
ASSET PURCHASE AGREEMENT

dated as of

____, 2016

by and between

**NJOY, INC.,
Chapter 11 Debtor and Debtor-in-Possession**

and

HOMEWOOD NJOY ACQUISITION, LLC

ASSET PURCHASE AGREEMENT

This ASSET PURCHASE AGREEMENT (“**Agreement**”) is entered into as of _____, 2016 by and between Homewood NJOY Acquisition, LLC, a Delaware limited liability company (the “**Purchaser**”), and NJOY, Inc., a Delaware corporation, having a place of business at 15211 N. Kierland Blvd., Suite 200, Scottsdale, Arizona 85254 (“**Seller**”), as debtor and debtor-in-possession in the chapter 11 case no. 16-12076 (CSS) (the “**Bankruptcy Case**”), pending in the United States Bankruptcy Court for the District of Delaware (the “**Bankruptcy Court**”).

RECITALS

WHEREAS, Seller is a leading independent manufacturer and distributor of electronic nicotine delivery systems (ENDS) (the “**Business**”);

WHEREAS, on September 16, 2016 (the “**Filing Date**”), Seller filed a voluntary petition with the Bankruptcy Court under chapter 11 of title 11 of the United States Code, Section 101, *et seq.* (the “**Bankruptcy Code**”);

WHEREAS, the transactions contemplated by this Agreement will be consummated pursuant to a Sale Approval Order (as defined below) to be entered in the Bankruptcy Case under Sections 105, 363, 365 and other applicable provisions of the Bankruptcy Code (as defined below), and this Agreement and the transactions contemplated herein are subject to the approval of the Bankruptcy Court; and

WHEREAS, Purchaser is or will be the assignee of certain rights of the holders of the Second Lien Claims, and desires to credit bid up to all of the Second Lien Claims (the “**Credit Bid**”) and to pay a specified amount in cash to the Sellers in connection with the Sale Transaction, subject to entry of an acceptable Sale Approval Order;

WHEREAS, Seller wishes to sell to Purchaser and Purchaser wishes to acquire from Seller certain assets related to the Business as set forth in this Agreement.

NOW, THEREFORE, in consideration of the mutual promises in this Agreement and for other good and valuable consideration, the parties hereby agree as follows.

AGREEMENT

1. DEFINITIONS

1.1 “**Accounts Receivable**” means all of Sellers’ trade accounts receivable and other rights to payment from customers or other third parties.

1.2 “**Actions**” has the meaning set forth in **Section 3.4** hereof.

1.3 “**Affiliate**” of a Person means any other Person that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with such Person.

1.4 “Agreement” means this Asset Purchase Agreement among the parties set forth on the first page hereof, including, without limitation, all Exhibits and Schedules hereto, as the same may be amended from time to time.

1.5 “Alternative Transaction” means the sale, transfer or other disposition, directly or indirectly, including through an asset sale, share sale, merger, amalgamation, or other similar transaction, including a plan of reorganization approved by the Bankruptcy Court, or resulting from the Auction, of the Purchased Assets, in a transaction or series of transactions with one or more Persons other than Purchaser.

1.6 “Ancillary Agreements” means any agreement, instrument or other document to be executed and delivered in connection with the consummation of the transactions contemplated by this Agreement and shall include, without limitation, any agreement, instrument, or other document that is set forth in **Section 2.6** hereof.

1.7 “Apportioned Obligations” has the meaning set forth in **Section 5.5** hereof.

1.8 “Assumed Contracts” has the meaning set forth in **Section 2.1(d)** hereof.

1.9 “Assumed Liabilities” has the meaning set forth in **Section 2.3(a)** hereof.

1.10 “Auction” means the auction of the Purchased Assets.

1.11 “Bankruptcy Case” has the meaning given to it in the recitals hereto.

1.12 “Bankruptcy Code” has the meaning given to it in the recitals hereto.

1.13 “Bankruptcy Court” has the meaning given to it in the recitals hereto.

1.14 “Bidding Procedures” means the auction, sale and bidding procedures approved by the Bid Procedures Order.

1.15 “Bid Procedures Order” means the order approving the bidding procedures at the Auction for the Purchased Assets.

1.16 “Business” has the meaning given to it in the recitals hereto.

1.17 “Business Day” means any day other than a Saturday, Sunday or other day on which commercial banks in Delaware are required or authorized by law to be closed.

1.18 “Cash and Cash Equivalents” means all cash and cash equivalents, including checks, commercial paper, treasury bills, certificates of deposit and other bank deposits, securities, securities entitlements, instruments and other investments of Sellers, and all bank accounts and securities accounts, including any cash collateral that is collateralizing any letters of credit.

1.19 “Cash Payment” has the meaning set forth in **Section 2.5(a)** hereof.

1.20 “Claim” has the meaning given that term in section 101(5) of the Bankruptcy Code and shall expressly include claims arising under any theory of successor liability.

1.21 “Closing” means the closing of the transactions contemplated by this Agreement.

1.22 “Closing Date” means the date in which the conditions set forth in Article VI are satisfied or waived, or such other date as the parties may mutually agree, upon which the Closing takes place.

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

1.24 “Consent” means any consent, approval, authorization, license or order of, registration, declaration or filing with, or notice to, or waiver from, any federal, state, local, foreign or other Governmental Entity or any Person, including, without limitation, any security holder or creditor which is necessary to be obtained, made or given in connection with the execution and delivery of this Agreement and/or any Ancillary Agreement, the performance by a Person of its obligations hereunder and/or thereunder and the consummation of the transactions contemplated hereby and/or thereby.

1.25 “Contract Assumption Order” has the meaning set forth in **Section 5.4(d)** hereof.

1.26 “CRCMS” has the meaning set forth in **Section 3.3** hereof.

1.27 “Cure Claims” means amounts that must be paid and obligations that otherwise must be satisfied, pursuant to Sections 365(b)(1)(A) and (B) of the Bankruptcy Code, in connection with the assumption, assignment, and/or sale of the Assumed Contracts, as determined pursuant to the process set forth in the Bid Procedures Order.

1.28 “Deposit” has the meaning set forth in **Section 2.5** hereof.

1.29 “DIP Amount” means the amount of all of Seller’s monetary obligations under the DIP Facility,

1.30 “DIP Facility” means the Seller’s post-petition financing in the form of a revolving credit facility with FLFC Lending Co., as authorized on a final basis by the Bankruptcy Court on October 14, 2016.

1.31 “Disclosure Schedules” means the disclosure schedules attached to this Agreement as **Exhibit A**, and includes but is not limited to each of the Schedules expressly referred to in **Section 3** of this Agreement.

1.32 “Employment Related Plan” means any employment, consulting, bonus, incentive compensation, deferred compensation, pension, profit sharing, retirement, stock purchase, stock option, stock ownership, stock appreciation rights, phantom stock, equity (or equity-based), leave of absence, layoff, vacation, day or dependent care, legal services, cafeteria, life, health, medical, dental, vision, welfare, accident, disability, workmen’s compensation or other insurance, severance, separation, termination, change of control, collective bargaining or other benefit plan, understanding, agreement, practice, policy or arrangement of any kind, whether written or oral, and whether or not subject to ERISA, including any “employee benefit plan” within the meaning of Section 3(3) of ERISA.

1.33 “Encumbrances” means collectively and without limitation, any and all mortgages, security interests, conditional sales or title retention agreements, pledges, hypothecations, rights, liens, judgments, interests, encumbrances or claims of any kind or nature whatsoever, including, without limitation, any and all “claims” as defined in Section 101(5) of the Bankruptcy Code, whether arising by agreement, any statute or otherwise and whether arising before, on or after the Filing Date.

1.34 “ERISA” means the Employee Retirement Income Security Act of 1974, as amended, and the rules and regulations promulgated thereunder.

1.35 “ERISA Affiliate” means any Person required at any particular time to be aggregated with any of Seller or any Seller Subsidiary under Sections 414(b), (c), (m) or (o) of the Code or Section 4001 of ERISA.

1.36 “Excluded Assets” has the meaning set forth in **Section 2.2** hereof.

1.37 “Excluded Liabilities” has the meaning set forth in **Section 2.3(b)** hereof.

1.38 “Filing Date” has the meaning given to it in the recitals hereto.

1.39 “Final Order” means an order, judgment or other decree, the operation or effect of which has not been reversed, stayed, modified or amended and any and all appeal periods with respect to such order, judgment or other decree have expired.

1.40 “First Lien Credit Agreement” means that certain Credit Agreement dated as of March 3, 2015 among Seller, the Guarantors (as defined therein), the Lenders (as defined therein) and the Agent (as defined therein), as amended from time to time.

1.41 “First Lien Claims” means the aggregate principal amount of obligations outstanding under the First Lien Credit Agreement, together with accrued interest and any other Claims with respect to the First Lien Credit Agreement by such holders, and any Liens securing the foregoing.

1.42 “GAAP” means United States generally accepted accounting principles, applied on a consistent basis.

1.43 “Governmental Entity” means any federal, state, local or foreign government, political subdivision, legislature, court, agency, department, bureau, commission or other governmental regulatory authority, body or instrumentality, including any industry or other non-governmental self-regulatory organizations.

1.44 “Insurance Policies” shall have the meaning set forth in Section 3.10 of this Agreement.

1.45 “Intellectual Property” means all Seller’s intellectual property of any kind used, or held for use, in connection with the operation of the Business, including the following: (i) trademarks, service marks, trade names, slogans, logos, trade dress, internet domain names, brand names, and other similar designations of source or origin, together with all goodwill, registrations

and applications related to the foregoing; (ii) patents, utility models and industrial design registrations (and all continuations, divisionals, continuations in part, provisionals, renewals, reissues, re-examinations and applications for any of the foregoing); (iii) copyrights and copyrightable subject matter (including, without limitation, any registrations and applications for any of the foregoing); (iv) trade secrets, proprietary processes, formulae, algorithms, models, and methodologies; and (v) computer software, computer programs, and databases (whether in source code, object code or other form).

1.46 “Intellectual Property Rights” means all proprietary rights and privileges of any kind or nature, however known or denominated, whether arising by operation of law, contractual obligation, or other means, throughout the world, including the right to distribute, exhibit, broadcast, and market by all means now known or hereafter devised (including over the Internet, World Wide Web, or other computer network) Intellectual Property.

1.47 “IP Assets” has the meaning set forth in **Section 3.5** hereof.

1.48 “Inventory” means all of Seller’s inventories (including, without limitation, raw materials, processed scrap, packaging materials, supplies, work in process, finished goods, spare parts and replacement and component parts and fuel) that are used, or held for use, in connection with the operation of the Business.

1.49 “Junior Term Loans” means all Term Loans (as such term is defined in the First Lien Credit Agreement) other than the Senior Term Loans (as such term is defined in the First Lien Credit Agreement).

1.50 “Knowledge of Seller” or any other similar knowledge qualification in this Agreement means all facts actually known by the President of the Seller and any member of the Seller’s board of directors.

1.51 “Material Adverse Effect” means a state of facts, event, change or effect to the Business, that results in a material adverse effect on the Business, taken as a whole, but excludes any state of facts, event, change or effect caused by states of facts, events, changes or developments relating to: (i) changes or conditions affecting the industry in general; (ii) changes in economic, regulatory or political conditions generally; (iii) any act(s) of war or of terrorism; (iv) the initiation of the Bankruptcy Case; (v) any actions taken in the Bankruptcy Case in furtherance of the transactions contemplated herein; or (vi) changes resulting from any motion, application, proceeding or order relating to, filed or entered in the Bankruptcy Case.

1.52 “Next Highest Bidder” has the meaning set forth in the Bidding Procedures.

1.53 “NPA” means that certain Convertible Note Purchase Agreement dated as of October 16, 2015 among Seller, the Guarantors (as defined therein), the Noteholders (as defined therein) and Homewood NJOY Services LLC as Agent, as amended on February 5, 2016 and further amended on April 8, 2016.

1.54 “Permits” means all licenses, certificates of authority, permits, orders, consents, franchises, approvals, registrations, clearances, variances, exemptions, local siting approvals,

authorizations, qualifications and filings under any laws or with any Governmental Entities or other private Persons.

1.55 “Person” means an individual, corporation, partnership, limited liability company, firm, joint venture, association, joint stock company, trust, unincorporated organization or other entity, or any Governmental Entity or quasi-governmental body or regulatory authority.

1.56 “Post-Closing Tax Period” shall mean (i) any Tax period beginning any time after the Closing Date and (ii) with respect to a Tax period that commences before but ends after the Closing Date, the portion of such period beginning the day after the Closing Date.

1.57 “Pre-Closing Tax Period” shall mean (i) any Tax period ending on or before the Closing Date and (ii) with respect to a Tax period that commences before but ends after the Closing Date, the portion of such period up to and including the Closing Date.

1.58 “Purchased Assets” has the meaning set forth in **Section 2.1** hereof.

1.59 “Purchase Price” has the meaning set forth in **Section 2.5** hereof.

1.60 “Purchaser” has the meaning given to it in the recitals hereto.

1.61 “Sale Approval Order” has the meaning set forth in **Section 5.4(c)** hereof.

1.62 “Sale Hearing” means the hearing to approve the sale of the Purchased Assets.

1.63 “Second Lien Claims” means (a) the aggregate principal amount of obligations outstanding under the NPA, together with accrued interest and any other Claims with respect to the NPA, and any Liens securing the foregoing.

1.64 “Seller” has the meaning given to it in the recitals hereto.

1.65 “Seller Plan” means an Employment Related Plan that Seller or any ERISA Affiliate sponsors, maintains, has any obligation to contribute to, has or may have liability under or is otherwise a party to, or that otherwise provides benefits for employees, former employees, independent contractors or former independent contractors (or their dependents and beneficiaries) of Seller on or prior to the Closing Date and, in the case of an Employment Related Plan that is subject to Part 3 of Title I of ERISA, Section 412 of the Code, or Title IV of ERISA, at any time during the five (5) year period preceding the Closing Date.

1.66 “Seller’s Representative” has the meaning set forth in **Section 7.15** hereof.

1.67 “Sponsors” means the lenders and agent pursuant to the NPA and the Term Lenders (as such term is defined in the First Lien Credit Agreement).

1.68 “Subsidiary” means, with respect to any Person, any other Person (i) of which the first Person owns directly or indirectly fifty percent (50%) or more of the equity interest in the other Person; (ii) of which the first Person or any other Subsidiary of the first Person is a general partner or (iii) of which securities or other ownership interests having ordinary voting power to

elect a majority of the board of directors or other persons performing similar functions with respect to the other Person are at the time owned by the first Person and/or one or more of the first Person's Subsidiaries.

1.69 “**Successful Bidder**” shall have the meaning set forth in the Bidding Procedures.

1.70 “**Tangible Personal Property**” has the meaning set forth in **Section 2.1(f)** hereof.

1.71 “**Taxes**” (or “**Tax**” where the context requires) shall mean all federal, state, county, provincial, local, foreign and other taxes (including, without limitation, income, alternative or add-on minimum, profits, premium, estimated, license, registration, value added, escheat, abandoned or unclaimed property, excise, sales, use, occupancy, gross receipts, franchise, ad valorem, severance, capital levy, production, transfer, withholding, employment and payroll related and property taxes and other governmental charges and assessments and taxes of any kind whatsoever), whether disputed or not, whether attributable to statutory or nonstatutory rules and whether or not measured in whole or in part by net income, including any obligations to indemnify or otherwise assume or succeed to the Tax liability of any other Person and including, without limitation, interest, additions to tax or interest, charges and penalties with respect thereto, and expenses associated with contesting any proposed adjustment related to any of the foregoing.

1.72 “**Tax Return**” means any report, return, declaration, claim for refund or other information or statement supplied or required to be supplied by any Person relating to Taxes, including any schedules or attachments thereto and any amendments thereof.

2. PURCHASE AND SALE OF ASSETS

2.1 Purchase and Sale of Assets. Subject to the terms and conditions of this Agreement together with any Bankruptcy Court approval that may be required, including the payment by Purchaser of the Purchase Price, at the Closing, Seller hereby agrees to sell, assign, transfer, convey and deliver to Purchaser, and Seller hereby sells, assigns, transfers, conveys and delivers to Purchaser, free and clear of any and all Encumbrances, good, valid and marketable title and interest in and to all of the assets, properties and rights of Seller (other than the Excluded Assets) to the maximum extent permitted by Section 363 of the Bankruptcy Code (such assets, properties and rights are hereinafter collectively referred to as the “**Purchased Assets**”), on an “As Is/Where Is” basis, including, but not limited to, the following assets, properties and rights:

- (a) All Inventory;
- (b) All Accounts Receivable, Cash and Cash Equivalents;
- (c) All Intellectual Property and Intellectual Property Rights;
- (d) All rights and privileges of Seller under the contracts, agreements, leases and licenses listed on **Schedule 2.1(d)** (the “**Assumed Contracts**”), which list may be revised by Purchaser in its sole discretion at any time prior to Closing;
- (e) All vested rights and privileges of Seller under or relating to any contracts or leases to which Seller is or was a party that are not capable of being assumed and/or assigned

under Section 365 of the Bankruptcy Code, including but not limited to those set forth on **Schedule 2.1(e)**;

(f) All owned equipment (including, but not limited to, office equipment), computers, servers, workstations, printers, machines, materials, prototypes, tools, supplies, vehicles, furniture, fixtures, all physical embodiments of the Works, and improvements to the foregoing (including, but not limited to, the tangible assets identified on **Schedule 2.1(f)**) (collectively, “**Tangible Personal Property**”); provided, however, that, Seller, Seller’s bankruptcy estate, and any successor to Seller, including any trustee appointed in the Bankruptcy Case, shall be provided with reasonable access to any information on Seller’s computer system in existence as of the Closing Date for a period of twelve (12) months thereafter to the extent necessary for the investigation of and pursuit of claims and causes of action not being purchased by Purchaser or otherwise released;

(g) All personal or mixed property, whether tangible or intangible, including but not limited to those set forth on **Schedule 2.1(g)**;

(h) All files, documents, instruments, papers, books and records (whether in paper, digital or other tangible or intangible form) that are now, or at the time of the Closing will be, used or held for use in or otherwise related to, useful in or necessary for the conduct of, the Business, the Purchased Assets or the Assumed Liabilities, including all financial records, technical information, operating and production records, quality control records, blueprints, Tax Returns, research and development notebooks and files, customer credit data, manuals, engineering and scientific data, business development, positioning, marketing and sales related material, drawings, technical plans, business plans, budgets, price lists, and lists of customers and suppliers; provided, however, that, Seller, Seller’s bankruptcy estate and any successor to Seller, including any trustee appointed in the Bankruptcy Case, shall be provided with reasonable access to any information in such files in existence as of the Closing Date for a period of twelve (12) months thereafter to the extent necessary for the investigation of and pursuit of claims and causes of action not being purchased by Purchaser or otherwise released;

(i) All interests in Permits, to the extent assignable, transferable or reissuable;

(j) All goodwill and other intangibles owned by Seller;

(k) All of Seller’s claims or causes of action of any type (other than claims that are Excluded Assets); and

(l) All Seller’s rights under the Insurance Policies identified on **Schedule 3.10** of the Disclosure Schedules.

2.2 Excluded Assets. Notwithstanding anything to the contrary herein, Seller shall not cause to be sold, assigned, transferred, conveyed or delivered, to Purchaser, and Purchaser shall not purchase, and the Purchased Assets shall not include, any right, title or interest of Seller in, any of the following assets (the “**Excluded Assets**”):

(a) All rights of Seller under this Agreement and the Ancillary Agreements;

(b) All corporate records, including without limitation, the organizational documents of Seller, accounting documents, audit materials, legal records, board and member minutes and related correspondence, stock transfer books, blank stock certificates and other related documents; provided, however, that Purchaser shall be granted reasonable access to, and the right to make copies of, any such documents;

(c) All human resources material including without limitation employment and compensation records and benefits information, except with respect to Transferred Employees;

(d) All executory contracts and unexpired leases that are not Assumed Contracts;

(e) All bankruptcy avoidance claims of Seller, including, without limitation, any claims arising under Sections 544, 545, 547, 548 549, 550 and 551 of the Bankruptcy Code and any applicable state law, except any such claims that may exist against any Sponsor or Affiliate of any Sponsor, or their respective directors, officers, partners, members, managers, agents, or representatives;

(f) All of Seller's and/or Seller's bankruptcy estate's director and officer liability claims, under applicable law, but (i) only to the extent of the Seller's director and officer liability policy limits, and (ii) excluding any such claims at all that may exist against any Sponsor or Affiliate of any Sponsor, or their respective directors, officers, partners, members, managers, agents, or representatives; and

(g) All Seller Plans and all assets owned or held by any Seller Plans.

2.3 Assumed and Excluded Liabilities.

(a) Upon the terms and subject to the conditions of this Agreement, on the Closing Date, Purchaser shall assume and agree to perform and discharge, when due (in accordance with their respective terms and subject to the respective conditions thereof) only the following obligations, claims and liabilities of Seller and no others (collectively, the "**Assumed Liabilities**"): (i) liabilities arising from the ownership of the Purchased Assets on and after the Closing Date, (ii) liabilities under the Assumed Contracts arising on and after the Closing; (iii) the Cure Claims; and (iv) post-petition trade payables arising from the operation of the Business by Purchaser or its Subsidiary in the ordinary course.

(b) Seller shall retain, and shall be responsible for paying or performing when due, or discharging, and shall pay or perform when due, or discharge, and the Purchaser shall not assume or have any responsibility for, all liabilities of Seller or its Affiliates not expressly assumed by Purchaser pursuant to **Section 2.3(a)** of this Agreement (the "**Excluded Liabilities**"). The term Excluded Liabilities shall specifically include, without limitation:

- (i) Taxes accruing during the Pre-Closing Tax Period;
- (ii) any and all liabilities accruing and/or arising out of or relating to the Excluded Assets;

(iii) except for the CRCMS fee subject to approval by the court, any and all liabilities of Seller under this Agreement and all legal, accounting, brokerage, investment banking and finder's fees or other fees and expenses incurred by or on behalf of Seller in connection with this Agreement and the transactions contemplated hereby;

(iv) any and all liabilities and obligations to current and former employees or contractors of Seller, or arising under or in connection with any Seller Plans, and including commissions payable, deferred compensation, past due wages, or interest payable;

(v) any and all liabilities and obligations arising out of or relating to any line-of-credit or other payable or debt facility or instrument;

(vi) any and all pre-petition trade payables or other accounts payable of Seller; and

(vii) all liabilities related to, associated with or arising out of any action, claim, suit or proceeding with respect to (i) the ownership, operation or use of the Purchased Assets, (ii) the operation of the Business prior to the Closing, or (iii) any Excluded Asset, in each case regardless of whether such action, claim, suit or proceeding is brought prior to, on or after the Closing.

2.4 Closing. Subject to the terms and conditions of this Agreement, the Closing shall take place at the offices of Gellert Scali Busenkell & Brown, LLC, 1201 N. Orange St., 3rd Floor, Wilmington, Delaware 19801, at such time as mutually agreed upon, or at such other place as the parties agree orally or in writing.

2.5 Consideration. The aggregate consideration to be paid by Purchaser for the Purchased Assets (the "**Purchase Price**") shall be the following:

(a) a cash amount equal to (i) the total amount of fees and expenses owed to CohnReznick Capital Markets Securities LLC, of approximately \$312,500, pursuant to the retention agreement approved by the Bankruptcy Court on October 7, 2016 (D.I. 127) and the Bid Procedures Order payable by Purchaser to CohnReznick Capital Markets Securities LLC at Closing by wire transfer or immediately available funds, plus (ii) the amount of Seller's obligations outstanding under the DIP Facility, payable by Purchaser to Seller at Closing by wire transfer or immediately available funds, plus (iii) \$250,000 to the Seller for the benefit of the Seller's general bankruptcy estate (collectively, the "Cash Payment");

(b) the Credit Bid of \$29,515,060, representing the Second Lien Claims and the Junior Term Loans, all of which will be released and discharged upon Closing;

(c) assumption of the Senior Term Loans (as defined in the First Lien Credit Agreement) pursuant to the consent referenced in **Section 2.6**; and

(d) assumption of the Assumed Liabilities.

The parties agree that to the extent that the purchase of the Purchased Assets does not constitute an Agreed G Reorganization, Purchaser shall prepare and deliver to Seller an allocation

schedule setting forth Purchaser's good faith determination of the allocation of the Purchase Price among the Purchased Assets (the "**Allocation**") in accordance with Code Section 1060 within sixty (60) days of the Purchaser's determination that the purchase of the Purchased Assets does not constitute an Agreed G Reorganization. The Allocation shall be used by the parties in preparing Form 8594 for each of the Purchaser and the Seller and all Tax Returns of Purchaser and Seller. Purchaser and Seller shall report and file all Tax Returns (including amended Tax Returns and claims for refund) in a manner that is consistent with the Allocation, and shall take no position contrary thereto or inconsistent therewith for Tax purposes unless required by applicable law. Without changing the Purchase Price, the Purchaser has the option to leave assets in Seller's bankruptcy estate, to exclude from Purchased Assets any assets of the Seller that are sold to other parties, and, prior to the Closing, to add or remove contracts, agreements, leases or licenses from Assumed Contracts. Purchaser further reserves the right to increase the cash portion of the Purchase Price (which increased portion may be used to satisfy the Senior Term Loans in all or part).

In accordance with the terms and conditions of an escrow agreement entered into by and among Purchaser, Seller and Gellert Scali Busenkell & Brown, LLC as escrow agent, dated as of November 7, 2016 (the "**Escrow Agreement**"), Seller has received a deposit from or on behalf of Purchaser (the "**Deposit**"). The Deposit will be released in accordance with the terms of the Escrow Agreement.

2.6 Delivery. Subject to entry of the Sale Approval Order, at the Closing:

- (a) Purchaser shall deliver the Cash Payment to Seller;
- (b) Purchaser shall deliver to Seller the written consent of the applicable lenders under the DIP Facility to the assumption by Purchaser of the Sellers' obligations with respect to the DIP Amount on terms reasonably acceptable to Purchaser;
- (c) Purchaser shall deliver to Seller fully executed releases and waivers with respect to the First Lien Claims (it being understood that because Purchaser is seeking to assume Seller's obligations, such releases and waivers may be granted only in the sole discretion of the lenders under the First Lien Credit Agreement);
- (d) Purchaser shall deliver to Seller fully executed releases and waivers with respect to the Second Lien Claims;
- (e) Purchaser shall deliver to Seller the officer's certificate required to be delivered pursuant to **Section 6.2(a)** and **6.2(b)**.
- (f) Seller shall deliver to Purchaser the Purchased Assets;
- (g) Seller shall deliver to Purchaser an executed Bill of Sale in the form attached as **Exhibit B** hereto;
- (h) Seller and Purchaser shall execute and deliver the Assignment and Assumption Agreement in the form attached as **Exhibit C** hereto;

(i) Seller and Purchaser shall execute and deliver a notarized original of the Intellectual Property Assignment in the form attached as **Exhibit D** hereto;

(j) Seller shall deliver to Purchaser all necessary consents to assignment related to the Assumed Contracts and Permits;

(k) Seller shall deliver to Purchaser such other and further documents as Purchaser shall reasonably request to demonstrate the purchase and sale of the Purchased Assets and conveyance of good and marketable title therein by the Purchaser as contemplated herein and to vest in Purchaser all right, title and interest in, to and under the Purchased Assets;

(l) Seller shall deliver to Purchaser any and all trademark, patent and copyright prosecution files included in the Purchased Assets;

(m) Seller shall deliver to Purchaser the officer's certificate required to be delivered pursuant to **Section 6.1(a)** and **6.1(b)**;

(n) Seller shall deliver to Purchaser an affidavit, sworn under penalty of perjury and dated as of the Closing Date, in form and substance required under the Treasury Regulations issued pursuant to Section 1445 of the Code, stating that Seller is not a foreign person as defined in Code Section 1445 of the Code;

(o) Seller shall deliver a true and correct copy of the Sale Approval Order; and

(p) Seller shall deliver a copy of the Bankruptcy Court's docket sheet for the Bankruptcy Case evidencing that the Sale Approval Order is a Final Order.

2.7 Possession. Subject to entry of the Sale Approval Order, right to possession of the Purchased Assets shall transfer to Purchaser on the Closing Date. Seller shall transfer and deliver to Purchaser on the Closing Date such keys, lock and safe combinations and other similar items as Purchaser shall require to obtain immediate and full occupation and control of the Purchased Assets, and shall also make available to Purchaser at Seller's then existing locations all documents in Seller's possession that are required to be transferred to Purchaser by this Agreement.

2.8 Transfer Taxes. Any sales, use, purchase, transfer, franchise, deed, fixed asset, stamp, documentary stamp, use or other Taxes and recording charges that may be payable by reason of the sale of the Purchased Assets or the assumption of the Assumed Liabilities under this Agreement or the transactions contemplated herein (collectively, "**Transfer Taxes**") that are not exempted under Section 1146(c) of the Bankruptcy Code (or otherwise exempted) shall be borne and paid by Purchaser.

2.9 "As Is/Where Is" Transaction. Purchaser acknowledges and agrees that it has conducted its own independent investigation, review and analysis of the Business, the Purchased Assets and the Assumed Liabilities, and acknowledges that it has been provided adequate access to the personnel, properties, assets, premises, books and records, and other documents and data of the Seller for such purpose. Purchaser acknowledges and agrees that: (a) in making its decision to enter into this Agreement and to consummate the transactions contemplated hereby, Purchaser has relied solely upon its own investigation and the express representations and warranties of the

Seller set forth in Article 3 of this Agreement; and (b) neither Seller, nor any other Person, has made any representation or warranty as to Seller, the Business, the Purchased Assets, the Assumed Liabilities or this Agreement, except as expressly set forth in Article 3 of this Agreement (as qualified by the Seller Disclosure Schedules). SUCH REPRESENTATIONS AND WARRANTIES MADE BY THE SELLER IN ARTICLE 3 CONSTITUTE THE SOLE AND EXCLUSIVE REPRESENTATIONS AND WARRANTIES OF THE SELLER TO PURCHASER IN CONNECTION WITH THE TRANSACTIONS CONTEMPLATED HEREBY, AND PURCHASER UNDERSTANDS, ACKNOWLEDGES AND AGREES THAT, EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES SET FORTH IN ARTICLE 3 OF THIS AGREEMENT, ALL OTHER REPRESENTATIONS AND WARRANTIES OF ANY KIND OR NATURE EXPRESS OR IMPLIED, WRITTEN OR ORAL (INCLUDING ANY REPRESENTATION OR WARRANTY AS TO THE ACCURACY OR COMPLETENESS OF ANY INFORMATION REGARDING ANY SELLER, ANY AFFILIATES OF ANY SELLER, THE BUSINESS, THE PURCHASED ASSETS OR THE ASSUMED LIABILITIES FURNISHED OR MADE AVAILABLE TO PURCHASER AND ITS REPRESENTATIVES AND ANY INFORMATION, DOCUMENTS OR MATERIAL MADE AVAILABLE TO PURCHASER, MANAGEMENT PRESENTATIONS OR IN ANY OTHER FORM IN EXPECTATION OF THE TRANSACTIONS CONTEMPLATED HEREBY OR AS TO THE FUTURE REVENUE, PROFITABILITY OR SUCCESS OF THE BUSINESS, OR ANY REPRESENTATION OR WARRANTY ARISING FROM STATUTE OR OTHERWISE IN LAW OR RELATING TO MERCHANTABILITY OR FITNESS FOR USE) ARE SPECIFICALLY DISCLAIMED BY THE SELLER. PURCHASER HEREBY ACKNOWLEDGES AND AGREES THAT PURCHASER IS PURCHASING THE PURCHASED ASSETS ON AN “AS IS, WHERE IS”, “WHERE IS,” AND “WITH ALL FAULTS” BASIS AFTER GIVING EFFECT TO THE TERMS CONTAINED HEREIN.

3. REPRESENTATIONS AND WARRANTIES OF SELLER

Seller hereby represents and warrants to Purchaser that, subject to entry of the Sale Approval Order and except as set forth in the Disclosure Schedule, which identifies exceptions only by the specific Section or subsection to which each entry relates, the statements in this **Section 3** are correct and complete as of the date hereof and shall be correct and complete as of the Closing Date.

3.1 Authority; No Conflicts. Seller is a corporation duly organized and in good standing under the laws of the State of Delaware and, subject to the limitations imposed on Seller as a result of having filed a petition for relief under the Bankruptcy Code, has the requisite power and authority to own, lease and operate its properties and to carry on its business as now conducted. Seller is duly licensed or qualified to do business as a foreign corporation and is in good standing in each jurisdiction in which the ownership of its property or the conduct of its business requires such qualification or license. Seller has all requisite power and authority to execute and deliver this Agreement and the Ancillary Agreements to which it is or shall, pursuant to this Agreement, be a party, and to perform, carry out and consummate the transactions contemplated hereby and thereby. The execution, delivery and performance of this Agreement and the Ancillary Agreements to which it is or shall, pursuant to this Agreement, be a party have been duly authorized by all necessary action on the part of Seller. This Agreement has been duly executed and delivered by Seller and constitutes the valid and legally binding obligation of Seller,

enforceable against Seller in accordance with its terms and conditions. Except as a result of the Bankruptcy Case and subject to the entry of the Sale Approval Order by the Bankruptcy Court, neither the execution and the delivery of this Agreement or any Ancillary Agreement, nor the consummation of the transactions contemplated hereby and thereby, will (a) conflict with, result in a violation, default, acceleration or breach of the terms of (with or without notice or passage of time), require the consent of a party under, or create in any party the right to accelerate, terminate, modify or cancel (i) the organizational documents of Seller, or (ii) any Purchased Contract or acquired Permit, (b) result in the creation or imposition of any Encumbrance on any of the Purchased Assets, (c) conflict with or result in a violation or breach of any law or regulation applicable to, or require the consent of a Governmental Entity with authority over Seller or the Purchased Assets.

3.2 Title. Seller has good and marketable title to, or a valid interest in, all of the Purchased Assets and, upon the Closing will convey and transfer to Purchaser all of the Purchased Assets, and Purchaser shall receive good and marketable title to, or a valid interest in, all of the Purchased Assets free and clear of any Encumbrances, pursuant to sections 105 and 363 of the Bankruptcy Code and any other applicable sections of the Bankruptcy Code and as set forth in the Sale Approval Order.

3.3 Brokers. Other than the Seller's retention of CohnReznick Capital Markets Securities LLC ("**CRCMS**") pursuant to a prior order of the Bankruptcy Court, Seller has no liability or obligation to pay any broker, finder or investment banker, any brokerage, finder's or other fee or commission in connection with the origination, negotiation or execution of this Agreement and the Ancillary Agreements or the transactions contemplated by this Agreement and the Ancillary Agreements based upon arrangements made by or on behalf of Seller for which Purchaser could become liable or obligated. Seller is responsible for and shall pay any and all amounts due and owing to CRCMS arising from the origination, negotiation or execution of this Agreement and the Ancillary Agreements or the transactions contemplated by this Agreement and the Ancillary Agreements and Purchaser has no obligation to CRCMS.

3.4 Litigation. Except as set forth in **Schedule 3.4** of the Disclosure Schedules, other than the Bankruptcy Case, there is no claim, action, suit, proceeding, opposition, challenge, cancellation proceeding or investigation (collectively, "**Actions**") pending or, to the Knowledge of Seller, currently threatened against Seller or the Business that would prohibit Seller from entering into this Agreement or any Ancillary Agreement, or to consummate the transactions contemplated hereby or thereby, or that, to the Knowledge of Seller, could result, either individually or in the aggregate, in any Material Adverse Effect, nor, to the Knowledge of Seller, is there any basis for the foregoing. There are no outstanding orders, writs, judgments, decrees, injunctions or settlements that restrict the Business, the Purchased Assets or the Assumed Liabilities in any material respect. **Schedule 3.4** of the Disclosure Schedules sets forth the caption and summary description of all Actions to which Seller or any Affiliate is a party or the Purchased Assets, Assumed Liabilities or the Business is subject.

3.5 Intellectual Property. **Schedule 3.5** of the Disclosure Schedules sets forth a complete and accurate list of all registered Intellectual Property and material unregistered Intellectual Property. Except as otherwise disclosed in **Schedule 3.5** of the Disclosure Schedules, Seller possesses all right, title and interest in and to the Intellectual Property and all Intellectual

Property Rights inherent therein or appurtenant thereto (all of the foregoing, collectively, the “**IP Assets**”), and all IP Assets shall be conveyed and transferred to Purchaser free and clear of all Encumbrances. No claims are pending against before a Governmental Entity or, to the Knowledge of Seller, threatened with regard to the ownership by Seller of any Intellectual Property. No Intellectual Property is subject to any material restriction on the use thereof by Seller, or material restriction on the licensing thereof by Seller to any Person. To the Knowledge of Seller, Seller has not infringed, misappropriated or otherwise violated, any intellectual property of any other Person and is not aware of any facts that indicate a likelihood of any of the foregoing and has not received any notices regarding any of the foregoing (including any demands or offers to license any intellectual property from any third party). To the Knowledge of Seller, the Intellectual Property is not being infringed, misappropriated or otherwise violated by any other Person.

3.6 Contracts.

(a) **Schedule 3.6(a)** of the Disclosure Schedules sets forth a complete and accurate list of the Contracts material to the Business or the Purchased Assets, including without limitation, Contracts: (i) with any Affiliate or current or former officer, director, stockholder or Affiliate of Seller; (ii) pursuant to which Seller or its Subsidiary is required to purchase or sell a stated portion of its requirements or output from or to another party; (iii) involving consideration in excess of \$25,000 annually or \$50,000 in the aggregate over the term of the Contract; (iv) for the sale of any of the assets of Seller or its Subsidiary other than in the ordinary course of business or for the grant to any Person of any preferential rights to purchase any of its assets; (v) for joint ventures, strategic alliances or partnerships; (vi) containing covenants of Seller or any of its Subsidiaries not to compete in any line of business or with any Person in any geographical area; (vii) relating to the acquisition by Seller or its Subsidiary of any operating business or the capital stock of any other Person; (viii) under which Seller or its Subsidiary has made advances or loans to any other Person in excess of \$5,000; (ix) providing for severance, retention, change in control or similar payments in excess of \$20,000; (x) for the employment of any individual on a full-time, part-time or consulting or other basis providing annual compensation in excess of \$75,000; (xi) for the provision of goods or services involving consideration in excess of \$100,000 annually or \$250,000 in the aggregate over the term of the Contract; (xii) that require any payments by way of royalties, fees or otherwise in excess of \$50,000 annually to any owner, licensor of, or other claimant to any Intellectual Property (excluding (A) licenses to customers or contractors or from suppliers in the ordinary course of business and (B) licenses to commercially available off-the-shelf software); (xiii) outstanding agreements of guaranty, surety or indemnification, direct or indirect, by Seller or its Subsidiary in excess of \$10,000; (xiv) which involve the expenditure of more than \$250,000 in the aggregate; and (xv) with an officer, director, shareholder or Affiliate of Seller.

(b) Other than with respect to the cure obligations under Section 365 of the Bankruptcy Code, each Assumed Contract, is in full force and effect in all material respects and constitutes a legal, valid, binding agreement, enforceable against Seller or its Affiliates and, to the Knowledge of Seller, each other party thereto, in accordance with its terms. Other than with respect to the cure obligations under Section 365 of the Bankruptcy Code, neither Seller nor any Affiliate of Seller nor, to the Knowledge of Seller, any other party to each such contract is in violation or material breach of, or in default under, nor has there occurred an event or condition that with the passage of time or giving of notice (or both) would constitute a default under, or

permit the termination of, any such contract. Seller has made available to Purchaser, correct and complete copies of all Assumed Contracts set forth on **Schedule 2.1(d)** and has provided Purchaser with its good faith estimate of the Cure Claims.

3.7 Tangible Personal Property. The Tangible Personal Property of Seller is free from material defects, subject to normal wear and tear and continued repair and replacement in accordance with past practice, and Seller has not received notice that any of the Tangible Personal Property is in violation of any existing law or order of any Governmental Authority. No approval or consent of any Person is needed so that the interest of Seller and its Affiliates in the Tangible Personal Property shall continue to be in full force and effect and enforceable by Purchaser following the Closing.

3.8 Subsidiaries. **Schedule 3.8** of the Disclosure Schedules sets forth a correct and complete list of the Company's Subsidiaries and all other equity interests it holds in any other Person.

3.9 Real Property. Seller does not own any real property. **Schedule 3.9** of the Disclosure Schedules contains a correct and complete list of each parcel of real property leased, subleased, licensed or occupied to or by Seller that is now, or at the time of Closing will be, used or held for use in or otherwise related to, or necessary for the conduct of, the Business ("**Leased Real Property**"), and includes the parties to such lease, sublease or license, any amendments thereto, the expiration date of such lease or sublease and any consents, approvals or other documents necessary or required such that each lease and sublease will be in full force and effect and remain binding on all parties thereto in accordance with the terms of such lease, sublease or license as of the Closing Date. Neither Seller nor any of its Affiliates owes any brokerage commissions with respect to any such leased space (including any contingent obligation in respect of future lease extensions). Seller has valid leasehold interests in all Leased Real Property and Seller is in possession of each parcel of Leased Real Property. Seller has made available to Purchaser prior to the execution of this Agreement correct and complete copies of all leases set forth in **Schedule 3.9** of the Disclosure Schedules (including any amendments and renewal letters) to the Leased Real Property.

3.10 Insurance. **Schedule 3.10** of the Disclosure Schedules sets forth a complete and correct list of all insurance policies held by or on behalf of Seller relating to the Business and a brief description of such policies (the "**Insurance Policies**"). The Insurance Policies listed on **Schedule 3.10** of the Disclosure Schedules include all policies of insurance that are required by material commercial contracts relating to the Business, in the amounts required under the Assumed Contracts. All the Insurance Policies listed on **Schedule 3.10** of the Disclosure Schedules are in full force and effect, all premiums due and payable thereon have been paid and no notice of cancellation or termination has been received by Seller with respect to any such policy.

3.11 Assets Held by Seller. Without limiting any of the representations and warranties set forth in **Section 3** of this Agreement, the Purchased Assets include all tangible and intangible assets, property and rights held for use, used in or required for use in the operation of the Business as currently conducted and are sufficient for the operation of the Business as currently conducted and, with respect to tangible property, are in good condition and repair.

3.12 Financial Statements. Set forth on **Schedule 3.12** of the Disclosure Schedules are copies of Seller's (i) unaudited consolidated and consolidating balance sheet as of June 30, 2016 (the "Latest Balance Sheet") and the related statements of income for the six-month period then ended. Each of the foregoing financial statements (including in all cases the notes thereto, if any) is accurate and complete, is consistent with the Seller's books and records (which, in turn, are accurate and complete), presents fairly Seller's financial condition and results of operations as of the times and for the periods referred to therein, and has been prepared in accordance with GAAP, subject changes resulting from normal year-end adjustments for recurring accruals (which shall not be material individually or in the aggregate) and to the absence of footnote disclosure.

3.13 Absence of Certain Changes. Since January 1, 2016, Seller and its Subsidiaries have operated only in the ordinary course of business and there has not been a Material Adverse Effect. Since January 1, 2016, neither Seller nor any of its Subsidiaries has: (a) sold, leased, assigned or transferred any of its tangible assets except in the ordinary course of business consistent with past practice, or canceled without fair consideration any debts or claims owing to or held by it; (b) sold, assigned, licensed, sublicensed, transferred or encumbered any Intellectual Property or abandoned or permitted to lapse any Intellectual Property; (c) made or granted any bonus or any wage or salary increase to any employee or group of employees (except as required by pre-existing contracts or consistent with past practice), or made or granted any increase in any Seller Plan, or amended, terminated or adopted any Seller Plan; (d) made any loans or advances to, or guarantees for the benefit of, any Person; (e) waived any rights of material value, whether or not in the ordinary course of business or consistent with past practice; (f) suffered any damage, destruction or casualty loss to its tangible assets, whether or not covered by insurance; (g) made any change in any method of accounting or accounting policies or changed any material business practice; (h) made, or committed to make, capital expenditures in an aggregate amount greater than \$250,000; (i) instituted or settled any material Action, (j) entered into any other material transaction, whether or not in the ordinary course of business; or (k) agreed or committed to do any of the foregoing.

3.14 Taxes. (a) Seller and its Subsidiaries have timely filed all Tax returns required to be filed with the appropriate Governmental Entities, and all such Tax returns are correct and complete in all respects; (b) other than Taxes the payment of which is prohibited or stayed by the Bankruptcy Code, Seller and its Subsidiaries have paid all Taxes due and payable by it (whether or not such Taxes are shown on any Tax return); (c) Seller and its Subsidiaries have withheld and paid all Taxes required to have been withheld and paid in connection with any amounts paid or owing to any employee, independent contractor, creditor, stockholder, or other third party; (d) neither Seller nor any Subsidiary of Seller has received any written notice of deficiency or assessment from any Governmental Entities with respect to liabilities for Taxes of such entity which have not been fully paid or finally settled; (e) neither Seller nor any Subsidiary of Seller has waived any statute of limitations in respect of Taxes or agreed to any extension of time with respect to a Tax assessment or deficiency; (f) no Tax audit, dispute, claim, controversy, examination, or other Action regarding Taxes is in progress or threatened, with respect to Seller or any of its Subsidiaries; (g) no claim has ever been made by a Governmental Entity in a jurisdiction where Seller or any of its Subsidiaries does not file Tax returns that such entity is or may be subject to taxation by that jurisdiction; (h) neither Seller nor any of its Subsidiaries has waived any statute of limitations in respect of Taxes or agreed to any extension of time with respect to a Tax assessment or deficiency; (i) none of the Assumed Liabilities is an obligation to make a payment

that will not be deductible under Section 280G of the Code; (j) neither Seller nor any of its Subsidiaries has been a member of an Affiliated Group (other than a group the common parent of which was the Seller) filing a consolidated federal income Tax Return or any state, local, or non-U.S. equivalent thereof; (k) neither Seller nor any of its Subsidiaries has any liability for the Taxes of any other Person under Section 1.1502-6 of the Treasury Regulations (or any similar provision of state, local, or foreign Law), as a transferee, successor, by contract, or otherwise; (l) neither the Seller nor any of its Subsidiaries has adopted as a method of accounting, or otherwise accounted for any advance payment or prepaid amount under, (A) the deferral method of accounting described in Rev. Proc. 2004-34, 2004-22 IRB 991 (or any similar method under state, local, or foreign Law) or (B) the method described in Treasury Regulation Section 1.451-5(b)(1)(ii) (or any similar method under state or local law); (m) Seller and its Subsidiaries have properly collected and remitted sales and similar Taxes with respect to sales or leases made or services provided to customers and have properly received and retained any appropriate Tax exemption certificates or other documentation for all such sales, leases or other services made without charging or remitting sales or similar taxes that qualify as exempt from sales and similar Taxes; and (n) neither the Seller nor any of its Subsidiaries has used the cash method of accounting for income Tax purposes.

3.15 Compliance with Laws and Permits. Seller and its Subsidiaries are in compliance in all material respects with all laws or regulations of any Governmental Entity applicable to their respective operations or assets or the Business. Neither the Seller nor any of its Subsidiaries has received any written notice of the violation of any laws or regulations. To the Knowledge of Seller, neither Seller nor any of its Subsidiaries is under investigation with respect to the violation of any law or regulation. Seller and its Subsidiaries currently have all Permits which are required for the operation of the Business as presently conducted. Neither the Seller nor any of its Subsidiaries is in default or violation, and no event has occurred which, with notice or the lapse of time or both, would constitute a default or violation, in any material respect of any term, condition or provision of any material Permit to which it is a party, to which the Business is subject or by which its properties or assets are bound.

4. REPRESENTATIONS AND WARRANTIES OF PURCHASER

Purchaser hereby represents and warrants to Seller as follows:

4.1 Authority. Purchaser is a limited liability company organized and in good standing under the laws of the State of Delaware. Purchaser has the right and authority to enter into, execute, deliver and perform this Agreement and the Ancillary Agreements and to carry out the obligations hereunder and thereunder, without the need for any further approval of its officers and directors. All action on Purchaser's part required for the lawful execution and delivery of this Agreement and the Ancillary Agreements have been taken. Upon its execution and delivery by Purchaser (and assuming the due authorization, execution and delivery by Seller), this Agreement and the Ancillary Agreements will be valid and legally binding obligations of the Purchaser in accordance with their respective terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium and similar laws affecting creditors' rights and remedies generally, and subject, as to enforceability, to general principles of equity, including principles of commercial reasonableness, good faith and fair dealing (regardless of whether enforcement is sought in a proceeding at law or in equity).

4.2 Compliance with Other Instruments. The execution, delivery and performance of this Agreement and the Ancillary Agreements, and the consummation of the transactions contemplated hereby and thereby will not result in any such violation or default or be in conflict with or constitute, with or without the passage of time and giving of notice, either a default under any such provision, instrument, judgment, order, writ, decree or contract or an event that results in the creation of any lien, charge or encumbrance upon any of its material properties or assets.

4.3 Brokers. No broker, finder or investment banker is entitled to any brokerage, finder's or other fee or commission in connection with the origination, negotiation or execution of this Agreement and the Ancillary Agreements or the transactions contemplated by this Agreement and the Ancillary Agreements based upon arrangements made by or on behalf of Purchaser.

4.4 Litigation. There is no action, suit, proceeding or investigation pending or, to Purchaser's knowledge, currently threatened in writing against Purchaser that questions the validity of this Agreement or any Ancillary Agreement, or the right of Purchaser to enter into such agreements, or to consummate the transactions contemplated hereby or thereby.

4.5 Financial Assurance. The Purchaser has sufficient cash, available lines of credit or other sources of immediately available funds to enable it to make payment of the Purchase Price and any other amounts to be paid by it hereunder.

4.6 Good Faith Purchaser. This Agreement and all Ancillary Agreements were negotiated and entered into at arm's length and, to the Purchaser's knowledge, in good faith, and Seller and Purchaser did not engage in any collusion with respect to setting or fixing the Purchase Price, and to the knowledge of Purchaser, there are no facts to support a finding that Seller negotiated and entered into this Agreement and all Ancillary Agreements other than in good faith as described in Section 363(m) of the Bankruptcy Code.

5. COVENANTS

5.1 Seller Records. Prior to the Closing Date, Seller shall afford Purchaser, its attorneys, accountants and representatives, free and full access to Seller's Business, books, records and employees, and shall provide to Purchaser and its representatives such additional financial and operating data and other information as Purchaser shall from time to time reasonably request. Seller shall cause its respective officers, employees, consultants, agents, accountants, attorneys and other representatives to cooperate with Purchaser and its representatives in connection with any such investigation and examination (including, if requested by Purchaser, promptly arranging meetings or telephone calls with business relations of Sellers as requested by Purchaser).

5.2 Filings and Authorizations. Each of Seller and Purchaser, as promptly as practicable, (i) shall make, or cause to be made, all such filings and submissions under laws, rules and regulations applicable to it, as may be required to consummate the transactions contemplated herein, in accordance with the terms of this Agreement, (ii) shall use all commercially reasonable efforts to obtain, or cause to be obtained, all authorizations, approvals, Consents and waivers from all Governmental Entities and non-governmental Persons necessary to be obtained by it, in order to consummate the transactions contemplated herein; provided, however, that, any provision hereof to the contrary notwithstanding, neither Seller nor Purchaser shall have any obligation to

pay any fee to any third party (other than any lawful fees assessed by a Governmental Entity) for the purpose of obtaining any Consent or any costs and expenses of any third party resulting from the process of obtaining such Consent and (iii) shall use commercially reasonable efforts to take, or cause to be taken, all other actions necessary, proper or advisable in order for him, her or it to fulfill his, her or its obligations hereunder (including the satisfaction of the conditions to closing set forth in **Section 6**). Seller and Purchaser shall coordinate and cooperate with one another in exchanging such information and supplying such reasonable assistance as may be reasonably requested by each in connection with the foregoing. Each party shall promptly inform the other party of any oral communication with, and provide copies of written communications with, any Governmental Entity regarding any filing or submission. No party hereto shall independently participate in any formal meeting with any Governmental Entity in respect of any filing, investigation or other inquiry conducted in connection with the contemplated transactions without giving the other parties hereto prior notice of the meeting and, to the extent permitted by such Governmental Entity, the opportunity to attend and/or participate.

5.3 Further Assurances; Accounts.

(a) Simultaneous with the Closing, Seller shall take such steps as may be necessary to put Purchaser in possession and operating control of the Purchased Assets and the Business. At or after the Closing, Seller shall, at the reasonable request of Purchaser, without further consideration, promptly execute and deliver, or cause to be executed and delivered, to Purchaser such assignments, bills of sale, consents and other instruments in addition to those required by this Agreement, in form and substance reasonably satisfactory to Purchaser, and take all such other actions as Purchaser may reasonably deem necessary or desirable to implement any provision of this Agreement and to more effectively transfer to and vest in Purchaser, ownership in, and to put Purchaser in possession of, all of the Purchased Assets, free and clear of any and all Encumbrances.

(b) Purchaser and Seller each shall use its commercially reasonable efforts to obtain (or obtain consent to transfer to Purchaser) as promptly as practicable all Permits required for Purchaser to conduct the Business and to own the Purchased Assets. Notwithstanding the foregoing, neither Purchaser nor Seller shall be required to expend any material sum or agree to a material concession to any Governmental Entity to obtain any such Permits.

(c) Upon the execution and delivery of this Agreement, Seller will carry out the applicable transfer instructions promulgated by the applicable domain name registrar as may be necessary or appropriate to effect the transfer of Seller's domain names to Purchaser, and complete Seller's portion of the domain name registrant transfer form attached hereto as **Exhibit E** and forward the completed and signed (and, where applicable, notarized) forms to Purchaser (Purchaser shall not be required to deliver Purchaser's completed portion of the form to Seller). Seller will comply with all assignment procedures specified by the applicable domain name registrar at the time of the assignment.

(d) Seller agrees to execute and deliver all documents and take all action requested by Purchaser or the registrars, including, without limitation, providing Purchaser with passwords, usernames, account numbers, and authorization codes, and assist Purchaser in any reasonable manner to obtain, perfect and enforce, for Purchaser's benefit, Purchaser's right, title

and interest in any and all countries, in and to all property rights in Seller's domain names, including, without limitation, compliance with any requests for documentation, approval and any other information requested by the applicable registrars to complete the transfer of the registrations from Seller to Purchaser, so that the WHOIS databases and records of the respective registrars confirm the transfer of the domain names from Seller to Purchaser.

(e) Seller hereby appoints Purchaser as Seller's attorney in fact to execute any instruments which Seller shall fail for any reason to execute and deliver for a period of five (5) business days following Seller's receipt of written request therefor, it being acknowledged that such appointment is coupled with an interest and is irrevocable. Purchaser will provide Seller with copies of any documents so executed on Seller's behalf.

5.4 Bankruptcy Covenants.

(a) Cure of Defaults. Purchaser shall, as soon as reasonably practicable after the Closing Date, cure any and all monetary (and to the extent disclosed by Seller and consented to by Purchaser, non-monetary) defaults and breaches and satisfy any monetary (and to the extent disclosed by Seller and consented to by Purchaser, non-monetary) liability or obligation arising and/or accruing from or relating to pre-Closing periods under the Assumed Contracts so that such Assumed Contracts may be assigned by Seller to Purchaser in accordance with the provisions of section 365 of the Bankruptcy Code (the "**Cure Amount**"), the Sale Approval Order, any other orders of the Bankruptcy Court effectuating such assignments, and this Agreement. Purchaser reserves the right to contest any Cure Amount.

(b) Motions, Orders, etc. Seller shall promptly provide Purchaser with the proposed final drafts of all documents, motions, orders, or pleadings that Seller proposes to file with the Bankruptcy Court relating to the approval of this Agreement, the Purchased Assets, or the consummation of the transactions contemplated hereby, or any provision therein or herein, and shall provide Purchaser and its counsel with a reasonable opportunity to review and comment on such documents, motions, orders, or pleadings.

(c) Sale Approval Order. Without limiting the generality of the foregoing **Section 5.4(b)**, the sale approval order, in the form annexed hereto as **Exhibit F** (the "**Sale Approval Order**"), shall be reasonably acceptable in form and substance to Purchaser and shall include provisions, among other things (i) providing that Purchaser shall not incur any liability as a successor to the Business, (ii) approving the sale of the Purchased Assets to Purchaser on the terms and conditions set forth in this Agreement and authorizing Seller to proceed with this transaction, (iii) stating that any objections filed with respect to the sale of the Purchased Assets, which have not been withdrawn, are overruled or the interests of such objections have been otherwise satisfied or adequately provided for by the Bankruptcy Court, (iv) finding that the Purchase Price represents fair value for the Purchased Assets, (v) finding that the sale is in the best interests of Seller's estate and creditors, (vi) finding that Purchaser is a good faith purchaser of the Purchased Assets under section 363(m) of the Bankruptcy Code and that the provisions of section 363(n) of the Bankruptcy Code have not been violated, (vii) providing that the sale of the Purchased Assets to Purchaser shall be free and clear of all Encumbrances whatsoever under section 363 of the Bankruptcy Code and any other applicable sections of the Bankruptcy Code, (viii) providing that the Bankruptcy Court shall retain jurisdiction, among other things, for the

purpose of enforcing the provisions of the Sale Approval Order including, without limitation, compelling delivery of the Purchased Assets to Purchaser and protecting Purchaser against any Encumbrances against Seller or the Purchased Assets, (ix) finding that, other than CRCMS, there are no brokers involved in consummating the sale and, other than the fees approved by the Bankruptcy Court in connection with CRCMS's retention of approximately \$312,500, no brokers' commissions are due, (x) providing that the parties hereto shall be authorized to close this transaction immediately upon execution of the Sale Approval Order pursuant to Rules 6004(g) and 6006(d) of the Federal Rules of Bankruptcy Procedure, (xi) authorizing and directing Seller to execute, deliver, perform under, consummate and implement this Agreement, together with all additional instruments and documents that may be reasonably necessary or desirable to implement the foregoing and (xii) determining that Purchaser is not a successor to Seller or otherwise liable for any of the Excluded Liabilities or Excluded Assets and permanently enjoining each and every holder of any of the Excluded Liabilities or Excluded Assets from commencing, continuing or otherwise pursuing or enforcing any remedy, claim, cause of action or Encumbrance against Purchaser or the Purchased Assets related thereto. Seller shall use its best efforts to obtain the earliest available date for a hearing to approve the Sale Approval Order. To the extent that there is any inconsistency between this paragraph and the Sale Approval Order, the Sale Approval Order shall govern.

(d) Assumed Contracts. Seller shall obtain an order or orders (which may include the Sale Approval Order) in a form reasonably satisfactory to Purchaser (collectively the “**Contract Assumption Order**”), among other things (i) approving the assumption and assignment of the Assumed Contracts to Purchaser pursuant to, and subject to the provisions of, section 365 of the Bankruptcy Code; (ii) providing that all monetary (and to the extent disclosed by Seller and consented to by Purchaser, non-monetary) defaults of Seller under the Assumed Contracts arising or accruing prior to the date of the Closing or the Contract Designation Deadline (if assumed after the Closing), without giving effect to any acceleration clauses or any default provisions in such contracts of a kind specified in section 365(b)(2) of the Bankruptcy Code, have been cured or will be promptly cured by Purchaser; and (iii) providing that the Assumed Contracts shall be transferred to, and remain in full force and effect for the benefit of, Purchaser, notwithstanding any provision in any such Assumed Contract or in applicable Law (including those described in sections 365(b)(2) and (f) of the Bankruptcy Code) that prohibits, restricts, or limits in any way such assignment or transfer.

(e) Other Bankruptcy Covenants. Seller shall promptly make any filings, take all actions, and use commercially reasonable efforts to obtain any and all other approvals and orders necessary or appropriate for consummation of the sale of the Purchased Assets, subject to its obligations to comply with any order of the Bankruptcy Court. In the event an appeal is taken, or a stay pending appeal is requested, from any of the foregoing orders of the Bankruptcy Court, Seller shall immediately notify Purchaser of such appeal or stay request and, upon Purchaser's request, shall provide to Purchaser within one (1) business day after Seller's receipt thereof a copy of the related notice of appeal or order of stay. Seller shall also provide Purchaser with written notice of any motion, application, brief or other pleading filed in connection with any appeal from any of such orders.

(f) Competing Transaction. This Agreement is subject to approval by the Bankruptcy Court and the consideration by Seller of higher or better competing bids in respect of

all or any part of the Purchased Assets (whether in combination with other assets of Seller's Affiliates or otherwise) (each a "**Competing Bid**"). Seller is permitted to and to cause its representatives, agents and Affiliates to, initiate contact with, solicit or encourage submission of any inquiries, proposals or offers by, any Person (in addition to Purchaser and its Affiliates, representatives and agents) in connection with any sale or other disposition of the Purchased Assets. In addition, Seller and its representatives, agents and Affiliates shall have the authority to respond to any inquiries or offers to purchase all or any part of the Purchased Assets (whether in combination with assets of Seller's Affiliates or otherwise) and perform any and all other acts related thereto which are required under the Bankruptcy Code or other applicable law, including supplying information relating to the Business and the assets of Seller to prospective purchasers.

5.5 Tax Matters.

(a) Except for any Transfer Taxes (as to which Purchaser shall wholly satisfy), all Taxes and similar ad valorem obligations levied with respect to the Purchased Assets for a taxable period which includes (but does not end on) the Closing Date (collectively, the "**Apportioned Obligations**") shall be apportioned between Seller and Purchaser based on the number of days of such taxable period included in the Pre-Closing Tax Period and the number of days of such taxable period included in the Post-Closing Tax Period. Seller shall be liable for the proportionate amount of such Taxes that is attributable to the Pre-Closing Tax Period, and Purchaser shall be liable for the proportionate amount of such Taxes that is attributable to the Post-Closing Tax Period. Upon receipt of any bill for Taxes relating to the Purchased Assets, each of Seller and Purchaser shall present a statement to the other setting forth the amount of reimbursement to which each is entitled under this Section 5.5 together with such supporting evidence as is reasonably necessary to calculate the proration amount. The proration amount shall be paid by the party owing it to the other within ten (10) Business Days after delivery of such statement. In the event that either Seller or Purchaser shall make any payment for which it is entitled to reimbursement under this Section 5.5(a), the other party shall make such reimbursement promptly but in no event later than ten (10) Business Days after the presentation of a statement setting forth the amount of reimbursement to which presenting party is entitled along with such supporting evidence as is reasonably necessary to calculate the amount of reimbursement.

(b) If applicable, Purchaser shall adopt the "standard procedure" for preparing and filing IRS Forms W-2, as described in Revenue Procedure 2004-53. Under this procedure, Purchaser as the successor employer shall provide Forms W-2 to all Transferred Employees reflecting all wages paid and Taxes withheld by Purchaser as the successor employer for the portion of the calendar year beginning on the day after the Closing Date. Seller as the predecessor employer shall provide Forms W-2 to all Transferred employees reflecting all wages paid and Taxes withheld by Seller for the portion of the calendar year ending on the Closing Date. If applicable, Purchaser shall adopt the "standard procedure" of Rev. Proc. 2004-53 for purposes of IRS Forms W-4 and W-5. Under this Procedure, Seller shall keep on file the Forms W-4 and W-5 provided by the Transferred Employees for the period required by applicable law concerning record retention. Purchaser shall obtain new IRS Forms W-4 and W-5 with respect to each Transferred Employee.

(c) All Tax sharing agreements, Tax allocation agreements, Tax indemnity obligations, and similar agreements, arrangements, understandings, and practices with respect to

or involving the Seller or the Purchased Assets shall be terminated as of the Closing Date and, on or after the Closing Date, neither Purchaser nor any Subsidiary of Purchaser shall be bound thereby or have any liability thereunder.

(d) Purchaser and Seller shall cooperate fully, as and to the extent reasonably requested by the other party, in connection with the filing of Tax Returns and any audit, litigation or other proceeding with respect to Taxes. Such cooperation shall include the retention and (upon the other party's request) the provision of records and information that are reasonably relevant to any such audit, litigation or other proceeding and making employees available on a mutually convenient basis to provide additional information and explanation of any material provided hereunder. All costs and expenses incurred in connection with this **Section 5.5(d)** shall be borne by the party who is subject to such proceeding.

(e) After the Closing, at Purchaser's election, Purchaser (or one of its Subsidiaries) shall exercise exclusive control over the handling, disposition and settlement of any inquiry, examination or proceeding (including an audit) by a Governmental Entity (or that portion of any inquiry, examination or proceeding by a Governmental Entity) with respect to Seller, provided that, to the extent any such inquiry, examination or proceeding by a Governmental Entity could materially affect the Taxes due or payable by Seller, Purchaser (or one of its Subsidiaries) shall control the handling, disposition and settlement thereof, subject to reasonable consultation rights of Seller. Each party shall notify the other party (or parties) in writing promptly upon learning of any such inquiry, examination or proceeding. The parties and their Affiliates shall cooperate with each other in any such inquiry, examination or proceeding as a party may reasonably request. Neither Seller nor any of its Affiliates shall extend, without Purchaser's prior written consent, the statute of limitations for any Tax for which Purchaser or any of its Affiliates may be liable.

(f) At Purchaser's election, the contemplated transactions may be effectuated in a manner designed to qualify as a tax-free reorganization under Code Section 368(a)(1)(G) (an **"Agreed G Reorganization"**), and Seller agrees to take all actions reasonably necessary or advisable to effectuate such treatment, including without limitation (a) the contribution of the Purchased Assets and Assumed Liabilities into a newly formed Subsidiary, (b) the sale of such Subsidiary to Purchaser for the Purchase Price and (c) the liquidation of Seller promptly thereafter.

(g) If and to the extent that the transactions contemplated herein constitute an Agreed G Reorganization: (i) the parties shall prepare and file all applicable income Tax Returns in a manner consistent with the foregoing and shall not take any action or position inconsistent with, or fail to take any necessary action in furtherance of, such treatment; (ii) the parties agree that this Agreement shall constitute a "plan" of Seller for purposes of Sections 368 and 354 of the Code; (iii) the board of directors or board of managers of Seller shall, by resolution, approve the execution of this Agreement and expressly recognize its treatment as a "plan" of Seller for purposes of Sections 368 and 354 of the Code, and the treatment of the transactions contemplated herein as a reorganization under Code Section 368(a)(1)(G) for federal income Tax purposes; (iv) Seller shall provide Purchaser with a statement setting forth the adjusted Tax basis of the Purchased Assets and the amount of net operating losses and other material Tax attributes of Seller that are available as of the Closing Date and after the close of any taxable year of Seller that impacts the numbers previously provided; and (v) Seller shall provide Purchaser with an estimate of the

cancellation of indebtedness income that Seller anticipates realizing for the taxable year that includes the Closing Date, and shall provide revised numbers after the close of any taxable year of Seller that impacts this number.

5.6 Notification. From time to time prior to the Closing, Seller shall notify Purchaser in writing with respect to any matter hereafter arising or any information obtained after the date hereof that, if existing, occurring or known at or prior to the date of this Agreement, would have been required to be set forth or described in the Disclosure Schedule or that is necessary to complete or correct any information in such schedule or in any representation and warranty of Seller that has been rendered inaccurate thereby. Seller shall promptly inform Purchaser of any claim by a third party that a contract has been breached, is in default, may not be renewed or that a consent would be required as a result of the transactions contemplated by this Agreement.

5.7 Use of Name. Seller agrees that from and after the Closing it will not use the name “NJOY” or any abbreviation of or derivation from that name or any name similar to it in any form whatsoever, including in respect of advertising and promotional materials; provided that Seller may use such names solely in connection with the resolution of the Bankruptcy Case.

5.8 Employees.

(a) From and after the date hereof until the Closing Date, Seller shall not terminate the employment of any non-management individual currently employed by the Seller in the Business (collectively, “**Employees**”) (other than for cause), without the prior written consent of Purchaser.

(b) Purchaser (or its Affiliates) may, in its sole discretion, make written offers of employment to any or all of the Employees (the “**Offer Employees**”), with such employment by Purchaser or its Affiliate (as applicable) to commence as of the Closing Date, conditional on Closing. Each such Offer Employee who executes and delivers an offer letter on or before the Closing Date and commences employment with Purchaser (or its Affiliates) on the Closing Date is hereinafter referred to as a “**Transferred Employee**”. Prior to the Closing, Seller shall cooperate with Purchaser in its efforts to obtain an executed offer letter from each such Employee to whom Purchaser desires (or is required) to extend an offer of employment. All such offers of employment shall be (i) subject to such compensation, benefit and other terms and conditions of employment as Purchaser shall determine in its sole discretion and (ii) contingent on such Employee’s waiver of any claims to termination payments against Seller’s bankruptcy estate. On the Closing Date, Seller shall terminate the employment of each Transferred Employee and Purchaser shall commence its employment of such Transferred Employee.

(c) Nothing in this **Section 5.8** expressed or implied shall confer any third party rights or remedies hereunder in any Person, including any Employees or Transferred Employees and nothing herein amends any Seller Plan or any employee benefit plan of Purchaser.

(d) Subject to applicable Law, Seller shall cooperate with Purchaser and shall permit Purchaser a reasonable period during normal business hours prior to the Closing Date, to communicate and meet with Employees at such times as Purchaser shall reasonably request in connection with Purchaser determining which Employees shall be extended an offer of employment.

(e) Following the Closing, Seller and Purchaser shall cooperate reasonably with each other to provide an orderly administrative transition to Purchaser of the Transferred Employees, including the provision by Seller to Purchaser of all necessary or appropriate documents, records, materials, accounting files and Tax information with respect to each Transferred Employee.

5.9 Pre-Closing Operations.

(a) Except as expressly contemplated by this Agreement, as required by applicable law or regulation, as required by orders of the Bankruptcy Court or prohibited by restrictions or limitations under the Bankruptcy Code on the activities and operations of Chapter 11 debtors, or with the prior written consent of Purchaser, prior to the Closing Seller shall, and shall cause its Subsidiaries to:

(i) operate only in the ordinary course of business;

(ii) use its commercially reasonable efforts to (A) preserve its present business operations, organization (including management and sales force) and goodwill of Seller and its Subsidiary and (B) preserve the present relationships with Persons having business dealings with Seller and its Subsidiaries (including customers and suppliers);

(iii) (A) use commercially reasonable efforts to maintain all of the tangible assets and tangible properties of the Seller and its Subsidiaries in their current condition, ordinary wear and tear excepted and (B) maintain insurance upon all of the assets and properties of the Seller and its Subsidiaries in such amounts and of such kinds comparable to that in effect on the date of this Agreement; and

(iv) (A) maintain the books, accounts and records of the Seller and its Subsidiaries in the ordinary course of business, (B) continue to collect accounts receivable and pay accounts payable utilizing normal procedures and without discounting or accelerating payment of such accounts, and (C) comply with all contractual and other obligations applicable to its operation in the ordinary course of business;

(b) Except as expressly contemplated by this Agreement, as required by applicable law or regulation, as required by orders of Bankruptcy Court or prohibited by restrictions or limitations under the Bankruptcy Code on the activities and operations of Chapter 11 debtors or with the prior written consent of Purchaser, prior to the Closing Seller shall not, nor shall it permit any of its Subsidiaries to:

(i) subject any of the Purchased Assets to any Encumbrance;

(ii) sell, lease, license, pledge, cancel, abandon, permit to lapse or otherwise dispose of any Purchased Asset having a fair market value in excess of \$25,000, except sales of Inventory in the ordinary course of business;

(iii) terminate or extend, waive, modify, rescind or make any material amendments to any Assumed Contract or waive, release or assign any material rights or claims thereunder, in each case outside of the ordinary course of business;

(iv) directly or indirectly, increase, modify, or accelerate the payment of any compensation of any current or former employee, consultant, independent contractor, partner, or agent of the Business;

(v) initiate, settle or compromise any material action, suit, litigation or other proceeding involving the Purchased Assets;

(vi) alter, whether through a complete or partial liquidation, dissolution, merger, consolidation, restructuring, reorganization or in any other manner, the legal structure or ownership of itself or any joint venture or similar arrangement to which Seller is a party that is a Purchased Asset hereunder;

(vii) voluntarily incur any Assumed Liabilities, except in the ordinary course of business, or make or agree to make any capital expenditures or investments with respect to the Purchased Assets;

(viii) make or change any election for Tax purposes, change an annual accounting period, adopt or change any accounting method, file any amended Tax Return, fail to pay any tax on or before the date when it becomes due and payable, enter into any closing agreement, settle any Tax claim or assessment, surrender any right to claim a refund of Taxes, consent to any extension or waiver of the limitation period applicable to any tax claim or assessment, or take any other similar action relating to the filing of any Tax Return or the payment of any Tax;

(ix) issue any capital stock, equity interest, option, warrant, subscription, call, exchange right or other right to purchase equity of any Person, or issue any obligations convertible into or exchangeable for equity in Seller; or

(x) agree, whether in writing or otherwise, to do any of the foregoing.

5.10 Preservation of Records. Seller or its successors and Purchaser agree that each of them shall preserve and keep the records held by it or their Affiliates relating to the Purchased Assets for three years after the Closing Date (except as provided below) and, to the extent not already conveyed and delivered to the other, shall make such records available to the other as may be reasonably required by such party in connection with, among other things, any insurance claims by, Actions, or tax audits against or governmental investigations of Seller or Purchaser or any of their Affiliates or in order to enable Sellers or Purchaser to comply with their respective obligations under this Agreement and each other agreement, document or instrument contemplated hereby. In the event Seller wishes to destroy such records before or after that time, Seller shall first give 30 days prior written notice to Purchaser, who shall have the right at its option and expense, upon prior written notice given to Seller within such 30 day period, to take possession of the records within 60 days after the date of such notice.

5.11 D&O Tail Policy. Upon Purchaser's request, Seller shall purchase a directors' and officers' liability insurance "tail policy" at Purchaser's expense, to be in effect for six years, on terms and conditions substantially similar to Seller's existing policies and acceptable to Purchaser, for the benefit of Seller's current and former directors with respect to their acts and omissions as directors, officers, employees and agents of Seller or its Subsidiaries occurring prior to the Closing.

6. CONDITIONS PRECEDENT TO CLOSING.

6.1 Conditions Precedent to Obligations of Purchaser. The obligation of Purchaser under this Agreement to consummate the transactions contemplated by this Agreement on the Closing Date shall be subject to the satisfaction, at or prior to the Closing Date, of all of the following conditions, any one or more of which may be waived by Purchaser:

(a) Representations and Warranties Accurate. The representations and warranties of Seller contained in this Agreement which are qualified as to materiality shall be correct and complete in all respects, and those not so qualified shall be correct and complete in all material respects, as of the Closing Date with the same force and effect as though made on and as of the Closing Date (except in any case that representations and warranties that expressly speak as of a specified date or time need only be correct and complete as of such specified date or time) and Purchaser shall have received a certificate signed by an authorized officer of Seller, dated the Closing Date, to the foregoing effect.

(b) Performance by Seller. Seller shall have performed and complied in all material respects with all covenants and agreements required to be performed or complied with by such Person hereunder on or prior to the Closing Date, and Purchaser shall have received a certificate signed by an authorized officer of Seller, dated the Closing Date, to the foregoing effect.

(c) Consents. All Consents required in connection with the consummation of the transactions contemplated by this Agreement and the Closing (including those set forth on **Schedule 6.1(c)** hereto) shall have been duly obtained, made or given and shall be in full force and effect, without the imposition upon Purchaser or Seller of any condition, restriction or required undertaking.

(d) No Legal Prohibition. No suit, action, investigation, inquiry or other proceeding by any Governmental Entity or other Person shall have been instituted or threatened which arises out of or relates to this Agreement, or the transactions contemplated hereby and no injunction, order, decree or judgment shall have been issued and be in effect or threatened to be issued by any Governmental Entity of competent jurisdiction, and no statute, rule or regulation shall have been enacted or promulgated by any Governmental Entity and be in effect, which in each case restrains or prohibits the consummation of the transactions contemplated hereby.

(e) Completion of Schedules. Seller shall have completed and delivered the Disclosure Schedules and all other schedules to be provided pursuant to this Agreement to Purchaser, and the Disclosure Schedules and such other schedules shall be acceptable to Purchaser in its sole discretion.

(f) No Material Adverse Effect. No Material Adverse Effect shall have occurred and no other event, loss, damage, condition or state of facts of any kind shall exist which has a Material Adverse Effect or can reasonably be expected to have a Material Adverse Effect.

(g) Additional Documents, etc. There shall have been delivered to Purchaser and Purchaser shall have delivered to Seller each of the agreements, documents, certificates and other items set forth on **Schedule 6.1(g)** of this Agreement, including those required by **Section 2.6** of this Agreement.

(h) Entry of Order; Appeal. The Bankruptcy Court shall have entered the Sale Approval Order in accordance with **Section 5.4(c)** and any other order in accordance with **Section 5.4(d)** relating to the assignment of the Assumed Contracts, all in form and substance acceptable to Purchaser (including without limitation unconditional authorization and approval of the Credit Bid), and the Sale Approval Order and any other order in accordance with **Section 5.5(d)** relating to the assignment of the Assumed Contracts, shall not have been stayed.

6.2 Conditions Precedent to Obligations of Seller. The obligations of Seller under this Agreement to consummate the transactions contemplated by this Agreement on the Closing Date shall be subject to the satisfaction, at or prior to the Closing Date, of all of the following conditions, any one or more of which may be waived by Seller:

(a) Representations and Warranties Accurate. The representations and warranties of Purchaser contained in this Agreement which are qualified as to materiality shall be correct and complete in all respects, and those not so qualified shall be correct and complete in all material respects, as of the Closing Date with the same force and effect as though made on and as of the Closing Date (except in any case that representations and warranties that expressly speak as of a specified date or time need only be correct and complete as of such specified date or time) and Seller shall have received a certificate signed by an authorized officer of Purchaser, dated the Closing Date, to the foregoing effect.

(b) Performance by Purchaser. Purchaser shall have performed and complied in all material respects with all covenants and agreements required to be performed or complied with by such Person hereunder on or prior to the Closing Date and Seller shall have received a certificate signed by an authorized officer of Purchaser, dated the Closing Date, to the foregoing effect.

(c) Consents. All Consents required to be obtained by Purchaser in connection with the purchase and sale of the Purchased Assets and the Closing shall have been duly obtained, made or given and shall be in full force and effect.

(d) No Legal Prohibition. No suit, action, investigation, inquiry or other proceeding by any Governmental Entity or other Person shall have been instituted or threatened which arises out of or relates to this Agreement or the transactions contemplated hereby and no injunction, order, decree or judgment shall have been issued and be in effect or threatened to be issued by any Governmental Entity of competent jurisdiction, and no statute, rule or regulation shall have been enacted or promulgated by any Governmental Entity and be in effect, which in each case restrains or prohibits the consummation of the transactions contemplated hereby.

(e) Additional Documents, etc. There shall have been delivered to Seller's Representative each of the agreements, documents and other items set forth on **Schedule 6.1(g)** of this Agreement to be delivered to Seller, including those required by **Section 2.6** of this Agreement.

6.3 Entry of Order; Appeal. The Sale Approval Order shall have been entered by the Bankruptcy Court and shall not have been stayed. If an appeal of the Sale Approval Order is filed,

Seller shall be obligated to proceed with the Closing notwithstanding the pendency of any such appeal, unless the Sale Approval Order is stayed.

7. MISCELLANEOUS

7.1 Termination. This Agreement may be terminated, and the transactions contemplated herein may be abandoned:

(a) any time before the Closing, by mutual written agreement of Seller and Purchaser;

(b) any time before the Closing, by Seller, on the one hand, or Purchaser, on the other hand, (i) in the event of a material breach hereof by any non-terminating party if such non-terminating party fails to cure such breach within five (5) Business Days following notification thereof by the terminating party, or (ii) upon notification to the non-terminating party by the terminating party that the satisfaction of any condition to the terminating party's obligations under this Agreement becomes impossible or impracticable with the use of commercially reasonable efforts if the failure of such condition to be satisfied is not caused by a breach hereof by the terminating party;

(c) after November 30, 2016, by either Purchaser or Seller if the Closing shall not have occurred by such date; provided, that a party may not terminate under this **Section 7.1(c)** if such party is then in material breach of the Agreement; or

(d) after the Auction, if Seller enters into a definitive agreement with respect to an Alternative Transaction because Purchaser is not the Successful Bidder at the Auction; provided, however, that if Purchaser is the Next Highest Bidder, then Purchaser may not terminate this Agreement or withdraw its irrevocable offer unless and until such Alternative Transaction has closed.

7.2 Effect of Termination. If this Agreement is validly terminated pursuant to **Section 7.1**, this Agreement will forthwith become null and void, and there will be no liability or obligation on the part of any party (or any of their respective officers, directors, employees, partners, agents or other representatives or Affiliates), except that the provisions with respect to expenses in **Section 7.3** will continue to apply following any such termination.

7.3 Expenses. Except as otherwise set forth herein, each party hereto shall pay its own expenses incurred in connection with this Agreement and the transactions contemplated hereby.

7.4 Compliance with Laws. Notwithstanding anything contained in this Agreement to the contrary, the obligations of the parties shall be subject to all laws, present and future, of any government having jurisdiction over the parties and this transaction, and to orders, regulations, directions or requests of any such government.

7.5 Further Cooperation; Waiver.

(a) Further Cooperation. At the request and expense of Purchaser, at any time following the Closing Date, Seller shall execute and deliver such other instruments and documents

and do and perform such other acts as may be reasonably necessary for the operation of the Business by Purchaser and effecting completely the consummation of the transactions contemplated hereby, including execution, acknowledgment and recordation of other such papers, using reasonable efforts to obtain the same from the respective inventors or authors as necessary for perfecting and conveying unto Purchaser the benefit of the transactions contemplated hereby; provided, however, that Seller shall not be obligated to pay any consideration or incur any costs to provide such cooperation.

(b) Reasonable Access to Records and Certain Personnel, Etc. In order to facilitate Seller's efforts to administer and close the Bankruptcy Case (including, without limitation, the preparation of filings in the Bankruptcy Case and state, local and federal tax returns and other filings, reconciliation of claims filed in the Bankruptcy Case), removal of corporate and other records and information relating or belonging to entities other than Seller, until the date on which Seller's chapter 11 case is closed, (i) Purchaser shall permit Seller's counsel any representative of Seller, including without limitation, any appointed liquidating trustee in the Bankruptcy Case, and other professionals and counsel for any successor to Seller and their respective professionals (collectively, "**Permitted Access Parties**") reasonable access to the financial and other books and records relating to the Purchased Assets or the Business and the systems containing such information, books and records, which access shall include the right of such Permitted Access Parties to copy or remove, as applicable (at the option of Purchaser), at such Permitted Access Parties' expense, such documents and records as they may request solely for the purposes described above and subject to an appropriate confidentiality agreement, and (ii) Purchaser shall permit the Permitted Access Parties reasonable access to Purchaser's employees free of charge with respect to the foregoing matters up to a period of 26 weeks, provided that such access does not interfere with the duties, obligations and performance such employees owe to Purchaser or its designees.

7.6 Governing Law; Jurisdiction. All disputes arising out of or related to this Agreement, including, without limitation, any dispute relating to the interpretation, meaning or effect of any provision hereof, will be resolved in the Bankruptcy Court and the parties hereto will each submit to the exclusive jurisdiction of the Bankruptcy Court for the purposes of adjudicating any such dispute, to the extent the jurisdiction of the Bankruptcy Court is applicable. If the jurisdiction of the Bankruptcy Court is not applicable, any legal action, suit or proceeding arising out of or relating to this Agreement, each and every agreement and instrument contemplated hereby or the transactions contemplated hereby and thereby shall be instituted in any Federal court of the District of Delaware. This Agreement shall be governed by and construed in accordance with the internal laws of the State of Delaware (i.e., without regard to its conflicts of law rules).

7.7 Entire Agreement; Interpretation. The terms and conditions of this Agreement, including its exhibits and the Ancillary Agreements, constitute the entire agreement between the parties with respect to the subject matter hereof, and merge and supersede all prior and contemporaneous agreements, understandings, negotiations and discussions. Neither of the parties shall be bound by any conditions, definitions, warranties, understandings, or representations with respect to the subject matter hereof other than as expressly provided herein. The section headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement. No oral explanation or oral information by either party hereto shall alter the meaning or interpretation of this Agreement. The terms "includes" and

“including” are not limiting. These terms and conditions will prevail notwithstanding any different, conflicting or additional terms and conditions which may appear on any purchase order, acknowledgment or other writing not expressly incorporated into this Agreement. Unless a contrary intention appears, (i) the words “herein”, “hereof” and “hereunder” and other words of similar import refer to this Agreement as a whole and not to any particular Article, Section or other subdivision, and to any certificates delivered pursuant hereto; and (ii) reference to any Article or Section means such Article or Section hereof. Any accounting terms used in this Agreement shall, unless otherwise defined in this Agreement, have the meaning ascribed thereto by GAAP.

7.8 Notices: All notices required or permitted to be given hereunder shall be in writing, shall make reference to this Agreement, and shall be delivered by hand, email, or dispatched by prepaid air courier or by registered or certified airmail, postage prepaid, addressed as follows:

If to Purchaser

Homewood NJOY Acquisition, LLC
641 Fifth Avenue, #PH4
New York, NY 10022
Phone: (631) 220-5555
Attn: Douglas Teitelbaum
Email: douglas@homewoodcap.com

with a copy to (which shall not constitute notice):

Kirkland & Ellis LLP
300 N. LaSalle
Chicago, Illinois 60654
Phone: (312) 862-2000
Attn: David L. Eaton
Michael Chu
Email: david.eaton@kirkland.com
michael.chu@kirkland.com

If to Seller

NJOY, Inc.
15211 N. Kierland Boulevard, Suite 200
Scottsdale, Arizona 85254
Attn: Jeffrey Weiss
Email: jweiss@njoy.com

with a copy to (which shall not constitute notice):

Gellert Scali Busenkell & Brown, LLC
1201 N. Orange Street, Suite 300
Wilmington, DE 19801
Attn: Michael Busenkell, Esquire
Phone: (302) 425-5807
Email: mbusenkel@gsbblaw.com

Such notices shall be deemed served when received by addressee or, if delivery is not accomplished by reason of some fault of the addressee, when tendered for delivery. Either party may give written notice of a change of address and, after notice of such change has been received, any notice or request shall thereafter be given to such party at such changed address.

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

7.10 No Ongoing Obligations. Purchaser shall not have any obligations solely by virtue of the provisions of this Agreement to support, maintain or otherwise continue the business operations of Seller or to otherwise market, promote or develop the Purchased Assets after the Closing Date.

7.11 No Survival of Representations and Warranties. None of the representations and warranties contained in this Agreement shall survive the Closing Date.

7.12 Amendment. This Agreement may not be amended or modified except by an instrument in writing signed by, or on behalf of, Seller and Purchaser.

7.13 Purchaser Indemnification Obligation. After the Closing, Purchaser shall indemnify Seller against and shall hold it harmless from any and all liabilities, losses, damages, costs and expenses (including, without limitation, reasonable attorneys' fees and expenses) that Seller may suffer or incur by reason of Seller's defense of any claim, suit or proceeding made or commenced against it arising out of obligations of Seller that were expressly assumed by Purchaser hereunder and only expressly for liabilities, claims or amounts arising or accruing after the Closing Date, other than expressly provided for herein. Seller shall provide written notice to Purchaser of any claim or dispute as to which indemnification is provided under this Section within 10 days of receipt of written notice by Seller of the commencement, or threatened commencement, of any such action; provided that the failure to provide such notice will not affect any rights hereunder except to the extent Purchaser is materially prejudiced thereby. Seller, on not less than thirty (30) days' notice to Purchaser, may make settlement of such claim, litigation or other proceeding with Purchaser's consent, and such settlement shall be binding on Seller and Purchaser for the purposes of this Section; provided, however, that, if within said thirty-day period Purchaser shall, in writing, have requested Seller to contest such claim, or to defend against such litigation or other proceeding, then Purchaser shall have the right and obligation to contest such claim or to defend against such litigation or other proceeding on its own behalf and on behalf of Seller, with counsel of its own choosing, but Seller may also, in its discretion, participate in such contest or defense on its own behalf and with counsel of its own choosing. If and only if Purchaser shall have failed, neglected or refused to contest such claim or to defend against such litigation or other proceeding, Purchaser shall reimburse Seller for the expenses incurred by Seller in such contest or defense.

7.14 No Agency. The parties hereto are independent contractors. Except as may be provided in this Agreement, neither party has any express or implied right or authority to assume or create any obligations on behalf of the other or to bind the other to any contract, agreement or undertaking with any third party. Nothing in this Agreement shall be construed to create a partnership, joint venture, employment or agency relationship between Seller and Purchaser.

7.15 Seller's Representative. Seller hereby irrevocably appoints [**Michael Rubin**] (herein called the "**Seller's Representative**") as its true and lawful attorney-in-fact and agent, with full power of substitution or resubstitution, to act solely and exclusively on behalf of Seller with respect to any matters relating to this Agreement and any document, certificate or other agreement to be executed and delivered by or on behalf of Seller pursuant hereto, with the full power, without the consent of Seller, to exercise as it in its sole discretion deems appropriate, all of the powers which Seller could exercise under the provisions of this Agreement or any document, certificate or other agreement to be executed and delivered by or on behalf of Seller pursuant hereto, including, without limitation, to (i) accept and give notices hereunder or thereunder on behalf of Seller, (ii) consent to any modification or amendment hereof or thereof or (iii) give any waiver or consent hereunder or thereunder; provided, that prior to taking any action set forth in clauses (ii) or (iii), Seller's Representative shall consult with Seller and Seller's bankruptcy estate regarding such action. Seller's Representative does hereby accept such appointment. Purchaser shall be

entitled to rely exclusively upon such notices, waivers, consents, amendments, modifications and other acts of Seller's Representative as being the binding acts of Seller, and Purchaser shall be entitled to deliver any notices, payments or other items required to be delivered by it to Seller hereunder or thereunder only to Seller's Representative, and any such delivery shall be fully effective as if it were made directly to Seller. Seller's Representative shall not affect any substitution for himself as Seller's Representative without the prior written consent of Purchaser, which consent shall not be unreasonably withheld.

7.16 Specific Performance. Notwithstanding anything to the contrary contained herein (other than **Section 7.2(b)** hereof), each party hereto acknowledges that money damages would be incalculable and an insufficient remedy for any breach of this Agreement by such party and that any such breach would cause the other party hereto irreparable harm. Accordingly, each party hereto also agrees that, in the event of any breach or threatened breach of the provisions of this Agreement by such party, the other party hereto shall (except to the extent **Section 7.2(b)** is applicable) be entitled to equitable relief without the requirement of posting a bond or other security, including in the form of injunctions and orders for specific performance.

7.17 Severability. Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction shall not invalidate the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction, and any such provision, to the extent invalid or unenforceable, shall be replaced by a valid and enforceable provision which comes closest to the intention of the parties underlying such invalid or unenforceable provision.

7.18 Waivers. Waiver by any party of any breach of or failure to comply with any provision of this Agreement by the other party shall not be construed as, or constitute, a continuing waiver of such provision, or a waiver of any other breach of, or failure to comply with, any other provision of this Agreement. No waiver of any such breach or failure or of any term or condition of this Agreement shall be effective unless in a written notice signed by the waiving party and delivered, in the manner required for notices generally, to each affected party.

7.19 Binding Effect; Third Party Beneficiaries; Assignment. This Agreement shall be binding upon, inure to the benefit of, and be enforceable by, the parties hereto and their respective successors and permitted assigns. Purchaser may assign all rights and obligations under this Agreement to another entity designated by Purchaser that is or will be beneficially owned by the Sponsors. Except as expressly set forth herein, nothing expressed or referred to in this Agreement is intended or shall be construed to give any Person other than the parties to this Agreement, or their respective legal representatives, successors and permitted assigns, any legal or equitable right, remedy or claim under or in respect of this Agreement or any provision contained herein. Neither party may assign this Agreement nor any of its rights hereunder, other than any right to payment of a liquidated sum, nor delegate any of its obligations hereunder, without the prior written consent of the other, except that Purchaser may assign its rights under this Agreement to any Affiliate or to any Person providing financing for the transaction.

7.20 Knowledge Qualifications. Except as otherwise provided in this Agreement, whenever any party makes any representation, warranty or other statement to such party's knowledge, such party will be deemed to have made due inquiry into the subject matter of such

representation, warranty or other statement, including due inquiry of each officer and director of such party as well as any other person who has responsibility with respect to the relevant subject matter.

[Remainder of Page Intentionally Left Blank]

IN WITNESS WHEREOF, the parties have executed this Asset Purchase Agreement as of the date first written above:

SELLER:

PURCHASER:

NJOY, INC.

HOMEWOOD NJOY ACQUISITION, LLC

By: _____

By: _____

Name:

Name:

Title:

Title:

EXHIBIT A

Disclosure Schedules

Schedule 2.1(d): Assumed Contracts

Schedule 2.1(e): Contract Rights

Schedule 2.1(f): Equipment and other Tangible Property

Schedule 2.1(g): Personal Property

Schedule 2.5: Allocation of Purchase Price

TBD

Schedule 3.4

Causes of Action

TBD

Schedule 3.5
Intellectual Property

Schedule 3.6(a)

Contracts

Schedule 3.8

Subsidiaries

Schedule 3.9

Leased Real Property

Schedule 3.10

Insurance Policies

Schedule 3.12

Financial Statements

Schedule 6.1(c)

Consents

TBD

Schedule 6.1(g)

Additional Documents

TBD

EXHIBIT B

Bill of Sale

EXHIBIT C

Assignment and Assumption Agreement

EXHIBIT D

Intellectual Property Assignment

EXHIBIT E

Domain Name Assignment

EXHIBIT F

Sale Approval Order