-day operations of the Business (including acts and omissions of Sellers in the ordinary and usual course), consistent with practice in the period from the Petition Date to the Effective Date, as such practice may be modified in non-material respects from time to time to the extent necessary to reflect the Bankruptcy Cases and orders of the Bankruptcy Court, and except to the extent otherwise permitted or required under this Agreement.

“Outside Date” has the meaning specified in Section 7.1(c).

“Parties” has the meaning specified in the preamble.

“Permitted Encumbrances” means (i) the rights and interests of each Gallery User to such Gallery User’s User Data and Archives; and (ii) any other immaterial rights and interests (other than a Lien) set forth in the Sale Order or that are not discharged by the Sale Order under Law.

“Personally Identifiable Information” has the meaning ascribed thereto under Bankruptcy Code §101(41A).

“Petition Date” has the meaning specified in the recitals.

“Proceeding” means any action, arbitration, audit, claim, charge, demand, complaint, cause of action, hearing, investigation, litigation, or suit (whether civil, criminal, administrative or investigative) commenced, brought, conducted, or heard by or before, or otherwise involving, any Governmental Authority or arbitrator.



“Purchase Price” has the meaning specified in Section 2.3(a).

“Representative” means with respect to a particular person, any duly authorized director, officer, employee, agent, consultant, advisor or other representative of such person, including legal counsel, accountants and financial advisors.

“Sale Order” means an order of the Bankruptcy Court, substantially in the form attached hereto as Exhibit D and with any changes thereto as Sellers and Transferee may approve (such approval not to be unreasonably withheld, conditioned or delayed), authorizing Sellers’ entry into and performance of this Agreement.

“Schedule” means any Schedule to this Agreement.

“Sellers” has the meaning set forth in the preamble.

“Sellers Privacy Notice” means the Kodak.com and kodakgallery.com Online Privacy Notice (updated December 29, 2011), a copy of which is attached to Schedule 3.3.

“Services” means the services performed by the Gallery for its customers.

“Shutterfly Litigation” has the meaning specified in Section 5.5(b).

“Stipulation” has the meaning specified in Section 5.5(b).

“Storage Agreements” means the storage agreements with suppliers required to store the User Data and Archives.

“Storage and Infrastructure Costs” means the costs incurred by KIN or the Gallery for the maintenance, storage and migration of User Data and Archives during the Transition Period.

“Successful Bidder” has the meaning specified in the Bidding Procedures.

“Tax” or “Taxes” (and with correlative meaning, “Taxable” and “Taxing”) means (i) any federal, state, provincial, local, foreign or other income, alternative, minimum, add-on minimum, accumulated earnings, personal holding company, franchise, capital stock, net worth, capital, profits, intangibles, windfall profits, gross receipts, value added, sales, use, goods and services, excise, customs duties, transfer, conveyance, mortgage, registration, stamp, documentary, recording, premium, severance, environmental, natural resources, real property, personal property, *ad valorem*, intangibles, rent, occupancy, license, occupational, employment, unemployment insurance, social security, disability, workers’ compensation, payroll, health care, withholding, estimated or other similar taxes, duty, levy or other governmental charge or assessment or deficiencies thereof (including all interest and penalties thereon and additions thereto whether disputed or not) and (ii) any transferee liability in respect of any items described in clause (i) above.

“Tax Return” means any return, report or similar statement required to be filed with respect to any Taxes (including any attached schedules), including any information return, claim for refund, amended return or declaration of estimated Tax.

“Terms of Service” means the Gallery Terms of Service (last revised September 25, 2009), including the Return Policy and Copyright Policy, copies of which are attached to Schedule 3.3.

“Third Parties” means persons not Affiliated with Sellers or Transferee.

“Transactions” means the transactions contemplated by this Agreement.

“Transfer Taxes” has the meaning specified in Section 5.7.

“Transferable Users” has the meaning specified in Section 2.1(c).

“Transferee Default Termination” has the meaning specified in Section 2.4.

“Transferee’s Privacy Policy” means the Shutterfly.com Privacy Policy (dated November 20, 2008), a copy of which is attached to Schedule 4.4, as the same may be amended from time to time.

“Transition End Date” has the meaning specified in Section 5.4(c).

“Transition Period” has the meaning specified in Section 2.2(a).

“Transition Procedures” has the meaning specified in Section 2.2(a).

“User Data” has the meaning specified in Section 2.1(a).

“Website” means the customer experiences at the URLs [www.kodakgallery.com](http://www.kodakgallery.com) and [www.kodakgallery.ca](http://www.kodakgallery.ca).

## **SECTION 1.2. Other Definitional and Interpretive Matters.**

(a) Unless otherwise expressly provided, for purposes of this Agreement, the following rules of interpretation shall apply:

- (i) When calculating the period of time before which, within which or following which any act is to be done or step taken pursuant to this Agreement, the date that is the reference date in calculating such period shall be excluded. If the last day of such period is a non-Business Day, the period in question shall end on the next succeeding Business Day.
- (ii) Any reference in this Agreement to \$ shall mean U.S. dollars.
- (iii) All Exhibits and Schedules annexed hereto or referred to herein are hereby incorporated in and made a part of this Agreement as if set forth in full herein. Any capitalized terms used in any Schedule or Exhibit but not otherwise defined therein shall be defined as set forth in this Agreement.
- (iv) Any reference in this Agreement to gender shall include all genders, and words imparting the singular number only shall include the plural and vice versa.

- (v) The provision of a Table of Contents, the division of this Agreement into Articles, Sections and other subdivisions and the insertion of headings are for convenience of reference only and shall not affect or be utilized in construing or interpreting this Agreement. All references in this Agreement to any "Section" are to the corresponding Section of this Agreement unless otherwise specified.
- (vi) The words such as "herein," "hereof" and "hereunder" refer to this Agreement as a whole and not merely to a subdivision in which such words appear unless the context otherwise requires.
- (vii) The word "including" or any variation thereof means "including, without limitation" and shall not be construed to limit any general statement that it follows to the specific or similar items or matters immediately following it.

(b) The parties participated jointly in the negotiation and drafting of this Agreement and, in the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as jointly drafted by the parties and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any provision of this Agreement.

## **ARTICLE II.**

### **TRANSFER OF ACQUIRED ASSETS**

#### **SECTION 2.1. Acquired Assets.**

(a) Upon the terms and subject to the conditions set forth in this Agreement, KIN shall transfer, assign, convey and deliver, and Kodak shall cause to be sold, transferred, assigned, conveyed and delivered, to Transferee, and Transferee shall accept and acquire, free and clear of all Claims and Encumbrances other than Permitted Encumbrances, all of KIN's and, to the extent related solely to the Gallery, Kodak's right, title and interest in and to the data and content associated with each of the Gallery's transacting customers and registered users in the United States and Canada (collectively, "Gallery Users") including but not limited to each Gallery User's customer historical, billing, transactions, usage, and similar information used by the Business in serving such customers ("User Data") as well as images uploaded by Gallery Users to storage sites of the Business, including embedded metadata and related customer content ("Archive"), other than the User Data and the Archives of Opted-out Users.

(b) Transferee acknowledges and agrees that under KIN's Terms of Service, KIN does not own the User Data and does not claim any Copyright in any Gallery User's images or other information in any Gallery User's Archive but has the right to transfer possession of the same to Transferee unless the Gallery User opts-out of any transfer of his or her User Data as provided in the Sellers' Privacy Notice.

(c) The parties agree that the Acquired Assets will be transferred to Transferee only to the extent that any Gallery User has not chosen to opt-out of having such Gallery User's User Data and Archive transferred as described in Exhibit A (the "Opted-out Users"). The Gallery Users who have not opted-out are sometimes referred to as the "Transferable Users".

(d) The parties agree that KIN will only transfer the Acquired Assets to Transferee as of the Closing Date and Sellers will not transfer any other rights or tangible or intangible assets to Transferee, and that, without limiting the foregoing, Sellers are not transferring: (i) any rights with respect to users of Gallery residing outside the United States and Canada, (ii) any intellectual property including as more particularly described in Section 5.5, (iii) any equipment, contracts, software or other tangible or intangible property, (iv) any accounts receivable, and (v) rights of Kodak other than those in User Data and Archives, including, without limitation, all rights of Kodak to the data in its general database, subject to such limitations as are imposed under Sections 5.6 and 5.12 herein.

## **SECTION 2.2. Transition of Acquired Assets.**

(a) The parties agree that the transfer of the Acquired Assets of the Transferable Users will require a transition period of up to several months beginning on the Closing Date and ending no later than nine (9) months after the Closing Date (the "Transition Period") and that cooperation and coordination between KIN and Transferee is required. KIN and Transferee have agreed upon initial procedures for the identification of the Opted-out Users and the Transferable Users and the transition of the Transferable Users and Acquired Assets set forth on Exhibit A to this Agreement ("Transition Procedures").

(b) Effective as of the Closing Date, Sellers will transfer, convey and assign to Transferee all of their rights and interest in and to the User Data and Archives of the Transferable Users and will execute such written instruments, extend such other cooperation and perform such other acts as may commercially reasonably be requested by Transferee to convey to Transferee rights in and to, and possession of, the User Data and Archives of the Transferable Users as provided for in this Agreement subject to KIN's Terms of Service and Sellers' Privacy Notice and pursuant to offering Gallery Users the right to opt-out of such transfer and assignment.

## **SECTION 2.3. Consideration.**

(a) Purchase Price. Transferee shall pay KIN an aggregate purchase price for the Acquired Assets of Twenty-Three Million Eight Hundred Thousand Dollars (\$23,800,000.00) ("Purchase Price") payable as follows:

- (i) on the Closing Date, Transferee shall pay by wire transfer of immediately available funds Nineteen Million Forty Thousand Dollars (\$19,040,000.00) ("Closing Price") to such account of Sellers as Kodak shall direct not fewer than two Business Days prior to the Closing Date; and
- (ii) on the date which is two Business Days following the Transition End Date, Transferee shall pay by wire transfer of immediately available funds Four Million Seven Hundred Sixty Thousand Dollars (\$4,760,000.00) (the "Transition Price") to such account of Sellers as Kodak shall direct not fewer than two Business Days prior to the Transition End Date.

(b) Consideration for Storage and Infrastructure Costs. On or before the 1st day of each calendar month following the Closing Date through the later of the month of the Transition End Date or the third month following the Closing Date, Transferee will pay Sellers Seven Hundred Thousand Dollars (\$700,000) per month to compensate Sellers for the Storage and Infrastructure Costs incurred by Sellers directly related to the Migration. Transferee will bear the costs of any contracts it enters into to facilitate Migration. In addition, Transferee shall bear the costs of any new or incremental products and/or services requested by Transferee to be provided under existing KIN contracts. Transferee will reimburse Sellers for such costs as provided herein. At the reasonable request of Transferee, KIN will obtain a price quotation for the requested new or incremental product and/or service. Upon approval of the price quotation by Transferee, KIN will submit an order for the new or incremental product or service. Kodak will provide invoices for any such service to Transferee and Transferee will reimburse KIN within ten Business Days after receipt by Transferee of copies of invoices with respect thereto. To the extent that the Migration is not complete by the 60<sup>th</sup> day following the Closing Date, the Parties shall agree on the functions required to be staffed and Transferee will reimburse KIN for the salary (excluding pensions, benefits and other costs) of KIN's providing the agreed upon positions.

(c) Except as expressly provided in this Agreement, the parties shall pay their own expenses and fees incurred in connection with the Transactions.

(d) As soon as practicable after the date of this Agreement, Transferee shall deliver to Kodak for Kodak's review and approval, on its own behalf and on behalf of the Gallery, the allocation schedule (the "Allocation Schedule") allocating the consideration among the Acquired Assets. The Allocation Schedule shall be reasonable and shall be prepared in accordance with Section 1060 of the Code and the regulations thereunder. On or before the 10<sup>th</sup> Business Day following its receipt of the Allocation Schedule from Transferee as herein provided, Kodak shall either deliver notice of its approval of such Allocation Schedule to Transferee or, in the event that Kodak shall have objections to all or any portion of the Allocation Schedule, Kodak shall deliver to Transferee a written objection to such Allocation Schedule, which written objection shall set forth in reasonable detail the basis for the objections of Sellers. In the event that Kodak shall deliver a written objection to the Allocation Schedule, Kodak and Transferee shall thereafter work in good faith for a period of 15 Business Days to resolve any and all objections set forth therein, and upon the resolution of all such objections, Kodak and Transferee shall give notice to the other Party of its agreement to the Allocation Schedule. To the extent that Transferee and Kodak agree upon the Allocation Schedule, Transferee and Sellers will each file IRS Form 8594, and all Tax Returns, in accordance with such Allocation Schedule; provided, however, that if Kodak and Transferee do not agree upon an Allocation Schedule, each party may file IRS Form 8594 and all Tax Returns in the manner determined by such party. Transferee, on the one hand, and Sellers, on the other hand, each agrees to provide the other promptly with any other information required to complete Form 8594.

**SECTION 2.4. Deposit.** Within five (5) Business Days following the date of this Agreement, (a) Sellers and Transferee shall enter into an escrow agreement (the "Escrow Agreement"), on terms reasonably acceptable to Sellers and Transferee, with an escrow agent reasonably acceptable to Sellers and Transferee (the "Escrow Agent"), and (b) the Transferee

shall deposit into escrow with the Escrow Agent an amount equal to Two Million Three Hundred Eighty Thousand Dollars (\$2,380,000) (such amount, together with any interest accrued thereon prior to the Closing Date, the "Deposit") by wire transfer of immediately available funds pursuant to the terms of the Escrow Agreement no later than the Bid Deadline (as defined in the Bidding Procedures). The Deposit shall not be subject to any lien, attachment, trustee process or any other judicial process of any creditor of Sellers or Transferee. The Deposit shall become payable to Sellers upon the earlier of (x) the Closing or (y) the termination of this Agreement pursuant to Section 7.1(e) or Section 7.1(i) (the "Transferee Default Termination"). At the Closing, the Deposit shall be delivered to an account designated by Sellers by wire transfer of immediately available funds as payment of a portion of the Closing Price. In the event the Deposit becomes payable to Sellers by reason of a Transferee Default Termination, the Escrow Agent shall, within two (2) Business Days after receiving a joint instruction from Sellers and Transferee or an order of the Bankruptcy Court, directing the disbursement to Sellers, disburse the Deposit to an account designated by Sellers by wire transfer of immediately available funds to be retained by Sellers for their own account. If this Agreement or the Transactions are terminated other than for a termination which constitutes a Transferee Default Termination, Sellers and Transferee shall instruct the Escrow Agent to, and the Escrow Agent shall, within two (2) Business Days after such instruction, return to Transferee the Deposit by wire transfer of immediately available funds. The Escrow Agent's escrow fees and charges shall be paid by Transferee.

### **ARTICLE III.** **SELLERS' REPRESENTATIONS**

As an inducement to Transferee to enter into this Agreement and to consummate the transactions contemplated hereby, Sellers jointly and severally represent and warrant to Transferee as follows:

**SECTION 3.1. Organization of Sellers.** Each of Kodak and KIN is a corporation duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization set forth opposite each such entities' name on Schedule 3.1. KIN has full corporate or similar power and authority to possess, operate and use the Acquired Assets and to carry on the Business as now conducted.

**SECTION 3.2. Authority of Sellers.**

(a) Subject to limitations imposed by the Bankruptcy Code and Bankruptcy Rules, Sellers have full corporate power and authority to execute and deliver this Agreement and to perform its obligations hereunder. Subject to limitations imposed by the Bankruptcy Code and Bankruptcy Rules, the execution, delivery and performance by Sellers of this Agreement have been duly and validly authorized and no additional corporate authorization or consent is required in connection therewith. Neither Kodak nor any affiliate of Kodak other than KIN has any rights in or to any User Data or Archives with respect to the Business, and after the Closing, neither Seller nor any Affiliate thereof will retain any rights in or to the User Data and Archives other than the User Data and Archives of Opted-Out Gallery Users and such rights in User Data as Kodak and its affiliates may have consistent with Section 5.6 herein.

**SECTION 3.3. Terms of Service and Privacy Notice.** True and complete copies of Sellers' Terms of Service and Privacy Notice as in effect since the dates set forth therein are attached to Schedule 3.3 have been posted on the Website. KIN's ability to transfer User Data and Archives to Transferee pursuant to the terms of this Agreement are allowed by KIN's Terms of Service and Privacy Notice subject to each Gallery User's ability to opt out of the transfer. KIN has not engaged in any practice or implied policy that would prevent the transfer of User Data and Archives to Transferee pursuant to this Agreement, subject to the Gallery User's right to opt-out of the transfer.

**SECTION 3.4. Brokers.** Other than Bank of America Merrill Lynch, there is no investment banker, broker, finder or other intermediary who has been retained by or is authorized to act on behalf of Sellers or any Affiliate of Sellers who might be entitled to any fee or commission in connection with the Transaction, which fee is the sole responsibility of Sellers.

#### **ARTICLE IV.** **TRANSFEEE'S REPRESENTATIONS**

As an inducement to Sellers to enter into this Agreement and to consummate the Transactions, Transferee hereby represents and warrants to Sellers and agrees as follows:

**SECTION 4.1. Organization and Authority of Transferee.**

(a) Transferee is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. Transferee is in good standing in each of the jurisdictions in which the ownership or leasing of its properties, or the acquisition of the Acquired Assets, requires or will require such qualification. Transferee has full power and authority to execute, deliver and perform its obligations under this Agreement. The execution, delivery and performance of this Agreement by Transferee has been duly authorized and approved by Transferee's board of directors and does not require any further authorization or consent of Transferee or its directors or shareholders. This Agreement has been duly authorized, executed and delivered by Transferee and is the legal, valid and binding agreement of Transferee enforceable against Transferee in accordance with its terms.

(b) Neither the execution and delivery of this Agreement nor the consummation of the Transactions nor compliance with or fulfillment of the terms, conditions and provisions of this Agreement will:

- (i) conflict with, result in a breach of the terms, conditions or provisions of, or constitute a default, or an event of default under (x) Transferee's organizational documents, (y) any Final Order to which Transferee is a Party or by which it is bound or (z) any Law binding upon Transferee; or
- (ii) require the approval, consent, authorization or act of, or the making by Transferee of any declaration, filing or registration with, any person.

**SECTION 4.2. Availability of Funds.** Transferee has as of the date hereof, and will have as of the Closing, sufficient funds to enable Transferee to pay the Closing Price in full at Closing and the Transition Price in full on the Transition End Date and all reimbursements of

Storage and Infrastructure Costs pursuant to Section 2.3(b), its share of any Transfer Taxes pursuant to Section 5.7 and all of its fees and expenses. Transferee's obligations to consummate the transactions contemplated by this Agreement are not conditioned or contingent in any way upon the receipt of financing from any person.

**SECTION 4.3. Transferee Experience.** Transferee is experienced and sophisticated with respect to transactions of the type contemplated by this Agreement. In consultation with experienced counsel and advisors of its choice, Transferee has conducted its own independent review and analysis of the Acquired Assets and the rights and obligations it is acquiring under this Agreement. Transferee acknowledges that it and its Representatives have been permitted such access to the books and records, contracts and other properties related to the Acquired Assets as it required to complete its review, and that it and its Representatives have been provided with an opportunity to meet with the officers and other employees of Sellers, to discuss the conduct of the Business.

**SECTION 4.4. Transferee's Acknowledgments; Exclusivity of Representations and Warranties.** Transferee acknowledges and agrees that except for the representations and warranties expressly contained in Article III, neither Sellers nor any other person makes any other express or implied representation or warranty to Transferee. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, THE ACQUIRED ASSETS ARE TRANSFERRED "AS IS," WITHOUT ANY WARRANTY OF ANY KIND, AND TRANSFEE HEREBY EXPRESSLY DISCLAIMS, TO THE EXTENT PERMITTED BY APPLICABLE LAW, ANY AND ALL CONDITIONS OR WARRANTIES OF ANY KIND OR NATURE, WHETHER EXPRESS, IMPLIED OR STATUTORY, INCLUDING ANY WARRANTIES OF OR RELATED TO TITLE, NON-INFRINGEMENT, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, VALIDITY OR ENFORCEABILITY. NOTWITHSTANDING ANYTHING CONTAINED IN THIS AGREEMENT, NOTHING CONTAINED IN THIS AGREEMENT WILL CONSTITUTE A LIMITATION OR WAIVER OF ANY PARTY TO ANY CLAIMS FOR FRAUD.

**SECTION 4.5. Brokers.** Other than Evercore Partners, there is no investment banker, broker, finder or other intermediary who has been retained by or is authorized to act on behalf of Transferee or any Affiliate of Transferee who might be entitled to any fee or commission in connection with the Transaction, which fee is the sole responsibility of Transferee.

## **ARTICLE V.** **COVENANTS**

The parties covenant and agree to take the following actions:

**SECTION 5.1. Privacy Policy.** Transferee shall treat all Personally Identifiable Information and non-personally identifiable information, obtained as a result of the transfer of the Acquired Assets in accordance with Transferee's Privacy Policy and Law.

**SECTION 5.2. Access to the Business by Transferee.** From the date hereof until the earlier of the Transition End Date and any termination of this Agreement in accordance with its terms, Sellers shall permit Transferee's authorized Representatives reasonable access during



regular business hours and upon reasonable notice to the offices and business records of KIN with respect to the Acquired Assets to the extent Transferee reasonably requests, subject to such limitations as may be required under applicable privacy and other Laws. Any such investigation shall be conducted in a manner so as not to interfere in any material respect with the operations of the Business.

**SECTION 5.3. Conduct of Business Prior to the Closing Date.**

(a) From the date hereof until the earlier of the Closing Date and any termination of this Agreement in accordance with its terms, KIN shall maintain the Acquired Assets and operate and carry on the Business and the Websites only in the Ordinary Course of Business, except as otherwise expressly required by this Agreement, or with the express written consent of Transferee. From the date hereof until the earlier of the Closing Date and any termination of this Agreement in accordance with its terms, Sellers shall use commercially reasonable efforts to maintain the current levels of (i) services available to Gallery Users on the Website; (ii) customer service in accordance with the Website's current practices; and (iii) marketing and promotions, in each case consistent with operating the Business in the Ordinary Course of Business and subject to the limitations of the Bankruptcy Code, the Bankruptcy Rules and any orders of the Bankruptcy Court.

(b) From the date hereof until the earlier of the Closing Date and any termination of this Agreement in accordance with its terms, KIN will provide Transferee with reports each week, in form and substance consistent with those provided by KIN currently to its management, with respect to: the number of unique transacting Gallery Users, orders, average order value and weekly revenues.

**SECTION 5.4. Cooperation on Migration.**

(a) Commencing immediately after the Closing Date, KIN and Transferee shall cooperate with each other to migrate the User Data and Archive of the Transferable Users ("Migration") to Transferee. KIN will take such actions reasonably required to enable it to maintain the hardware, infrastructure, bandwidth, network and other resources reasonably necessary to store the User Data and Archive, including maintaining the Storage Agreements until the Transition End Date. KIN shall also, at its sole expense except as otherwise provided in Section 2.3(b), throughout the Migration, dedicate and provide sufficient staffing reasonably necessary to maintain Website performance service levels as described in Exhibit A which are agreed as sufficient to facilitate the successful Migration of the User Data and Archives of the Transferable Users to Transferee as well as customer service levels as described in Exhibit A.

(b) Notwithstanding the expiration of the Transition Period, KIN shall deliver or cause its Affiliates to deliver to Transferee any User Data of Transferable Users that either comes into KIN's or such Affiliate's possession or which KIN discovers to be in its or such Affiliate's possession within one hundred eighty (180) days after such expiration.

(c) At such time as all of the Acquired Assets have been transferred and delivered to Transferee, Sellers will send a written notice to Transferee (the "Migration Completion Notice") certifying to Transferee that such transfer and delivery has been completed and proposing an end

date for the Transition Period, which date shall be no earlier than the fifth Business Day following delivery of the Migration Completion Notice and no later than nine (9) months after the Closing Date (such date, the "Transition End Date"). To the extent Transferee has any reasonable objections to the status of the Migration, Transferee shall deliver a written notice to Sellers as promptly as practicable and in no event later than five Business Days following delivery of the Migration Completion Notice by Sellers, such notice to set forth all such objections and to describe in reasonable detail their basis. In the event that Transferee timely delivers such written notice, Sellers and Transferee shall thereafter work in good faith for a period of 15 Business Days and use commercially reasonable efforts to resolve any and all reasonable objections set forth therein, and upon the resolution of all such objections, Sellers shall promptly deliver to Transferee a new Migration Completion Notice.

**SECTION 5.5. Certain Matters.**

(a) Stipulation. The parties agree that all discussions, data, material and information exchanged in the course of negotiating this Agreement, including the fact of the negotiations themselves, as well as both the terms and existence of the letter agreement, dated as of February 18, 2012, between Kodak and Transferee and this Agreement, and all information made available to Transferee pursuant to the terms of this Agreement, including without limitation pursuant to Section 5.2, are subject to the stipulation entered into by the parties on July 14, 2011 (the "Stipulation"), and to all applicable privileges, including, but not limited to, the privilege provided by Fed. R. Evid. 408, the privilege provide by Cal. Evid. Code § 1152, and any other privilege or immunity that may attach under federal, state, or common law. In furtherance of the Stipulation, to the extent Gallery Users whose User Data and Archives are transferred to Transferee from the Gallery in connection with the Transactions place sales orders after the Closing Date, such sales shall be treated for all intents and purposes as sales from any other customer of Transferee.

(b) No License Express or Implied. Nothing in this Agreement or the Transactions shall create a license, express or implied, to any Kodak or KIN intellectual property, including without limitation, any license to the patents asserted in a certain litigation, Eastman Kodak Company v. Shutterfly, Inc., Civil Action No. 10-1079-SLR, now pending in the United States District Court for the District of Delaware ("Shutterfly Litigation"). Notwithstanding the foregoing, no revenue generated by Kodak Gallery prior to the 60th day following the Closing Date shall be subject to damages in the Shutterfly Litigation.

**SECTION 5.6. Non-Compete**. Kodak agrees that it will not, and will cause KIN not to, in the United States and/or Canada and during the period beginning on the day after the Closing Date and ending on the third anniversary of that date, directly or indirectly, for its own account or on behalf of or together with any other person engaged in any online business that essentially duplicates the Business, including but not limited to (i) using the "Kodak Gallery" name or (ii) using KIN technology (including its product creation path and designs) to recreate the Gallery or duplicative service on a Kodak-branded, white label (where the white label partner fulfills at least 90% of its orders off site and ships to home), or co-branded web or mobile platform; provided that such non-compete shall not affect certain existing Kodak business lines as currently conducted (and reasonably extended therefrom), namely (i) the Retail Systems

Solutions business, (ii) the Paper and Output Solutions business, (iii) the digital camera and devices business, and (iv) the event imaging solutions business.

**SECTION 5.7. Transfer Taxes.** On the Closing Date, Sellers will make the Acquired Assets available through electronic download by Transferee. Sellers and Transferee shall cooperate in determining the applicability, if any, of any sales Tax, use Tax, documentary stamp Tax or similar Tax attributable to the transfer of the Acquired Assets and not exempted under the Sale Order or by section 1146(a) of the Bankruptcy Code ("Transfer Taxes"). Transfer Taxes shall be borne one-half by KIN and one-half by Transferee. Transferee and Sellers agree to furnish or cause to be furnished to each other, upon request, as promptly as practicable, such information and assistance relating to the Business and the Acquired Assets (including access to books and records) as is reasonably necessary for the filing of all Tax Returns and other reasonably required purposes, the making of any election relating to Taxes, the preparation for any audit by any taxing authority, and the prosecution or defense of any claim, suit or proceeding relating to any Tax. In the event either Transferee or KIN is required under applicable Law to file any Tax Return and pay any Transfer Taxes, and the aggregate of the Transfer Taxes paid by such party exceeds one-half of the Transfer taxes payable with respect to the Transactions, such party shall give notice to the other party of the excess and the party which has paid less than one-half of the Transfer Taxes shall reimburse the other party to the extent required. Transferee and Sellers shall retain all books and records with respect to Taxes pertaining to the Acquired Assets for a period of at least six years following the Closing Date. On or after the end of such period, each Party shall provide the other with at least 10 days prior written notice before destroying any such books and records, during which period the Party receiving such notice can elect to take possession, at its own expense, of such books and records. Sellers and Transferee shall cooperate with each other in the conduct of any audit or other proceeding relating to Taxes involving the Acquired Assets.

**SECTION 5.8. Payments by Gallery Users.**

(a) Regardless of whether payments are made to Sellers or Transferee, Sellers and Transferee agree that all accounts receivable, and payments with respect thereto, from Gallery Users: (i) for goods or services ordered and fulfilled prior to the Closing Date are for the account of KIN, (ii) for goods and services ordered by Opted-out Users whether before or after the Closing Date are for the account of KIN, (iii) for good or services ordered by Gallery Users from KIN during the period the Websites continue after the Closing Date under Paragraph 6 of Exhibit A are for the account of KIN; and (iv) for goods or services ordered from and fulfilled by Transferee after the Closing Date (whether or not the User Data and Archives of such Transferable User have migrated to Transferee as of the date of the order or payment) are for the account of Transferee; such that the party fulfilling such order is entitled to the revenues.

(b) In the event that Sellers or Transferee receive a payment with respect to any account receivable which, under Section 5.8(a), belongs to the other party, the recipient shall hold such payment in trust for the benefit of the proper party and on or before the tenth Business Day of the month following the month of receipt, the recipient shall pay such amount to the proper party. All payments received from Transferable Users shall be deemed payments with respect to the longest outstanding account receivable unless Sellers or Transferee have received

written notice from the paying Gallery User that such longest outstanding account receivable is in dispute and that the payment is in respect of a different account.

**SECTION 5.9. Terms of Service and Privacy Notice.** From and after the date of this Agreement until the Transition End Date, each of Sellers and Transferee shall use commercially reasonable efforts to comply with KIN's Terms of Service and Privacy Notice, including without limitation as it applies to a Gallery User's right to opt out of the transfer contemplated by this Agreement.

**SECTION 5.10. Bankruptcy Sale Process.** Sellers will (i) as promptly as possible, but in no event later than the date that is two (2) Business Days from the date hereof, file with the Bankruptcy Court the Bidding Procedures and Sale Motion, which will attach the proposed forms of Bidding Procedures Order and Sale Approval Order; and (ii) notify, as required by the Bankruptcy Code and the Bankruptcy Rules, all parties entitled to notice of such motion and proposed orders, as modified by orders in respect of notice which may be issued at any time and from time to time by the Bankruptcy Court, and such additional parties as Sellers, in consultation with Transferee, have determined should be notified.

**SECTION 5.11. Canadian Customer List.** At Closing, Kodak shall cause Kodak Canada, Inc. to convey to Transferee all right, title and interest, if any, of Kodak Canada, Inc. in and to the Canadian customer list and to the User Data that comprises such list, free and clear of all Claims and Encumbrances other than Permitted Encumbrances.

**SECTION 5.12. Database Information.** Kodak will not use information in its general database about Gallery Users in violation of Section 5.6. Kodak will not sell, transfer, license or lease an extract containing only the User Data of Gallery Users to any third party. Kodak will not transfer the Archive to any purchaser, but may transfer a particular Gallery User's Archive back to such Gallery User. Sellers will not retain Archives after the later of (i) sixty (60) days following the Closing Date and (ii) the Transition End Date.

**SECTION 5.13. Further Assurances/Reasonable Commercial Efforts.**

(a) Each of the Sellers and Transferee shall use their reasonably commercial efforts to timely take, or cause to be taken, all actions, and timely do, or cause to be done, all matters reasonably necessary, proper or advisable to consummate all aspects of the transaction contemplated by this Agreement, including without limitation, timely filing all pleadings and executing and delivering such documents and papers reasonably necessary to consummate the transaction contemplated by this Agreement.

(b) Sellers will not materially modify the Bidding Procedures in a manner inconsistent with this agreement without the consent of Transferee, which consent shall not be unreasonably withheld, conditioned or delayed.

**ARTICLE VI.**  
**CONDITIONS TO CLOSING; CLOSING**

**SECTION 6.1. Conditions to Obligations of Each Party.** The respective obligations of each party to effect the Transactions shall be subject to the fulfillment (or, if permitted by Law, waiver) on or prior to the Closing Date, of the following conditions:

(a) The Sale Order will have been entered, will not have been modified, revised or amended in any material respect (except to the extent such modification, revision or amendments have been approved by Sellers and Transferee (such approval not to be unreasonably withheld, conditioned or delayed)) and will not have been stayed, vacated or reversed for the lesser of (i) fourteen days after entry of the Sale Order or (ii) such shorter time period ordered by the Bankruptcy Court pursuant to Rule 6004(h) of the Bankruptcy Rules and no notice of appeal of the Sale Order has been filed where such appeal challenges the validity of the Transactions under section 363(m) of the Bankruptcy Code (other than on the grounds that the Transferee did not purchase the Acquired Assets in good faith), provided that the Transferee, with the consent of Sellers, can waive such requirements.

(b) No Governmental Authority shall have enacted, issued, promulgated or entered any order that is in effect and has the effect of making illegal or otherwise prohibiting the consummation of the Transactions that has not been withdrawn or terminated.

**SECTION 6.2. Conditions to Obligations of Transferee.** The obligation of Transferee to effect the Transactions shall be subject to the fulfillment on or prior to the Closing Date of the following additional conditions:

(a) the representations and warranties of Sellers contained in this Agreement shall be true and correct in all material respects when made and on and as of the Closing Date with the same effect as if such representations and warranties had been made on and as of such date, and Transferee shall have received a certificate of Sellers to such effect signed by a duly authorized officer thereof; and

(b) each covenant and obligation that Sellers are required to perform or comply with pursuant to this Agreement at or prior to the Closing shall have been duly performed and complied with in all material respects, and Transferee shall have received a certificate of Sellers to such effect signed by a duly authorized officer thereof.

Any condition specified in this Section 6.2 may be waived by Transferee; provided that no such waiver shall be effective against Transferee unless it is set forth in a writing executed by Transferee.

**SECTION 6.3. Conditions to Obligations of Sellers.** The obligation of Sellers to transfer the Acquired Assets contemplated by this Agreement shall be subject to the fulfillment on or prior to the Closing Date of the following additional conditions:

(a) the representations and warranties of Transferee contained in this Agreement shall be true and correct in all material respects when made and on and as of the Closing Date with the same effect as if such representations and warranties had been made on and as of such date and

Sellers shall have received a certificate of Transferee to such effect signed by a duly authorized officer thereof;

(b) each covenant and obligation that Transferee is required to perform or to comply with pursuant to this Agreement at or prior to the Closing shall have been duly performed and complied with in all material respects, and Sellers shall have received a certificate of Transferee to such effect signed by a duly authorized officer thereof; and

(c) the Closing Price shall have been delivered to Sellers.

Any condition specified in this Section 6.3 may be waived by Sellers; provided that no such waiver shall be effective against Sellers unless it is set forth in writing executed by Sellers.

#### **SECTION 6.4. Closing.**

(a) Upon the terms and conditions set forth in this Agreement, the closing of the Transactions (the "Closing") shall take place at the offices of Nixon Peabody LLP, 300 S. Riverside Plaza, 16th Floor, Chicago, Illinois, on the fifth Business Day after the Sale Order becomes a Final Order; or at such other place or time as Transferee and Sellers may mutually agree. The date and time at which the Closing actually occurs is hereinafter referred to as the "Closing Date."

### **ARTICLE VII.** **TERMINATION**

**SECTION 7.1. Termination.** This Agreement may be terminated, and the transactions contemplated hereby may be abandoned, by written notice promptly given to the other Parties hereto, at any time prior to the Closing Date:

(a) by mutual written consent of Transferee and Sellers;

(b) by either Transferee or Sellers upon written notice given within two Business Days after the stated date if: (i) the Bidding Procedures Order is not entered by March 31, 2012 or (ii) the Sale Order is not entered on or prior to May 2, 2012;

(c) by either Transferee or Sellers upon written notice of such termination to the other Parties, if the Closing shall not have occurred on or prior the earlier of May 16, 2012 (the "Outside Date") or the fifth Business Day after the Sale Order has become a Final Order;

(d) by Transferee if there has been a material breach by Sellers of any of their representations, warranties or covenants that would result in a condition set forth in Section 6.2 not being met, which breach is not curable, or if curable, is not cured within thirty (30) days after written notice of such breach, specifying such breach in reasonable detail, is given by Transferee to Sellers; provided, solely with respect to Section 5.13(b), such thirty (30) day period shall be ten (10) days after written notice of such breach, specifying such breach in reasonable detail, is given by Transferee to Sellers;

(e) by Sellers if there has been a material breach by Transferee of any of its representations, warranties or covenants that would result in a condition set forth in Section 6.3 not being met, which breach is not curable, or if curable, is not cured within thirty (30) days;

(f) by Transferee, if Sellers elect to terminate the Bidding Process (as defined in the Bidding Procedures) prior to entry by the Bankruptcy Court of the Sale Order or an order authorizing Sellers to enter into an Alternative Transaction;

(g) by Transferee, upon the earlier of (i) the entry by the Bankruptcy Court of the Sale Order approving a sale to the Successful Bidder (other than to the Transferee), and (ii) the expiration of ten (10) Business Days from the conclusion of the Auction where Transferee is not designated as the Highest Bidder;

(h) by either Transferee or Sellers if an Alternative Transaction is consummated; or

(i) by Sellers, upon Transferee's breach of its obligation to close the Transactions at the Closing following the Bankruptcy Court's entry of the Sale Order approving the Transactions, which breach is not cured within five (5) days from the receipt of written notice thereof from Sellers (but not later than the Outside Date).

Notwithstanding the foregoing provisions of this Section 7.1, the right to terminate this Agreement pursuant to Section 7.1 shall not be available to the party seeking to terminate if such party has breached this Agreement or, to the extent applicable, the Bidding Procedures, and such breach has been the cause of, or has resulted in, the event or condition giving rise to a right to terminate this Agreement.

**SECTION 7.2. Break-Up Fee.** In the event that (i) this Agreement is terminated by Transferee pursuant to paragraphs (d), (f) or (g) of Section 7.1, (ii) when this Agreement is so terminated, Transferee is not in material breach of this Agreement, and (iii) an Alternative Transaction is consummated within six (6) months following the date of such termination, Sellers will pay to Transferee, from the first available proceeds of such Alternative Transaction in immediately available funds, not more than five (5) Business Days after the date of such consummation, a cash fee of Six Hundred Thousand Dollars (\$600,000) (the "Break-Up Fee"). Notwithstanding anything to the contrary herein, Sellers' obligation to pay the Break-Up Fee pursuant to this Section 7.2 is expressly subject to entry of the Bidding Procedures Order. To the extent that Sellers fail to pay any amount of the Break-Up Fee if and when the same is due and payable, Transferee shall have an Administrative Expense Claim against Sellers and their bankruptcy estate for such unpaid amount as set forth in the Bidding Procedures Order.

**SECTION 7.3. Effect of Termination.** In the event of termination of this Agreement by either Party, all rights and obligations of the Parties under this Agreement shall terminate without any liability of any Party to any other Party except as otherwise provided in this Article VII and except that each Party shall be liable for any willful breach of this Agreement by such Party. Notwithstanding the foregoing, the provisions of Section 5.5, Section 7.2 and Article VIII shall expressly survive the expiration or termination of this Agreement.

**ARTICLE VIII.**  
**GENERAL PROVISIONS**

**SECTION 8.1. Public Disclosure.** Subject to the Parties' disclosure obligations imposed by Law, the Parties shall (a) cooperate with each other in the development and distribution of all news releases, other public information disclosures and announcements, including announcements and notices to customers with respect to this Agreement or any of the Transactions and (b) not issue any such announcement or statement prior to consultation with, and the approval of, the other party (such approval not to be unreasonably withheld, conditioned or delayed); provided that approval shall not be required (i) where a party determines, based on advice of counsel and after consultation with the other party, that such disclosure is required by Law or the rules of any stock exchange on which the securities of such party or any of its Affiliates are listed; (ii) in the case of Sellers, where an announcement or statement is intended to inform of the public of developments in the Bankruptcy Court's conduct of the Bankruptcy Cases other than with respect to the transactions contemplated by this Agreement; or (iii) for ordinary customer communications regarding Gallery Users' Kodak Gallery orders or customer service inquiries. The Parties shall use their reasonable business efforts to cause a mutually agreeable press release or announcement to be issued no later than two Business Days following the date hereof.

**SECTION 8.2. Notices.** All notices or other communications required or permitted hereunder shall be in writing and shall be given or delivered by personal delivery, by facsimile, email or by a nationally recognized private overnight courier service addressed as follows:

If to Transferee, to:

Shutterfly, Inc.  
2800 Bridge Parkway  
Redwood City, CA 94065  
Attn: Charlotte Falla  
Phone: (650) 610-3555  
Facsimile: 650-593-3574  
Email: cfalla@shutterfly.com

With a copy to:

Vectis Law Group  
2225 E. Bayshore Road, Suite 200  
Palo Alto, CA 94303-3220  
Attn: Patrick Costello  
Phone: (650) 320-1688  
Facsimile:  
Email: pcostello@vectislawgroup.com



Fenwick & West LLP  
555 California Street, 12th Floor  
San Francisco, CA 94104  
Attn: David Michaels  
Phone: (415) 875-2455  
Facsimile: (415) 281-1350  
Email: dmichaels@fenwick.com

If to Sellers, to:

Eastman Kodak Company  
343 State Street  
Rochester, New York 14650-0218  
Attn: General Counsel  
Phone: (585) 724-9549  
Facsimile: (585) 724-4332  
Email: Patrick.sheller@kodak.com  
with a copy to:

Nixon Peabody LLP  
1300 Clinton Square  
Rochester, New York 14604  
Attn: Deborah J. McLean  
Phone: (585) 263-1307  
Facsimile: (866) 947-0724  
Email: dmclean@nixonpeabody.com

and to:

Sullivan & Cromwell LLP  
125 Broad Street  
New York, NY 10004-2498  
Attn: Andrew G. Dietderich  
Phone: (212) 558-4000  
Facsimile: (212) 558-3588  
Email: dietdericha@sullcrom.com

or to such other address or facsimile number as such Party may indicate by a notice delivered to the other Party hereto.

Any notice, consent, authorization, direction or other communication delivered as aforesaid shall be deemed to have been effectively delivered and received, if: sent by a nationally recognized private overnight courier service, on the date following the date upon which it is delivered for overnight delivery to such courier service, if delivered personally (with written confirmation of receipt), on the date of such delivery or, if sent via facsimile or email, on the date of the transmission of the facsimile or email, provided that the sender thereof receives

written confirmation that the facsimile or email was successfully delivered to the intended recipient.

**SECTION 8.3. Assignment.** None of the Parties may assign or delegate its rights or obligations under this Agreement (whether by operation of Law, change of control, or otherwise), either in whole or in part, without the prior written consent of the other Parties, except that Sellers may assign, delegate or transfer any of its rights or obligations under this Agreement to an Affiliate of Sellers, to any purchaser or successor of interest of all or substantially all of the Business or to any succeeding entity upon consummation of a plan of reorganization pursuant to chapter 11 of the U.S. Bankruptcy Code. Any attempted assignment in violation of this Section 8.3 will be void and without effect. Subject to the foregoing, this Agreement will benefit and bind the Parties' successors and permitted assigns.

**SECTION 8.4. Entire Agreement.** This Agreement and the Schedules referred to herein contain the entire understanding of the Parties with regard to the subject matter contained herein or therein, and supersede all prior agreements, understandings or letters of intent between or among any of the Parties with respect to such subject matter.

**SECTION 8.5. Schedules.** For purposes of the representations and warranties of Sellers contained in this Agreement, disclosure on any Schedule of any facts or circumstances shall be deemed to be adequate response and disclosure of such facts or circumstances with respect to all representations or warranties by Sellers calling for disclosure of such information, whether or not such disclosure is specifically associated with or purports to respond to one or more of such representations or warranties, if it is reasonably apparent from the Schedule that such disclosure is applicable. The inclusion of any information in any Schedule or other document delivered by Sellers pursuant to this Agreement shall not be deemed to be an admission or evidence of the materiality of such item, nor shall it establish a standard of materiality for any purpose whatsoever.

**SECTION 8.6. Amendment; Waivers.** Any provision of this Agreement may be amended or waived if such amendment or waiver is in writing and signed, in the case of an amendment, by Transferee and Sellers, or in the case of a waiver, by the Party against whom the waiver is to be effective. No failure or delay by any of the Parties in exercising any right, power or privilege hereunder will operate as a waiver thereof nor will any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies herein provided will be cumulative and, except as otherwise expressly provided herein, not exclusive of any rights or remedies provided by Law.

**SECTION 8.7. Survival.** All of the representations and warranties of Transferee contained in this Agreement will survive Closing for a period of one (1) year from the Closing Date. None of the representations and warranties of Sellers contained in this Agreement shall survive Closing and Sellers shall have no liability to Transferee after Closing for any breach thereof. The covenants and agreements of the Parties set forth in this Agreement will survive until fully performed or until such performance is expressly waived in writing by the other Parties. Sellers' rights to be indemnification pursuant to Section 8.8 shall survive indefinitely.

**SECTION 8.8. Indemnification.** Transferee agrees to indemnify and defend Sellers, their Affiliates, directors, officers, shareholders, partners, members, attorneys, accountants, agents, representatives, advisors and employees, each in their capacity as such (the "Indemnified Parties") from, against and in respect of any and all actual, losses, damages or expenses, including reasonable costs and attorneys' fees, asserted against, any of the Indemnified Parties in respect of third-party claims, directly relating to, arising out of or resulting from Transferee's breach of its covenant set forth in Section 5.1. Transferee will select counsel and control defense. The Sellers will have the right to participate, at the Sellers's expense, in any Claim and to select attorneys to defend it, which attorneys will be independent of any attorneys chosen by Transferee relating to such claim or related claim. Transferee will not settle, compromise or otherwise enter into any agreement regarding the disposition of any Claim against the Sellers without the prior written consent and approval of the Sellers, unless such settlement, compromise or disposition provides for monetary relief which is to be paid by Transferee and a complete and unconditional release of the Sellers.

**SECTION 8.9. Injunctive Relief.** Each of the Parties may seek equitable relief, including the remedies of specific performance and injunction, with respect to any actual or attempted breach of this Agreement.

**SECTION 8.10. Execution in Counterparts; Electronic Delivery.** This Agreement may be executed in counterparts, each of which shall be considered an original instrument, but all of which shall be considered one and the same agreement, and shall become binding when one or more counterparts have been signed by and delivered to each of the Parties hereto. Delivery of an executed counterpart of a signature page to this Agreement by facsimile or other electronic means shall be effective as delivery of a manually executed counterpart of this Agreement.

**SECTION 8.11. Governing Law.**

(a) This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York applicable to contracts executed in and to be performed in that State.

(b) To the fullest extent permitted by applicable Law, each Party: (i) agrees that any claim, action or proceeding by such Party seeking any relief whatsoever arising out of, or in connection with, this Agreement, or the transactions contemplated hereby shall be brought only in (x) the U.S. Bankruptcy Court, if brought prior to the entry of a final decree closing the Bankruptcy Case, and (y) in the United States District Court for the Southern District of New York or, if that court lacks subject matter jurisdiction, the Supreme Court of the State of New York, County of New York (collectively, the "New York Courts") ; (ii) agrees to submit to the jurisdiction of the Bankruptcy Court or the New York Courts, as applicable, pursuant to the preceding clauses (i)(x) and (y) for purposes of all legal proceedings arising out of, or in connection with, this Agreement or the transactions contemplated hereby; (iii) waives and agrees not to assert any objection that it may now or hereafter have to the laying of the venue of such action brought in any such court or any claim that any such action brought in such court has been brought in an inconvenient forum; (iv) agrees that the mailing of process or other papers in connection with any such action or proceeding in the manner provided by the Bankruptcy Court, if the Bankruptcy Case is still pending, or as provided in Section 8.2 should be valid and

sufficient service thereof; and (v) agrees that a final judgment in any such action or proceeding shall be conclusive and may be enforced in any other jurisdictions by suit on the judgment and in any other manner provided by applicable Law.

(c) THE PARTIES HEREBY IRREVOCABLY WAIVE ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM (WHETHER BASED IN CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE ACTIONS OF SELLERS, TRANSFEREE, OR THEIR RESPECTIVE REPRESENTATIVES IN THE NEGOTIATION OR PERFORMANCE HEREOF.

**SECTION 8.12. No Third Party Beneficiaries.** This Agreement is for the sole benefit of the Parties and their permitted assigns and nothing herein, express or implied, is intended to or shall confer upon any other person any legal or equitable benefit, claim, cause of action, remedy or right of any kind.

**SECTION 8.13. No Set-off, Deduction or Counterclaim.** Any payment payable by any of the Parties under this Agreement shall be made in full without any set-off or counterclaim howsoever arising and shall be free and clear of, and without deduction of, or withholding for, any amount which is due and payable to such party by the other Parties under this Agreement.

**SECTION 8.14. Severability.** If any provision of this Agreement is determined to be invalid or unenforceable, the validity or enforceability of the other provisions or of this Agreement as a whole will not be affected; and, in such event, such provision will be changed and interpreted so as best to accomplish the objectives of such provision within the limits of applicable Law or applicable court decision.

**SECTION 8.15. Bulk Sales Law.** Subject to the entry of the Sale Order, each of the Parties waives compliance by the other Parties with any applicable bulk sales Law.

**[SIGNATURE PAGES FOLLOW]**

IN WITNESS WHEREOF, each of the Parties hereto has caused this Transfer Agreement to be executed by their respective officers thereunto duly authorized, as of the date first written above.

**TRANSFeree:**

**Shutterfly, Inc.**

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

Name: JEFFREY HOUSENBOLD  
Title: CEO

**SELLERS:**

**Eastman Kodak Company**

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

Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**Kodak Imaging Network, Inc.**

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

Name: \_\_\_\_\_  
Title: \_\_\_\_\_

IN WITNESS WHEREOF, each of the Parties hereto has caused this Transfer Agreement to be executed by their respective officers thereunto duly authorized, as of the date first written above.

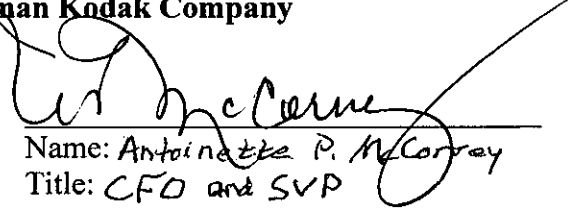
**TRANSFeree:**

**Shutterfly, Inc.**

By: \_\_\_\_\_  
Name:  
Title:

**SELLERS:**

**Eastman Kodak Company**

NK By:   
Name: Antoinette P. McCorrey  
Title: CFO and SVP

**Kodak Imaging Network, Inc.**

By: \_\_\_\_\_  
Name:  
Title:

IN WITNESS WHEREOF, each of the Parties hereto has caused this Transfer Agreement to be executed by their respective officers thereunto duly authorized, as of the date first written above.

**TRANSFeree:**

**Shutterfly, Inc.**

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**SELLERS:**

**Eastman Kodak Company**

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**Kodak Imaging Network, Inc.**

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

*[Signature]*  
VICTOR CHO  
CEO & PRESIDENT KODAK  
IMAGING NETWORK.

## **BIDDING PROCEDURES**

The procedures set forth herein (the “Bidding Procedures”) govern the proposed sale (the “Sale”) by Eastman Kodak Company (“Kodak”) and Kodak Imaging Network, Inc. (“KIN”), as debtors and debtors in possession (collectively, the “Debtors” or “Sellers”) of certain assets of KIN’s business “Kodak Gallery” (the “Transferred Assets”).

The Sale will be implemented pursuant to the Transfer Agreement, dated March 1, 2012 (as it may be amended, the “Stalking Horse Purchase Agreement” or the “Stalking Horse Bid”), by and among Shutterfly, Inc. (the “Stalking Horse Purchaser”) and Sellers, subject to the receipt of higher or otherwise better bids in accordance with these Bidding Procedures. All capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Stalking Horse Purchase Agreement.

These Bidding Procedures describe, among other things, the manner in which bidders and bids become Qualified Bidders and Qualified Bids (each as defined below), the receipt and negotiation of bids received, the conduct of any subsequent Auction (as defined below), the ultimate selection of the Successful Bidder(s) (as defined below), and Bankruptcy Court approval of the Sale (collectively, the “Bidding Process”). Where these Bidding Procedures state that an election is to be made or action taken by the Debtors, such decision or action shall be made in the sole discretion of the Debtors unless otherwise indicated.

The form of these Bidding Procedures was approved by order dated [\_\_\_\_\_] (the “Bidding Procedures Order”), of the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”) (in which the Debtors’ chapter 11 bankruptcy cases, jointly administered under Case No. 12-10202 (ALG), are pending) pursuant to Debtors’ Motion for Orders (I)(A) Authorizing Debtors’ Entry into the Stalking Horse Purchase Agreement, (B) Authorizing and Approving the Bidding Procedures and Break-Up Fee, (C) Approving the Notice Procedures, (D) Authorizing the Filing of Certain Documents under Seal and (E) Setting a Date for the Sale Hearing and (II) Authorizing and Approving the Sale of Certain Assets of Kodak Imaging Network, Inc. Free and Clear of All Claims and Interests, filed March [2], 2012.

If the Stalking Horse Purchase Agreement is terminated by Sellers or the Stalking Horse Purchaser for any reason at any time prior to the consummation of a Successful Bid (as defined below), the Debtors may elect to terminate the Bidding Process. If the Debtors elect to terminate the Bidding Process, neither the Stalking Horse Purchaser nor the Debtors will have any obligations with respect thereto; provided that, for the avoidance of doubt, such termination of the Bidding Process will not affect Sellers’ obligations with respect to the Break-Up Fee or any liability of the Stalking Horse Purchaser for breach, in each case as provided in the Stalking Horse Purchase Agreement.

### Preliminary Participation Requirements

In order to participate in the Bidding Process, each interested person or entity must deliver the following documents to the parties described below (the “Preliminary Bid Documents”), together with such other documents as the Debtors may request:



- (a) an executed confidentiality agreement (a “Bidder Confidentiality Agreement”), which shall inure to the benefit of any purchaser of the Transferred Assets, and shall be in the form attached hereto as Appendix A or in such other form as the Debtors may require in light of the nature of the confidential information to be shared and the identity and business of the interested person or entity; and
- (b) preliminary proof of the financial capacity of the potential bidder to close the Sale, which may include current unaudited or verified financial statements of, or verified financial commitments obtained by, the potential bidder (or, if the potential bidder is an entity is formed for the purpose of acquiring the Transferred Assets, the party that will fund the purchase price and bear liability for a breach of the Stalking Horse Purchase Agreement), the adequacy of which the Debtors and its advisors will determine their discretion after consultation with the Creditors Committee, the Second Lien Noteholders Committee and the DIP Agent.

The Preliminary Bid Documents must be transmitted so as to be received no later than [\_\_:], Eastern Time, on [\_\_\_\_] by each of the following parties (collectively, the “Notice Parties”): (a) the Debtors, c/o Eastman Kodak Company, 343 State Street, Rochester, NY 14650-0126 (Attn: Jeremy R. Salesin and Dorothy H. Cusker); (b) Sullivan & Cromwell LLP, counsel to the Debtors, 125 Broad Street, New York, New York 10004 (Attn: Andrew G. Dietderich and Michael H. Torkin); (c) Nixon Peabody LLP, counsel to the Debtors, 1300 Clinton Square, Rochester, NY 14604 (Attn: Deborah J. McLean, Esq.); (d) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Brian S. Masumoto, Esq.); (e) Milbank, Tweed, Hadley & McCloy LLP, proposed counsel to the Official Committee of Unsecured Creditors, 1 Chase Manhattan Plaza, New York, New York (Attn: Dennis F. Dunne, Tyson M. Lomazow and Brian Kinney); (f) Akin Gump Strauss Hauer & Feld LLP, counsel to the Ad Hoc Committee of Second Lien Noteholders, One Bryant Park, New York, New York 10036 (Attn: Michael S. Stamer, David Botter and Stephen Kuhn); (g) Davis Polk & Wardwell LLP, counsel to Citicorp North America, Inc., as agent for the Debtors' postpetition secured lenders, 450 Lexington Ave, New York, New York 10017 (Attn: Marshall S. Huebner and Brian M. Resnick); (h) the Stalking Horse Purchaser, c/o Shutterfly, Inc., 2800 Bridge Parkway, Redwood City, CA 94065 (Attn: Charlotte Falla); and (i) Vectis Law Group, counsel to the Stalking Horse Purchaser, 2225 E. Bayshore Road, Suite 200, Palo Alto, CA 94303 (Attn: Patrick M. Costello); provided, however, that the Debtors may consider Preliminary Bid Documents submitted after the foregoing deadline if the Debtors, after consultation with the Creditors Committee, the Second Lien Noteholders Committee and the DIP Agent, determine it will be helpful to the success of the Bidding Process.

Within three (3) Business Days after a potential bidder delivers the Preliminary Bid Documents, the Debtors shall determine and notify such potential bidder whether it qualifies as a “Potential Bidder” and deliver to such Potential Bidder an electronic copy of the Stalking Horse Purchase Agreement, together with all exhibits and schedules thereto; provided that the Debtors may redact any information contained therein that the Debtors determine to be confidential commercial information. The Stalking Horse Purchaser will be considered a Potential Bidder so long as the Stalking Horse Purchase Agreement is in effect. No person or entity which does not qualify as a Potential Bidder may bid or otherwise participate in the Bidding Process.

### Due Diligence

Until the Bid Deadline (as defined below) and subject to the Bidder Confidentiality Agreement, the Debtors may provide in their discretion such due diligence access or additional information as may be reasonably requested by any Potential Bidder. All due diligence requests shall be directed to Subra Narayan, Eastman Kodak Company, c/o Karen Baker, 1999 Lake Avenue, Rochester, NY 14650 (t: 650.350.4077), or Kenneth Fillion, Eastman Kodak Company, 343 State Street, Rochester, NY 14650 (t: 585.724.5800).

Each Potential Bidder who submits a bid will be deemed to acknowledge and represent that it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the assets and liabilities of the Debtors and their Affiliates in making its bid, and that it did not rely upon any written or oral statements, representations, promises, warranties or guarantees whatsoever, whether express, implied, by operation of law or otherwise, regarding the Debtors or their Affiliates, or the completeness of any information provided in connection with its bid or the Bidding Process, except to the extent expressly stated in definitive documentation entered into by the Debtors and the Successful Bidder.

### Bid Deadline

A Potential Bidder who desires to make a bid must deliver the Bid Requirements (as defined below) so as to be received by the Notice Parties no later than [\_\_:\_\_], Eastern Time, on [\_\_\_\_\_] (the "Bid Deadline"). The Debtors may extend the Bid Deadline in their discretion after consultation with the Creditors Committee, the Second Lien Noteholders Committee and the DIP Agent. If the Debtors extend the Bid Deadline, the Debtors will promptly notify all Potential Bidders, the Creditors' Committee, the Second Lien Noteholders Committee and counsel to the DIP Agent of such extension.

### Bid Requirements

A bid will be considered only if the bid includes all of the following (the "Bid Requirements"):

- (a) authorization for the Debtors to provide the Bid Documents and Marked Agreement to the Notice Parties;
- (b) a duly authorized and executed Stalking Horse Purchase Agreement to purchase all or a substantial portion of the Transferred Assets, including the purchase price for the Transferred Assets, together with all exhibits, schedules and ancillary agreements, together with a version marked to show those amendments and modifications to the Stalking Horse Purchase Agreement (a "Marked Agreement") and the proposed Sale Order, which may not be materially more burdensome to the Debtors than the Stalking Horse Purchase Agreement or inconsistent with these Bidding Procedures;
- (c) constitutes a good faith, bona fide offer to purchase the Transferred Assets and to assume such liabilities as the Proposed Bidder proposes to assume;

- (d) results in a value (after provision for the payment of the Break-Up Fee) as determined by the Debtors pursuant to the Bid Assessment Criteria, either individually or, in conjunction with another Qualified Bid, greater than or equal to the net value the Debtors would receive under the Stalking Horse Purchase Agreement plus \$500,000.00 (it being understood that the Debtors will value any assumption of liabilities or other non-cash consideration in their discretion);
- (e) the identity of each entity that will be participating in connection with the bid and the terms of such participation;
- (f) the identity of the assets to be purchased and the contracts and leases to be assumed;
- (g) an unambiguous commitment to pay all amounts required to cure any defaults pursuant to section 365(b) of the Bankruptcy Code and to provide adequate assurance of future performance under any executory contracts or unexpired leases the Potential Bidder proposes to be assumed;
- (h) information sufficient in the judgment of the Debtors, after consultation with the Creditors Committee, the Second Lien Noteholders Committee and the DIP Agent, to demonstrate to the satisfaction of the Debtors that the Potential Bidder has the financial wherewithal and operational ability to consummate the transaction contemplated by the Marked Agreement, or in the absence of such financial wherewithal, written evidence of a firm commitment for financing the consummation of the transaction contemplated by the Marked Agreement, or other evidence of ability to consummate the transaction contemplated by the Marked Agreement that is satisfactory to the Debtors after consultation with the Creditors Committee, the Second Lien Noteholders Committee and the DIP Agent;
- (i) unless the Debtors otherwise determine, is not conditioned on any contingency, including, without limitation, obtaining any of the following: (i) financing, (ii) shareholder or board of directors approval, and/or (iii) the outcome or completion of a due diligence review;
- (j) evidence of approval by the board of directors (or other appropriate governing body) of the Potential Bidder, and, if applicable, its parent company, with respect to the submission of the bid and the execution and delivery of the Marked Agreement and the proposed Sale Order;
- (k) identifies with particularity each and every condition to closing;
- (l) is received on or before the Bid Deadline;
- (m) unless the Debtors otherwise determine, includes a cash deposit equal to 10% of the Purchase Price under the Stalking Horse Purchase Agreement to an escrow account designated by the Debtors (the “Good Faith Deposit”);
- (n) does not include an entitlement to any break-up fee, transaction fee, termination fee or any similar type of payment or, unless the Debtors otherwise determine, any expense reimbursement or any similar type of reimbursement; and
- (o) is irrevocable until such outside date as the Debtors determine or the earlier consummation of a transaction with the Successful Bidder or an Alternative Bidder.

A Potential Bidder who submits a bid that satisfies all of the Bid Requirements and the Due Diligence Requirements (as defined below) shall be a "Qualified Bidder" and its submitted bid will constitute a "Qualified Bid." The Debtors shall notify the Potential Bidders whether their bids have been determined to be Qualified Bids by no later than [\_\_:\_], Eastern Time, on [\_\_\_\_\_]. The Stalking Horse Purchaser shall be deemed a Qualified Bidder and the Stalking Horse Purchase Agreement shall be deemed a Qualified Bid for all purposes in connection with the Bidding Process.

#### Evaluation of Qualified Bids

Prior to the Auction (as defined below), the Debtors shall evaluate the Qualified Bids and identify the Qualified Bid or combination of Qualified Bids that is, in the Debtors' judgment after consultation with the Creditors Committee, the Second Lien Noteholders Committee and the DIP Agent, the highest or otherwise best offer (the "Starting Bid"). Within twenty-four (24) hours of such determination, but in no event later than one (1) Business Day prior to the date of the Auction, the Debtors shall distribute copies of the Starting Bid to each Qualified Bidder. If no Qualified Bids are received by the Bid Deadline, then the Auction will not occur, the Stalking Horse Purchase Agreement will be deemed the Successful Bid (as defined herein) and, subject to the Debtors' termination rights under the Stalking Horse Purchase Agreement, the Debtors will pursue entry of the Sale Order as soon as practicable.

A Qualified Bid will be valued by the Debtors based upon several factors, including, without limitation, items such as the net value and recovery to the Debtors' estates provided by such bid, the total consideration to be received by the Debtors, the number and complexity of transactions that would be required to consummate the Qualified Bid, the number of counterparties to such transactions, the amount of assets included or excluded from the Qualified Bid, whether the Qualified Bid contemplates offers of comparable employment to KIN Debtor's employees, the number, type and nature of any changes to the Stalking Horse Purchase Agreement, the potential disruption to the Debtors that would result from the Qualified Bid being consummated in comparison to that resulting from the Stalking Horse Purchase Agreement and the likelihood and timing of consummating such transactions (the "Bid Assessment Criteria"), each as determined by the Debtors in their sole discretion. The Debtors' determination of the value of a Qualified Bid, or the relative value of Qualified Bids, shall be final as between the Debtors, the Stalking Horse Purchaser and any Qualified Bidders and shall not be subject to challenge by the Stalking Horse Purchaser or any Qualified Bidder in such capacity.

#### Due Diligence from Bidders

Each Qualified Bidder shall comply with all reasonable requests for additional information and due diligence access by the Debtors or their representatives (the "Due Diligence Requirements"). Failure of a Qualified Bidder to fully comply with the Due Diligence Requirements will be a basis for the Debtors to determine that a bid made by an otherwise Qualified Bidder is not a Qualified Bid.

#### Auction

In the event that, on or before the Bid Deadline, the Debtors receive one or more Qualified Bids in addition to the Stalking Horse Purchase Agreement, the Debtors will conduct an auction in accordance with the following procedures (the "Auction") upon notice to all Qualified Bidders. The Auction will commence at [\_\_:\_\_], Eastern Time, on [\_\_\_\_] at the offices of Sullivan & Cromwell LLP, 125 Broad Street, New York, NY or such later time or other place as the Debtors shall timely notify the Stalking Horse Bidder, all other Qualified Bidders and the Notice Parties.

- (a) Unless the Debtors otherwise determine, only the Debtors, the Stalking Horse Purchaser, any representative of each of the Creditors' Committee, the Second Lien Noteholders Committee and the DIP Agent, and any Qualified Bidder (and the legal and financial advisors to each of the foregoing), will be entitled to attend the Auction, and only the Stalking Horse Purchaser and the Qualified Bidders will be entitled to make any Subsequent Bids at the Auction.
- (b) The Debtors may employ and announce at the Auction additional procedural rules that they determine appropriate under the circumstances (e.g., the amount of time allotted to make Subsequent Bids) for conducting the Auction after consultation with the Creditors Committee, the Second Lien Noteholders Committee and the DIP Agent, provided that such rules are (i) not inconsistent with the Bidding Procedures Order, the Bankruptcy Code, the Bankruptcy Rules or any order of the Bankruptcy Court entered in connection herewith and (ii) disclosed to each Qualified Bidder.
- (c) Each Qualified Bidder will be required to confirm on the record of the Auction that it has not engaged in any collusion with respect to the bidding or the Sale.
- (d) Bidding at the Auction will begin with the Starting Bid and continue, in one or more rounds of bidding, so long as during each round at least one subsequent bid is submitted by a Qualified Bidder that (i) improves upon such Qualified Bidder's immediately prior Qualified Bid (a "Subsequent Bid") and (ii) the Debtors determine that such Subsequent Bid is (a) for the first round, a higher or otherwise better offer than the Starting Bid, and (b) for subsequent rounds, a higher or otherwise better offer than the Leading Bid (defined below). The first minimum incremental bid at the Auction shall have a value as determined by the Debtor of at least \$500,000.00 over the Starting Bid, with any subsequent bid increases to be made in minimum increments of at least \$200,000.00. After the first round of bidding and between each subsequent round of bidding, the Debtors shall announce the bid (and the value of such bid) that they believe to be the highest or otherwise best offer (the "Leading Bid") and the time in which a Subsequent Bid must be received. The Debtors may permit 'passes' and otherwise modify these procedures as the Debtors determine appropriate in the circumstances after consultation with the Creditors Committee, the Second Lien Noteholders Committee and the DIP Agent.
- (e) For purposes of evaluating the value of the consideration provided by Subsequent Bids (including any Subsequent Bid by the Stalking Horse Purchaser), the Debtors will give the Stalking Horse Purchaser a credit equal to the Break Up Fee.
- (f) Absent irregularities in the conduct of the Auction, the Bankruptcy Court will not consider bids made after the Auction is closed.

### Selection Of Successful Bid

The Debtors reserve the right to (i) determine in their discretion, after consultation with the Creditors Committee, the Second Lien Noteholders Committee and the DIP Agent, which bid is the highest or best (the "Highest Bid(s)") and the bidder(s) making such bid(s), the "Highest Bidder(s)") based on the Bid Assessment Criteria or such other considerations as they deem appropriate and (ii) reject at any time prior to entry of a Bankruptcy Court order approving an offer, without liability, any offer, other than the Stalking Horse Bid, that the Debtors, in their discretion after consultation with the Creditors Committee, the Second Lien Noteholders Committee and the DIP Agent, deem to be (x) inadequate or insufficient, (y) not in conformity with the requirements of the Bidding Procedures Order, the Bankruptcy Code, the Bankruptcy Rules or any order of the Bankruptcy Court entered in connection herewith or (z) contrary to the best interests of the Debtors. If an Auction is held, the Debtors shall be deemed to have accepted a Qualified Bid only when (i) such bid is declared the Highest Bid at the Auction and (ii) definitive documentation has been executed in respect thereof. Such acceptance is conditioned upon approval by the Bankruptcy Court of the Highest Bid and entry of the Sale Order approving such Highest Bid.

### Sale Hearing

The Sale Hearing will be held before the Honorable Allan L. Gropper at [\_\_:\_\_], Eastern Time, on [\_\_\_\_], in the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, NY 10004. The Sale Hearing may be adjourned without further notice by an announcement of the adjourned date at the Sale Hearing. If the Debtors do not receive any Qualified Bids (other than the Qualified Bid of the Stalking Horse Purchaser), the Debtors will report the same to the Bankruptcy Court at the Sale Hearing and will proceed with a sale of the Transferred Assets to the Stalking Horse Purchaser following entry of the Sale Order in accordance with the terms of the Stalking Horse Purchase Agreement. If the Debtors do receive additional Qualified Bids, then, at the Sale Hearing, the Debtors will seek approval of the Highest Bid and, if the Highest Bid is not promptly approved and the Debtors so elect, the next highest or best Qualified Bid received in the Auction. The Qualified Bid approved by the Bankruptcy Court and reflected in the entry of the Sale Order shall be deemed to be the "Successful Bid", and the applicable Qualified Bidder the "Successful Bidder", for purposes hereof.

In addition, at the Debtors' election, one or more other Qualified Bid(s) received in the Auction constituting the next highest or best bid(s) may be approved alongside the Successful Bid (such bids, the "Alternate Bid(s)," and such bidder(s), the "Alternate Bidder(s)"); *provided, however*, that in no event shall the Stalking Horse Purchase Agreement be deemed an Alternate Bid or the Stalking Horse Purchaser deemed an Alternate Bidder without the Stalking Horse Purchaser's consent, in its sole discretion. Following approval of the Sale to the Successful Bidder(s), if the Successful Bidder(s) fail(s) to consummate the Sale because of (a) failure of a condition precedent beyond the control of either the Debtors or the Successful Bidder(s) upon which occurrence the Debtors have filed a notice with the Bankruptcy Court advising of such failure or (b) a breach or failure to perform on the part of such Successful Bidder(s) upon which

occurrence the Debtors have filed a notice with the Bankruptcy Court advising of such breach or failure to perform, then the Alternate Bid(s) will be deemed to be the Successful Bid(s) and the Debtors will be authorized, but not directed, to effectuate a Sale to the Alternate Bidder(s) subject to the terms of the Alternate Bid(s) of such Alternate Bidder(s) without further order of the Bankruptcy Court.

#### Break-Up Fee

If the Stalking Horse Purchaser is not the Successful Bidder and the Sale is consummated with a Successful Bidder pursuant to a Successful Bid, the Break-Up Fee shall be paid to the Stalking Horse Purchaser out of the first available proceeds received on account of the Successful Bid (the "Sale Proceeds") in accordance with the Stalking Horse Purchase Agreement; provided, however, that to the extent the Sale Proceeds do not cover the full amount of the Break-Up Fee, the Break-Up Fee shall be deemed an allowed expense of administration against Sellers and their estates under Section 503(b) of the Bankruptcy Code.

#### Return of Good-Faith Deposit

Each Good Faith Deposit shall be returned to each Qualified Bidder not selected by the Debtors as the Successful Bidder(s) or Alternative Bidder(s) by no later than the fifth (5th) Business Day following the conclusion of the Auction. The Good Faith Deposits of the Successful Bidder(s) and Alternative Bidder(s) will be retained in escrow until the earlier of (a) the closing of the Sale and (b) the permanent withdrawal of the Transferred Assets for sale by the Debtors. At the closing of the Sale contemplated by the Successful Bid, any Alternative Bidder(s)' Good Faith Deposit shall be returned to the Alternative Bidder(s) and the Successful Bidder(s) will be entitled to credit the amount of its Good Faith Deposit against the price paid for the Transferred Assets. If the Successful Bidder(s) fail to consummate the Sale because of a breach or failure to perform on the part of such Successful Bidder(s), the Successful Bidder(s)' Good Faith Deposit shall be forfeited to the Debtors as liquidated damages.

#### Beneficiaries; Modification of Procedures

No person or entity other than the Debtors and the Stalking Horse Purchaser shall be a beneficiary of or have a right to enforce these bidding procedures or the Bidding Process. The Debtors may amend these bidding procedures or the Bidding Process after consultation with the Creditors Committee, the Second Lien Noteholders Committee and the DIP Agent, *provided* that (a) no amendment inconsistent with the Stalking Horse Purchase Agreement may be made without the consent of the Stalking Horse Purchaser, such consent not to be unreasonably withheld, conditioned or delayed, and (b) no amendment to these Bidding Procedures shall affect the right of the Stalking Horse Purchaser to terminate the Stalking Horse Purchase Agreement, pursuant to the terms and conditions set forth therein, in the event of a delay in reaching the milestones specified therein.