Course of Study Fall 2019
University of National and World Economy
Faculty of Law, Sofia, Bulgaria

NEGOTIATION WORKSHOP

ACQUIRING A PRIVATELY OWNED BUSINESS IN THE UNITED STATES. REPRESENTING BUYERS AND SELLERS.

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MOCK NEGOTIATION WORKSHOP
BACKGROUND INFORMATION

Introduction

In the Fall of 2019, you will be participating in a Mock Negotiation Workshop. Enclosed are some materials that will assist you in your negotiations. Although you will be negotiating the acquisition of a business, negotiation skills must be acquired by all types of lawyers, litigators and transactional lawyers alike.

Enclosed is an initial draft of the Asset Purchase Agreement you will be negotiating. Also enclosed is a glossary of terms that are used throughout the enclosed materials. The first draft of an agreement providing for the acquisition of a business is usually prepared by the buyer's counsel unless the seller is conducting an auction with more than one potential buyer. The buyer's counsel generally will have rather superficial information regarding the seller at the time the acquisition agreement is being drafted. Therefore, although you can assume for our purposes that the enclosed draft was drafted by the buyer's counsel and is in a form the buyer would be willing to execute based on its knowledge of the seller's business, the results of the buyer's further investigation into the seller's business may prompt the buyer to suggest revisions to the enclosed draft.

You have also been provided with certain information regarding the buyer and seller. The inclusion of extensive representations and warranties in the first draft forces the seller to disclose significant information about itself. This will assist the buyer in assessing the benefits and risks of the acquisition and in pricing the transaction. In this respect, the buyer's first draft is a request for information and a disclosure device.

The first draft will also deal with the allocation of risks among the parties from contingencies such as environmental and tort liability. The buyer typically will ask the seller to bear most of the risk associated with discoveries that directly or indirectly relate to the seller's business prior to the closing–issues that may be material to pricing the acquisition. The seller may counter that unknown contingencies are inherent in operating any business and should be borne by the owner of the business at the time they arise.

Considerations in Deciding on an Asset Purchase

There are three basic structures for business acquisitions in the US: a statutory business combination, a purchase of shares and a purchase of assets. A statutory combination usually is structured as a merger, but it might be a consolidation if permitted by US state corporate statutes. A purchase of shares can be a voluntary purchase from each shareholder or, in some US states, a "share exchange" whereby all shareholders can be bound to exchange their shares under a plan of exchange approved by holders of the requisite percentage of shares.

An acquisition might be structured as an asset purchase for a variety of reasons. It may be the only structure that can be used where the buyer is only interested in purchasing a portion of the company's assets or assuming only certain of its liabilities. If the stock of a company is widely held or it is likely that one or more of the shareholders will not consent, a sale of stock (except perhaps by way of a statutory merger or share exchange) may be impractical. In many

cases, however, an acquisition can be structured as a merger, a purchase of stock or a purchase of assets.

From tax and liability perspectives, often it will be in the buyer's best interests to purchase assets and it will be in the seller's best interests to sell stock or to merge. Because of these competing interests, it is important that counsel for both parties be involved at the outset in weighing the various legal and business considerations in an effort to arrive at the optimum, or at least an acceptable, structure. Some of these considerations are specific to the business in which a company engages, some relate to the particular corporate or other structure of the buyer and the seller and others are more general in nature.

Set forth below are some of the more typical matters to be addressed in evaluating an asset purchase as an alternative to a stock purchase or a statutory combination, merger or share exchange:

Purchased Assets. Asset transactions are typically more complicated and more time consuming than stock purchases and statutory combinations. In contrast to a stock purchase, the buyer in an asset transaction will only acquire the assets described in the acquisition agreement. Accordingly, the assets to be purchased need to be described, with varying degrees of specificity, in the agreement and the transfer documents. The usual practice is for the buyer's counsel to use a broad description that includes all of the seller's assets, while describing the more important categories, and then to specifically describe the assets to be excluded and retained by the seller. Often excluded are cash, accounts receivable, litigation claims or claims for tax or other refunds, personal assets and certain records pertaining only to the seller's organization. This approach puts the burden on the seller to specifically identify the assets that are to be retained.

Asset purchases also present difficult questions about ongoing coverage for risks insured against by the seller. Most insurance policies are, by their terms, not assignable and a buyer may not be able to secure coverage for acts involving the seller or products it manufactures or services it renders prior to the closing.

Assumed Liabilities. An important reason for structuring an acquisition as an asset transaction is the desire on the part of a buyer to limit its responsibility for liabilities of the seller, particularly unknown or contingent liabilities.

Unlike a stock purchase or share exchange statutory combination, where the acquired corporation retains all of its liabilities and obligations, known and unknown, the buyer in an asset purchase has an opportunity to determine which liabilities of the seller it will contractually assume. Accordingly, one of the most important issues to be resolved is what liabilities incurred by the seller prior to the closing are to be assumed by the buyer. It is rare in an asset purchase for the buyer not to assume some of the seller's liabilities relating to the business, as for example the seller's obligations under contracts for the performance of services or the manufacture and delivery of goods after the closing. Most of the seller's liabilities will be set forth in the representations and warranties of the seller in the acquisition agreement and in the seller's schedules, reflected in the seller's financial statements or otherwise disclosed by the seller in the course of the negotiations and due diligence. For these known liabilities, the issue as to which

will be assumed by the buyer and which will stay with the seller should be reflected in the express terms of the acquisition agreement.

For unknown liabilities or liabilities that are imposed on the buyer as a matter of law, the solution is not so easy and lawyers spend significant time and effort dealing with the allocation of responsibility and risk in respect of these liabilities. Many acquisition agreements provide that none of the liabilities of the seller, other than those expressly assumed, are being assumed by the buyer and then give examples of the types of liabilities not being assumed (*e.g.*, tax, products and environmental liabilities). There are, however, some recognized exceptions to a buyer's ability to avoid the seller's liabilities by the terms of the acquisition agreement, including the following:

- Bulk sales laws, which remain in effect in some jurisdictions, permit creditors of a seller to follow the assets of certain types of sellers into the hands of a buyer unless specified procedures are followed.

- Under fraudulent conveyance or transfer statutes, the assets acquired by the buyer can be reached by creditors of the seller under certain circumstances. Actual fraud is not required and a statute may apply merely where the purchase price is not deemed fair consideration for the transfer of assets and the seller is insolvent or is rendered insolvent by the transaction.

- Liabilities can be assumed by implication, which may be the result of imprecise drafting coupled with third-party beneficiary arguments which can leave a buyer with responsibility for liabilities of the seller.

- Some US state tax statutes provide that taxing authorities can follow the assets to recover taxes owed by the seller; often the buyer can secure a waiver from the state or other accommodation to eliminate this risk.

- Under some environmental statutes and court decisions, the buyer may become subject to remediation obligations with respect to activities of a prior owner of real property.

- In some states, courts have held buyers of manufacturing businesses responsible for tort liabilities for defects in products manufactured while the seller controlled the business. Similarly, some courts have held that certain environmental liabilities pass to a buyer that acquires substantially all the seller's assets, carries on the business and benefits from the continuation.

- The purchaser of a business may have successor liability for the seller's unfair labor practices, employment discrimination, pension obligations or other liabilities to employees.

- In certain jurisdictions, the purchase of an entire business where the shareholders of the seller become shareholders of the buyer can cause a sale of assets to be treated as a "de facto merger." This theory could result in the buyer assuming all of the seller's liabilities.

None of these exceptions prevents a buyer from attempting to limit the liabilities to be assumed. Thus, either by compliance with a statutory scheme (*e.g.*, the bulk sales laws or state tax lien waiver procedure) or by careful drafting, a conscientious buyer can take comfort in the fact that most contractual provisions of the acquisition agreement should be respected by the courts and should protect the buyer against most, but not all, unforeseen liabilities of the seller.

It is important to recognize that in a sale of assets the seller retains primary responsibility for satisfying all its liabilities, whether or not assumed by the buyer. Unlike a sale of stock or a statutory combination, where the shareholders may only be liable to the buyer through the indemnification provisions of the acquisition agreement, a creditor still can proceed directly against the seller after an asset sale. If the seller is liquidated, its shareholders may remain subject to claims of the seller's creditors under statutory or common law principles, although this exposure might be limited to the proceeds received on liquidation and expire after a period of time. Under state corporate law statutes, a seller's directors may become personally liable to its creditors if the seller distributes the proceeds of a sale of assets to its shareholders without making adequate provision for its liabilities.

In determining what liabilities and business risks are to be assumed by the buyer, the lawyers drafting and negotiating the acquisition agreement need to be sensitive to the reasons why the transaction is being structured as a sale of assets. If the parties view the transaction as the acquisition by the buyer of the entire business of the seller, as in a stock purchase, and the transaction is structured as a sale of assets only for tax or other technical reasons, then it may be appropriate for the buyer to assume most or all liabilities, known and unknown. If instead the transaction is structured as a sale of assets because the seller has liabilities the buyer does not want to assume, then the agreement should reflect that intention.

A buyer may be concerned about successor liability exposure and not feel secure in relying on the indemnification obligations of the seller and its shareholders to make it whole. Under these circumstances, it might also require that the seller maintain in effect its insurance coverage or seek extended coverage for pre-closing occurrences which could support these indemnity obligations for the benefit of the buyer. In recent years, insurance against breaches of representations and warranties have become quite common in acquisition transactions.

Employment Issues. A sale of assets may yield more employment or labor issues than a stock sale or statutory combination, because the seller will typically terminate its employees who may then be employed by the buyer. Both the seller and buyer run the risk that employee dislocations from the transition will result in litigation or, at the least, ill will of those employees affected. The financial liability and risks associated with employee benefit plans, including funding, withdrawal, excise taxes and penalties, may differ depending on the structure of the transaction. Responsibility under the US Worker Adjustment and Retraining Notification Act (the "WARN Act") can vary between the parties, depending upon whether the transaction is structured as an asset purchase, stock purchase or statutory combination. In a stock purchase or

statutory combination, any collective bargaining agreements generally remain in effect. In an asset purchase, the status of collective bargaining agreements will depend upon whether the buyer is a "successor," based on the continuity of the business and work force or on the provisions of the seller's collective bargaining agreement. If it is a successor, the buyer must recognize and bargain with the union.

Organization of Asset Purchase Agreement

The structure of the enclosed Asset Purchase Agreement follows current practice. Article I contains a glossary of defined terms. Articles II and III contain the economic and operative terms of the acquisition, including the assets to be acquired, the consideration to be paid and the basic mechanics of the closing.

Articles IV and V are the representations and warranties of the seller and buyer, respectively. The representations and warranties are statements of fact that exist or will exist at the time of the closing. The seller's representations and warranties, which contain detailed statements about its business, are much more comprehensive than the buyer's and include extensive provisions regarding matters such as environmental problems, employee benefits and intellectual property that could result in significant liabilities for the buyer after the closing if not covered by adequate representations and warranties (and the corresponding indemnification obligations) by the seller. The buyer's representations and warranties deal mainly with the buyer's ability to enter into the acquisition agreement and to consummate the acquisition. In a transaction where all or a portion of the purchase price will be paid in stock of the buyer, the buyer's representations and warranties will typically include statements about its business as well since the seller will, in effect, be making an investment in the buyer's business.

Article VI contains the conditions precedent to the parties' obligations to consummate the contemplated transactions.

Article VII contain covenants the parties commit to perform (affirmative covenants) or not to perform (negative covenants).

Article VIII contains indemnification provisions giving each party specific remedies for the other's breach of certain obligations under the acquisition agreement. These provisions cover matters such as calculation of damages, recovery of expenses and costs (including legal fees) in addition to damages (a right that may not exist absent an indemnification provision), and procedures for claiming damages.

Article IX contains general provisions such as notice, severability and choice of law.

In some transactions, the parties do not sign a binding agreement until the closing. If a letter of intent has been executed that includes a no-shop provision and gives the buyer adequate opportunity to conduct due diligence, the buyer may resist becoming contractually bound until it is ready to close. Conversely, the seller has an interest in not permitting extensive due diligence until the buyer is contractually bound. This is especially so in circumstances in which the buyer is a competitor or in which the seller is concerned that the due diligence process will necessitate or risk disclosure to employees, customers or competitors that the business is for sale.

Occasionally it is the seller that is reluctant to sign before the closing. This may be the case, for example, if the seller has announced that the business is for sale, has several potential buyers and does not want to preclude talking to alternative buyers until the seller is certain that the transaction will close.

Sometimes a simultaneous signing and closing occurs because the transaction simply evolves that way. The parties may be negotiating an agreement that contemplates a period between signing and closing, but the due diligence may proceed more rapidly than the negotiations, and it may develop that a waiting period would be pointless or even harmful to the transaction. In such circumstances, the acquisition agreement will not contain pre-closing covenants, a termination provision and other provisions that are rendered unnecessary by the decision to sign and close simultaneously.

MEMORANDUM

To: Counsel to Rum & Cola, Inc. (Buyer)

From: Jeffrey M. Epstein

Date: Fall, 2019

Subject: Mock Negotiation Workshop

In connection with the Mock Negotiation Workshop to be held during the Fall of 2019, enclosed are the following documents: (i) information exclusive to your team; (ii) the schedule; (iii) team assignments; (iv) negotiation training background information; (v) a glossary; (vi) a memo listing relevant sections of the asset purchase agreement; and (vii) an initial draft of the asset purchase agreement.

At the Mock Negotiation Workshop you will be negotiating the terms of an Asset Purchase Agreement pursuant to which your client, Rum & Cola, Inc. ("Buyer"), a public company that manufactures and distributes alcoholic beverages worldwide, may acquire substantially all of the assets of Blue Duck Corp. ("Seller"), a private company that manufactures and distributes premium vodka and other alcoholic beverages in the U.S.

You are free to discuss the information described below with your teammates prior to the Mock Negotiation Workshop. **However, you should not discuss the information contained below with students assigned to represent Seller.**

Each team will be assisted by me and possibly other faculty members to help guide you during the negotiations. **Please review the enclosed materials prior to the first session.** You do not need to be familiar with the asset purchase agreement to participate in the negotiations, but becoming generally familiar with the sections listed on the attached memo may be useful in understanding certain aspects of the negotiations.

Buyer:

You are counsel to Rum & Cola, Inc. ("Buyer"), a public company that manufactures and distributes alcoholic beverages worldwide. Buyer does not have a very strong brand presence in the vodka industry and is interested in this market. As a result, starting today, you will be negotiating to purchase the assets (*i.e.*, property, equipment, inventory and the like) of Blue Duck Corp. ("Seller"), a company that manufactures and distributes a very popular brand of premium vodka and other alcoholic beverages in the U.S., in a transaction called, appropriately, an asset purchase (or asset sale, depending on your point of view).

The following information will be important in negotiating the terms of the asset purchase agreement. Some of this information will already be known by Seller and some of it will be disclosed by you during the course of your negotiations:

Purchase Price

Buyer's investment bankers have advised Buyer's board of directors that Seller's assets that Buyer will be acquiring, net of the liabilities Buyer will be assuming, are worth approximately US$1 billion. Since your client was unable to conduct a substantial due diligence investigation of Seller's business before the negotiations, your client has instructed you to acquire as much information as time permits during your negotiations with Seller's counsel so that the purchase price may be adjusted based on the resolution of the issues set forth below. Buyer has directed you to settle on a purchase price between US$900 million and US$1 billion. Buyer would like to pay 80% of the purchase price in cash and the other 20% with shares of its common stock.

The deal will be subject to US regulatory review (the Federal Trade Commission) for possible anti-competitive effects.

Financing

Buyer will need to borrow approximately $650-$750 million in order to fund the purchase price. Buyer has approximately $300 million of cash on hand to fund the purchase price, but would like to reserve at least $50 million to fund operating expenses. Buyer has obtained a letter of interest from No Nonsense Bank (the "Bank"), which states that the Bank is interested in loaning money to Buyer in respect of this transaction but does not specify an amount and does not obligate the Bank to loan any money to Buyer. The amount that the Bank is willing to lend and its willingness to lend any money to Buyer will depend upon the resolution of certain of the issues to be negotiated with Seller's counsel. The Bank usually requires Buyer to obtain Seller's customer list for the purpose of customer verifications as a condition precedent before issuing a full commitment letter. Buyer does not believe this is feasible but has instructed you to work it out with the Bank and Seller's counsel. The Bank also would like to be satisfied with the resolution of any issues relating to environmental and products liabilities. You will have the opportunity to meet with an official of the Bank as you negotiate the terms of the Asset Purchase Agreement with Seller's counsel to determine whether your proposed resolution of these issues is satisfactory to the Bank. The Bank will have final approval of the terms as they are negotiated. Your goal is to borrow as much of the purchase price as possible so that your client keeps as much cash on hand as possible.

Environmental

Seller owns the manufacturing facility in which it produces its Blue Duck vodka. Buyer has informed you that it is common knowledge that the soil in the surrounding area contains petroleum hydrocarbons ("PHCs"). Buyer, a strong supporter and contributor to environmental groups, is worried about the level of PHCs in the soil and any backlash or bad publicity that may

result if the PHC levels are too high. Buyer would like you to find out if Seller is aware of the level of PHCs in the soil and would like to see copies of any findings and reports from it or from governmental findings resulting from testing of the area.

In addition, Buyer was informed by an insider that Seller's facility is creating a health hazard due to sporadic ethanol emissions. Buyer and Seller cannot confirm the validity of such rumor without testing the air. Buyer consulted an environmental specialist who believes that it is possible that the government will require the property owner to renovate and remove any harmful environmental problems, which could cost approximately US$35 million in clean-up costs. Buyer has informed you that your goal is to allocate any environmental liability to Seller.

Buyer's environmental specialist has requested to review Seller's environmental records, but to date, Seller has not made its records available.

Trademark

Seller owns the trademark "Blue Duck" and the only reason its premium vodka sells as well as it does in the U.S. is because "Blue Duck" vodka is a popular, trendy vodka that is generally recognized as the preferred brand used in martinis. There are rumors circulating in the alcoholic beverage industry that after this transaction, Seller is considering developing a new gin that it may market as "Red Geese" gin. Buyer is concerned that Seller's potential new product would confuse consumers and be destructive to Buyer's newly acquired business.

Employment

Jeff Golden, a rising star in his early-mid 40s, has been Seller's chief executive officer (the "CEO") for the past 3 years. Mr. Golden was named by Business Week as one of the top 10 executives in 2008 and is highly regarded and respected in the alcoholic beverage industry. Mr. Golden is also a former NCAA Division I college basketball player. Since Mr. Golden joined Blue Duck three years ago, Blue Duck has won two ABIBL (Alcoholic Beverage Industry Basketball League) championships. Buyer has recently learned that Mr. Golden has been known to drink large quantities of Blue Duck vodka at the championship celebrations. He also has the reputation for getting drunk at business functions and for making what might be considered inappropriate remarks to women present at such functions.

When conducting the due diligence review of Seller, you discovered that Mr. Golden's employment agreement provides that, in the event Mr. Golden is not offered employment as the chief executive officer following a "change of control," or his employment is terminated (other than for "cause") or his responsibilities are reduced in connection with or within one year following a "change of control," he will be entitled to receive a payment of $15,000,000. The employment agreement defines "change of control" as follows:

"(a) the Company is party to a merger or consolidation which results in the voting securities of the Company outstanding immediately prior thereto failing to continue to represent (either by remaining outstanding or by being converted into voting securities of the

surviving or another entity) at least fifty (50%) percent of the combined voting power of the voting securities of the Company or such surviving or other entity outstanding immediately after such merger or consolidation;

(b) the sale or disposition of all or substantially all of the Company's assets (or consummation of any transaction having similar effect); or

(c) the dissolution or liquidation of the Company."

The employment agreement also states that the CEO may be terminated for "cause" in which case, the CEO will not be entitled to earn any compensation following the date of termination.

The employment agreement defines "cause" as follows:

"(i) repeated failure of Employee to satisfy reasonable performance objectives or to follow reasonable and lawful directives, which in each case are consistent with the position which Employee then holds; *provided*, that any such failure is reasonably determined by the Company to be materially injurious to the business or interests of the Company;

(ii) willful misconduct by Employee that causes any material injury to the financial condition or business reputation of the Company;

(iii) any act of fraud, dishonesty or defalcation with respect to any aspect of the business of the Company;

(iv) use of illegal drugs or excessive use of alcoholic beverages; or

(v) conviction or commission of a felony or of a crime involving moral turpitude."

Buyer may be interested in hiring Seller's CEO following the acquisition, but Buyer is not certain whether it wants to give him the position of CEO of Rum & Cola, Inc. Additionally, Buyer has informed you that its current CEO, Ms. L. R. Rorlynn, is entitled to receive a lump sum payment of US$2,000,000 for diminution of responsibilities. Buyer may be interested in hiring Mr. Golden, but does not want to be responsible for paying any portion of Mr. Golden's change of control payment or Ms. Rorlynn's lump sum payment described above.

Litigation/Products Liability

Sixteen women and a male stripper were admitted to the Dashland's Infirmary on June 30, 2019 with severe abdominal pain after attending a bachelorette party at which, among other alcoholic beverages, vodka was consumed. They were diagnosed as suffering from acute methanol poisoning. The vodka consumed at the party was purchased from a convenience store in Queens, New York just a few blocks away from Seller's manufacturing facility. All vodka

bottles from the store were seized by the police and submitted for forensic examination. The NYPD issued three press releases to the local and national media in order to alert the public to the dangers of consuming vodka. The forensic examination revealed that some of the vodka bottles seized contained dangerous levels of methanol and were 150 proof. The results showed, in all cases, levels of methanol sufficient to render the vodka unfit for human consumption and cause serious health risks. Effects of methanol poisoning include abdominal pain, drowsiness and dizziness, severe metabolic acidosis, blurred vision leading to blindness and coma with respiratory difficulties. Recently, ten more incidents of acute methanol poisoning have arisen in the prominent Eichsley area of Brooklyn and a total of 425 bottles of vodka have been confiscated and sent for testing. The recent incident is very similar to a previous incident involving vodka bottles found on sale in the Queens area that also contained high levels of methanol. The manufacturer of the vodka is not yet known nor is it known where the vodka might be on sale but Buyer is very concerned since the manufacturing facility of Seller was only a few blocks from the original incident.

Buyer has been informed that there is a high possibility that Seller's manufacturing facility produced a bad batch of the Blue Duck vodka and potential lawsuits may be filed. Buyer has directed you to find out as much information as you can during your negotiations because they do not want any risk of potential lawsuits after the acquisition. Buyer is particularly curious about Seller's product records since Buyer has been told that such records are "not available."

Accounting Irregularities

Through an ongoing internal investigation, Buyer recently learned that its European subsidiary may have improperly reported its revenues to the parent company in 2018 and as a result, Buyer's earnings may have been overstated by close to 5% in its 2018 public filings. Buyer believes that the problem was limited to 2018, and was caused by a product line manager and his supervisor accelerating some large sales of their product line from early 2019 in order for them to meet performance targets, but Buyer is still investigating. To the best of Buyer's knowledge, 2019 has thus far been a record year for the European subsidiary, and even without counting the sales accelerated into 2018, Buyer expects that it would meet its announced projections for 2019.

Please feel free to contact me (or any other participating faculty members) prior to the Mock Negotiation Workshop with any questions you may have. We will also be available to you throughout the Mock Negotiation Workshop to answer your questions and give advice.

MEMORANDUM

To: Counsel to Blue Duck Corp. (Seller)

From: Jeffrey M. Epstein

Date: Fall, 2019

Subject: Mock Negotiation Workshop

In connection with the Mock Negotiation Workshop to be held during the Fall of 2019, enclosed are the following documents: (i) information exclusive to your team; (ii) the schedule; (iii) team assignments; (iv) negotiation training background information; (v) a glossary; (vi) a memo listing relevant sections of the asset purchase agreement; and (vii) an initial draft of the asset purchase agreement.

At the Mock Negotiation Workshop you will be negotiating the terms of an Asset Purchase Agreement pursuant to which your client, Blue Duck Corp. ("Seller"), a private company that manufactures and distributes premium vodka and other alcoholic beverages in the U.S., intends to sell substantially all of its assets to Rum & Cola, Inc. ("Buyer"), a public company that manufactures and distributes alcoholic beverages worldwide.

You are free to discuss the information described below with your teammates prior to the Mock Negotiation Workshop. **However, you should not discuss the information contained below with Students assigned to represent Buyer.**

Each team will be assisted by me and possibly other faculty members to help guide you during the negotiations. **Please review the enclosed materials prior to the first session.** You do not need to be familiar with the asset purchase agreement to participate in the negotiations, but becoming generally familiar with the sections listed on the attached memo may be useful in understanding certain aspects of the negotiations.

Seller:

You are counsel to Blue Duck Corp. ("Seller"), a private company that manufactures and distributes premium vodka and other alcoholic beverages in the U.S. Seller's biggest selling item is the premium vodka label "Blue Duck." Starting today, you will be negotiating the sale of Seller's assets (*i.e.*, property, equipment, inventory and the like) to Rum & Cola Corp. ("Buyer"), a public company that manufactures and distributes alcoholic beverages worldwide, in a transaction called, appropriately, an asset sale (or asset purchase, depending on your point of view).

The following information will be important in negotiating the terms of the asset purchase agreement. Some of this information will already be known by Buyer and some of it will be disclosed by you during the course of your negotiations:

Purchase Price

Seller's investment bankers have advised Seller's board of directors that the assets that will be sold are worth approximately US$1 billion. Since Buyer was not able to conduct a substantial due diligence investigation of Seller's business before the negotiations, the purchase price may be adjusted based on the resolution of the issues set forth below. Seller has directed you to settle on a purchase price between US$900 million and US$1 billion. Buyer has proposed paying 80% of the purchase price in cash and the other 20% with shares of its common stock. Since Seller may be receiving stock of Buyer in the transaction, you will want to do some due diligence to confirm whether you think Buyer's common stock is properly valued.

The deal will be subject to US regulatory review (the Federal Trade Commission) for possible anti-competitive effects.

Financing

Buyer will need to borrow money from Non Nonsense Bank (the "Bank") in order to finance the acquisition. Buyer has obtained a letter of interest from the Bank, which states that the Bank is interested in loaning money to Buyer in respect of this transaction but does not specify an amount and does not obligate the Bank to loan any money to Buyer. Your client has instructed you that it is not comfortable with Buyer's ability to fund the transaction, and will require Buyer to obtain a satisfactory commitment letter from the Bank for at least 75% of the purchase price. Commitment letters do not obligate the Bank to loan money unless and until certain conditions precedent are satisfied, but give assurance that once those conditions precedent are met, the Bank will loan the specified amount of money. The amount that the Bank is willing to lend and its willingness to lend any money to Buyer will depend upon the resolution of certain of the other issues to be negotiated. Seller has advised you that the Bank usually requires unusual and burdensome conditions precedent. Seller has directed you to be wary of any unusual requests.

Environmental

Seller owns the manufacturing facility in which it produces its Blue Duck vodka. The facility is located on a site that was formerly used as an oil depot during World War II by the previous owner. Seller has informed you that it is common knowledge that the soil beneath the facility and in the surrounding area contain high levels of petroleum hydrocarbons ("PHCs"). Seller has been running the facility for over 3 years and has not received any notice or complaint regarding the level of PHCs. It is possible that the government will require the property owner to remediate the PHCs. The cost to remediate the PHCs is unknown.

In addition, Seller's facility may be creating a health hazard due to sporadic ethanol emissions. Seller remembers reviewing reports conducted by a private environmental specialist, but has since been unable to locate such records. Seller's environmental specialist has informed you that Blue Duck's vodka consists of 0.013% methanol, 99.507% ethanol and 0.48% fusils. The specialist believes that the current levels of ethanol emissions are not yet toxic, but if the emissions occur frequently enough, they may become toxic and can result in damage to a human's central nervous system. There is no indication that there are high levels of ethanol in the air yet, but Seller cannot be sure without testing. It is possible that the government will require the property owner to remediate the causes of the ethanol emissions if it reaches toxic levels. The cost to remediate the ethanol emissions could be approximately US$35 million. Seller's long-time friend owns Greensky Environmental Co. ("Greensky"), an environmental clean-up company, and Seller believes it could call in a favor and engage Greensky to do the ethanol emissions remediation for US$20 million. No study to determine the levels of ethanol in the air have begun. Additionally, due to the sporadic nature of the emissions, the results of a test, if performed, will not be completed for at least six months.

Trademark

Seller owns the trademark "Blue Duck" and the only reason its premium vodka sells as well as it does in the U.S. is because their "Blue Duck" vodka is a popular, trendy vodka that is generally recognized as the preferred brand used in martinis. After the closing of the sale of "Blue Duck," Seller intends to develop a product called "Red Geese" gin for distribution on a multi-national level. Seller envisions marketing "Red Geese" as the new preferred brand to be used in martinis.

Employment

Jeff Golden, a rising star in his early-mid 40s, has been Seller's chief executive officer (the "CEO") for the past 3 years. He single-handedly increased Seller's revenues and market share by putting "Blue Duck" on the map. Mr. Golden was named by Business Week as one of the top 10 executives in 2008 and is highly regarded and respected in the alcoholic beverage industry. Mr. Golden is also a former NCAA Division I college basketball player and has led Blue Duck to two ABIBL (Alcoholic Beverage Industry Basketball League) championships in the last three years. The ABIBL championships have become a big source of pride for the Blue Duck employees.

Mr. Golden's employment agreement provides that, in the event that he is not offered employment as the CEO following a "change of control," or his employment is terminated (other than for "cause") or his responsibilities are reduced in connection with or within one year following a "change of control," he will be entitled to receive a payment of $15,000,000. The employment agreement defines "change of control" as follows:

"(a) the Company is party to a merger or consolidation which results in the voting securities of the Company outstanding immediately prior thereto failing to continue to

represent (either by remaining outstanding or by being converted into voting securities of the surviving or another entity) at least fifty (50%) percent of the combined voting power of the voting securities of the Company or such surviving or other entity outstanding immediately after such merger or consolidation;

(b) the sale or disposition of all or substantially all of the Company's assets (or consummation of any transaction having similar effect); or

(c) the dissolution or liquidation of the Company."

The employment agreement also states that the CEO may be terminated for "cause" in which case, the CEO will not be entitled to earn any compensation following the date of termination. The employment agreement defines "cause" as follows:

"(i) repeated failure of Employee to satisfy reasonable performance objectives or to follow reasonable and lawful directives, which in each case are consistent with the position which Employee then holds; *provided*, that any such failure is reasonably determined by the Company to be materially injurious to the business or interests of the Company;

(ii) willful misconduct by Employee that causes any material injury to the financial condition or business reputation of the Company;

(iii) any act of fraud, dishonesty or defalcation with respect to any aspect of the business of the Company;

(iv) use of illegal drugs or excessive use of alcoholic beverages; or

(v) conviction or commission of a felony or of a crime involving moral turpitude."

In addition, the CEO hosts many business meetings in which "Blue Duck" vodka flows like a river. All members of senior management (including the CEO) are known to drink a "healthy quantity" but none is thought to be an alcoholic. You do not know if Buyer would be willing to employ the CEO following the acquisition but Seller has informed you that the CEO wants to work for the combined company after the closing and plans to retire by age 50 to spend more time with his family and pursue other interests. Seller does not want to become liable for any portion of the $15,000,000 payment should the CEO become entitled to receive such payment. Your goal is to try to get the Buyer to hire the CEO post-closing as Buyer's CEO, or to minimize the portion of the $15,000,000 payment for which Seller is responsible.

Litigation/Products Liability

Sixteen women and a male stripper were admitted to the Dashland's Infirmary on June 30, 2019 with severe abdominal pain after attending a bachelorette party at which, among other alcoholic beverages, vodka was consumed. They were diagnosed as suffering from acute

methanol poisoning. The vodka consumed at the party was purchased from a convenience store in Queens, New York just a few blocks away from Seller's manufacturing facility. All vodka bottles from the store were seized by the police and submitted for forensic examination. The NYPD issued three press releases to the local and national media in order to alert the public to the dangers of consuming vodka. The forensic examination revealed that some of the vodka bottles seized contained dangerous levels of methanol and were 150 proof. The results showed, in all cases, levels of methanol sufficient to render the vodka unfit for human consumption and cause serious health risks. Effects of methanol poisoning include abdominal pain, drowsiness and dizziness, severe metabolic acidosis, blurred vision leading to blindness and coma with respiratory difficulties. Recently, ten more incidents of acute methanol poisoning have arisen in the prominent Eichsley area of Brooklyn and a total of 425 bottles of vodka have been confiscated and sent for testing. The recent incident is very similar to a previous incident involving vodka previously found on sale in the Queens area that also contained high levels of methanol. Although it is not known where the poisonous vodka might be on sale, nor is the manufacturer of the vodka yet known, some of the women at the bachelorette party distinctly remember a goose, duck or swan.

Seller's manufacturing manager has informed you that six months ago there was a bad batch of approximately 1,000 Blue Duck vodka bottles containing high methanol levels and instead of 80 proof, this batch was 150 proof. An action was filed against Seller by the groom of the deceased bride who was one of the sixteen women who claimed to have drunk the "Blue Duck" vodka at the bachelorette party. Seller has been informed through discovery that the male stripper saw the bride, who only weighed 115 pounds, drink approximately two bottles of red wine and eight shots of the so called contaminated "Blue Duck" vodka. The action seeks US$25 million for wrongful death, survival claims, negligence, defective manufacturing, medical bills and pain and suffering. Of the fifteen other women, six are in critical condition and nine have recovered. The families of the critical patients are thinking of filing lawsuits against Seller. Your goal is to reduce the risk of potential lawsuits to Seller.

Please feel free to contact me (or any other participating faculty members) prior to the Mock Negotiation Workshop with any questions you may have. We will also be available to you throughout the Mock Negotiation Workshop to answer your questions and give advice.

ASSET PURCHASE AGREEMENT

BETWEEN

BLUE DUCK CORP.

AND

RUM & COLA, INC.

_____, 20__

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ASSET PURCHASE AGREEMENT

This ASSET PURCHASE AGREEMENT (this "Agreement") is dated as of _____, 20__, by and between Blue Duck Corp., a New York corporation ("Seller"), and Rum & Cola, Inc., a New York corporation ("Buyer").

WHEREAS, Seller is in the business of manufacturing and selling premium vodka (the "Business").

WHEREAS, Seller desires to sell to Buyer, and Buyer desires to purchase from Seller, substantially all of Seller's assets, on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

ARTICLE I

DEFINITIONS

Unless the context otherwise requires, capitalized terms used in this Agreement or in any Schedule attached hereto and not otherwise defined herein shall have the following meanings for all purposes of this Agreement:

"Assigned Contracts" has the meaning set forth in Section 2.1(e).

"Assumed Liabilities" has the meaning set forth in Section 2.3.

"Audited Financial Statements" has the meaning set forth in Section 4.5(a).

"Basket" has the meaning set forth in Section 8.5.

"Business" has the meaning set forth in the recitals hereto.

"Buyer" has the meaning set forth in the introductory paragraph hereto.

"Buyer Common Stock" shall mean the Buyer's common stock, par value $0.001 per share.

"Buyer SEC Reports" shall mean all filings made by the Buyer with the SEC since December 31, 2007, including those that the Buyer may file after the date of this Agreement until the Closing Date.

"Buyer's Representatives" means the directors, officers, employees, accountants, counsel, agents, consultants, advisors and other authorized representatives of Buyer.

"Cash Payment" has the meaning set forth in Section 2.7.

"Claim Notice" has the meaning set forth in Section 8.4(a).

"Cleanup" means cleanup costs or corrective action, including any investigation, cleanup, removal, containment or other remediation or response actions.

"Closing" has the meaning set forth in Section 3.1.

"Closing Date" has the meaning set forth in Section 3.1.

"Code" has the meaning set forth in Section 4.12(c).

"Damages" has the meaning set forth in Section 8.2.

"Employee Benefit Plans" has the meaning set forth in Section 4.12(a).

"Environment" means soil, land surface or subsurface strata, surface waters (including navigable waters, ocean waters, streams, ponds, drainage basins and wetlands), groundwaters, drinking water supply, stream sediments, ambient air (including indoor air), plant and animal life and any other environmental medium or natural resource.

"Environmental Liabilities" means any out-of-pocket cost, damages, expense, liability, obligation or other responsibility to the extent arising from or under any Environmental Requirement and consisting of or relating to:

(a) any environmental matters or conditions (including on-site or off-site contamination, and regulation of chemical substances or products);

(b) fines, penalties, judgments, awards, settlements, legal or administrative proceedings, damages, losses, claims, demands and response, investigative, remedial or inspection costs and expenses arising under any Environmental Requirement;

(c) financial responsibility under any Environmental Requirement for Cleanup required by any applicable Environmental Requirement (whether or not such Cleanup has been required or requested by any governmental authority or any other Person) and for any natural resource damages; or

(d) any other compliance, corrective, investigative or remedial measures required under Environmental Requirement.

The terms "removal," "remedial" and "response action," include the types of activities covered by the United States Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601 *et seq.*, as amended.

"Environmental Requirements" means any applicable federal, state, local, municipal, foreign or other administrative order, law, ordinance, regulation or statute or common law requirement relating to Hazardous Activity in effect as of the Closing Date that requires or relates to:

(a) required reporting to government authorities, employees or the public of intended or actual Releases of pollutants or hazardous substances or materials, violations of discharge

limits or other prohibitions and of the commencement of activities that could have significant impact on the Environment;

(b) preventing or reducing to acceptable levels the Release of pollutants or Hazardous Substances or materials into the Environment;

(c) reducing the quantities, preventing the Release or minimizing the hazardous characteristics of wastes that are generated;

(d) protecting resources, species or ecological amenities;

(e) reducing to acceptable levels the risks inherent in the transportation of hazardous substances, pollutants, oil or other potentially harmful substances;

(f) cleaning up pollutants that have been Released, preventing the threat of Release, or paying the costs of such clean up or prevention; or

(g) making responsible parties pay private parties, or groups of them, for damages done to their health or the Environment, or permitting self-appointed representatives of the public interest to recover for injuries done to public assets.

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended.

"Exchange Act" means the Securities Exchange Act of 1934, as amended, and the rules and regulations thereunder.

"Excluded Assets" has the meaning set forth in Section 2.2.

"Excluded Liabilities" has the meaning set forth in Section 2.4.

"Existing Indebtedness" has the meaning set forth in Section 4.7(a).

"Financial Statements" has the meaning set forth in Section 4.5(a).

"GAAP" means generally accepted accounting principles as in effect from time to time, consistently applied.

"Hazardous Activity" means the distribution, generation, handling, importing, management, manufacturing, processing, production, refinement, Release, storage, transfer, transportation, treatment or use (including any withdrawal or other use of groundwater) of Hazardous Substances in, on, under, about or from Seller's facilities or any part thereof into the Environment.

"Hazardous Substances" has the meaning set forth in Section 4.16(b)(i).

"Indemnified Party" has the meaning set forth in Section 8.4.

"Indemnifying Party" has the meaning set forth in Section 8.4.

"Intellectual Property" has the meaning set forth in Section 2.1(f).

"Inventory" has the meaning set forth in Section 2.1(a).

"I.R.S." means the United States Internal Revenue Service or any successor agency and, to the extent relevant, the United States Department of the Treasury.

"Latest Balance Sheet Date" has the meaning set forth in Section 4.5(c).

"Lien" means any lien (including any Tax lien), mortgage, pledge, security interest, charge, easement, option, defect in title, claim, community property interest, condition, equitable interest, right of first refusal or any other restriction or encumbrance of any kind, including any restriction on use, voting, transfer, receipt of income or exercise of any other attribute of ownership.

"Limit" has the meaning set forth in Section 8.5.

"Material Adverse Effect" means with respect to any event, matter, condition or circumstance, any change or effect that would have a material adverse effect upon the business, condition (financial or otherwise), assets, liabilities, operations, performance, properties or operating results of Seller, taken as a whole, other than any effect: (i) resulting from applicable laws or regulations or matters that generally affect the industry in which Seller engages, (ii) any effect resulting from changes in general economic, regulatory or political conditions or (iii) any action required or permitted under this Agreement or the transactions contemplated hereby.

"Material Contracts" has the meaning set forth in Section 4.10(a).

"Necessary Consents" has the meaning set forth in Section 6.2(c)(i).

"Parachute Payment" means any payment in the nature of compensation to or for the benefit of an individual if such payment is contingent on a change in (i) the ownership or effective control of a corporation, or (ii) the ownership of a substantial portion of the assets of the corporation.

"Payment Shares" has the meaning set forth in Section 2.7.

"Permits" means permits, licenses, registrations, certificates of occupancy, approvals and authorizations by or of governmental authorities or third parties.

"Person" means any individual, corporation, partnership, limited liability company, joint venture, association, joint stock company, trust (including any beneficiary thereof), unincorporated organization or government or any agency or political subdivision thereof.

"Personal Property Leases" has the meaning set forth in Section 2.1(k).

"Proprietary Rights" means all patents, patent applications, patent disclosures, discoveries that may be patentable and inventions (whether or not patentable and whether or not reduced to practice); all registered and unregistered trademarks, service marks, trade dress, trade

names, corporate names, fictional business names and applications; all registered and unregistered statutory and common law copyrights in both published works and unpublished works; all registrations, applications and renewals for any of the foregoing; all know-how, trade secrets, confidential information, ideas, formulae, compositions, know-how, manufacturing and production processes and techniques, research and development information, drawings, specifications, designs, plans, improvements, proposals, technical and computer data, documentation and software, financial, business and marketing plans, and franchisee, customer and supplier lists and related information owned, used or licensed by Seller as licensee or licensor; and all other proprietary rights.

"Purchase Price" has the meaning set forth in Section 2.7.

"Purchased Assets" has the meaning set forth in Section 2.1.

"Real Property" has the meaning set forth in Section 2.1(b).

"Real Property Leases" has the meaning set forth in Section 2.1(k).

"Release" means any spilling, leaking, emitting, discharging, depositing, escaping, leaching, dumping or other releasing into the Environment, whether intentional or unintentional.

"Sarbanes-Oxley Act" has the meaning set forth in Section 5.4(a).

"SEC" has the meaning set forth in Section 5.4(a).

"Securities Act" has the meaning set forth in Section 4.22.

"Seller" has the meaning set forth in the introductory paragraph hereto.

"Seller's Representatives" means directors, officers, employees, accountants, counsel, agents, consultants, advisors and other authorized representatives of Seller.

"Subsidiary" shall mean, when used with reference to an entity, any other entity 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, or a majority of the outstanding voting securities of which, are owned directly or indirectly by such entity.

"Surviving Representations" has the meaning set forth in Section 8.1(a).

"Taxes" means all federal, state, local and foreign taxes, including, without limitation, all income, gross income, gross receipts, sales, use, value-added, ad valorem, transfer, franchise, profits, license, withholding, payroll, employment, excise, estimated, severance, stamp, occupation, property, alternative minimum or other taxes, and customs duties of any kind whatsoever, together with any interest, penalties, and additions to tax or additional amounts relating thereto, imposed by any governmental authority, as well as any of the foregoing amounts that are due and owing pursuant to any indemnity obligation or tax sharing agreement.

"Tax Returns" has the meaning set forth in Section 4.14.

"Third Party Claim" has the meaning set forth in Section 8.4(a).

"Unaudited Financial Statements" has the meaning set forth in Section 4.5(a).

ARTICLE II

PURCHASE AND SALE OF ASSETS

Section 2.1 Purchase and Sale. On the terms and subject to the conditions set forth in this Agreement, at the Closing, Seller agrees to sell, transfer and deliver to Buyer, free and clear of all Liens, and Buyer agrees to purchase from Seller, all of Seller's assets, goodwill and properties, whether real or personal, tangible or intangible, owned by Seller and used by Seller in the Business on the Closing Date, other than the Excluded Assets (collectively, the "Purchased Assets"), including, without limitation:

(a) Inventory and Supplies. All inventory and supplies of Seller, including, without limitation, raw materials, finished goods and packaging materials, office, operation and other supplies (the "Inventory");

(b) Real Property. The real property and buildings located at 8800 Metropolitan Avenue, Queens, New York, which real property is more particularly described on Schedule 2.1(b), together with all rights and appurtenances pertaining to such property, including, without limitation, any right, title and interest of Seller in and to adjacent streets, alleys, strips, gores and rights-of-way, and any rights, easements, improvements and appurtenances pertaining to such property (collectively, the "Real Property");

(c) Tangible Personal Property. All fixtures, equipment (including computer hardware and software), machinery, supplies, tools, vehicles (whether or not registered under motor vehicle registration laws), furniture and other similar personal property of Seller;

(d) Receivables. All notes and accounts receivable of Seller or other rights to receive payment for goods or services provided by the Business as existing on the Closing Date, and all notes, bonds and other evidences of indebtedness of any corporation or other Person held by Seller;

(e) Contracts. All rights Seller may have under any and all agreements, contracts, purchase orders, licenses and leases pertaining to the Business including, without limitation, customer contracts, customer orders and backlog relating to the Business, royalty and license agreements and rights, purchase agreements and rights to use technology owned by others, which the Buyer shall assume, including the contracts set forth on Schedule 2.1(e) (collectively, the "Assigned Contracts");

(f) Intellectual Property. All Proprietary Rights relating to the conduct of the Business, including any and all rights to the name "Blue Duck" or derivatives thereof, and any and all claims, causes of action, rights of recovery, benefits and set-offs arising out of or related to any such Proprietary Rights; all rights of Seller in telephone listings and numbers, post office boxes and cable, website, telex and similar agreements; all of Seller's website addresses and e-mail addresses; and the benefit of all warranties and guaranties of manufacturers, contractors,

suppliers, sellers and others which relate to the Purchased Assets (collectively, the "Intellectual Property");

(g) Customer Information. All customer lists, files, programs, plans, data and related information, in whatever form, relating to past, present and prospective customers of Seller and all related sales and credit records, lists of past and present suppliers to the Business, and all Proprietary Rights relating thereto;

(h) Records. All books and records of Seller since January 1, 2004, including, without limitation, all records, files, papers, sales and purchase correspondence, books of account and financial and employment records, except Seller's minute books, stock record books (and similar corporate records) and Tax Returns, which shall remain the property of Seller;

(i) Licenses, Permits and Approvals. All rights of Seller in and to transferable Permits;

(j) Claims. All causes of actions, claims, warranties, guarantees, refunds, rights of recovery and set-off of every kind and character, including, without limitation, rights and claims against suppliers of inventory and other assets transferred hereunder other than those claims not related to the Purchased Assets;

(k) Leases. All of Seller's interests under (i) personal property leases (and the leasehold interests created thereby) listed on Schedule 2.1(k) (the "Personal Property Leases"), and any personal property leases entered into after the date hereof in accordance with the provisions hereof and (ii) all leases of space in the building(s), including, without limitation, those leases of space set forth in Schedule 2.1(k), if any, and any leases of space entered into after the date hereof in accordance with the provisions hereof, and all deposits and advance payments made by tenants thereunder (the "Real Property Leases"); and

(l) Other Assets. All other properties and assets owned or held by Seller that are used in, or are necessary for the continued conduct of, or are otherwise customarily used in, the Business as of the Closing Date, whether or not of a type falling within any of the categories of assets or properties described above;

but excluding therefrom the Excluded Assets.

Section 2.2 Excluded Assets. Notwithstanding the foregoing, the following properties and assets of Seller shall be retained by Seller and are expressly excluded from the purchase and sale contemplated by this Agreement (collectively, the "Excluded Assets"):

(a) Records and Tax Returns. Seller's formal corporate records, including its charter documents, minute books and other records having exclusively to do with the organization of Seller and taxpayer and other identification numbers and all Tax Returns of Seller;

(b) Claims. All causes of action, claims, rights of recovery and set-off of Seller not relating to the Purchased Assets or arising out of the conduct of the Business, irrespective of when such claims or rights arose; and

(c) Tax Refunds. All Tax refunds to which Seller may become entitled.

Section 2.3 Assumption of Liabilities. Upon the terms and subject to the conditions contained herein, at the Closing, Buyer shall assume the following, and only the following, liabilities of Seller (the "Assumed Liabilities"):

(a) All liabilities of the Business accruing, arising out of, or relating to events or occurrences happening after the Closing under the Assigned Contracts; and

(b) All obligations arising under the Assigned Contracts and Permits, but only to the extent such obligations relate to performance required during the period after the Closing Date.

Section 2.4 Excluded Liabilities. Notwithstanding the foregoing, Seller agrees that Buyer is not assuming any other liability of Seller, whether known, unknown, matured or contingent, including, without limitation, the following liabilities and obligations of Seller (collectively, the "Excluded Liabilities"):

(a) any liability or obligation of Seller to its shareholders;

(b) any current or long-term liability or obligation of Seller with respect to indebtedness for borrowed money, including any bank debt or notes payable;

(c) any liability or obligation of Seller for any federal, state, local or other Taxes, including, without limitation, income, sales, use, franchise or other Taxes or for any penalties or interest with respect to any of the foregoing, relating to periods prior to the Closing Date;

(d) any liabilities or obligations with respect to any Employee Benefit Plans;

(e) any liabilities for product liability claims with respect to products shipped by Seller prior to the Closing Date;

(f) any liabilities for personal injury or property damage of third parties arising from events occurring prior to the Closing;

(g) any contracts other than the Assigned Contracts;

(h) any obligations to any employees with respect to bonuses payable upon the consummation of the transactions contemplated hereby;

(i) any liabilities for Environmental Liabilities arising out of acts, occurrences or conditions existing prior to Closing; or

(j) any liabilities of Seller related to actions, arbitration, hearings, suits, investigations or litigation ("Litigation Events") including, but not limited to, Litigation Events set forth on Schedule 4.9, arising out of acts, occurrences or conditions existing prior to Closing.

Section 2.5 Transfers of Personal Property Leases, Real Property Leases and Assigned Contracts. To facilitate the assignment or transfer of the Personal Property Leases, Real Property Leases and Assigned Contracts, Seller shall execute such documents relating to the assignment or transfer as may be prepared by Buyer and reasonably acceptable to Seller that are reasonably necessary or appropriate for evidencing or recording the assignments or transfers to Buyer.

Section 2.6 Assignment of Intellectual Property. On the Closing Date, Seller shall execute and deliver assignments in form and substance reasonably satisfactory to Buyer with respect to the Intellectual Property, including all goodwill associated therewith.

Section 2.7 Purchase Price. The aggregate purchase price (the "Purchase Price") for the sale and transfer of the Purchased Assets shall be $_____, which shall be paid as follows: (i) $_____ in cash (the "Cash Payment") and (ii) delivery of shares of Buyer Common Stock with a fair market value equal to $_____, based on the closing price of the Buyer Common Stock on the trading day immediately preceding the Closing Date (the "Payment Shares"). At the Closing, Buyer shall pay the Purchase Price (x) by wire transfer of the Cash Payment in immediately available funds to an account designated by Seller and (y) by issuance of the Payment Shares to Seller, free and clear of all Liens other than restrictions on transfer under federal and state securities laws.

ARTICLE III

CLOSING

Section 3.1 Time and Place of Closing. Unless the parties hereto shall agree in writing upon a different location, time or date, the closing of the purchase and sale of the Purchased Assets (the "Closing") shall take place at the offices of _____, at _____, New York time, on _____. The term "Closing Date" means the date and time at which the Closing occurs.

Section 3.2 Documents to be Delivered by Seller. At the Closing, the following instruments and documents shall be delivered or provided to Buyer by Seller, duly executed (to the extent applicable), unless the Buyer shall waive such delivery:

(a) Instruments of Conveyance. Such bills of sale, assignments, endorsements and other documents of title and other good and sufficient instruments of conveyance and transfer, as shall be effective to vest the Buyer with full, complete and marketable right, title and interest in and to the Purchased Assets, free and clear of all Liens;

(b) Consents and Assignments. Written evidence that all Necessary Consents have been obtained;

(c) Releases. All releases and payoff letters obtained pursuant to Section 6.2(d);

(d) Closing Certificate. A certificate, dated the Closing Date, duly executed by Seller, to the effect that the conditions set forth in Section 6.2(a) have been satisfied;

(e) Books and Records. The originals of all books, records, documents and other written materials exclusively related to the Business and included in the Purchased Assets, and copies of all other books, records, documents and other written materials directly related to the Business and included in the Purchased Assets, such that the originals and copies will collectively constitute all books, records, documents and other written materials necessary to the conduct of the Business as presently conducted and as currently proposed to be conducted by Buyer;

(f) Deed. A good and sufficient special warranty deed in recordable form executed and acknowledged by Seller in favor of Buyer, in form and substance reasonably acceptable to Buyer and its counsel, the delivery and recordation of which will vest in Buyer good, marketable and indefeasible fee title in and to the Real Property; and

(g) Other Documents. Such other documents or instruments as Buyer may reasonably request in order to give effect to the transactions contemplated by this Agreement.

Section 3.3 Documents to be Delivered by Buyer. At the Closing, the following instruments and documents shall be delivered or provided to Seller by Buyer, duly executed (to the extent applicable), unless Seller shall waive such delivery:

(a) Payment of Purchase Price.

(i) Bank wire transfer of the Cash Payment as provided in Section 2.7; and

(ii) Stock certificates representing the Payment Shares issued in the name of Seller, duly executed by the appropriate officers of Buyer and containing the following legend: "THE SHARES REPRESENTED BY THIS CERTIFICATE HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"), AND MAY NOT BE OFFERED, SOLD OR OTHERWISE TRANSFERRED EXCEPT PURSUANT TO AN EXEMPTION FROM REGISTRATION UNDER THE SECURITIES ACT OR PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT UNDER THE SECURITIES ACT, IN EACH CASE IN ACCORDANCE WITH ALL OTHER APPLICABLE SECURITIES LAWS";

(b) Instruments of Assumption. Assumption agreements in form and substance satisfactory to Seller, executed by Buyer, pursuant to which Buyer assumes the Assumed Liabilities, Assigned Contracts and Permits as of the Closing;

(c) Closing Certificate. A certificate, dated the Closing Date, duly executed by Buyer, to the effect that the conditions set forth in Section 6.1(a) have been satisfied; and

(d) Other Documents. Such other documents or instruments as Seller may reasonably request in order to give effect to the transactions contemplated by this Agreement.

ARTICLE IV

REPRESENTATIONS AND WARRANTIES OF SELLER

Seller represents and warrants to Buyer as follows:

Section 4.1 Organization; Good Standing. Seller is a corporation duly organized, validly existing in good standing under the laws of New York and has the corporate power to carry on its business as now being conducted, to own or use the properties and assets that it purports to own or use and to perform all its obligations under the Assigned Contracts. Seller is not qualified to do business as a foreign corporation in any jurisdiction and the failure to be so qualified would not have a Material Adverse Effect. Copies of Seller's charter documents heretofore delivered to Buyer are accurate and complete as of the date hereof.

Section 4.2 Subsidiaries. Seller does not own, directly or indirectly, any capital stock or other equity securities in any corporation, partnership, limited liability company, joint venture, association, trust or any other unincorporated organization or entity or have any agreement or commitment to purchase any such interest.

Section 4.3 Authorization. Seller has all requisite corporate power and authority, and has taken all corporate action necessary, to execute and deliver this Agreement, to consummate the transactions contemplated hereby and to perform its obligations hereunder. The execution and delivery of this Agreement by Seller and the consummation by Seller of the transactions contemplated hereby have been duly approved by the board of directors and shareholders of Seller. No other corporate proceedings on the part of Seller are necessary to authorize this Agreement and the transactions contemplated hereby. This Agreement, assuming the due authorization, execution and delivery by Buyer, has been duly executed and delivered by Seller and constitutes the legal, valid and binding obligations of Seller, enforceable against Seller in accordance with its terms, except as such enforcement may be limited by any bankruptcy, insolvency, reorganization, moratorium, fraudulent transfer or other laws (whether statutory, regulatory or decisional), now or hereafter in effect, relating to or affecting the rights of creditors generally or by equitable principles (regardless of whether considered in a proceeding at law or in equity).

Section 4.4 No Conflicts. The execution, delivery, and performance by Seller of this Agreement and the transactions contemplated hereby do not and will not (a)(i) contravene any provisions of Seller's charter documents or any resolutions of the board of directors or shareholders of Seller, (ii) except as set forth in Schedule 4.4, with or without the giving of notice or the passage of time or the taking of any action or any or all of the foregoing, conflict with or result in any breach or violation by Seller, or constitute a default or permitted or required termination or modification or acceleration of performance by Seller under, or result in the creation of any Lien upon Seller's assets pursuant to, any mortgage, indenture, contract, agreement, insurance policy, settlement, license, permit or other instrument to which Seller is a party or otherwise affecting the Seller's assets or operations or (iii) result in any violation by Seller of any law, rule or regulation applicable to it, or any license or permit issued by any governmental authority to Seller, or give any governmental authority or other Person the right to challenge any of the transactions contemplated hereby or exercise any relief under any law or

order to which Seller may be subject, (b) result in any violation by Seller of any judgment, injunction or decree of any court or governmental authority applicable to Seller or (c) require any consent or approval of, notice to, or filing, registration or qualification with, any court or administrative governmental authority to be made or obtained by Seller.

Section 4.5 Financial Statements; Undisclosed Liabilities.

(a) Seller has delivered to Buyer (i) the audited balance sheet and related audited statements of income, retained earnings and cash flow of Seller for the year ended December 31, 20__, together with the notes thereto and the report thereon of _____, independent certified public accountants (the "Audited Financial Statements"), (ii) the audited balance sheet and the related audited statements of income, retained earnings and cash flow for each of the fiscal years 200_ through 200_, together with the notes thereto and the report thereon of Ernst & Young LLP, independent certified public accountants and (iii) the unaudited balance sheet and related statements of income of Seller for the __-month period ended _____ (the "Unaudited Financial Statements" and, together with the Audited Financial Statements, the "Financial Statements").

(b) The Audited Financial Statements are consistent with the books and records of Seller, and present fairly, in all material respects, the financial position and results of operations and cash flows of Seller as of and for the year ended December 31, 20__ in conformity with GAAP.

(c) The Unaudited Financial Statements are consistent with the books and records of Seller, and present fairly, in all material respects, the financial position and results of operations and cash flows of Seller as of and for the __-month period ended _____ (the "Latest Balance Sheet Date") in conformity with GAAP, except for the absence of required footnote disclosure and customary year-end adjustments (the effect of which will not have a Material Adverse Effect).

(d) Except (i) to the extent of amounts specifically reflected therefor in the Unaudited Financial Statements, (ii) as specifically set forth in Schedule 4.5(d) or (iii) for liabilities or obligations arising after the Latest Balance Sheet Date in the ordinary course of business, Seller does not have any liabilities or obligations, (whether accrued, absolute or contingent) and does not have knowledge of any contingencies, that could, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. No financial statements of any Person other than Seller are required by GAAP to be included in the financial statements of Seller.

Section 4.6 Conduct of the Business. Except as required or otherwise contemplated by this Agreement, since the Latest Balance Sheet Date, (a) the Business has been conducted in the ordinary course of business with such exceptions as have not had a Material Adverse Effect, (b) neither the financial condition nor the business of Seller has materially adversely changed and (c) there has not been any (i) change in Seller's authorized or issued capital stock; grant of any stock option or right to purchase shares of capital stock of Seller; issuance of any security convertible into such capital stock; grant of any registration rights; purchase, redemption, retirement or other acquisition by Seller of any shares of any such capital stock; or declaration or

payment of any dividend or other distribution or payment in respect of shares of capital stock; (ii) amendment to the charter documents of Seller; (iii) payment or material increase by Seller of any bonuses, salaries or other compensation to any stockholder, director, officer or employee or entry into any employment, severance or similar contract or agreement with any director, officer or employee; (iv) adoption of, or increase in the payments to or benefits under, any Employee Benefit Plan for or with any employees of Seller; (v) damage to or destruction or loss of any material asset or property of Seller, whether or not covered by insurance, materially and adversely affecting the properties, assets, business, financial condition or prospects of Seller; (vi) entry into, termination of, or receipt of notice of termination of (A) any license, distributorship, dealer, sales representative, joint venture, credit or similar agreement, or (B) any contract, agreement or transaction involving a total remaining commitment by or to Seller of at least $20,000; (vii) sale (other than sales of inventory in the ordinary course of business), lease or other disposition of any asset or property of Seller or mortgage, pledge or imposition of any Lien on any material asset or property of Seller, including the sale, lease or other disposition of any of the Intellectual Property; (viii) cancellation or waiver of any claims or rights with a value to Seller in excess of $20,000; (ix) (A) incurrence or assumption of any long-term debt (including any capitalized lease), (B) assumption, guarantee, endorsement or other liability or responsibility (whether direct, contingent or otherwise) of the obligations of any other Person (other than endorsements of checks in the ordinary course) or (C) loans, advances or capital contributions made to, or investment in, any Person; (x) material reduction in the rate of payment of trade accounts payable by Seller other than in the ordinary course of business, or any material increase in the ratio of trade accounts payable to the purchases made during the most recent sixty (60) day period other than in the ordinary course of business; (xi) material increase in the ratio of accrued liabilities to sales made during the most recent sixty (60) day period other than in the ordinary course of business; (xii) reduction in the amount of inventory of Seller other than normal seasonal reductions in the ordinary course of business; (xiii) material increase in the rate of collection of accounts receivable of Seller other than in the ordinary course of business, or any material decrease in the ratio of accounts receivable to the sales made during the most recent sixty (60) day period other than in the ordinary course of business; (xiv) payment, discharge or satisfaction of any material claims, liabilities or obligations (absolute, accrued, asserted or unasserted, contingent or otherwise), other than in the ordinary course of business consistent with past practice, or failure to pay or other satisfaction of any material claims, liabilities or obligations other than on a basis, and within the time, consistent with past practice; (xv) change in the accounting methods used by Seller; or (xvi) agreement, whether oral or written, by Seller to do any of the foregoing.

Section 4.7 Purchased Assets.

(a) Seller has, and will, upon the consummation of the transactions contemplated hereby, transfer to Buyer, good and marketable title to the Purchased Assets and upon the consummation of the transactions contemplated hereby, assuming the payoff of all bank loans, revolver balances and notes payable of Seller (the "Existing Indebtedness") and release of associated Liens, Buyer will acquire good and marketable title to all of the Purchased Assets, free and clear of any Liens. Upon the consummation of the transactions contemplated hereby, Buyer will acquire the right to use, and a valid leasehold interest in, all of the Purchased Assets consisting of leasehold interests, subject to the terms of such leasehold interests.

(b) The Purchased Assets include without limitation all assets necessary for the conduct of the Business as presently conducted by Seller.

(c) All tangible assets and properties which are part of the Purchased Assets are in good operating condition (ordinary wear and tear excepted).

Section 4.8 Inventory; Accounts Receivable.

(a) Inventory. Except for reserves included in the Financial Statements, the Inventory reflected in the Unaudited Financial Statements or manufactured or acquired since the Latest Balance Sheet Date consists of items of a quantity and quality useable and/or saleable in the ordinary course of business as conducted by Seller prior to the Closing, except for defective, damaged or obsolete items and items below standard quality, all of which (i) to the extent they were on hand on the Latest Balance Sheet Date, have been written down in the Unaudited Financial Statements to estimate realizable market value or (ii) to the extent they have been manufactured or acquired since the Latest Balance Sheet Date, do not constitute a material portion of the Inventory either in quantity or value. All Inventory not written off has been valued at the lower of cost or net realizable value. The quantities of each item of Inventory (whether raw materials, work-in-process or finished goods) are not excessive, but are reasonable in the present circumstances and past practices of Seller. Schedule 4.8(a) contains a complete list of all addresses at which the Inventory is located.

(b) Accounts Receivable. Except for reasonable and ordinary course reserves reflected in the Financial Statements, Seller's accounts receivable reflected in the Unaudited Financial Statements and arising between the Latest Balance Sheet Date and the Closing Date have arisen in bona-fide arms length transactions in the ordinary course of business, represented, represent or will represent valid obligations arising from sales actually made or services actually performed in the ordinary course of business and are valid and binding obligations of the account debtors without counterclaims, set-offs or other defenses thereto (other than returns and claims in the ordinary course of business). Unless paid prior to the Closing Date, such accounts receivable are or will be as of the Closing Date current and collectible net of the respective reserves shown in the Unaudited Financial Statements or on the accounting records of Seller as of the Closing Date (which reserves are reasonable and calculated consistent with past practice). Subject to such reserves, each of such accounts receivable either has been or will be collected in full, without any set-off, within one hundred twenty days after the day on which it first becomes due and payable. Schedule 4.8(b) contains a complete and accurate list of all accounts receivable as of the Latest Balance Sheet Date, which list sets forth the aging of such accounts receivable.

Section 4.9 Compliance with Law; Litigation; Injunctions.

(a) Seller has not violated, and is in compliance with, and has received no notice, claim, complaint or other communication (whether oral or written) regarding any actual, alleged, possible or potential violation of, failure to comply with or liability under, any term or requirement of any injunction, law, rule, permit, regulation, order, judgment or decree applicable to it or any of the assets owned or used by it.

(b) Except as set forth in Schedule 4.9 (i) there is no action, suit, investigation, claim or other proceeding pending or threatened against or affecting Seller at law or in equity, before any federal, state or municipal court, administrative agency or arbitrator and no event has occurred or circumstance exists that may give rise to or serve as a basis for the commencement of any such action, suit, investigation, claim or other proceeding, and (ii) neither Seller nor any of its assets is a party to, or subject to or bound by, any judgment, order, injunction or decree of any court or governmental authority.

(c) Seller is, and at all times since December 31, 20__ has been, in compliance with all of the terms and requirements of each judgment, order, injunction or decree of any court or governmental authority to which it, or any of the assets owned or used by it, is or has been subject.

Section 4.10 Contracts and Agreements; Defaults.

(a) Set forth in Schedule 4.10(a) is a list, as of the date of this Agreement, of (i) all Existing Indebtedness, (ii) all outstanding warranties, guaranties and similar undertakings by Seller of any obligation of another Person for borrowings, excluding endorsements made for collection in the ordinary course of business, (iii) all outstanding contracts containing non-competition or non-solicitation covenants or similar restrictions of Seller or otherwise purporting to restrict the business activity of Seller or limit the freedom of Seller to engage in any line of business, (iv) all employment contracts and severance agreements to which Seller is a party, (v) each lease, rental or occupancy agreement, license, installment and conditional sale agreement, and other contract or agreement affecting the ownership of, leasing of, title to, use of or any leasehold or other interest in, any real or personal property (other than leases of personal property with an annual rent not in excess of $5,000 or cancelable (without liability) within thirty (30) days), (vi) collective bargaining, labor or union contracts, (vii) options with respect to any real or personal property of Seller, whether Seller shall be the grantor or grantee thereunder, (viii) contracts not made in the ordinary course of business, (ix) distribution, franchise, license, sales, consulting or agency contracts related to the Purchased Assets or the Business which are not cancelable (without liability) within thirty (30) days, (x) each licensing agreement or other contract or agreement with respect to Intellectual Property, including agreements with current or former employees, consultants or contractors regarding the appropriation or the non-disclosure of any of the Intellectual Property, (xi) each joint venture, partnership and other contract or agreement (however named) involving a sharing of profits, losses, costs or liabilities by Seller with any other Person, (xii) each contract or other agreement providing for payments to or by any Person based on sales, purchases or profits, other than direct payments for goods, (xiii) each power of attorney that is currently effective and outstanding and (xiv) all outstanding agreements, leases and contracts to which Seller is a party involving obligations of more than $50,000 per annum (collectively, the "Material Contracts").

(b) Except as set forth in Schedule 4.10(b):

(i) Each of the Material Contracts is in full force and effect and is valid and enforceable in accordance with its terms;

(ii) Seller is, and at all times since December 31, 2004 has been, in compliance with all applicable terms and requirements of each Material Contract under which Seller has or had any obligation or liability or by which Seller or any of the assets owned or used by Seller is or was bound;

(iii) Each other Person that has or had any obligation or liability under any Material Contract under which Seller has or had any rights is, and at all times since December 31, 2004 has been, in compliance with all applicable terms and requirements of such Material Contract;

(iv) No event has occurred or circumstance exists that (with or without notice or lapse of time) may contravene, conflict with or result in a violation or breach of, or give Seller or any other Person the right to declare a default or exercise any remedy under, or to accelerate the maturity or performance of, or to cancel, terminate or modify, any Material Contract; and

(v) Seller has not given to or received from any other Person, at any time since December 31, 2007, any oral or written notice or other communication regarding any actual, alleged, possible or potential violation or breach of, or default under, any Material Contract.

(c) There are no renegotiations of, attempts to renegotiate, or outstanding rights to renegotiate any material amounts paid or payable to Seller under current or completed Material Contracts with any Person and no such Person has made written demand for such renegotiation.

Section 4.11 Affiliated Transactions. Schedule 4.11 sets forth a complete and accurate list of all contracts, agreements, commitments, understandings or transactions to which any officer, director, shareholder, partner, member, trustee or beneficial owner of Seller or any Person related by blood or marriage to any such Person or any Person in which any such Person owns any beneficial interest, on the one hand, and Seller, on the other hand, is a party. No such Person owns any beneficial interest has, or since January 1, 20__ has had, any interest in any property (whether real, personal or mixed and whether tangible or intangible), used in or pertaining to the Business.

Section 4.12 Employee Benefits.

(a) Employee Benefit Plans. Except as described in Schedule 4.12(a), Seller does not maintain, contribute to, or have any liability or contingent liability for any "employee pension benefit plan" (as defined in Section 3(2) of ERISA), "employee welfare benefit plan" (as defined in Section 3(1) of ERISA), "multiemployer plan" (as defined in Section 3(37) of ERISA), plan of deferred compensation, fringe benefit plan (including, but not limited to, vacation time, holiday pay, bonus programs, moving expense reimbursement programs and sick leave), excess benefit plan, bonus or incentive plan (including, but not limited to, stock options, restricted stock, stock bonus and deferred bonus plans), severance benefit plan, salary reduction agreement, employment agreement, consulting agreement or any other benefit plan, program, contract or arrangement for current or former officers, directors or employees (or their respective

beneficiaries) (collectively, the "Employee Benefit Plans"), whether or not written, which provides in each case for payments in excess of $10,000 annually.

(b) Employee Benefit Plan Documents. Seller has provided to Buyer true and complete copies of (i) each material written plan document and summary plan description for the Employee Benefit Plans, (ii) the most recent determination letter received from the I.R.S. regarding the employee pension benefit plans and (iii) each written plan document for the multiemployer plans.

(c) Compliance. To the extent required by ERISA and the Internal Revenue Code of 1986, as amended (the "Code"), each Employee Benefit Plan: (i) has been and currently complies in form and in operation in all material respects with all applicable requirements of ERISA and the Code and its terms (except as otherwise required by law); (ii) has been and is operated in material compliance with applicable rules in such a manner as to qualify, where appropriate, for both Federal and state purposes, for income tax exclusions to its participants, tax-exempt income for its funding vehicle, and the allowance of deductions and credits with respect to contributions thereto; and (iii) where appropriate, has received, has timely applied for, or intends to apply timely for a favorable letter of determination from the I.R.S.

Section 4.13 Labor.

(a) Collective Bargaining Agreements. Seller is not, and since December 31, 20__, Seller has not been, a party to any labor or collective bargaining agreement.

(b) Labor-Related Investigations and Proceedings. (i) Seller is not participating in, there is not pending and Seller has not been threatened with in writing, or advised in writing of, an investigation or proceeding before the National Labor Relations Board, the Equal Employment Opportunity Commission or any comparable governmental authority or under the National Labor Relations Act, (ii) Seller is not involved in, there is not pending and Seller has not been threatened with in writing, a labor strike, dispute, picketing, employee grievance process, slowdown or stoppage, (iii) Seller is not participating in, there is not pending and Seller has not been threatened with in writing, or advised in writing of an investigation or proceeding under any law, regulation or order which prohibits discrimination, retaliation or harassment of employees or which requires affirmative action regarding employment and (iv) Seller is not subject to any order, judgment, conciliation agreement or decree which affects any of its rights to apply, establish, modify or terminate the employment policies, procedures and terms and conditions of employment regarding any employee or group of employees. Seller has complied with all federal, state, local, municipal, foreign, international, multinational or other administrative orders, constitutions, laws, ordinances, principles of common law, regulations, statutes and treaties relating to employment, equal employment opportunity, nondiscrimination, immigration, wages, hours, benefits, collective bargaining, the payment of social security and similar Taxes, occupational safety and health and plant closing.

(c) Payments to Employees. Neither the execution and delivery of this Agreement nor the consummation of any or all of the transactions contemplated hereby will: (i) entitle any current or former employee of Seller to severance pay, unemployment compensation or any other payment, (ii) accelerate the time of payment or vesting or increase the

amount of any compensation due to any such employee or former employee or (iii) directly or indirectly result in any payment made or to be made to or on behalf of any Person to constitute a Parachute Payment, nor is the Seller party to or bound by any contract that could require it to make any payment that could constitute a Parachute Payment.

Section 4.14 Taxes. Except as set forth in Schedule 4.14, Seller has filed all returns and reports with respect to Taxes ("Tax Returns") which are required to be filed, all such Tax Returns were true, correct and complete in all material respects when filed, and all Taxes shown to be due on such Tax Returns have been timely paid. All Taxes due and payable by Seller with respect to its businesses, operations, income or properties have been paid in a timely fashion, and will be paid in a timely fashion, when due, upon, to and through the Closing Date whether or not such Taxes are shown or required to be shown on a Tax Return. Any Tax deficiencies or adjustments proposed as a result of any governmental audits have been paid or settled, and there are no present disputes or audits concerning Taxes payable by Seller. Seller has not been notified by any governmental authority of any pending or upcoming Tax audits of Seller's federal, state, county, local or foreign Tax liability.

Section 4.15 Permits. All Permits of any governmental department or agency that are presently required for the operation of the business conducted by Seller have been duly obtained and are in full force and effect and Seller has not received any written notices threatening a suspension, modification or cancellation of any of the foregoing. Seller is in compliance with such licenses, permits, registrations and authorizations.

Section 4.16 Environmental.

(a) Compliance with Environmental Requirements. Seller has complied and is in compliance with all applicable Environmental Requirements.

(b) No Hazardous Substances. Except as set forth in Schedule 4.16(b), Seller has never:

(i) generated, transported, treated, stored, manufactured, possessed, used, Released or disposed of any hazardous, toxic or dangerous materials, substances, wastes, pollutants or contaminants (including, without limitation, petroleum and all derivatives thereof or synthetic substitutes therefor and asbestos containing materials) ("Hazardous Substances"), at any site, location or facility onsite or offsite;

(ii) owned or operated its business or facilities in violation of any Environmental Requirements;

(iii) owned or operated its business or facilities in a manner that could give rise to any liability or remedial obligation under any Environmental Requirements; and

no Hazardous Substances are present on, in or under any real property currently owned or used by Seller.

Section 4.17 Real Property. Seller is the sole owner of the Real Property free and clear of all Liens and does not own, lease (as lessee or lessor) or license any other real estate that is used in the operation of the Business. The Real Property constitutes all real properties used or occupied by Seller in conducting the Business.

Section 4.18 Intellectual Property. Schedule 4.18 contains a complete and correct list of all patents and registered Intellectual Property owned by Seller and all pending patent applications and applications for the registration of other Intellectual Property owned or filed by Seller. Schedule 4.18 also contains a complete and correct list of (a) all current trademark and service mark registrations, trademark and service mark applications, copyright registrations, and trade and corporate names used by Seller, (b) all current licenses and other rights granted by Seller to any third party with respect to Intellectual Property and (c) all licenses and other rights granted to Seller by any third party in writing with respect to Intellectual Property, excluding implied licenses and paid up licenses. All such applications, patents and registrations have been duly filed, and those registrations and patents which have been issued are validly existing and in full force and effect and all required maintenance and annuity fees have been timely paid in full. Except as set forth in Schedule 4.18:

(a) Seller has, or will have on the Closing Date, good and marketable title to all patents, patent applications, trademark registrations, trademark applications and copyright registrations used in the Business, free and clear of all Liens and without payment of any royalties, license fees or other amounts;

(b) There are no judicial orders, decrees, judgments or stipulations or related settlement agreements restricting or affecting Seller's use or right to use any patents, patent applications, trademark registrations, trademark applications, copyrights and copyright registrations;

(c) Seller has not received (and Seller has no knowledge of) any notice, claim or allegation from any other party challenging the right of Seller to use, possess, transfer, convey or otherwise dispose of any of the Intellectual Property. There is no interference, opposition, cancellation, reexamination, reissue or other contest proceeding, action, claim, dispute or claim of infringement, misappropriation or other violation of any intellectual property or other proprietary rights of any other Person. Seller's use of the Intellectual Property, past and present, has not and does not violate or infringe upon the rights of any other Person or constitute a breach of any agreement, obligation, promise or commitment by which Seller may be bound or constitute a violation of any laws, regulations or orders in any jurisdiction;

(d) Seller does not have any written obligation to grant licenses with respect to any Intellectual Property;

(e) The Intellectual Property include all rights and interests necessary to conduct the Business as it is currently conducted, and such rights will not be adversely affected by the execution and delivery of this Agreement or the consummation of the transactions contemplated by this Agreement; and

(f) Seller has taken reasonable and practicable steps to protect and preserve the confidentiality of the trade secrets and confidential information of Seller not subject to copyright or patent rights ("Confidential IP Information"). Use by Seller of Confidential IP Information not owned by Seller has been and is pursuant to the terms of a written agreement between Seller and the owner of such Confidential IP Information, or is otherwise lawful.

Section 4.19 Insurance Policies. Set forth in Schedule 4.19 is a correct and complete list of all insurance policies that relate to Seller, the Business or the Purchased Assets. Such policies are in full force and effect, will remain in full force and effect until the consummation of the transactions contemplated hereby, and Seller has not received written notice that Seller is in default under any of them. Seller has not received any written notice of cancellation or intent to cancel with respect to such insurance policies. All premiums due under such policies have been paid by Seller.

Section 4.20 Brokers. Seller has not employed any broker or finder or incurred or will incur any broker's, finder's or similar fees, commissions or expenses, in each case in connection with the transactions contemplated by this Agreement.

Section 4.21 No Misrepresentation. None of the representations and warranties of Seller set forth in this Agreement contains any untrue statement of a material fact or omits to state a material fact necessary to make the statements contained herein or therein not misleading.

Section 4.22 Investment Intent.

(a) The Seller is acquiring the Payment Shares for investment purposes only and not with a view to, or for, distribution or resale thereof, in whole or in part, in contravention of the Securities Act of 1933, as amended (the "Securities Act").

(b) The Seller is an "accredited investor" as defined in Rule 501(a) of Regulation D under the Securities Act and has such knowledge and experience in financial and business matters to evaluate the merits and risks of the acquisition of the Payment Shares and has the capacity to protect its own interests in connection with such acquisition.

ARTICLE V

REPRESENTATIONS AND WARRANTIES OF BUYER

Buyer hereby represents and warrants to Seller:

Section 5.1 Organization; Good Standing. Buyer is a New York corporation, validly existing as a New York corporation in good standing under the laws of the State of New York.

Section 5.2 Authority; Binding Effect

. Buyer has the power and authority to execute and deliver this Agreement, to perform its obligations hereunder, and to consummate the transactions provided for hereby, and all requisite corporate action of Buyer necessary for the making and performance of this Agreement by Buyer has been duly authorized and taken. This Agreement, assuming the due authorization, execution

and delivery by the Seller, constitute the valid and binding obligations of Buyer, enforceable against Buyer in accordance with its terms except as such enforcement may be limited by any bankruptcy, insolvency, reorganization, moratorium, fraudulent transfer or other laws (whether statutory, regulatory or decisional), now or hereafter in effect, relating to or affecting the rights of creditors generally or by equitable principles (regardless of whether considered in a proceeding at law or in equity).

Section 5.3 No Conflicts. The execution, delivery, and performance by Buyer of this Agreement do not and will not (a)(i) contravene any provisions of the charter documents of Buyer, (ii) with or without the giving of notice or the passage of time or both, result in any breach by Buyer of or default or permitted or required acceleration of performance by Buyer under, or the creation of any Lien upon any of Buyer's assets, or the creation in favor of any third party of any right of termination of, any mortgage, indenture, contract, agreement or other instrument to which Buyer is a party or (iii) result in any violation by Buyer of any law, rule or regulation applicable to Buyer, or any license or permit issued by any governmental authority to Buyer. Buyer is not a party to, nor subject to or bound by, any judgment, injunction or decree of any court or governmental authority which may prevent Buyer from consummating its purchase of the Purchased Assets as contemplated by this Agreement. This Agreement has been duly executed and delivered by Buyer.

Section 5.4 Reports; Financial Statements.

(a) Since December 31, 20__, the Buyer has timely filed or furnished all forms, reports, statements, certifications and other documents required to be filed or furnished by it to the Securities and Exchange Commission (the "SEC "), all of which have complied, as to form, as of their respective filing dates, or with respect to amendments to Buyer SEC Reports filed prior to the date hereof, as of the date of the last such amendment, in all material respects with all applicable requirements of the Securities Act, the Exchange Act and the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act") and, in each case, the rules and regulations of the SEC promulgated thereunder. None of such Buyer SEC Reports, at the time filed or furnished, contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading.

(b) Neither the Buyer nor any of its Subsidiaries has any liabilities of any nature, whether accrued, absolute, fixed, contingent or otherwise, whether due or to become due, and whether or not required to be recorded or reflected on a balance sheet under GAAP, other than such liabilities (i) as and to the extent reflected or reserved against on the most recent consolidated balance sheet of the Buyer included in the Buyer SEC Reports filed prior to the date of this Agreement, or in the notes thereto, (ii) with respect to or arising from transactions contemplated hereby, (iii) incurred in the ordinary course of business consistent with past practice since the date of such balance sheet or (iv) as would not reasonably be expected to have, individually or in the aggregate, a material adverse effect on the Buyer or its Subsidiaries.

Section 5.5 Brokers. Buyer has not employed any broker or finder or incurred or will incur any broker's, finder's or similar fees, commissions or expenses, in each case in connection with the transactions contemplated by this Agreement.

Section 5.6 No Misrepresentation. None of the representations and warranties of the Buyer set forth in this Agreement contains any untrue statement of a material fact or omits to state a material fact necessary to make the statements contained herein or therein not misleading.

ARTICLE VI

CONDITIONS PRECEDENT TO THE OBLIGATIONS OF THE PARTIES

Section 6.1 Conditions Precedent to the Obligations of Seller. The obligations of Seller under this Agreement to effect the Closing are subject to the fulfillment of each of the following conditions prior to or at the Closing to Seller's satisfaction, each of which may be waived (as conditions to its obligations) by Seller in its absolute discretion:

(a) Representations, Warranties and Covenants of Buyer.

(i) The representations and warranties of Buyer contained in Article V of this Agreement shall be true and correct in all material respects as of the date of this Agreement and as of the Closing, as though made at and as of the Closing; and

(ii) Buyer shall have performed and complied in all material respects with each and every covenant and agreement required by this Agreement to be performed or complied with by it at or prior to the Closing.

(b) No Injunction. There must not be in effect any federal, state, local, municipal, foreign, international, multinational or other administrative order, constitution, law, ordinance, principle of common law, regulation, statute or treaty or any injunction or other order that restrains or prohibits the consummation of the transactions contemplated by this Agreement.

(c) Certificates. There shall have been delivered to Seller a certificate of the Secretary of Buyer certifying copies of (i) the charter documents of Buyer; (ii) all requisite corporate resolutions of Buyer approving the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby; and (iii) the identification and signature of each officer of Buyer executing this Agreement.

Section 6.2 Conditions Precedent to the Obligations of Buyer. The obligations of Buyer under this Agreement to effect the Closing are subject to the fulfillment of each of the following conditions prior to or at the Closing to Buyer's satisfaction, each of which may be waived (as conditions to its obligations) by Buyer in its absolute discretion:

(a) Representations, Warranties and Covenants.

(i) The representations and warranties of Seller contained in Article IV of this Agreement shall be true and correct in all material respects as of the date of this Agreement and as of the Closing, as though made at and as of the Closing; and

(ii) Seller shall have performed and complied in all material respects with each and every covenant and agreement required by this Agreement to be performed or complied with by it at or prior to the Closing.

(b) No Injunction. There must not be in effect any federal, state, local, municipal, foreign, international, multinational or other administrative order, constitution, law, ordinance, principle of common law, regulation, statute or treaty or any injunction or other order that restrains or prohibits the consummation of the transactions contemplated by this Agreement.

(c) Assignment of Contracts; Consents from Third Parties.

(i) Seller shall, on or prior to the Closing Date and to the extent required by Buyer, assign to Buyer all of its rights under the Assigned Contracts and to obtain all consents with respect to those Assigned Contracts set forth on Schedule 6.2(c) attached hereto (the "Necessary Consents") necessary in order for Buyer to fully and effectively succeed to all rights thereunder of Seller; and

(ii) Seller shall, on or prior to the Closing Date and to the extent requested by Buyer, have assigned to Buyer all of its rights under any and all Permits.

(d) Lien Release; Payoff Letters. The holders of any Liens affecting the Purchased Assets shall have either (a) irrevocably released such Liens, or (b) irrevocably agreed in writing to release such Liens upon receipt of a stated amount at the Closing.

(e) Certificates. There shall have been delivered to Buyer a certificate of the Secretary of Seller certifying copies of (i) the charter documents of Seller; (ii) all requisite corporate resolutions of Seller approving the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby; and (iii) the identification and signature of each officer of Seller executing this Agreement.

(f) Assignment of Intellectual Property. Seller shall have executed and delivered assignments in form and substance reasonably satisfactory to Buyer with respect to the Intellectual Property, including all goodwill associated therewith.

ARTICLE VII

COVENANTS AFTER CLOSING

Section 7.1 Access to Books and Records.

(a) Seller's Access. After the Closing Date, Buyer will give, or cause to be given, to Seller and Seller's Representatives, during normal business hours, such reasonable access to the personnel, properties, titles, contracts, books, records, files and documents and, at Seller's expense, copies of titles, contracts, books, records, files and documents as is necessary to allow Seller to obtain information in connection with the preparation and any audit of Seller's tax returns and any claims, demands, other audits, suits, actions or proceedings by or against Seller as the previous owner and operator of the Purchased Assets and the Business. Buyer agrees to cooperate fully with Seller after the Closing Date, at Seller's expense, with respect to

any claims, demands, Tax or other audits, suits, actions and proceedings by or against Seller as the previous owner and operator of the Purchased Assets and the Business. In connection with the foregoing, Seller shall and shall cause Seller's Representatives to conduct themselves in a manner designed to avoid any unreasonable interference with the operations of the Buyer.

(b) Buyer's Access. After the Closing Date, Seller will give, or cause to be given, to Buyer and Buyer's Representatives, during normal business hours, such reasonable access to the personnel, properties, titles, contracts, books, records, files and documents and, at Buyer's expense, copies of Seller's titles, contracts, books, records, files and documents as is necessary to allow Buyer to obtain information in connection with the preparation and any audit of Buyer's tax returns and any claims, demands, other audits, suits, actions or proceedings by or against Buyer as the owner and operator of the Purchased Assets and the Business. Seller agrees to cooperate fully with Buyer after the Closing Date, at Buyer's expense, with respect to any claims, demands, Tax or other audits, suits, actions and proceedings by or against Buyer as the owner and operator of the Purchased Assets and the Business. In connection with the foregoing, Buyer shall and shall cause Buyer's Representatives to conduct themselves in a manner designed to avoid any unreasonable interference with the operations of the Seller.

Section 7.2 Payment of Assumed Liabilities. Following the Closing Date, Buyer shall pay promptly when due all Assumed Liabilities; *provided, however*, that this covenant shall not apply to that portion (or all) of any debt that Buyer is contesting in good faith.

Section 7.3 Name. As of the Closing, Seller shall amend its certificate of incorporation to change its name to a name that does not include a color or an animal and which does not sound like "Blue Duck."

ARTICLE VIII

INDEMNIFICATION

Section 8.1 Survival.

(a) Subject to the terms hereof, all representations, warranties, covenants and agreements contained in this Agreement or in any certificate or other document delivered pursuant to this Agreement shall survive the Closing. If the Closing occurs, Seller will have no liability (for indemnification or otherwise) with respect to any representation or warranty or any covenant or agreement to be performed and complied with prior to the Closing Date, other than those in Sections 4.7, 4.12, 4.14 and 4.16 (the "Surviving Representations"), unless on or before 11:59 p.m. (New York time) on the eighteen (18) month anniversary of the Closing Date, Buyer notifies Seller of a claim specifying the factual basis of that claim in reasonable detail to the extent then known by Buyer. A claim with respect to:

(i) Section 4.7 may be made at any time;

(ii) Section 4.12 or 4.14 may be made until sixty (60) days after the expiration of the statute of limitations applicable to the underlying claim (as it may from time to time be extended), unless no statute of limitations is applicable to the underlying claim, in which event a claim hereunder may be made at any time; and

(iii) Section 4.16 may be made on or before 11:59 pm (New York time) on the three (3) year anniversary of the Closing Date.

(b) If the Closing occurs, Buyer will have no liability (for indemnification or otherwise) with respect to any representation or warranty or any covenant or agreement to be performed and complied with prior to the Closing Date, unless on or before 11:59 p.m. (New York time) on the eighteen (18) month anniversary of the Closing Date, Seller notifies Buyer of a claim specifying the factual basis of that claim in reasonable detail to the extent then known by Seller.

(c) A claim for indemnification or reimbursement based upon any agreement set forth in this Agreement to be performed and complied with after the Closing Date may be made at any time except as otherwise set forth in this Agreement or barred by the applicable statute of limitations.

Section 8.2 Indemnification by Seller. From and after the Closing and subject to the indemnification provisions of this Article VIII, Seller agrees to pay and to indemnify fully, hold harmless and defend Buyer and its agents, directors, officers, employees, consultants, agents, advisors, representatives, successors, and assigns, from and against any and all claims and/or liabilities, damages, penalties, judgments, assessments, losses, costs and expenses (including costs of investigation and defense and reasonable attorneys' fees), whether or not involving a third party claim (collectively, "Damages") arising out of, relating to or based upon:

(a) any inaccuracy or breach by Seller of any representation or warranty contained in this Agreement, the Schedules and Exhibits hereto;

(b) any breach by Seller of any covenant or agreement contained in this Agreement;

(c) any claim by any Person for brokerage or finder's fees or commissions or similar payments based upon any agreement or understanding alleged to have been made by any such Person with Seller (or any Person acting on their behalf) in connection with any of the transactions contemplated by this Agreement;

(d) any product shipped by Seller prior to the Closing Date; and

(e) Seller's failure to pay, discharge or perform any of its liabilities or obligations other than the Assumed Liabilities, including, without limitation, the Excluded Liabilities.

Section 8.3 Indemnification by Buyer. From and after the Closing and subject to the indemnification provisions of this Article VIII, Buyer agrees to pay and to indemnify fully, hold harmless, and defend Seller and its agents, directors, officers, employees, consultants, representatives, successors and assigns, from and against any and all Damages arising out of, relating to or based upon:

(a) any inaccuracy or breach of any representation or warranty of Buyer contained in this Agreement;

(b) any breach of any covenant or agreement of Buyer contained in this Agreement;

(c) Buyer's failure to discharge or pay the Assumed Liabilities; and

(d) product liability claims with respect to products shipped by the Buyer after the Closing Date.

Section 8.4 Method of Asserting Claims. The party or parties making a claim for indemnification under this Article VIII, for the purposes of this Agreement, is referred to as the "Indemnified Party" and the party or parties against whom such claims are asserted under this Article VIII is, for the purposes of this Agreement, referred to as the "Indemnifying Party." All claims by any Indemnified Party under this Article VIII shall be asserted and resolved as follows:

(a) In the event that (i) any claim, demand or proceeding is asserted or instituted by any party other than the parties hereto which could give rise to Damages for which an Indemnifying Party would be liable to an Indemnified Party hereunder (such claim, demand or proceeding, a "Third Party Claim") or (ii) any Indemnified Party hereunder shall have a claim to be indemnified by any Indemnifying Party hereunder which does not involve a Third Party Claim, the Indemnified Party shall, within ten (10) days after the Indemnified Party has knowledge of the claim, send to the Indemnifying Party a written notice specifying the nature of such claim or demand and the amount or estimated amount and containing a reference to the provisions of this Agreement in respect of which such right of indemnification is claimed (a "Claim Notice").

(b) In the event of a Third Party Claim, the Indemnifying Party may, and upon request of the Indemnified Party shall, retain counsel of its choice, reasonably acceptable to the Indemnified Party, to represent the Indemnified Party and any others the Indemnifying Party may reasonably designate in connection with such claim or demand and shall pay the reasonable fees and disbursements of such counsel with regard thereto; *provided, however*, that any Indemnified Party is hereby authorized prior to the date on which it receives written notice from the Indemnifying Party designating such counsel, to retain counsel, whose fees and expenses shall be at the expense of the Indemnifying Party to file any motion, answer or other pleading and take such other action which it shall reasonably deem necessary to protect its interests or those of the Indemnifying Party until the date on which the Indemnified Party receives such notice from the Indemnifying Party. In the event that an Indemnifying Party shall retain such counsel, an Indemnified Party shall have the right to retain its own counsel but the fees and expenses of such counsel shall be at the expense of such Indemnified Party unless (i) the Indemnifying Party and the Indemnified Party shall have mutually agreed to the retention of such counsel, or (ii) the named parties to any such proceeding (including, but not limited, to, any impleaded parties) include both the Indemnifying Party and the Indemnified Party and representation of both parties by the same counsel would be inappropriate, in the judgment of the Indemnified Party, due to actual or potential differing interests between them. The Indemnifying Party shall not, in connection with any proceeding or related proceedings in the same jurisdiction, be liable for the reasonable fees and expenses of more than one such firm for all such Indemnified Parties. If requested by the Indemnifying Party, the Indemnified Party agrees to cooperate with the

Indemnifying Party and its counsel in contesting any claim or demand which the Indemnifying Party defends, or, if appropriate and related to the claim in question, in making any counterclaim against the Person asserting the Third Party Claim or demand, or any cross-complaint against any Person. No claim or demand may be settled without the consent of the Indemnifying Party, which consent will not be unreasonably withheld. Unless the Indemnifying Party shall have agreed in writing that any and all Damages to the Indemnified Party related to a claim or demand are fully covered by the indemnities provided herein (subject to any applicable limitations), no such claim or demand may be settled without the consent of the Indemnified Party, which consent will not be unreasonably withheld or delayed.

(c) From and after the delivery of a Claim Notice hereunder, at the reasonable request of the Indemnifying Party, the Indemnified Party shall grant the Indemnifying Party and its representatives all reasonable access to the books, records, and properties of the Indemnified Party to the extent reasonably related to the matters to which the Claim Notice relates. The Indemnifying Party will not, and shall require that its representatives do not, use (except in connection with such Claim Notice) or disclose to any third Person other than the Indemnifying Party's representatives (except as may be required by applicable law) any information obtained pursuant to this Section 8.4(c) which is designated as confidential by the Indemnified Party. All such access shall be granted during normal business hours, shall be subject to the normal safety regulations of the Indemnified Party, and shall be granted under conditions which will not interfere with the business and operations of the Indemnified Party.

(d) A claim for indemnification for any matter not involving a Third Party Claim may be asserted by notice to the party from whom indemnification is sought.

Section 8.5 Limitations on Indemnity Payments to Buyer. No claim for indemnification under this Article VIII may be made by Buyer, and no payment in respect thereof shall be required of Seller, until the aggregate amount of Damages against which Buyer is entitled to be indemnified exceeds $3 million (the "Basket"), whereupon Buyer shall be entitled to indemnification hereunder for the amount of Damages in excess of the Basket. Notwithstanding the foregoing, claims for indemnification arising out of claims with respect to the Excluded Liabilities shall not be subject to the Basket. Notwithstanding anything contained herein to the contrary, the maximum aggregate amount of Damages against which Buyer shall be entitled to be indemnified hereunder with respect to all claims hereunder shall be $100 million (the "Limit"). Notwithstanding the foregoing, the Limit shall not apply to: (a) the Surviving Representations, (b) claims of fraudulent misrepresentations of Seller and (c) claims with respect to the Excluded Liabilities.

Section 8.6 Limitations on Indemnity Payments to Seller. No claim for indemnification under this Article VIII may be made Seller, and no payment in respect thereof shall be required of Buyer, until the aggregate amount of Damages against which Seller is entitled to be indemnified exceeds the Basket, whereupon Seller shall be entitled to indemnification hereunder for the amount of Damages in excess of the Basket. Notwithstanding anything contained herein to the contrary, the maximum aggregate amount of Damages against which Seller shall be entitled to be indemnified hereunder with respect to all claims hereunder shall be the Limit. Notwithstanding the foregoing, the Limit shall not apply to claims of fraudulent misrepresentations of Buyer.

Section 8.7 No Consequential Damages. The obligations of an Indemnifying Party in respect of a claim for indemnification hereunder shall not include any special, exemplary or consequential damages, including business interruption or lost profits, or any punitive damages.

Section 8.8 Exclusive Remedy. The indemnification provided in this Article VIII shall be the exclusive remedy available to the parties following the Closing with respect to any claims for breach of any representation, warranty, covenant or agreement made by the parties in this Agreement, except for claims of intentional misrepresentation, fraud or intentional breach of any covenant or agreement.

ARTICLE IX

MISCELLANEOUS

Section 9.1 Expenses. Regardless of whether the Closing occurs, each party hereto shall bear all of its expenses incurred in connection with the transactions contemplated by this Agreement.

Section 9.2 Further Assurances. From time to time after the Closing Date, without the payment of any additional consideration except as otherwise set forth in this Agreement, each party hereto will execute all such instruments and take all such actions as the other party shall reasonably request in connection with carrying out and effectuating the intent and purpose hereof and all transactions and things contemplated by this Agreement.

Section 9.3 Notices. All notices, requests, demands, and other communications given or made pursuant to this Agreement shall be in writing and shall be deemed to have been duly given or made as follows: (a) if sent by registered or certified mail in the United States return receipt requested, postage and fees prepaid, upon receipt; (b) if sent by reputable overnight air courier (such as Federal Express), one business day after mailing; (c) if sent by facsimile transmission or by telex or by other written form of electronic communication, upon receipt; or (d) if otherwise actually personally delivered, when delivered. All notices shall be delivered to the following addressees:

If to Seller, to:

8800 Metropolitan Avenue
Queens, New York 11375
Attention: Chief Executive Officer
Telephone: (718) 555-1234
Facsimile: (718) 555-4321

If to Buyer, to:

525 Park Avenue
New York, New York 10022
Attention: Chief Executive Officer
Telephone: (212) 555-1000
Facsimile: (212) 555-0001

or to such other address as a party may from time to time designate in writing in accordance with this Section.

Section 9.4 Assignment. This Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns; *provided, however*, that neither this Agreement nor any of the rights, interests or obligations hereunder may be assigned by any of the parties hereto without the prior written consent of the other parties.

Section 9.5 Governing Law. This Agreement shall be construed in accordance with the laws of the State of New York, without regard to the conflict of law provisions thereof.

Section 9.6 Waiver of Provisions. The provisions, terms, covenants, representations, warranties and conditions of this Agreement may be waived only by a written instrument executed by the party hereto waiving compliance. The failure of any party hereto at any time or times to require performance of any provision of this Agreement shall in no manner affect the right of such party at a later date to enforce the same. No waiver by any party hereto of any condition or the breach of any provision, term, covenant, representation or warranty contained in this Agreement, whether by conduct or otherwise, in any one or more instances shall be deemed to be or construed as a further or continuing waiver of any such condition or of the breach of any other provision, term, covenant, representation or warranty of this Agreement.

Section 9.7 Counterparts. This Agreement may be executed in several counterparts, and all counterparts so executed shall constitute one agreement, binding on the parties hereto, notwithstanding that such parties are not signatories to the same counterpart.

Section 9.8 Entire Agreement; Amendment. This Agreement constitutes the entire agreement between the parties and supersedes and cancels any and all prior agreements between them relating to the subject matter hereof, and may not be amended or modified except by a written agreement signed by Seller and Buyer.

Section 9.9 Severability; Remedies. Any provision of this Agreement which is invalid or unenforceable shall be ineffective to the extent of such invalidity or unenforceability, without affecting in any way the remaining provisions hereof.

* * * * *

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

BLUE DUCK CORP.

By: _____
Name:
Title:

RUM & COLA, INC.

By: _____
Name:
Title:

FALL 2019

FOR DISCUSSION

Amazon.com is a public US based multinational electronic commerce company. It is the largest online retailer in the United States. Amazon uses the internet as the sole system for selling goods and products to its consumers. Amazon directly sells a very broad range of product, including books, music, videos, clothing and household appliances. Amazon sells its goods in a different way in comparison with its competitors.

The competitors of Amazon use store fronts as their main distribution channel. This method of using many store fronts is extremely costly. The competitors of Amazon are at a disadvantage because their costs are significantly higher than costs of Amazon. It allows Amazon to sell the same goods at a lower price. Amazon's business model can provide a competitive advantage because since there are no store fronts, the main distribution warehouse can be anywhere.

Quidsi is the world's fastest growing electronic commerce company with a mission of making life easier by creating a better electronic commerce experience and delivering goods free and fast, within one or two days, while providing extraordinary customer service.

Amazon would like to increase its online business. It observed that Quidsi was able to sell its diapers at a lower price than Amazon and therefore decided to buy the company. Quidsi is able to sell at a lower price because it packages the diapers using robots and has invented a formula for placing the diapers in the proper size box. Despite that last year Quidsi's total sales were only $180 million, the purchase price will be about 500 million USD.

1. Why would Amazon pay $500 million for a company whose total sales last year were only $180 million? If you were an Amazon board member how could you justify voting for the transaction?

2. Why would the managers want cash instead of stock of Amazon? If Amazon were to offer stock, how would a price be determined?

3. How can Amazon make sure the present management will work for them? What will the present management want in return?

4. How can Amazon be sure that someone else will not steal the secrets of the robots and the packaging?

5. Is there any way Amazon can prevent Walmart from trying to buy the company? Is there any problem for Amazon because they tried to keep the acquisition secret?

6. Suppose that prior to the public announcement of the transaction an executive of Quidsi told his best friend about the transaction. The next week while playing golf with his buddies the friend disclosed the transaction and the buddies immediately went out and purchased the stock of Quidsi. After the announcement of the transaction, the buddies sold the stock for a profit of US $500,000. Any problem for the buddies?

7. Suppose the robots are powered by nuclear fuel and one of the workers has just been sent to the hospital with radiation poisoning. Any problem for Amazon? How can Amazon protect itself?

8. Suppose Quidsi had a 100% owned subsidiary operating in the Russian Federation which handled its transactions with Asian countries. The subsidiary did business with North Korea and transferred payments made by North Korea to Quidsi. In order to trade with North Korea the subsidiary needed a special license from the Russian Federation which it obtained by employing the services of a private contractor who had substantial contacts with various government officials. These activities did not violate the laws of the Russian Federation but if conducted in the United States would violate applicable laws relating to money laundering, sanctions involving trading with North Korea and foreign corrupt practices. Any problems for Amazon?