

# SECURITIES & EXCHANGE COMMISSION EDGAR FILING

**Attis Industries Inc.**

**Form: 8-K**

**Date Filed: 2019-06-05**

Corporate Issuer CIK: 949721

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

FORM 8-K

CURRENT REPORT

Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Date of Report (Date of earliest event reported): **May 31, 2019**

**ATTIS INDUSTRIES INC.**

(Exact name of registrant as specified in its charter)

**New York**

(State or other jurisdiction  
of incorporation)

**001-13984**

(Commission File Number)

**13-3832215**

(IRS Employer  
Identification No.)

**12540 Broadwell Road, Suite 2104  
Milton, GA 30004**

(Address of principal executive offices)

**(678) 580-5661**

(Registrant's telephone number, including area code)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- ☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
- ☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
- ☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- ☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
Common Stock, par value \$0.025	ATIS	The NASDAQ Capital Market
Warrant to purchase Common Stock (expiring January 30, 2022)	ATISW	The NASDAQ Capital Market

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this chapter).

Emerging growth company ☐

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. ☐

**Item 1.01 Entry into a Material Definitive Agreement.**

As previously reported, on January 16, 2019, Attis Ethanol Fulton, LLC (the "Purchaser"), an indirect wholly-owned subsidiary of Attis Industries Inc. (the "Company"), entered into that certain Asset Purchase Agreement (the "Purchase Agreement") with Sunoco Retail LLC (the "Seller"), pursuant to which the Purchaser has agreed to acquire from the Seller certain assets of the Seller related to the Seller's ethanol production facility, including real property, intellectual property and other assets related to the ethanol production business (collectively, the "Purchased Assets") contingent upon a financing.

On May 31, 2019 (the "Closing Date"), the Purchaser entered into the Second Amended and Restated Asset Purchase Agreement (the "Restated APA") with the Seller. The Restated APA contains customary representations, warranties and covenants and the closing occurred upon satisfaction of customary closing conditions.

In consideration for the Purchased Assets, (i) Purchaser will pay Seller \$20,000,000 in cash (the "Cash Payment") with \$13,500,000 paid to the Seller by the Closing Date and the remaining amount payable 30 days from the Closing Date, or later, subject to certain adjustments as set forth in the Restated APA; (ii) Purchaser shall pay Seller an amount equal to the value of the raw materials inventory at the Facility (as defined in the Restated APA) on the six (6) month anniversary of Closing Date; and (iii) on the six (6) month anniversary of Closing Date, Purchaser shall pay Seller an amount equal to the value of the finished goods inventory at the Facility as of the closing.

On the Closing Date, Attis Biofuels, LLC, an indirect subsidiary of the Company, the Company, Jeffrey S. Cosman, Chief Executive Officer of the Company, and Highscore Capital LLC ("Highscore"), entered into a Loan and Security Agreement (the "Loan and Security Agreement") whereby the Seller issued to Highscore, a secured promissory note (the "Note") in the principal amount of \$15,000,000. The Note is secured by a mortgage in the amount of \$15,000,000 on the real property purchased as part of the Purchased Assets. The interest on the Loan and Security Agreement is payable as follows: (i) on June 30, 2019, an amount equal to three and one-half percent (3 ½%) of the outstanding principal balance, plus \$1,075,000.00; and (ii) on July 5, 2019 and on the Friday of each succeeding week until the outstanding amount on the Loan and Security Agreement shall have been paid in full \$250,000. The Loan and Security Agreement and the Note contain customary events of default, representations, warranties and covenants.

Additionally, the Company issued to Highscore a warrant (the "Warrant") to purchase 550,000 shares of the Company's common stock. The Warrant is exercisable beginning on November 30, 2019, at the price of \$2.85 per share, subject to adjustment, expiring five years from the initial exercise date. On or after July 29, 2019, if the Company is not listed on a national securities exchange following the first anniversary of the date of issuance of the Warrant, if Highscore has not then exercised the Warrant in full on or prior to such date, at Highscore's option (such option being the "Put Right"), in lieu of exercising Highscore's, the Company shall repurchase from Highscore the Warrant, at \$1.00 per share. Subsequent to the Company's effective registration of certain securities pursuant to, and to the extent of, its obligations under certain Registration Rights Agreements previously entered into by the Company, Highscore has the right to demand in writing that the Company prepare and file with the U.S. Securities and Exchange Commission (the "SEC") a Registration Statement on Form S-1 or such other Registration Statement as the Company then qualifies to use (other than on Form S-8 or S-4), as determined by the Company in its sole discretion, to effect a registration of the shares of common stock underlying the Warrant covering the resale of such shares. The Company will utilize commercially reasonable efforts to prepare and file such Registration Statement with the SEC within one hundred twenty (120) days after such demand.

In connection with the Purchase Agreement, the Company delivered a guaranty (the "Guaranty") in favor of the Seller to guarantee the payment and performance of all obligations, liabilities and indemnities of Purchaser. Additionally, in connection with the Restated APA, Sunoco LLC and Purchaser entered into an Assignment and Assumption Agreement (the "Assignment") whereby Sunoco LLC assigned to the Purchaser certain contracts of the Sunoco LLC's affiliates.

The above descriptions of the Purchase Agreement, Restated APA, Warrant, Guaranty, Loan and Security Agreement, Assignment and Assumption Agreement, Subordination Agreement and Note do not purport to be complete and are qualified in their entirety by reference to such documents filed as Exhibits 2.1, 2.2, 4.1, 10.1, 10.2, 10.3, 10.4 and 10.5 respectively, hereto.

On June 3, 2019 and June 4, 2019 the Company issued two press releases announcing the closing of the purchase of the Purchase Assets. Copies of the press releases are filed hereto as Exhibits 99.1 and 99.2 and are incorporated herein by reference.

**Item 2.01 Completion of Acquisition or Disposition of Assets.**

The disclosure set forth above under Item 1.01 to this Current Report on Form 8-K is hereby incorporated by reference into this Item 2.01.

**Item 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant.**

The disclosure set forth above under Item 1.01 to this Current Report on Form 8-K is hereby incorporated by reference into this Item 2.03.

**Item 9.01. Financial Statements and Exhibits**

(d) Exhibits.

<b>Exhibit No.</b>	<b>Description</b>
2.1	<a href="#">Asset Purchase Agreement, dated January 16, 2019, by and between Sunoco Retail LLC and Attis Ethanol Fulton, LLC (incorporated herein by reference to Exhibit 2.1 to the Company's Current Report on Form 8-K filed with the SEC on January 18, 2019).</a>
2.2*	<a href="#">Second Amended and Restated Asset Purchase Agreement, dated May 31, 2019, by and between Sunoco Retail LLC and Attis Ethanol Fulton LLC</a>
4.1*	<a href="#">Highscore Capital LLC Warrant</a>
10.1	<a href="#">Guaranty Agreement, dated January 16, 2019, by and between the Company and Sunoco Retail LLC (incorporated herein by reference to Exhibit 10.1 to the Company's Current Report on Form 8-K filed with the SEC on January 18, 2019).</a>
10.2*	<a href="#">Loan and Security Agreement by and among Attis Ethanol Fulton, LLC, Attis Industries Inc., High Score Capital LLC and certain guarantors</a>
10.3*	<a href="#">Assignment and Assumption Agreement</a>
10.4*	<a href="#">Subordination Agreement</a>
10.5*	<a href="#">Secured Promissory Note issued by Attis Ethanol Fulton, LLC in favor of Highscore Capital LLC</a>
99.1*	<a href="#">Press Release, dated June 3, 2019</a>
99.2*	<a href="#">Press Release, dated June 4, 2019</a>

\* Filed herewith

## SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

### ATTIS INDUSTRIES INC.

Date: June 5, 2019

By: /s/ Jeffrey Cosman

Name: Jeffrey Cosman

Title: Chief Executive Officer

EXECUTION VERSION

**SECOND AMENDED AND RESTATED**

**ASSET PURCHASE AGREEMENT**

by and between

**SUNOCO RETAIL LLC,**

as Seller

and

**ATTIS ETHANOL FULTON, LLC,**

as Purchaser

dated as of May 31, 2019

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## SECOND AMENDED AND RESTATED ASSET PURCHASE AGREEMENT

**SECOND AMENDED AND RESTATED ASSET PURCHASE AGREEMENT** (this "**Agreement**"), dated as of May 31, 2019 (the "**Signing Date**"), by and between Sunoco Retail LLC, a Pennsylvania limited liability company ("**Seller**"), and Attis Ethanol Fulton, LLC, a Georgia limited liability company ("**Purchaser**").

### WITNESSETH:

**WHEREAS**, Seller presently conducts the Business;

**WHEREAS**, subject to the terms and conditions hereof, Seller desires to sell, transfer and assign to Purchaser, and Purchaser desires to acquire and assume from Seller, all of the Purchased Assets and Assumed Liabilities in exchange for the consideration contemplated herein, all as more specifically provided herein;

**WHEREAS**, the parties hereto have previously entered into that certain Amended and Restated Asset Purchase Agreement, dated as of April 25, 2019 by and between Seller and Purchaser (the "**Prior Agreement**"); and

**WHEREAS**, in accordance with Section 12.6 of the Prior Agreement, each of the parties hereto desires to amend and restate the Prior Agreement, in its entirety, as set forth in this Agreement.

**NOW, THEREFORE**, in consideration of the premises and the mutual covenants and agreements hereinafter contained and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, and intending to be legally bound, the parties to this Agreement hereby agree as follows:

### ARTICLE I DEFINITIONS

1.1 Certain Definitions. For purposes of this Agreement, the following terms shall have the meanings specified in this Section 1.1:

"**1886 Malt House**" means the approximately 40,000 square foot malted grain production house at the Facility.

"**Affiliate**" means, with respect to any Person, any other Person that, directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such Person, and the term "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through ownership of voting securities, by contract or otherwise; *provided, however*, that unless expressly provided, the term "**Affiliate**" when referring to Seller or any of its Affiliates shall not include Energy Transfer LP, a Delaware limited partnership, LE GP, LLC, a Delaware limited liability company or any of their respective Subsidiaries, other than Sunoco GP LLC, a Delaware limited liability company, Sunoco LP, a Delaware limited partnership and each of their respective Subsidiaries.

**"Agreement"** shall have the meaning ascribed to such term in the preamble of this Agreement.

**"Ancillary Documents"** shall have the meaning ascribed to such term in Section 5.2 of this Agreement.

**"Asset Acquisition Statement"** shall have the meaning ascribed to such term in Section 2.6 of this Agreement.

**"Assignment and Assumption Agreement"** means the Assignment and Assumption Agreement to be entered into by and between Purchaser and Seller, substantially in the form attached hereto as Exhibit A.

**"Assumed Liabilities"** shall have the meaning ascribed to such term in Section 2.3 of this Agreement.

**"Bill of Sale"** means the Bill of Sale to be provided by Seller, substantially in the form attached hereto as Exhibit B.

**"Business"** means the business of operating the Facility and marketing the products produced at the Facility.

**"Business Day"** means any day of the year on which national banking institutions in Houston, Texas are open to the public for conducting business and are not required or authorized to close.

**"Calculation Period"** means (a) from and including the first day of the Derivative Transition Period to and including the last day of such calendar month and (b) thereafter, each calendar month during the Derivative Transition Period.

**"Claim"** shall have the meaning ascribed to such term in Section 11.5(a) of this Agreement.

**"Closing"** shall have the meaning ascribed to such term in Section 4.1 of this Agreement.

**"Closing Date"** shall have the meaning ascribed to such term in Section 4.1 of this Agreement.

**"Code"** means the Internal Revenue Code of 1986, as amended.

**"Confidentiality Agreement"** shall have the meaning ascribed to such term in Section 7.5 of this Agreement.

**"Continuation Period"** shall have the meaning ascribed to such term in Section 8.1(a).

**"Contract"** means any written contract, indenture, note, bond, lease or other agreement.

**"Current Litigation Matters"** shall have the meaning ascribed to such term in Section 5.12 of this Agreement.

**"Deed"** means the Bargain and Sale Deed to be provided by Seller, substantially in the form attached hereto as Exhibit F.

**"Deposit"** shall have the meaning ascribed to such term in Section 3.2(a).

**"Derivative Transition Period"** shall have the meaning ascribed to such term in Section 2.7.

**"Easements"** means the easements appurtenant to Seller's ownership of the Facility and Seller's operation of the Business and Facility.

**"Employee"** or **"Employees"** means all individuals, as of the date hereof, who are employed by Seller or its Affiliates primarily in connection with the Business, together with individuals who are hired in respect of the Business after the date hereof and prior to the Closing.

**"Employee Benefit Plans"** means (a) each "employee benefit plan" as such term is defined in Section 3(3) of ERISA, (whether or not tax-qualified, subject to ERISA or written), including each "employee pension benefit plan" (as defined in Section 3(2) of ERISA) and each "employee welfare benefit plan" (as defined in Section 3(1) of ERISA); and (b) any compensation arrangement, plan, policy or program, whether written or unwritten or funded or unfunded; and/or any other pension, benefit, retirement, compensation, employment, profit-sharing, bonus, incentive compensation, performance award, deferred compensation, vacation, sick pay, paid time off, stock purchase, stock option, phantom equity, equity or equity-based award, plan or benefit, unemployment, hospitalization or other medical, life insurance, long- or short-term disability, change of control, retention, severance or fringe benefit, including any employment agreements, in each case, that is established, maintained, contributed to or required to be contributed to or sponsored by the Seller or any Affiliate, including any ERISA Affiliate on behalf of any of the Employees.

**"Environmental Law"** means any applicable Law currently in effect relating to the protection of the environment (including natural resources) including the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9601 et seq.), the Hazardous Materials Transportation Act (49 U.S.C. App. § 1801 et seq.), the Resource Conservation and Recovery Act (42 U.S.C. § 6901 et seq.), the Clean Water Act (33 U.S.C. § 1251 et seq.), the Clean Air Act (42 U.S.C. § 7401 et seq.) the Toxic Substances Control Act (15 U.S.C. § 2601 et seq.), and the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 136 et seq.), and the regulations promulgated pursuant thereto.

**"Environmental Liability"** means any and all obligations, responsibilities, Liabilities, or Legal Proceedings (including Claims of any Person) arising under Environmental Laws or provisions related to Hazardous Materials or Environmental Laws under Contracts, arising from contamination or pollution of the environment (including natural resources), or otherwise relating to Hazardous Materials (including the Release or threatened Release of Hazardous Materials) or Remedial Actions, whether known or unknown, asserted or unasserted, absolute or contingent, matured or unmatured, conditional or unconditional, arising from or related to the Business or any Purchased Asset.

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

**"ERISA Affiliate"** means, with respect to any entity, trade or business, any other entity, trade or business that is a member of a group described in Section 414(b),(c), (m) or (o) of the Code or Section 4001(b)(l) of ERISA that includes the first entity, trade or business, or that is a member of the same "controlled group" as the first entity, trade or business pursuant to Section 4001(a)(14) of ERISA.

**"Excluded Assets"** shall have the meaning ascribed to such term in Section 2.2 of this Agreement.

**"Excluded Contracts"** means the Contracts set forth on Seller Schedule 1.1(a).

**"Excluded Liabilities"** shall have the meaning ascribed to such term in Section 2.4 of this Agreement.

**"Expenses"** shall have the meaning ascribed to such term in Section 11.3(a)(ii) of this Agreement.

**"Facility"** means Seller's ethanol production facility, including the 1886 Malt House, located at 376 Owens Road, Fulton, New York 13069, including without limitation, all Owned Properties listed on Seller Schedule 5.7, together with all mineral interests related thereto and buildings, structures, fixtures and other improvements owned by Seller located thereon, and all of Seller's right, title and interest as lessor under any unexpired Real Property Leases set forth on Seller Schedule 5.7.

**"Final Written Statement"** shall have the meaning ascribed to such term in Section 2.7.

**"GAAP"** means generally accepted accounting principles in the United States as determined by the Financial Accounting Standards Board from time to time, applied on a consistent basis as of the date of any application thereof.

**"Governmental Body"** means any government or governmental or regulatory body thereof, or political subdivision thereof, whether foreign, federal, state, or local, or any agency, instrumentality or authority thereof, or any court or arbitrator (public or private).

**"Guaranty"** means the Guaranty to be provided by Purchaser, substantially in the form attached hereto as Exhibit C.

**"Hazardous Material"** means any material or substance which is defined as a "hazardous waste," "hazardous substance," "hazardous material," "restricted hazardous waste," "contaminant," "toxic waste" or "toxic substance" under any provision of Environmental Law, including petroleum and its by-products and asbestos.

**"Indebtedness"** of any Person means, without duplication, (i) the principal of and premium (if any) in respect of (A) indebtedness of such Person for money borrowed and (B) indebtedness evidenced by notes, debentures, bonds or other similar instruments for the payment of which such Person is responsible or liable; (ii) all obligations of such Person issued or assumed as the deferred purchase price of property, all conditional sale obligations of such Person and all obligations of such Person under any title retention agreement (but excluding trade accounts payable and other accrued current liabilities arising in the Ordinary Course of Business); (iii) all obligations of such Person under leases required to be capitalized in accordance with GAAP in effect as of December 31, 2018; (iv) all obligations of such Person for the reimbursement of any obligor on any letter of credit; (v) all obligations of the type referred to in clauses (i) through (iv) of other Persons for the payment of which such Person is responsible or liable, directly or indirectly, as obligor, guarantor, surety or otherwise, including guarantees of such obligations; and (vi) all obligations of the type referred to in clauses (i) through (v) of other Persons secured by any Lien on any property or asset of such Person (whether or not such obligation is assumed by such Person).

**"Insolvency Laws"** means any bankruptcy, insolvency, reorganization, moratorium or other similar Law affecting the enforcement of creditors' rights generally, and general principles of equity (regardless of whether enforcement is considered in a proceeding in law or equity).

**"Knowledge of Seller"** means the actual knowledge of those Persons identified on Seller Schedule 1.1(b) after due and appropriate inquiry by the foregoing persons of those persons within Seller's organization or who have been retained by, or have continued to provide services to, Seller in connection with the transactions contemplated by this Agreement who are, in the reasonable judgment of such foregoing persons, in a position to be most familiar with the applicable subject matter.

**"Law"** means any federal, state or local law, statute, code, ordinance, rule or regulation.

**"Legal Proceeding"** means any judicial, administrative or arbitral actions, suits or proceedings (public or private) by or before a Governmental Body.

**"Liability"** means any debt, liability or obligation (whether direct or indirect, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due), and including all costs and expenses relating thereto.

**"Lien"** means any lien, encumbrance, pledge, mortgage, deed of trust, security interest, claim, lease, charge, option, right of first refusal, easement, servitude, hypothecation, title defect, right of first offer or similar purchase right, voting right, right to receipt of income or the right to exercise any attribute of ownership.

**"Losses"** shall have the meaning ascribed to such term in Section 11.3(a)(i) of this Agreement.

**"Material Adverse Effect"** means (i) a material adverse effect on the Business, the Purchased Assets, the Seller Properties, results of operations or financial condition of Seller and its Subsidiaries (taken as a whole), or (ii) a material adverse effect on the ability of Seller or its Subsidiaries to consummate the transactions contemplated by this Agreement, other than an effect resulting from an Excluded Matter. **"Excluded Matter"** means any one or more of the following: (i) the effect of any change in the United States or foreign economies or securities or financial markets in general; (ii) the effect of any change that generally affects any industry in which Seller or any of its Subsidiaries operates; (iii) the effect of any change arising in connection with earthquakes, hostilities, acts of war, sabotage or terrorism or military actions or any escalation or material worsening of any such hostilities, acts of war, sabotage or terrorism or military actions existing or underway as of the date hereof; (iv) the effect of any action taken by Purchaser or its Affiliates with respect to the transactions contemplated hereby or with respect to Seller or its Subsidiaries; (v) any matter of which Purchaser is aware on the date hereof; (vi) the effect of any changes in applicable Laws or accounting rules; or (vii) any effect resulting from the public announcement of this Agreement, compliance with terms of this Agreement or the consummation of the transactions contemplated by this Agreement.

**"Material Contract"** shall have the meaning ascribed to such term in Section 5.9 of this Agreement.

**"Monthly Written Statement"** shall have the meaning ascribed to such term in Section 2.7.

**"Net Aggregate MTM"** means the net aggregate sum of all Transaction Values as of the end of the Derivative Transition Period, which may be either positive or negative.

**"Net Settlement Amount"** means, with respect to any calendar month, the net aggregate of all Settlement Payments for such Calculation Period, which may be either positive or negative.

**"Non-Permitted Exceptions"** shall have the meaning ascribed to such term in Section 9.3 of this Agreement.

**"Nonassignable Asset"** shall have the meaning ascribed to such term in Section 2.5(c) of this Agreement.

**"Objection Matters"** shall have the meaning ascribed to such term in Section 9.3 of this Agreement.

**"Objection Notice"** shall have the meaning ascribed to such term in Section 9.3 of this Agreement.

**"Offtake Agreement"** means the Offtake Agreement to be entered into by and between Purchaser and Seller, substantially in the form attached hereto as Exhibit D.

**"Open Derivative Positions"** means the open derivative positions of the Business that are associated with future fixed priced contracts, as specified on Schedule 1.1(f), which the parties hereto agree may be updated by Seller prior to the Closing in good faith to reflect the expiration, settlement and/or replacement of any such Open Derivative Positions and/or the entry into new Open Derivative Positions in the Ordinary Course of Business during the period between the date hereof and the Closing Date (with such updated Schedule 1.1(f) constituting the list of Open Derivative Positions to be transferred pursuant to Article II).

**"Order"** means any order, injunction, judgment, decree, or ruling of a Governmental Body.

**"Ordinary Course of Business"** means the ordinary and usual course of normal day-to-day operations of the Business.

**"Owned Properties"** shall have the meaning ascribed to such term in Section 5.7 of this Agreement.



**"Permits"** means any approvals, authorizations, consents, licenses, permits or certificates issued by a Governmental Body.

**"Permitted Exceptions"** means (i) liens for current Taxes, assessments or other governmental charges not yet delinquent or the amount or validity of which is being contested in good faith by appropriate proceedings provided an appropriate reserve is established therefor; (ii) those items disclosed on Schedule 1.1(c) and other than with respect to Owned Properties, Liens incurred in the Ordinary Course of Business; (iii) zoning, entitlement and other land use and environmental regulations by any Governmental Body; (iv) title of a lessor under a capital or operating lease; (v) liens granted to landlords; (vi) such matters which shall become Permitted Exceptions in accordance with Section 9.3 hereof; (vii) such other imperfections in title, charges, easements, restrictions and encumbrances that do not materially impair the continued use of such asset or property (or interest therein) as it is currently used and (viii) Liens that will be released as of the Closing.

**"Person"** means any individual, corporation, partnership, firm, joint venture, association, joint-stock company, trust, unincorporated organization, Governmental Body or other entity.

**"Prior Agreement"** shall have the meaning ascribed to such term in the recitals of this Agreement.

**"Purchase Price"** shall have the meaning ascribed to such term in Section 3.1 of this Agreement.

**"Purchased Assets"** shall have the meaning ascribed to such term in Section 2.1 of this Agreement.

**"Purchased Contracts"** means each of the Contracts listed on Seller Schedule 1.1(d).

**"Purchased Intellectual Property"** means all intellectual property rights used by Seller that are primarily used in connection with the Business and arising from or in respect of the following: (i) all patents and applications therefor, including continuations, divisionals, continuations-in-part, or reissue patent applications and patents issuing thereon, (ii) all trademarks, service marks, trade names, service names, brand names, all trade dress rights, logos, Internet domain names and corporate names and general intangibles of a like nature, together with the goodwill associated with any of the foregoing, and all applications, registrations and renewals thereof and (iii) copyrights and registrations and applications therefor and works of authorship, and mask work rights, in each case used primarily in connection with the Business, in each of the foregoing clauses (i), (ii) and (iii), as more specifically set forth on Seller Schedule 1.1(e).

**"Purchaser"** shall have the meaning ascribed to such term in the preamble of this Agreement.

**"Purchaser 401(k) Plan"** shall have the meaning ascribed to such term in Section 8.2(b) of this Agreement.

**"Purchaser Benefit Plans"** shall have the meaning ascribed to such term in Section 8.2(a) of this Agreement.

**"Purchaser Schedules"** shall have the meaning ascribed to such term in Article VI of this Agreement.

**"Real Property Lease"** shall have the meaning ascribed to such term in Section 5.7 of this Agreement.

**"Release"** means any release, spill, emission, leaking, pumping, injection, deposit, disposal, discharge, dispersal, or leaching into the indoor or outdoor environment.

**"Remedial Action"** means all actions to (i) clean up, remove, treat or in any other way address any Hazardous Material, (ii) prevent the Release of any Hazardous Material so it does not endanger or threaten to endanger public health or welfare or the environment, or (iii) perform pre-remedial studies and investigations or post-remedial monitoring and care.

**"Revised Statements"** shall have the meaning ascribed to such term in Section 2.6 of this Agreement.

**"Schedule Supplement"** shall have the meaning ascribed to such term in Section 7.9(b) of this Agreement.

**"Schedules"** means the Purchaser Schedules and Seller Schedules, collectively.

**"Seller"** shall have the meaning ascribed to such term in the preamble of this Agreement.

**"Seller Fundamental Representations"** means the representations and warranties of Seller contained in Sections 5.1, 5.2 and 5.15.

**"Seller Licenses and Permits"** shall have the meaning ascribed to such term in Section 5.13(b) of this Agreement.

**"Seller Marks"** shall have the meaning ascribed to such term in Section 7.8 of this Agreement.

**"Seller Property"** shall have the meaning ascribed to such term in Section 5.7 of this Agreement.

**"Seller Response Due Date"** shall have the meaning ascribed to such term in Section 9.3 of this Agreement.

**"Seller Schedules"** shall have the meaning ascribed to such term in Article V of this Agreement.

**"Settlement Payments"** means, with respect to a Calculation Period and an Open Derivative Position, without duplication, the sum of (a) the net settlement amounts, if any, payable by one party to the other, which may be positive (i.e., received by Seller) or negative (i.e., paid by Seller), using the initial trade price, and (b) the net breakage, unwind or early termination amount, if any, payable by one party to the other, which may be positive (i.e., received by Seller) or negative (i.e., paid by Seller), in connection with the early termination of such Open Derivative Position, exclusive of any costs of enforcement or collection, in either such case, calculated by Seller in accordance with the documentation governing such Open Derivative Position.

**"Severance Benefits"** shall have the meaning ascribed to such term in Section 8.1(a).

**"Signing Date"** shall have the meaning ascribed to such term in the preamble of this Agreement.

**"Software"** means, except to the extent generally available for purchase from a third Person, any and all (i) computer programs, including any and all software implementations of algorithms, models and methodologies, whether in source code or object code, (ii) databases and compilations, including any and all data and collections of data, whether machine readable or otherwise, (iii) descriptions, flow-charts and other work product used to design, plan, organize and develop any of the foregoing and (iv) all documentation including user manuals and other training documentation related to any of the foregoing, in each case that are used by Seller and its applicable Affiliates primarily in the Business.

**"Standard Procedure"** shall have the meaning ascribed to such term in Section 8.1(b) of this Agreement.

**"Subsidiary"** means any Person of which a majority of the outstanding voting securities or other voting equity interests are owned, directly or indirectly, by Seller.

**"Survey"** shall have the meaning ascribed to such term in Section 9.2 of this Agreement.

**"Tangible Personal Property"** shall have the meaning ascribed to such term in Section 2.1(k) of this Agreement.

**"Tax Authority"** means any state or local government, or agency, instrumentality or employee thereof, charged with the administration of any Law or regulation relating to Taxes.

**"Tax Return"** means all returns, declarations, reports, estimates, information returns and statements required to be filed in respect of any Taxes.

**"Taxes"** means (i) all federal, state, local or foreign taxes, charges, fees, imposts, levies or other assessments, including all net income, gross receipts, capital, sales, use, ad valorem, value added, transfer, franchise, profits, inventory, capital stock, license, withholding, payroll, employment, social security, unemployment, excise, severance, stamp, occupation, property and estimated taxes, customs duties, fees, assessments and charges of any kind whatsoever and (ii) all interest, penalties, fines, additions to tax or additional amounts imposed by any taxing authority in connection with any item described in clause (i).

**"Title Commitment"** shall have the meaning ascribed to such term in Section 9.1 of this Agreement.

**"Title Company"** means Sutton Land of Texas, LLC, 1717 St. James Place, Suite 115, Houston TX 77056, Attn: Jackie Furash.

**"Title Objection Period"** means the period beginning on the Signing Date and ending at 5:00 p.m., Fulton, New York time, on February 19, 2019.

**"Title Policy"** shall mean a standard ALTA policy of owner's title insurance issued by the Title Company in the amount of the Purchase Price attributable to the Owned Properties, which policy shall be obtained at Purchaser's sole cost.

**"Transaction Value"** means, with respect to the final Calculation Period and (a) each Open Derivative Position that terminated early during such final Calculation Period, without duplication, the sum of (i) the net settlement amounts, if any, payable by one party to the other, which may be positive (*i.e.*, received by Seller) or negative (*i.e.*, paid by Seller), using the initial trade price, and (ii) the net breakage, unwind or early termination amount, if any, payable by one party to the other, which may be positive (*i.e.*, received by Seller) or negative (*i.e.*, paid by Seller), in connection with the early termination of such Open Derivative Position, exclusive of any costs of enforcement or collection, in either such case, calculated by Seller in accordance with the documentation governing such Open Derivative Position, and (b) each Open Derivative Position that did not terminate early during the final Calculation Period, the sum of (i) the net settlement amounts, if any, payable by one party to the other, which may be positive (*i.e.*, received by Seller) or negative (*i.e.*, paid by Seller) and (ii) the amount that would be payable to Seller (expressed as a positive number) or payable by Seller (expressed as a negative number) as if the Open Derivative Position were being terminated as of the time of determination, calculated by Seller in accordance with the documentation governing such Open Derivative Position using estimates at mid-market of the amounts that would be paid for a replacement transaction for the Open Derivative Position.

**"Transferred Employees"** shall have the meaning ascribed to such term in Section 8.1(a) of this Agreement.

**"Transition Services Agreement"** means the Transition Services Agreement to be entered into by and between Purchaser and Seller, substantially in the form attached hereto as Exhibit E.

#### 1.2 Other Definitional and Interpretive Matters.

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

Calculation of Time Period. When calculating the period of time before which, within which or following which any act is to be done or step taken pursuant to this Agreement, the date that is the reference date in calculating such period shall be excluded. If the last day of such period is a non-Business Day, the period in question shall end on the next succeeding Business Day.

Dollars. Any reference in this Agreement to \$ shall mean U.S. dollars.

Exhibits/Schedules. The Exhibits and Schedules to this Agreement are hereby incorporated and made a part hereof and are an integral part of this Agreement. All Exhibits and Schedules annexed hereto or referred to herein are hereby incorporated in and made a part of this Agreement as if set forth in full herein. Any matter or item disclosed on one schedule shall be deemed to have been disclosed on each other schedule. Any capitalized terms used in any Schedule or Exhibit but not otherwise defined therein shall be defined as set forth in this Agreement.

Gender and Number. Any reference in this Agreement to gender shall include all genders, and words imparting the singular number only shall include the plural and vice versa.

Headings. The provision of a Table of Contents, the division of this Agreement into Articles, Sections and other subdivisions and the insertion of headings are for convenience of reference only and shall not affect or be utilized in construing or interpreting this Agreement. All references in this Agreement to any "Section" are to the corresponding Section of this Agreement unless otherwise specified.

Herein. The words such as "herein," "hereinafter," "hereof" and "hereunder" refer to this Agreement as a whole and not merely to a subdivision in which such words appear unless the context otherwise requires.

Including. The word "including" or any variation thereof means "including, without limitation" and shall not be construed to limit any general statement that it follows to the specific or similar items or matters immediately following it.

Laws. Except as this Agreement otherwise specifies, all references herein to any Law shall be deemed to refer to that Law or any successor Law, as the same may have been amended or supplemented from time to time through the date hereof, and any rules or regulations promulgated thereunder.

Contracts. All references herein to any agreement or contract shall be deemed to refer to such agreement or contract as amended, modified or supplemented from time to time in accordance with the terms thereof.

Accounting Terms. All accounting terms used herein and not expressly defined herein shall have the meanings given to them under GAAP and shall be calculated in a manner consistent with GAAP.

Time of the Essence. With regard to all dates and time periods set forth or referred to in this Agreement, time is of the essence

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

## **ARTICLE II**

### **PURCHASE AND SALE OF ASSETS; ASSUMPTION OF LIABILITIES**

2.1 Purchase and Sale of Assets. On the terms and subject to the conditions set forth in this Agreement, at the Closing, Purchaser shall purchase, acquire and accept from Seller, and Seller shall sell, transfer, assign, convey and deliver to Purchaser all of Seller's right, title and interest in, to and under the Purchased Assets. "**Purchased Assets**" shall mean the following assets of Seller as of the Closing, to the extent primarily related to the Business:

- (a) the Facility;

(b) the Easements;

(c) all Owned Property and all rights of Seller under each Real Property Lease, together with all improvements, fixtures and other appurtenances thereto and rights in respect thereof;

(d) all raw materials inventory located at the Facility, including corn, denaturant, enzymes and yeast;

(e) all finished goods inventory located at the Facility, including corn oil, barley, dried distillers' grains and ethanol co-products, but expressly excluding produced denatured ethanol;

(f) all fixtures, furniture and furnishings, machinery (mobile or otherwise), systems, materials, components and equipment (including without limitation any and all vehicles), in each case, as (i) located in or on or attached to the Facility and primarily used by Seller in connection with the ownership of the Purchased Assets or the operation of the Business, or (ii) exclusively used by Seller in connection with the ownership of the Purchased Assets or the operation of the Business;

(g) all rights and obligations of the Seller under the Purchased Contracts;

(h) to the extent assignable, the Seller Licenses and Permits;

(i) all of the books, records, plans, drawings, specifications, instruction, operating and other procedural manuals and materials, and reports related to the Business and/or the Purchased Assets and located at the Facility;

(j) all right, title and interest to the Purchased Intellectual Property;

(k) any other tangible asset together with any express or implied warranty by the manufacturers or lessors of any item or component part thereof and all maintenance records and other documents relating thereto, (i) located in or on or attached to the Facility and primarily used by Seller in connection with the ownership of the Purchased Assets or the operation of the Business, or (ii) exclusively used by Seller in connection with the ownership of the Purchased Assets or the operation of the Business (the "**Tangible Personal Property**"); and

(l) all rights and obligations of the Seller under the Open Derivative Positions.

**2.2 Excluded Assets.** Nothing herein contained shall be deemed to sell, transfer, assign or convey the Excluded Assets to Purchaser, and Seller shall retain all right, title and interest to, in and under the Excluded Assets. "**Excluded Assets**" shall mean all assets, properties, interests and rights of Seller other than the Purchased Assets, including without limitation each of the following assets:

(a) produced denatured ethanol located at the Facility;

(b) cash, cash equivalent items, accounts receivable and bank deposits, including checking accounts, bank accounts, certificates of deposits and securities of Seller, in each case, existing as of the Closing Date;

(c) the Excluded Contracts;

(d) tax refunds and credits to the extent relating to time periods prior to the Closing, insurance policies and proceeds which are not expressly transferred to Purchaser in connection with the transactions contemplated by this Agreement;

(e) Seller's rights (including indemnification), claims and recoveries under litigation against third parties arising out of, or relating to, events prior to the Closing;

(f) any grant proceeds that are awarded or received on or prior to the Closing Date in connection with the 1886 Malt House; and

(g) any (i) confidential personnel and medical records pertaining to any Employee; (ii) other books and records that Seller is required by Law to retain or that Seller determines are necessary or advisable to retain; *provided, however*, that Purchaser shall have the right to make copies of any portions of such retained books and records that relate to the Business or any of the Purchased Assets; (iii) any information management systems of Seller, other than those used or held for use primarily in the conduct of the Business; (iv) minute books, stock ledgers and stock certificates of Seller; and (v) documents relating to proposals to acquire the Business by Persons other than Purchaser.

**2.3 Assumption of Liabilities.** On the terms and subject to the conditions set forth in this Agreement, at the Closing, Purchaser shall assume, effective as of the Closing, and shall timely perform and discharge in accordance with their respective terms, the following Liabilities of Seller other than the Excluded Liabilities (collectively, the **"Assumed Liabilities"**):

(a) all Liabilities of Seller under the Purchased Contracts, to the extent arising on or after the Closing Date;

(b) all transfer taxes and all other Taxes applicable to the transfer of the Purchased Assets pursuant to this Agreement;

(c) all other Liabilities with respect to the Business, the Purchased Assets or the Transferred Employees, to the extent arising on or after the Closing Date;

(d) all Liabilities relating to amounts required to be paid by Purchaser hereunder; and

(e) all Liabilities of Seller under the Open Derivative Positions, to the extent arising on or after the Closing Date.

2.4 Excluded Liabilities. Purchaser will not assume or be liable for any Excluded Liabilities. “ **Excluded Liabilities**” shall mean the following Liabilities of Seller:

(a) all Liabilities to the extent arising out of Excluded Assets, including Contracts that are not Purchased Contracts;

(b) accounts payable existing as of the Closing Date;

(c) except as otherwise provided in Section 2.3(c), all Liabilities for Taxes (i) relating to the Excluded Assets, (ii) for all taxable periods (or portions thereof) ending on or prior to (or, to the extent attributable to the portion of such period ending on the Closing Date, including) the Closing Date, in the case of Taxes relating to the Purchased Assets and (iii) under any Tax allocation, sharing or similar agreement (whether oral or written);

(d) all Liabilities arising out of, relating to or with respect to (i) the employment or performance of services, or termination of employment or services by Seller or any of its Affiliates of any individual on or before the Closing Date, (ii) workers' compensation claims against Seller or any of its applicable Affiliates that relate to the period ending on the Closing Date, irrespective of whether such claims are made prior to or after the Closing or (iii) any Employee Benefit Plan;

(e) Liabilities arising from the sales of products in the Ordinary Course of Business prior to the Closing;

(f) all Environmental Liabilities to the extent arising prior to the Closing Date;

(g) all Liabilities with respect to the Business, the Purchased Assets or the Transferred Employees, to the extent arising prior to the Closing Date;

(h) all Liabilities with respect to Transferred Employees attributable to their accrued and unused vacation and sick days through the Closing Date; and

(i) all Liabilities relating to amounts required to be paid by Seller hereunder.

2.5 Further Conveyances and Assumptions; Consent of Third Parties.

(a) From time to time following the Closing, Seller shall, or shall cause its Affiliates to, make available to Purchaser such data in personnel records of Transferred Employees as is reasonably necessary for Purchaser to transition such employees into Purchaser's records.

(b) From time to time following the Closing, Seller and Purchaser shall, and shall cause their respective Affiliates to, execute, acknowledge and deliver all such further conveyances, notices, assumptions, releases and acquaintances and such other instruments, and shall take such further actions, as may be reasonably necessary or appropriate to assure fully to Purchaser and its respective successors or assigns, all of the properties, rights, titles, interests, estates, remedies, powers and privileges intended to be conveyed to Purchaser under this Agreement and the Ancillary Documents and to assure fully to Seller and its Affiliates and their successors and assigns, the assumption of the liabilities and obligations intended to be assumed by Purchaser under this Agreement and the Seller Agreements, and to otherwise make effective the transactions contemplated hereby and thereby.



(c) Nothing in this Agreement nor the consummation of the transactions contemplated hereby shall be construed as an attempt or agreement to assign any Purchased Asset, including any Contract, Permit, certificate, approval, authorization or other right, which by its terms or by Law is nonassignable without the consent of a third party or a Governmental Body or is cancelable by a third party in the event of an assignment ("**Nonassignable Assets**") unless and until such consent shall have been obtained. With respect to Material Contracts or Permits that are material for the Business as a going concern after the Closing Date, Seller shall, and shall cause its Affiliates to, use its commercially reasonable efforts to cooperate with Purchaser at its request for up to 180 days following the Closing Date in endeavoring to obtain such consents promptly; provided, however, that such efforts shall not require Seller or any of its Affiliates to incur any expenses or Liabilities or provide any financial accommodation or to remain secondarily or contingently liable for any Assumed Liability to obtain any such consent. Purchaser and Seller shall use their respective commercially reasonable efforts to obtain, or cause to be obtained, any consent, substitution, approval or amendment required to novate all Liabilities under any and all Purchased Contracts or other Liabilities that constitute Assumed Liabilities or to obtain in writing the unconditional release of Seller and its Affiliates so that, in any such case, Purchaser shall be solely responsible for such Liabilities. To the extent permitted by applicable Law, in the event consents to the assignment thereof cannot be obtained, such Nonassignable Assets shall be held, as of and from the Closing Date, by Seller or the applicable Affiliate of Seller in trust for Purchaser and the covenants and obligations thereunder shall be performed by Purchaser in Seller's or such Affiliate's name and all benefits and obligations existing thereunder shall be for Purchaser's account. Seller shall take or cause to be taken at Purchaser's expense such actions in its name or otherwise as Purchaser may reasonably request so as to provide Purchaser with the benefits of the Nonassignable Assets and to effect collection of money or other consideration that becomes due and payable under the Nonassignable Assets, and Seller or the applicable Affiliate of Seller shall promptly pay over to Purchaser all money or other consideration received by it in respect of all Nonassignable Assets. As of and from the Closing Date, Seller on behalf of itself and its Affiliates authorizes Purchaser, to the extent permitted by applicable Law and the terms of the Nonassignable Assets, at Purchaser's expense, to perform all the obligations and receive all the benefits of Seller or its Affiliates under the Nonassignable Assets and appoints Purchaser its attorney-in-fact to act in its name on its behalf or in the name of the applicable Affiliate of Seller and on such Affiliate's behalf with respect thereto, and Purchaser agrees to indemnify and hold Seller and its Affiliates, agents, successors and assigns harmless from and against any and all Liabilities and Losses based upon, arising out of or relating to Purchaser's performance of, or failure to perform, such obligations under the Nonassignable Assets.

**2.6 Purchase Price Allocation.** Prior to the Closing, Seller and Purchaser shall reasonably cooperate to allocate the Purchase Price (including the Assumed Liabilities) among the Purchased Assets in a manner mutually agreeable to both Seller and Purchaser and, in accordance with such allocation, by no later than September 1, 2019, Purchaser shall prepare and deliver to Seller copies of Form 8594 and any required exhibits thereto (the "**Asset Acquisition Statement**"). Purchaser shall prepare and deliver to Seller from time to time revised copies of the Asset Acquisition Statement (the "**Revised Statements**") so as to report any matters on the Asset Acquisition Statement that need updating (including purchase price adjustments, if any) consistent with the agreed upon allocation. The Purchase Price for the Purchased Assets shall be allocated in accordance with the Asset Acquisition Statement or, if applicable, the last Revised Statements, provided by Purchaser to Seller, and all income Tax Returns and reports filed by Purchaser and Seller shall be prepared consistently with such allocation.

2.7 Open Derivative Positions. The assignment of Open Derivative Positions hereunder shall be accompanied by the necessary documentation therefor, including the Market Regulation Reporting Form for Transfer Trades pursuant to CME, CBOT, NYMEX and COMEX Rule 853.A.2 & 853.A.3. If any of the Open Derivative Positions have not been transferred to Purchaser within 10 Business Days following the Closing, Seller will continue to use commercially reasonable efforts to transfer such Open Derivative Positions to Purchaser (and Purchaser will reasonably cooperate with Seller in such efforts, including but not limited to the negotiation of customary transfer or novation documentation) until the end of the fourth full calendar month following the Closing (the "**Derivative Transition Period**"). Within 10 Business Days following the end of each Calculation Period, Seller will provide to Purchaser a written statement ("**Monthly Written Statement**") reflecting the Settlement Payments, if any, for each Open Derivative Position that has not been transferred as of the end of the applicable Calculation Period. Within 10 Business Days following effective delivery of each such Monthly Written Statement to Purchaser, Seller will pay to Purchaser the Net Settlement Amount (if positive) or Purchaser will pay to Seller the Net Settlement Amount (if negative). Additionally, within 20 Business Days following the end of the Derivative Transition Period, Seller will deliver to Purchaser a written statement (the "**Final Written Statement**") reflecting the Transaction Value for each Open Derivative Position that has not been transferred as of the end of the Derivative Transition Period. Within five Business Days following effective delivery of such Final Written Statement to Purchaser, Seller will pay to Purchaser the Net Aggregate MTM (if positive) or Purchaser will pay to Seller the Net Aggregate MTM (if negative). Any payments pursuant to this Section 2.7 shall be considered as an adjustment to the Purchase Price.

### ARTICLE III CONSIDERATION

3.1 Consideration. The aggregate consideration for the Purchased Assets shall be (a) an amount in cash equal to Twenty Million Dollars (\$20,000,000) (the "**Purchase Price**"), which shall be payable in accordance with Section 3.2 below, (b) the payment of additional amounts contemplated by Section 3.2(c), Section 3.2(e) and Section 3.2(f) and (c) the assumption of the Assumed Liabilities.

#### 3.2 Payment of Purchase Price.

(a) Purchaser shall, in partial consideration for the consent by Seller to amend this Agreement and delay the Closing as contemplated herein, pay an amount equal to One and One-Half Million Dollars (\$1,500,000) to Seller as a non-refundable, earnest money deposit (the "**Deposit**"), which amount shall be paid by wire transfer of immediately available funds into an account designated by Seller on the dates and in the amounts set forth below:

- (i) Five Hundred Thousand Dollars (\$500,000) by no later than 3:00 p.m. Central Time on April 26, 2019;

(ii) Five Hundred Thousand Dollars (\$500,000) by no later than 3:00 p.m. Central Time on April 30, 2019; and

(iii) Five Hundred Thousand Dollars (\$500,000) by no later than 3:00 p.m. Central Time on May 2, 2019.

Purchaser's breach of any subclause of this Section 3.2(a) will result in Seller's right to terminate this Agreement in accordance with Article IV.

(b) By no later than 3:00 p.m. Central Time on the Closing Date, Purchaser shall, pay an amount equal to Twelve Million Five Hundred Ten Thousand Seven Hundred Nineteen Dollars and Seventy Five Cents (\$12,510,719.75) to Seller, which amount shall be paid by wire transfer of immediately available funds into an account designated by Seller. Purchaser's breach of this Section 3.2(b) will result in Seller's right to terminate this Agreement in accordance with Article IV.

(c) By no later than 3:00 p.m. Central Time on the Closing Date, Purchaser shall pay, by wire transfer of immediately available funds into an account designated by Seller, an amount equal to Nine Hundred Eighty Nine Thousand Two Hundred Eighty Dollars and Twenty Five Cents (\$989,280.25), which amount shall represent the amount of expenses Seller has incurred in connection with the May Facility maintenance shutdown as of Closing.

(d) Purchaser shall use its reasonable best efforts to pay the remaining Five Million Nine Hundred Eighty Nine Thousand Two Hundred Eighty Dollars and Twenty Five Cents (\$5,989,280.25) of the Purchase Price by wire transfer of immediately available funds into an account designated by Seller by no later than 30 days after the Closing Date; *provided* that if, despite using its reasonable best efforts, Purchaser is unable to fulfill the foregoing payment obligation by no later than 30 days after the Closing Date, Purchaser shall be permitted to pay the foregoing amount after such date, subject to the following conditions:

(i) if payment is to be made greater than 30 days but not more than 60 days after the Closing Date, Purchaser shall pay an additional amount equal to Five Hundred Thousand Dollars (\$500,000) to Seller for an aggregate amount of Six Million Four Hundred Eighty Nine Thousand Two Hundred Eighty Dollars and Twenty Five Cents (\$6,489,280.25) payable to Seller, which amount shall be paid by wire transfer of immediately available funds into an account designated by Seller;

(ii) if payment is to be made greater than 60 days but not more than 90 days after the Closing Date, Purchaser shall pay an additional amount equal to One Million Dollars (\$1,000,000) to Seller for an aggregate amount of Six Million Nine Hundred Eighty Nine Thousand Two Hundred Eighty Dollars and Twenty Five Cents (\$6,989,280.25) payable to Seller, which amount shall be paid by wire transfer of immediately available funds into an account designated by Seller; or

(iii) if payment is to be made greater than 90 days after the Closing Date, Seller shall be entitled to an additional discount of \$0.02 per gallon with respect to the ethanol sold and delivered to Seller pursuant to the Offtake Agreement, until such time that the aggregate amount of such discount and any cash paid to Seller equals Six Million Nine Hundred Eighty Nine Thousand Two Hundred Eighty Dollars and Twenty Five Cents (\$6,989,280.25).

(e) On the six-month anniversary of the Closing Date, Purchaser shall pay, by wire transfer of immediately available funds into an account designated by Seller, an amount equal to the value of the raw materials inventory at the Facility as of Closing referenced in Section 2.1(d) of this Agreement, which inventory shall be valued in accordance with the inventory valuation procedures set forth on Seller Schedule 3.2.

(f) On the six-month anniversary of the Closing Date, Purchaser shall pay, by wire transfer of immediately available funds into an account designated by Seller, an amount equal to the value of the finished goods inventory at the Facility as of Closing referenced in Section 2.1(e) of this Agreement, which inventory shall be valued in accordance with the inventory valuation procedures set forth on Seller Schedule 3.2.

3.3 Earnout. The provisions of Exhibit H are incorporated herein.

3.4 Prorations. At Closing, the following items shall be prorated as of the Closing Date with all items of income and expense for the Facility being borne by Purchaser from and after (and including) the Closing Date: fees and assessments; prepaid expenses and obligations under Purchased Contracts; accrued operating expenses; Taxes; and any assessments by private covenant for the then-current calendar year of Closing. The provisions of this Section 3.3 shall survive the Closing. Specifically, the following shall apply to such prorations:

(a) Taxes. If Taxes for the year of Closing are not known or cannot be reasonably estimated, Taxes shall be prorated based on Taxes for the year prior to Closing. Any additional Taxes relating to the year of Closing or prior years arising out of a change in the use of the Seller Property or a change in ownership shall be assumed by Purchaser effective as of Closing and paid by Purchaser when due and payable, and Purchaser shall indemnify Seller from and against any and all such Taxes, which indemnification obligation shall survive the Closing. Seller reserves the right to pursue any challenge to Taxes attributable to any time period prior to Closing and shall be entitled to any refund or reduction of Taxes attributable to any time period prior to Closing.

3.5 Utilities. Charges for water, fuel, gas, oil, heat, electricity and other utility and operating charges and prepaid service Contracts shall be prorated as of the Closing Date based upon the last available invoice. Seller and Purchaser will either coordinate the transfer of such utility accounts to Purchaser as of the Closing or attempt to obtain final utility meter readings as close as possible to the Closing. Any such prorated amount that is allocated to Seller shall reduce the Purchase Price and Purchaser shall be responsible for, and shall pay, all such charges for all periods prior to Closing.

#### ARTICLE IV CLOSING AND TERMINATION

4.1 Closing Date. Subject to the satisfaction of the conditions set forth in Sections 10.1 and 10.2 hereof (or the waiver thereof by the party entitled to waive that condition), the closing of the purchase and sale of the Purchased Assets and the assumption of the Assumed Liabilities provided for in Article II hereof (the "**Closing**") shall take place at the offices of Vinson & Elkins L.L.P. located in Houston, Texas (or at such other place as the parties may designate in writing) at 10:00 a.m. local time, on May 31, 2019, or at such other time and place as the parties to this Agreement may mutually agree in writing. The date on which the Closing shall be held is referred to in this Agreement as the "**Closing Date**."

4.2 Termination of Agreement. This Agreement may be terminated prior to the Closing as follows:

(a) at the election of Seller or Purchaser on or after September 1, 2019, if the Closing shall not have occurred by the close of business on such date; *provided* that the terminating party is not in material default of any of its obligations hereunder;

(b) by mutual written consent of Seller and Purchaser;

(c) by Purchaser in the circumstances contemplated by Sections 7.9 or 9.3; and

(d) by Seller or Purchaser if there shall be in effect a final nonappealable Order of a Governmental Body of competent jurisdiction restraining, enjoining or otherwise prohibiting the consummation of the transactions contemplated hereby; it being agreed that the parties hereto shall promptly appeal any adverse determination which is not nonappealable (and pursue such appeal with reasonable diligence);

(e) by Seller upon Purchaser's failure to pay any amounts owed to Seller, when and if owed, pursuant to any subclause of Section 3.2(a), Section 3.2(b) or Section 3.2(c); and

(f) by Seller if the Closing shall not have occurred on or before May 8, 2019, provided that the failure of the Closing to have occurred is not primarily due to a willful breach by Seller of any of its obligations hereunder.

4.3 Procedure Upon Termination. In the event of termination and abandonment by Purchaser or Seller, or both, pursuant to Section 4.2 hereof, written notice thereof shall forthwith be given to the other party, and this Agreement shall terminate, and the purchase of the Purchased Assets hereunder shall be abandoned, without further action by Purchaser or Seller.

4.4 Effect of Termination.

(a) In the event that this Agreement is terminated in accordance with Sections 4.2(a), 4.2(b), 4.2(c), 4.2(e) or 4.2(f), Seller shall be entitled to keep the Deposit as its sole remedy against Purchaser with respect to the failure of Closing to occur and each of the parties shall be relieved of their duties and obligations arising under this Agreement after the date of such termination and such termination shall be without further liability to Purchaser or Seller; *provided* that no termination pursuant to Section 4.2 shall relieve any party hereto from liability for any willful breach of this Agreement; *provided, further*, that the obligations of the parties set forth in Article XII hereof shall survive any such termination and shall be enforceable hereunder. It is agreed that Seller's right to retain the Deposit as set forth in this Section 4.4(a) is not a penalty, is an integral part of this Agreement and that without such right, Seller would not have entered in the amendments to this Agreement.

(b) Nothing in this Section 4.4 shall relieve Purchaser or Seller of any liability for a breach of this Agreement prior to the date of termination. The damages recoverable by the non-breaching party shall include all attorneys' fees reasonably incurred by such party in connection with the transactions contemplated hereby.

(c) The Confidentiality Agreement shall survive any termination of this Agreement and nothing in this Section 4.4 shall relieve Purchaser or Seller of their obligations under the Confidentiality Agreement.

## ARTICLE V REPRESENTATIONS AND WARRANTIES OF SELLER

Except as set forth in the disclosure schedules delivered by Seller to Purchaser concurrently with the execution of this Agreement (the "**Seller Schedules**"), Seller hereby represents and warrants to Purchaser that as of the Signing Date and as of the Closing Date:

5.1 Organization and Good Standing. Seller is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Pennsylvania and has all requisite limited liability company power and authority to own, lease and operate its properties and to carry on its business as now conducted. Seller is duly qualified or authorized to do business as a foreign Person and is in good standing under the laws of each jurisdiction in which it owns or leases real property and each other jurisdiction in which the conduct of its business or the ownership of its properties requires such qualification or authorization, except where the failure to be so qualified, authorized or in good standing would not have a Material Adverse Effect.

5.2 Authorization of Agreement. Seller has all requisite limited liability company power, authority and legal capacity to execute and deliver this Agreement and Seller has all requisite limited liability company power, authority and legal capacity to execute and deliver each other agreement, document, or instrument or certificate contemplated by this Agreement and the consummation of the transaction contemplated hereby (the "**Ancillary Documents**"), to perform its obligations hereunder and thereunder and to consummate the transactions contemplated hereby and thereby. The execution and delivery of this Agreement and the Ancillary Documents and the consummation of the transactions contemplated hereby and thereby have been duly authorized by all requisite limited liability company action on the part of Seller. This Agreement has been, and each of the Ancillary Documents will be at or prior to the Closing, duly and validly executed and delivered by Seller and (assuming the due authorization, execution and delivery by the other parties hereto and thereto) this Agreement constitutes, and each of the Ancillary Documents when so executed and delivered will constitute, legal, valid and binding obligations of Seller, enforceable against Seller in accordance with their respective terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium and similar laws affecting creditors' rights and remedies generally, and subject, as to enforceability, to general principles of equity, including principles of commercial reasonableness, good faith and fair dealing (regardless of whether enforcement is sought in a proceeding at law or in equity).

### 5.3 Conflicts; Consents of Third Parties.

(a) Except as set forth on Seller Schedule 5.3(a), none of the execution and delivery by Seller of this Agreement or by Seller and its applicable Affiliates of the Ancillary Documents, the consummation of the transactions contemplated hereby or thereby, or compliance by Seller and its applicable Affiliates with any of the provisions hereof or thereof will conflict with, or result in any breach, violation of or default (with or without notice or lapse of time, or both) under, or give rise to a right of suspension, modification, termination or cancellation under any provision of (i) the certificate of organization and limited liability company agreement of Seller; (ii) any Material Contract or Seller Licenses and Permits; (iii) any Order of any Governmental Body applicable to Seller or by which any of the Purchased Assets are bound; or (iv) any applicable Law, other than, in the case of clauses (ii), (iii) and (iv), such conflicts, violations, defaults, terminations or cancellations that would not have a Material Adverse Effect.

(b) Except as set forth on Seller Schedule 5.3(b), no consent, waiver, approval, Order, Permit or authorization of, or declaration or filing with, or notification to, any Person or Governmental Body is required on the part of Seller in connection with the execution and delivery of this Agreement or the Ancillary Documents, the compliance by Seller with any of the provisions hereof or thereof, or the consummation of the transactions contemplated hereby or thereby, or the taking by Seller of any other action contemplated hereby or thereby, except for such other consents, waivers, approvals, Orders, Permits, authorizations, declarations, filings and notifications, the failure of which to be obtained or made would not have a Material Adverse Effect.

5.4 Title to Purchased Assets: Sufficiency. Except as set forth on Seller Schedule 5.4, Seller and its applicable Affiliates own and have good title to each of the Purchased Assets (other than the Seller Properties), free and clear of all Liens other than Permitted Exceptions. The Purchased Assets constitute all of the assets necessary for Purchaser to conduct the Business from and after the Closing Date as it has been conducted by Seller as of the date of this Agreement, taking into account the services to be provided under the Transition Services Agreement.

5.5 Absence of Certain Developments. Except as expressly contemplated by this Agreement or as set forth on Seller Schedule 5.5, since November 30, 2018, (i) Seller has conducted the Business only in the Ordinary Course of Business; (ii) there has not been any event, change, occurrence or circumstance that has had a Material Adverse Effect and (iii) to the Knowledge of Seller, there has been no event, occurrence or development that could reasonably be expected to result in a Material Adverse Effect.

#### 5.6 Taxes.

(a) Except as set forth on Seller Schedule 5.6(a), and except for matters that would not have a Material Adverse Effect, (i) Seller has timely filed all Tax Returns required to be filed with the appropriate Tax Authorities in all jurisdictions in which such Tax Returns are required to be filed; (ii) all such Tax Returns were correct and complete in all respects and have been prepared in substantial compliance with all applicable Laws and regulations; (iii) Seller is not currently the beneficiary of any extension of time within which to file any Tax Return; (iv) no claim has ever been made by an authority in a jurisdiction where Seller does not file Tax Returns that Seller is or may be subject to taxation by that jurisdiction and (v) all Taxes due and owing by Seller (whether or not shown on any Tax Return) have been paid.

(b) Seller is not a Foreign Person within the meaning of Section 1445 of the Code.

5.7 **Real Property.** Seller Schedule 5.7 sets forth a list of (i) all real property owned in fee by Seller and its applicable Affiliates (individually, an “***Owned Property***” and collectively, the “***Owned Properties***”) and primarily relating to the Business and (ii) (1) all real property leased by Seller as landlord and (2) all leases of real property under which Seller or a Subsidiary is a tenant and annual payments exceed \$50,000 (individually, a “***Real Property Lease***” and collectively, the “***Real Property Leases***”) and, together with the Owned Properties, being referred to herein individually as a “***Seller Property***” and collectively as the “***Seller Properties***”) as lessee or lessor. Neither Seller nor any Subsidiary has received any written notice of any default or event that with notice or lapse of time, or both, would constitute a default by Seller or any Subsidiary under any of the Real Property Leases.

(a) To the Knowledge of Seller, there is no condemnation, expropriation or other proceeding in eminent domain, pending or threatened, affecting any of the Seller Properties or any portion thereof or interest therein that is reasonably likely to result in a Material Adverse Effect. To the Knowledge of Seller, except as shown on Seller Schedule 5.7(a), there is no injunction, decree, order, writ or judgment outstanding, nor any claims, litigation, administrative actions or similar proceedings, pending or threatened, relating to the ownership, lease, use or occupancy of any Seller Property or any portion thereof that is reasonably likely to result in a Material Adverse Effect.

(b) To the Knowledge of Seller, there is no pending or anticipated change in any zoning or land use laws applicable to the Seller Properties that will materially impair the development, construction, operation or use of any Seller Property or any portion thereof as each Seller Property is currently being used. Seller has not received any written notice of violation of any building, zoning, comprehensive planning, subdivision, health and safety and other land use laws, regulations, ordinances and rules affecting any Seller Property that remains uncured as of the Signing Date.

(c) To the Knowledge of Seller, all material authorizations, approvals, consents and Permits from Governmental Bodies which are required or appropriate to use or occupy the Seller Properties and to own, operate, construct and develop the Business on the Seller Properties have been issued and are in full force and effect. Except as shown on Seller Schedule 5.7(c), Seller has not received any written notice from any Governmental Body or other entity having jurisdiction over the Seller Properties threatening a current or prospective suspension, revocation, modification or cancellation of any authorizations, approvals, consents or Permit from Governmental Bodies as a result of a violation that remains uncured as of the Signing Date.

(d) To the Knowledge of Seller, each Real Property Lease is in full force and effect. The possession and quiet enjoyment of the Seller Property under any Real Property Lease has not been disturbed and there are currently no unresolved disputes with respect to any Real Property Lease. Seller has not received or sent any written notice of material default under any Real Property Lease that remains uncured. To the Knowledge of Seller, no security deposit or portion thereof deposited with respect to such Real Property Lease has been applied in respect of a breach or default under such Real Property Lease which has not been redeposited in full. Seller does not owe any brokerage commissions or finder's fees with respect to such Real Property Lease. Except as shown on Seller Schedule 5.7(d), Seller has not subleased, licensed or otherwise granted any Person (other than Affiliates) the right to use or occupy any Seller Property or any portion thereof.



5.8 Intellectual Property. Seller Schedule 1.1(e) contains a complete and accurate list and summary of all the Purchased Intellectual Property. Except as set forth on Seller Schedule 5.8, Seller and its applicable Affiliates own or have valid licenses to use all material Purchased Intellectual Property used by them in the Ordinary Course of Business, except to the extent the failure to be the owner or the valid licensee would not have a Material Adverse Effect. To the Knowledge of Seller, the Purchased Intellectual Property do not infringe on the intellectual property rights of any Person. Except as set forth on Seller Schedule 5.8, Seller has the right to use all of the Purchased Intellectual Property without payment to any third party. To the Knowledge of Seller, neither the Seller's nor any Subsidiary's use of the Purchased Intellectual Property has interfered with, infringed upon, misappropriated, or otherwise come into conflict with any intellectual property rights of any Person, and Seller has never received any written charge, complaint, claim, demand, or notice alleging any such interference, infringement, misappropriation, or violation (including any claim that the Seller must license or refrain from using any intellectual property rights of any Person). To the Knowledge of Seller, no Person has interfered with, infringed upon, misappropriated, or otherwise come into conflict with any of Seller's rights in the Purchased Intellectual Property. Neither Seller nor any Subsidiary has received any written notice of any default or any event that with notice or lapse of time, or both, would constitute a default under any material Purchased Intellectual Property license to which Seller or any Subsidiary is a party or by which it is bound.

5.9 Material Contracts.

(a) Seller Schedule 5.9 sets forth all of the following Contracts to which Seller is a party or by which it is bound and that are primarily related and necessary to the operation of the Business or by which the Purchased Assets are bound and that are Purchased Contracts (collectively, the "**Material Contracts**"):

(i) Contracts for the sale of any products produced at the Facility for consideration in excess of \$100,000;

(ii) Contracts for the sale of any of the other assets of Seller, other than in the Ordinary Course of Business, for consideration in excess of \$50,000;

(iii) Contracts which involve the expenditure of more than \$100,000 in the aggregate or require performance by Seller more than one year from the date hereof that, in either case, are not terminable by Seller or any of its applicable Affiliates without penalty on notice of 90 days or less;

(iv) Contracts with any individuals employed by Seller at the Facility;

(v) Contracts with any labor union or association representing any individuals employed by Seller at the Facility;

(vi) Contracts relating to incurrence of Indebtedness, or the making of any loans, in each case involving amounts in excess of \$50,000;  
or

(vii) Real Property Leases

(b) Except as set forth on Seller Schedule 5.9, Seller has not received any written notice of any default or event that with notice or lapse of time or both would constitute a default by Seller under any Material Contract, except for defaults that would not have a Material Adverse Effect.

(c) Except as set forth on Seller Schedule 5.9, (i) the Material Contracts are legal, valid, binding, enforceable, and in full force and effect (except as enforcement thereof may be limited by applicable Insolvency Laws), and will continue to be legal, valid, binding, enforceable, and in full force and effect on identical terms following the consummation of the transactions contemplated herein; (ii) Seller is, and at all times has been, in material compliance with all applicable terms and requirements of the Material Contracts; (iii) to the Knowledge of Seller, no event has occurred or circumstance exists that (with or without notice or lapse of time) will contravene, conflict with or result in a breach of, or give the 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 payment under, or to cancel, terminate or modify, any of the Material Contracts; and (iv) to the Knowledge of Seller, no party to the Material Contracts has threatened to terminate its business relationship with the Seller for any reason.

(d) Except as set forth on Seller Schedule 5.9, there are no renegotiations of, attempts to renegotiate or outstanding rights to renegotiate any material amounts paid or payable to the Seller under the Material Contracts other than in the Ordinary Course of Business with any Person having the contractual or statutory right to demand or require such renegotiation and no such Person has made written demand for such renegotiation.

(e) Each Material Contract relating to the sale or provision of services by the Seller has been entered into in the Ordinary Course of Business of Seller and has been entered into without the commission of any act alone or in concert with any other Person, or any consideration having been paid or promised, that is or would be in violation of any Law.

5.10 Employee Benefits.

(a) Seller Schedule 5.10(a) lists all material Employee Benefits Plans in which the Employees are eligible to participate.

(b) Seller Schedule 5.10(b) lists the name, job title, hourly rate or annual base salary (as applicable), hire date, service date, which date is also the date recognized for Employee Benefit Plan eligibility, employment status as active or on leave (including type of leave), work location, classification as exempt or non-exempt under the Fair Labor Standards Act, annual incentive compensation opportunity for 2018 (whether payable in cash or equity) and accrued but unused vacation days (as of the date of this Agreement) of each Employee, which schedule will be updated prior to Closing to reflect any newly hired Employee retained.

(c) With respect to each Employee Benefit Plan listed on Seller Schedule 5.10(a), Seller has made available to Purchaser (i) true and correct copies of the applicable Employee Benefit Plans document including all amendments thereto or, if an Employee Benefit Plan is not in writing a written summary relating to such Employee Benefits Plan and (ii) in the case of any Employee Benefits Plan that is intended to be qualified under Section 401(a) of the Code, a copy of the most recent determination, opinion or advisory letter from the Internal Revenue Service and any legal opinions issued thereafter with respect to such Employee Benefit Plan's continued qualification.

(d) None of the Employee Benefit Plans is subject to subject to Section 302 of ERISA, Section 412 of the Code or Title IV of ERISA or is a "multi-employer plan," within the meaning of Section 3(37) or Section 4001(a)(3) of ERISA.

(e) There does not now exist, nor do any circumstances exist that would reasonably be expected to result in, any liability of Seller or its Affiliates, including any ERISA Affiliate, under Title IV of ERISA, Section 302 of ERISA or Section 412 or 4971 of the Code, in each case, that would reasonably be expected to be a liability of Purchaser following the Closing or result in the imposition of any Lien (other than Permitted Exceptions) upon any of the Purchased Assets.

(f) Each of the Employee Benefit Plans has been maintained, in all material respects, in accordance with its terms and all provisions of applicable Law.

(g) Neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated hereby will (i) result in any payment becoming due to any Employee; (ii) increase any benefits otherwise payable to an Employee under any Employee Benefit Plan or (iii) result in the acceleration of the time of payment or vesting of any such benefits.

(h) To the Knowledge of Seller, neither the Seller or its applicable Affiliates or any Employee is bound by any Contract that purports to limit the ability of Seller, its Subsidiaries or any such Employee (i) to engage in or continue or perform any conduct, activity, duties or practice relating to the Business or (ii) to assign to the Seller or to any other Person any rights to any invention, improvement, or discovery used in the Business. Except as set forth on Seller Schedule 5.10(h), all salaries, wages and other compensation and benefits payable to each Employee has been accrued and paid by the Seller when due for all periods through the Closing Date, or will have been paid by the Seller when due for all periods through the Closing Date.

#### 5.11 Labor.

(a) Except as set forth on Seller Schedule 5.11, neither Seller nor any of its applicable Affiliates is a party to any labor or collective bargaining agreement covering the Employees and no application or petition for an election of or for certification of a collective bargaining agent is pending covering any of the Employees.

(b) Except as set forth on Seller Schedule 5.11, there are, with respect to the Employees, no (i) strikes, work stoppages, work slowdowns or lockouts pending or, to the Knowledge of Seller, threatened against or involving Seller or any of its applicable Affiliates or (ii) unfair labor practice charges, grievances or complaints pending or, to the Knowledge of Seller, threatened by or on behalf of any employee or group of employees of Seller or any of its applicable Affiliates, except in each case as would not have a Material Adverse Effect.

(c) Seller has been and is currently in compliance in all material respects with all applicable Laws relating to labor and employment of the Employees, including Laws related to the hiring, promotion and termination of employees; discrimination; equal employment opportunities; disability; labor relations; wages and hours; worker classification; work authorization; workers' compensation and occupational safety and health.

5.12 Litigation. Except as set forth on Seller Schedule 5.12 (the "**Current Litigation Matters**"), there are no Legal Proceedings pending or, to the Knowledge of Seller, threatened against Seller relating to the Purchased Assets or the operation of the Business before any Governmental Body, which, if adversely determined, would have a Material Adverse Effect.

5.13 Compliance with Laws: Permits.

(a) Seller is in compliance with all Laws applicable to the Purchased Assets and the Business, except where the failure to be in compliance would not have a Material Adverse Effect. Seller has not received any written notice of or been charged with the violation of any Laws relating to the Purchased Assets or its operation of the Business, except where such violation would not have a Material Adverse Effect.

(b) Seller currently has all licenses and Permits from any Governmental Body, which are necessary to or used exclusively in connection with the ownership of the Purchased Assets or the operation of the Business as presently conducted, except where the absence of which would not have a Material Adverse Effect (the "**Seller Licenses and Permits**"). Neither Seller nor any of its applicable Affiliates is in default or violation (and no event has occurred which, with notice or the lapse of time or both, would constitute a default or violation) of any term, condition or provision of any Seller Licenses and Permits to which it is a party, except where such default or violation would not have a Material Adverse Effect.

5.14 Environmental Matters. The representations and warranties contained in this Section 5.14 are the sole and exclusive representations and warranties of Seller pertaining or relating to any environmental, matters, including any arising under any Environmental Laws, Permits issued under Environmental Law, or Hazardous Materials. Except as set forth on Seller Schedule 5.14 hereto and except in each case as would not have a Material Adverse Effect:

(a) the operation of the Business by Seller and each of its applicable Affiliates are in compliance with all Environmental Laws, including the terms and conditions of all Permits issued pursuant to any Environmental Laws required for the operation of the Business as presently conducted;

(b) Seller and each of its applicable Affiliates has obtained all Permits issued pursuant to Environmental Laws required for the operation of the Business as presently conducted;

(c) neither Seller nor any of its applicable Affiliates is the subject of any outstanding Order with any Governmental Body respecting (i) a violation of Environmental Laws, (ii) Remedial Action or (iii) any Release or threatened Release of Hazardous Materials, in each case, relating to the operation of the Business;

(d) neither Seller nor any of its applicable Affiliates has received any written Order or claim of any Person that remains unresolved and alleging that Seller or any of its Subsidiaries may be in violation of any Environmental Law, any Permit issued pursuant to Environmental Law, or may have any liability under any Environmental Law, in each case, relating to the operation of the Business;

(e) to the Knowledge of Seller, there has been no Release of any Hazardous Materials at, to, or from any of the Owned Property or Real Property Leases that has not been resolved to the satisfaction of the applicable Governmental Body;

(f) there are no pending or threatened Legal Proceedings of any nature alleging any violation of any Environmental Law with respect to or affecting the Businesses or the Purchased Assets; and

(g) Except as disclosed on Schedule 5.14, to the Knowledge of Seller, no Seller Property contains wetlands, vegetation, animal species or significant historic/archaeological sites which are subject to special regulations or limitations under any applicable Law.

5.15 Financial Advisors. Except as set forth on Seller Schedule 5.15, no Person has acted, directly or indirectly, as a broker, finder or financial advisor for Seller in connection with the transactions contemplated by this Agreement and no Person is entitled to any fee or commission or like payment from Purchaser in respect thereof.

5.16 Tangible Personal Property. All Tangible Personal Property owned or leased by the Seller as of the Signing Date is and will be as of Closing in the possession of the Seller, except for any Tangible Personal Property sold or transferred in the Ordinary Course of Business between the Signing Date and the Closing Date. Seller Schedule 5.16 includes a list of all vehicles included in the Tangible Personal Property.

5.17 Permits.

(a) Seller Schedule 5.17(a) contains (i) a complete and accurate list of all material Permits, owned or held by the Seller which are necessary or required to own and operate the Business, the Purchased Assets and the Seller Properties. Seller Schedule 5.17(a) also contains a complete and accurate list of all material Permits, for which the Seller has made application with respect to the ownership and operation of the Business and the Seller Properties where such application is still pending as of the Signing Date and at Closing. The Seller has not received any written notice from any Governmental Body of rejection of any such application or any written notice that any such application is being considered for rejection. Each Permit listed on Seller Schedule 5.17(a) is valid and in full force and effect. The Permits listed or required to be listed in Seller Schedule 5.17(a) collectively constitute all of the material Permits necessary or required to permit the Seller to lawfully conduct and operate the Business on each Seller Property in accordance with all Laws. The Seller is in material compliance with all of the terms and requirements of each Permit listed or required to be listed on Seller Schedule 5.17(a).

(b) Seller has delivered or made available, or has caused to be delivered or made available, to Purchaser (or its representatives) copies of all Permits and applications therefor referred to above in this Section 5.17.

(c) Except as set forth in Seller Schedule 5.17(c), to the Knowledge of Seller, no event has occurred or circumstance exists that could reasonably be expected to (i) constitute or result directly in a material violation of or a material failure to comply with any material term or material requirement of any Permit listed or required to be listed in Seller Schedule 5.17(a), or (ii) result directly in the revocation, withdrawal, suspension, cancellation or termination of, or any adverse modification to any Permit. Seller Schedule 5.17(c) sets forth a complete and accurate list of any uncured notices of violation with respect to any Permit listed or required to be listed in Seller Schedule 5.17(a).

(d) Except as set forth in Seller Schedule 5.17(d), neither Seller nor its applicable Affiliates have received any written notice from any Governmental Body or any other Person regarding as yet uncured as of the Signing Date (i) any actual, alleged, possible or potential violation of or failure to comply with any term or requirement of any Permit listed on Seller Schedule 5.17(a) or (ii) any actual, proposed, possible or potential revocation, withdrawal, suspension, cancellation, termination of or modification to any Permit listed on Seller Schedule 5.17(a).

(e) All applications required to have been filed for the renewal of the Permits listed or required to be listed in Seller Schedule 5.17(a) have been duly filed on a timely basis with the appropriate Governmental Bodies, and all other filings required to have been made with respect to such Permits have been duly made on a timely basis with the appropriate Governmental Bodies.

5.18 Corrupt Practices. Except in compliance with all Laws, neither the Seller, its Subsidiaries nor any of their Affiliates, or each of their respective officers, directors, employees or agents, have, directly or indirectly, ever made, offered or agreed to offer anything of value to (i) any employees, representatives or agents of any customers of Seller or its Affiliates for the purpose of attracting business to Seller or its Affiliates or (ii) any domestic governmental official, political party or candidate for government office or any of their employees, representatives or agents.

5.19 No Other Representations or Warranties; Schedules. Except for the representations and warranties contained in this Article V (as modified by the Seller Schedules hereto), neither Seller nor any other Person makes any other express or implied representation or warranty with respect to Seller, its Affiliates, to the extent applicable, the Business, the Purchased Assets, the Assumed Liabilities or the transactions contemplated by this Agreement, and Seller disclaims any other representations or warranties, whether made by Seller, any Affiliate of Seller or any of their respective officers, directors, employees, agents or representatives. Except for the representations and warranties contained in Article V hereof (as modified by the Seller Schedules hereto), Seller (i) expressly disclaims and negates any representation or warranty, expressed or implied, at common law, by statute, or otherwise, relating to the condition of the Purchased Assets (including any implied or expressed warranty of merchantability or fitness for a particular purpose, or of conformity to models or samples of materials) and (ii) hereby disclaims all liability and responsibility for any representation, warranty, projection, forecast, statement, or information made, communicated, or furnished (orally or in writing) to Purchaser or its Affiliates or representatives (including any opinion, information, projection, or advice that may have been or may be provided to Purchaser by any director, officer, employee, agent, consultant, or representative of Seller or any of its Affiliates). Seller makes no representations or warranties to Purchaser regarding the probable success or profitability of the Business. The disclosure of any matter or item in any Seller Schedule shall not be deemed to constitute an acknowledgment that any such matter is required to be disclosed. The terms and conditions of this Section 5.19 shall expressly survive the Closing, not merge with the provisions of any closing documents, and shall be incorporated into the Deed.

**ARTICLE VI**  
**REPRESENTATIONS AND WARRANTIES OF PURCHASER**

Except as set forth in the disclosure schedules delivered by Purchaser to Seller concurrently with the execution of this Agreement (the “ **Purchaser Schedules**”), Purchaser hereby represents and warrants to Seller that:

6.1 Organization and Good Standing. Purchaser is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Georgia and has all requisite limited liability company power and authority to own, lease and operate its properties and to carry on its business as now conducted.

6.2 Authorization of Agreement. Purchaser has full limited liability company power and authority to execute and deliver this Agreement and each Ancillary Document and to consummate the transactions contemplated hereby and thereby. The execution, delivery and performance by Purchaser of this Agreement and each Ancillary Document have been duly authorized by all necessary limited liability company action on behalf of Purchaser. This Agreement has been, and each Ancillary Document will be at or prior to the Closing, duly executed and delivered by Purchaser and (assuming the due authorization, execution and delivery by the other parties hereto and thereto) this Agreement constitutes, and each Ancillary Document when so executed and delivered will constitute, the legal, valid and binding obligation of Purchaser, enforceable against Purchaser in accordance with their respective terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium and similar laws affecting creditors’ rights and remedies generally, and subject, as to enforceability, to general principles of equity, including principles of commercial reasonableness, good faith and fair dealing (regardless of whether enforcement is sought in a proceeding at law or in equity).

6.3 Conflicts; Consents of Third Parties.

(a) Except as set forth on Purchaser Schedule 6.3, none of the execution and delivery by Purchaser of this Agreement and of the Ancillary Documents, the consummation of the transactions contemplated hereby or thereby, or the compliance by Purchaser with any of the provisions hereof or thereof will conflict with, or result in any violation of or default (with or without notice or lapse of time, or both) under, or give rise to a right of termination or cancellation under any provision of (i) the certificate of organization or limited liability company agreement of Purchaser, (ii) any Contract or Permit to which Purchaser is a party or by which Purchaser or its properties or assets are bound or (iii) any Order of any Governmental Body applicable to Purchaser or by which any of the properties or assets of Purchaser are bound or (iv) any applicable Law.

(b) No consent, waiver, approval, Order, Permit or authorization of, or declaration or filing with, or notification to, any Person or Governmental Body is required on the part of Purchaser in connection with the execution and delivery of this Agreement or the Ancillary Documents, the compliance by Purchaser with any of the provisions hereof or thereof, the consummation of the transactions contemplated hereby or the taking by Purchaser of any other action contemplated hereby, or for Purchaser to conduct the Business.

6.4 Litigation. There are no Legal Proceedings pending or, to the knowledge of Purchaser, threatened against Purchaser, or to which Purchaser is otherwise a party before any Governmental Body, which, if adversely determined, would reasonably be expected to have a material adverse effect on the ability of Purchaser to perform its obligations under this Agreement or to consummate the transactions hereby. Purchaser is not subject to any Order of any Governmental Body except to the extent the same would not reasonably be expected to have a material adverse effect on the ability of Purchaser to perform its obligations under this Agreement or to consummate the transactions contemplated hereby.

6.5 Financial Advisors. No Person has acted, directly or indirectly, as a broker, finder or financial advisor for Purchaser in connection with the transactions contemplated by this Agreement and no Person is entitled to any fee or commission or like payment in respect thereof.

6.6 Financial Capability. Purchaser (i) has, and at the Closing will have, sufficient internal funds (without giving effect to any unfunded financing regardless of whether any such financing is committed) available to pay the amounts set forth in Section 3.2 of this Agreement and any expenses incurred by Purchaser in connection with the transactions contemplated by this Agreement, (ii) has, and at the Closing will have, the resources and capabilities (financial or otherwise) to perform its obligations hereunder and (iii) has not incurred any obligation, commitment, restriction or Liability of any kind, which would impair or adversely affect such resources and capabilities.

6.7 Solvency.

(a) Immediately after giving effect to the consummation of the transactions contemplated by this Agreement (including, without limitation, any debt and equity financings being entered into in connection therewith);

(i) the fair saleable value (determined on a going concern basis) of the assets of Purchaser shall be greater than the total amount of their liabilities (including all liabilities, whether or not reflected in a balance sheet prepared in accordance with GAAP, and whether direct or indirect, fixed or contingent, secured or unsecured, disputed or undisputed);

(ii) Purchaser shall be able to pay its debts and obligations in the Ordinary Course of Business as they become due; and

(iii) Purchaser shall have adequate capital to carry on its businesses and all businesses in which it is about to engage.

(b) In completing the transactions contemplated by this Agreement, Purchaser does not intend to hinder, delay or defraud any present or future creditors of Purchaser or Seller.

6.8 Condition of the Business.

(a) Notwithstanding anything contained in this Agreement to the contrary, Purchaser acknowledges and agrees that Seller is not making any representations or warranties whatsoever, express or implied, beyond those expressly given by Seller in Article V hereof (as modified by the Seller Schedules as supplemented or amended), and Purchaser acknowledges and agrees that, except for the representations and warranties contained therein, the Purchased Assets and the Business are being transferred on a "where is" and, as to condition, "as is" basis. Any claims Purchaser may have for breach of representation or warranty shall be based solely on the representations and warranties of Seller set forth in Article V hereof (as modified by the Seller Schedules as supplemented or amended). Purchaser further represents that neither Seller nor any of its Affiliates nor any other Person has made any representation or warranty, express or implied, regarding Seller, the Purchased Assets, the Business or the transactions contemplated by this Agreement or as to the accuracy or completeness of any information not expressly set forth in this Agreement and neither Purchaser nor any of its Affiliates has relied on any such express or implied representation or warranty. Purchaser further agrees that none of Seller, any of its Affiliates or any other Person will have or be subject to any liability to Purchaser or any other Person resulting from the distribution to Purchaser or its representatives or Purchaser's use of, any such information, including any confidential memoranda distributed on behalf of Seller relating to the Business or other publications or data room information provided to Purchaser or its representatives, or any other document or information in any form provided to Purchaser or its representatives in connection with the sale of the Business and the transactions contemplated hereby. Purchaser acknowledges that it has conducted to its satisfaction, its own independent investigation of the Business and, in making the determination to proceed with the transactions contemplated by this Agreement, Purchaser has relied on the results of its own independent investigation.



**ARTICLE VII  
COVENANTS**

7.1 Access to Information. Seller agrees that, prior to the Closing Date, Purchaser shall be entitled, through its officers, employees and representatives (including, without limitation, its legal advisors and accountants), to make such investigation of the properties, businesses and operations of the Business and such examination of the books and records of the Business, the Purchased Assets and the Assumed Liabilities as it reasonably requests and to make extracts and copies of such books and records. Any such investigation and examination shall be conducted during regular business hours upon reasonable advance notice and under reasonable circumstances and shall be subject to restrictions under applicable Law. Seller shall cause the officers, employees, consultants, agents, accountants, attorneys and other representatives of Seller and its applicable Affiliates to cooperate with Purchaser and Purchaser's representatives in connection with such investigation and examination, and Purchaser and its representatives shall cooperate with Seller and its representatives and shall use their reasonable efforts to minimize any disruption to the Business. Prior to performing any inspection or test, Purchaser must deliver a certificate of insurance to Seller evidencing that Purchaser and its contractors, agents and representatives have in place and will maintain during the term of this Agreement commercial general liability insurance acceptable to Seller covering any accident arising in connection with the presence of Purchaser, its contractors, agents and representatives on Seller Properties, which insurance shall name as additional insured thereunder Seller and such other parties holding insurable interests as Seller may designate. Notwithstanding anything herein to the contrary, no such investigation or examination shall be permitted to the extent that it would require Seller or any of its applicable Affiliates to disclose information subject to attorney-client privilege or conflict with any confidentiality obligations to which Seller or any of its applicable Affiliates is bound. Notwithstanding anything to the contrary contained herein, prior to the Closing, without the prior written consent of Seller, which may be withheld for any reason, Purchaser shall not contact any suppliers to, or customers of, Seller. Purchaser must obtain Seller's prior written consent (which consent will not be unreasonably withheld or delayed) prior to performing any invasive or intrusive testing of the Owned Properties (including, without limitation, collection of air, soil, groundwater, or building material samples or soil cores or any test designed to identify the presence of Hazardous Material), and following any such invasive testing, Purchaser shall restore the Owned Properties as nearly as reasonably practicable to the condition that existed prior to such testing. Purchaser hereby agrees to indemnify, defend and hold Seller, its partners, shareholders, members, managers, owners and affiliates and their respective officers, managers, directors, employees, agents and representatives harmless from and against any and all liens, claims, causes of action, damages, liabilities and expenses (including reasonable attorneys' fees) arising out of Purchaser's inspections or tests permitted under this Agreement.

7.2 Conduct of the Business Pending the Closing.

(a) Prior to the Closing, except (i) as set forth on Seller Schedule 7.2, (ii) as required by applicable Law, (iii) as otherwise contemplated by this Agreement or (iv) with the prior written consent of Purchaser (which consent shall not be unreasonably withheld or delayed), Seller shall, solely as it relates to the Business:

(i) conduct the Business in the Ordinary Course of Business; and

(ii) use its commercially reasonable efforts to (A) preserve the present business operations, organization and goodwill of Seller and (B) preserve the present relationships with customers and suppliers of Seller.

(b) Except (i) as set forth on Seller Schedule 7.2, (ii) as required by applicable Law, (iii) as otherwise contemplated by this Agreement or (iv) with the prior written consent of Purchaser (which consent shall not be unreasonably withheld or delayed), Seller shall not, solely as it relates to the Business:

(i) other than in the Ordinary Course of Business, (A) increase the annual level of compensation of any Employee, (B) grant any unusual or extraordinary bonus, benefit or other direct or indirect compensation to any Employee, (C) increase the coverage or benefits available under any (or create any new) Employee Benefit Plan for the Employees or (D) enter into any employment, deferred compensation, severance, consulting, non-competition or similar agreement (or amend any such agreement) with an Employee, except, in each case, as required by applicable Law from time to time in effect or by any of the Employee Benefit Plans;

(ii) make or rescind any material election relating to Taxes, settle or compromise any claim, action, suit, litigation, proceeding, arbitration, investigation, audit or controversy relating to Taxes, or except as may be required by applicable Law or GAAP, make any material change to any of its methods of accounting or methods of reporting income or deductions for Tax or accounting practice or policy from those employed in the preparation of its most recent Tax Returns;

(iii) subject any of the Purchased Assets to any Lien, except for Permitted Exceptions;

(iv) acquire any material properties or assets that would constitute Purchased Assets or sell, assign, license, transfer, convey, lease or otherwise dispose of any of the Purchased Assets (except pursuant to an existing Contract for fair consideration in the Ordinary Course of Business or for the purpose of disposing of obsolete or worthless assets);

(v) enter into or agree to enter into any merger or consolidation with, any corporation or other entity that would result in a Material Adverse Effect;

(vi) cancel or compromise any debt or claim or waive or release any material right of Seller that constitutes a Purchased Asset except in the Ordinary Course of Business;

(vii) enter into any commitment for capital expenditures in excess of \$10,000 for any individual commitment and \$50,000 for all commitments in the aggregate;

(viii) enter into, modify or terminate any labor or collective bargaining agreement or, through negotiation or otherwise, make any commitment or incur any liability to any labor organization; or

(ix) agree to do anything prohibited by this Section 7.2.

7.3 Consents. Seller shall use (and shall use commercially reasonable efforts to cause each of its applicable Affiliates to use) its commercially reasonable efforts, and Purchaser shall cooperate with Seller, to obtain at the earliest practicable date all consents and approvals required to consummate the transactions contemplated by this Agreement, including, without limitation, the consents and approvals referred to in Section 5.3(b) hereof and to transfer all transferable Permits to Purchaser; *provided, however*, that Seller shall not be obligated to pay any consideration therefor to any third party from whom consent or approval is requested.

7.4 Further Assurances. Each of Seller and Purchaser shall use commercially reasonable efforts to (i) take all actions necessary or appropriate to consummate the transactions contemplated by this Agreement and (ii) cause the fulfillment at the earliest practicable date of all of the conditions to their respective obligations to consummate the transactions contemplated by this Agreement.

7.5 Confidentiality. Purchaser acknowledges that the information provided to it in connection with this Agreement and the transactions contemplated hereby is subject to the terms of that certain Confidentiality Agreement dated as of August 8, 2017 by and between Purchaser (fka Meridian Waste Solutions, Inc.) and Seller (the "**Confidentiality Agreement**"), the terms of which are incorporated herein by reference. Effective upon, and only upon, the Closing Date, the Confidentiality Agreement shall terminate with respect to information relating solely to the Business or otherwise included in the Purchased Assets; *provided, however*, that Purchaser acknowledges that any and all other Confidential Information (as such term is defined in the Confidentiality Agreement) provided to it by Seller or its representatives concerning Seller shall remain subject to the terms and conditions of the Confidentiality Agreement after the Closing Date.

7.6 Preservation of Records. Seller and Purchaser agree that each of them shall preserve and keep the records held by it or their Affiliates relating to the Business for a period of three years from the Closing Date and shall make such records and personnel available to the other as may be reasonably required by such party in connection with, among other things, any insurance claims by, Legal Proceedings or tax audits against or governmental investigations of Seller or Purchaser or any of their Affiliates or in order to enable Seller or Purchaser to comply with their respective obligations under this Agreement and each other agreement, document or instrument contemplated hereby or thereby. In the event Seller or Purchaser wishes to destroy such records after that time, such party shall first give 45 days' prior written notice to the other and such other party shall have the right at its option and expense, upon prior written notice given to such party within such 45-day period, to take possession of the records within 180 days after the date of such notice.

7.7 Publicity.

(a) Upon execution of this Agreement, Seller and Purchaser shall each use its reasonable best efforts to agree to the timing of communications concerning this Agreement and the transactions contemplated hereby to the individuals employed by Seller at the Facility. In no event shall any press release or public announcement concerning this Agreement or the transactions contemplated hereby, including those contemplated by Section 7.7(b) of this Agreement, precede any communication to the individuals employed by Seller at the Facility.

(b) Neither Seller nor Purchaser shall issue any press release or public announcement concerning this Agreement or the transactions contemplated hereby without obtaining the prior written consent of the other party hereto, which consent shall not be unreasonably withheld or delayed; provided that such disclosure shall be expressly permitted if required by applicable Law or by the applicable rules of any stock exchange on which Purchaser or Seller or their applicable Affiliates lists securities; provided, further, that the disclosing party shall provide the other party with the reasonable opportunity to review any such disclosure prior to dissemination. Notwithstanding anything to the contrary contained in this paragraph, Seller hereby authorizes Purchaser to issue a press release substantially in the form of Exhibit G at any time after January 18, 2019.

(c) Each of Purchaser and Seller agrees that the terms of this Agreement shall not be disclosed or otherwise made available to the public and that copies of this Agreement shall not be publicly filed or otherwise made available to the public, except where such disclosure, availability or filing is required by applicable Law and only to the extent required by such Law. In the event that such disclosure, availability or filing is required by applicable Law, each of Purchaser and Seller (as applicable) agrees to use its commercially reasonable efforts to obtain "confidential treatment" of this Agreement with the U.S. Securities and Exchange Commission (or the equivalent treatment by any other Governmental Body) and to redact such terms of this Agreement as the other party shall reasonably request.

7.8 Use of Name. Purchaser agrees that it shall (i) as soon as practicable after the Closing Date and in any event within 90 days following the Closing Date, cease to make any use of the name "Sunoco" or any service marks, trademarks, trade names, identifying symbols, logos, emblems, signs or insignia related thereto or containing or comprising the foregoing, including any name or mark confusingly similar thereto (collectively, the "**Seller Marks**") and (ii) immediately after the Closing, cease to hold itself out as having any affiliation with Seller or any of its Affiliates. In furtherance thereof, as promptly as practicable but in no event later than 90 days following the Closing Date, Purchaser shall remove, strike over or otherwise obliterate all Seller Marks from all materials including, without limitation, any vehicles, business cards, schedules, stationery, packaging materials, displays, signs, promotional materials, manuals, forms, computer Software and other materials.

7.9 Seller Schedules: Supplementation and Amendment of Seller Schedules.

(a) Seller may, at its option, include in the Seller Schedules items that are not material in order to avoid any misunderstanding, and such inclusion, or any references to dollar amounts, shall not be deemed to be an acknowledgement or representation that such items are material, to establish any standard of materiality or to define further the meaning of such terms for purposes of this Agreement. Information disclosed in the Seller Schedules shall constitute a disclosure for all purposes under this Agreement notwithstanding any reference to a specific section, and all such information shall be deemed to qualify the entire Agreement and not just such section.

(b) From time to time prior to the Closing Date, Seller may supplement or amend the Seller Schedules with respect to any event, development, occurrence or non-occurrence of an event hereafter arising or that it first becomes aware of after the date hereof (each a "**Schedule Supplement**") if such event, development, occurrence or non-occurrence of an event has caused, or would reasonably be expected to cause, any representation or warranty made by Seller to be untrue or inaccurate in any material respect, and each such Schedule Supplement shall be deemed to be incorporated into and to supplement and amend the Seller Schedules as of the Closing Date; provided, however, that if such event, development, occurrence or non-occurrence of any event that is the subject of a Schedule Supplement constitutes or relates to something that has had a Material Adverse Effect, then Purchaser shall have the right to terminate this Agreement for failure to satisfy the closing condition in Section 10.1(a); provided, further, that if Purchaser has the right to, but does not elect to terminate this Agreement within the earlier of (i) five Business Days after receipt of such notice and (ii) one Business Day prior to the Closing Date, then Purchaser shall be deemed to have irrevocably waived any right to terminate this Agreement with respect to such matter under any of the conditions in Section 10.1(a). Seller shall provide any such Schedule Supplement to Purchaser (A) no later than five Business Days prior to the Closing Date with respect to any event, development, occurrence or non-occurrence of an event that arises or that Seller first becomes aware of prior to the sixth Business Day prior to the Closing Date and (B) promptly (but in any event within one Business Day) following any event, development, occurrence or non-occurrence of an event that arises or that Seller first becomes aware of after the sixth Business Day prior to the Closing Date and before one Business Day prior to the Closing Date.

7.10 1886 Malt House Divestiture. In the event that Purchaser divests, directly or indirectly, any or all of the assets or ownership interests of the 1886 Malt House at any time prior to the two-year anniversary of the Closing Date, Seller shall be entitled to a contingency payment from Purchaser in an amount equal to 50% of the total net consideration received by Purchaser in connection with such transaction or transactions, as applicable, regardless of whether such consideration is paid in cash, equity or otherwise and regardless of whether such consideration is paid prior to the two-year anniversary of the Closing Date, and Purchaser agrees to enter into and to require any Person who acquires such assets to enter into documentation reasonably necessary to effect the foregoing.

7.11 Non-Competition and Non-Solicitation. The restrictive covenants contained in this Section 7.11 are intended and necessary to protect the Purchased Assets, the Business and other interests and rights being acquired by Purchaser under this Agreement.

(a) For the period commencing on the Closing Date and expiring on the third anniversary thereof, except as expressly permitted herein, Seller shall not directly engage in the business of producing ethanol in the state of New York.

(b) For the period commencing on the Closing Date and expiring on the third anniversary thereof, Seller shall not, without the prior written consent of Purchaser, directly or indirectly, solicit, encourage, cause, induce to hire or hire, interfere in the business relationship of or enter into an employment agreement, consulting agreement or service relationship with (i) any employee of Purchaser or (ii) any other senior level or manager level employee or consultant of Purchaser, in each case, employed as of the Closing Date. The foregoing restrictions are not intended to preclude general solicitations in newspapers or similar mass media not specifically targeted towards the foregoing individuals listed in clauses (i) and (ii).

7.12 Insurance. Prior to Closing, Seller shall maintain property insurance on all-risk extended coverage basis (including coverage against fire, wind, tornado, vandalism, malicious mischief, water damage and sprinkler leakage) in an amount not less than one hundred percent (100%) of full replacement cost thereof covering the following: the Facility; all raw materials inventory located at the Facility, including corn, denaturant, enzymes and yeast; all finished goods inventory located at the Facility, including corn oil, barley, dried distillers' grains and ethanol co-products, but expressly excluding produced denatured ethanol; all fixtures, furniture and furnishings, machinery (mobile or otherwise), systems, materials, components and equipment located at or attached to the Facility.

## ARTICLE VIII EMPLOYEES AND EMPLOYEE BENEFITS

### 8.1 Employment.

(a) Transferred Employees. Not later than five Business Days prior to the Closing, Purchaser or its designated Affiliate shall deliver, in writing, an offer of employment to each of the Employees listed on Seller Schedule 5.10(b) to commence immediately following the Closing. The terms and conditions of the base salary or hourly rate, as applicable, included in such offers by Purchaser or its Affiliate to the Employees shall be not less than or inferior to the base salary/hourly rate, as applicable, that each Employee receives from Seller as of the date of this Agreement. The terms and conditions of the other compensation opportunities and/or benefits included in such offers by Purchaser or its Affiliate to the Employees shall be the same as those provided to similarly-situated employees of Purchaser and its Affiliates as of the Closing Date. Each such offer of employment shall be at the same salary or hourly wage rate and position in effect immediately prior to the Closing. Such individuals who accept such offer by the Closing Date are hereinafter referred to as the "**Transferred Employees**." Purchaser shall provide, or cause to be provided, for a period of one year following the Closing Date (the "**Continuation Period**") to each of the Transferred Employees, base salary or base hourly rate and a position of employment that is, in each case, substantially equivalent to those provided to such Transferred Employee immediately prior to the Closing. In the event that during the Continuation Period, (i) the employment of a Transferred Employee is involuntarily terminated by Purchaser, other than for cause or other than due to such Transferred Employee's death or disability or (ii) Purchaser fails to provide a Transferred Employee with a base compensation or base hourly rate that is equal to or better to the base salary/base hourly rate than the base salary or base hourly rate of such Transferred Employee as was in effect immediately prior to the Closing Date and such Transferred Employee resigns his or her employment with Purchaser within 30 days following such failure, then Purchaser shall be responsible for and shall pay to such Transferred Employee, in a lump sum payment, not later than 60 days following the date of the Transferred Employee's termination of employment, at least the following severance benefit (the "**Severance Benefits**"): two weeks of the Employee's base salary or base hourly rate (hourly rate to be multiplied by 80 hours) for each full year of service (pro-rated for partial years), measured from the Transferred Employee's date of hire reflected in Seller Schedule 5.10(b); *provided, however*, that in no event shall such Severance Benefit be less than six weeks of such base compensation/base hourly rate, and further provided that Purchaser's obligation to pay the Severance Benefits shall be subject to the Transferred Employee first executing Purchaser's standard form release of all claims against Purchaser and its Affiliates, with such release to include a release of all claims against Seller and its Affiliates. The costs incurred for the Severance Benefits shall be borne exclusively by Purchaser.

(b) Standard Procedure. Pursuant to the “**Standard Procedure**” provided in Section 5 of Revenue Procedure 96-60, 1996-2 C.B. 399, (i) Purchaser and Seller shall report on a predecessor/successor basis as set forth therein, (ii) Seller will not be relieved from filing a Form W-2 with respect to any Transferred Employees and (iii) Purchaser will undertake to file (or cause to be filed) a Form W-2 for each such Transferred Employee with respect to the portion of the year during which such Employees are employed by Purchaser that includes the Closing Date, excluding the portion of such year that such Employee was employed by Seller or its Subsidiaries.

#### 8.2 Employee Benefits.

(a) Benefits. For purposes of eligibility, vesting and entitlement to benefits, including entitlement to, and level of, severance, paid time off and vacation benefits (but not for accrual of pension benefits or retiree health plans), each Transferred Employee shall be given credit for all service with the Seller, its Affiliates and their respective predecessors under any Employee Benefit Plan, program or arrangement of the Purchaser or its Affiliates in which such Transferred Employee is eligible to participate (the “**Purchaser Benefit Plans**”), to the same extent as if such service had been performed for the Purchaser or any of its Affiliates. For purposes of any Purchaser Benefit Plans providing welfare benefits to Transferred Employees, the Purchaser shall, or shall cause its Affiliates to, as applicable, to (i) waive all limitations as to preexisting conditions, exclusions, waiting periods, actively-at-work requirements, and requirements to show evidence of good health with respect to participation and coverage requirements applicable to the Transferred Employees under any such Purchaser Benefit Plan and (ii) offer Transferred Employees and their covered dependents the opportunity to participate in the health and welfare plans offered by Purchaser or its Affiliates as of the first day of the calendar month following the calendar month in which the Closing Date occurs.

(b) Effective as of the Closing Date, the Purchaser will maintain or designate a defined contribution plan and related trust intended to be qualified under section 401(a), 401(k) and 501(a) of the Code (the "**Purchaser 401(k) Plan**") in which Transferred Employees shall be eligible to participate. Purchaser will take all action necessary or appropriate to allow Transferred Employees to roll over any amounts that are eligible for rollover treatment under the Code from an Employee Benefit Plan of Seller or an Affiliate that is intended to be qualified under section 401(a) and 501(a) of the Code to the Purchaser 401(k) Plan may elect to roll over his or her entire account balance, including any plan loans, to the Purchaser 401(k) Plan if (i) the rollover is initiated within ninety (90) days following the Closing Date and (ii) Seller directs its 401(k) record-keeper to provide Purchaser with information and documentation reasonably necessary to effect the rollover of such loans to the Purchaser 401(k) Plan.

(c) Nothing contained in this Section 8.2(c) or elsewhere in this Agreement shall be construed to prevent the termination of employment of any individual Transferred Employee or any change in the employee benefits available to any individual Transferred Employee.

(d) The provisions of this Article VIII are solely for the benefit of the parties to this Agreement and nothing in this Article VIII, express or implied, will confer upon any Employee or Transferred Employee, consultant, manager or other service provider (or any dependent, successor, legal representative or beneficiary thereof), any rights or remedies, including any right to continuance of employment or any other service relationship with Seller, Purchaser or any of its or their Affiliates, or any right to compensation or benefits of any nature or kind whatsoever under this Agreement. Notwithstanding anything in this Article VIII or otherwise in this Agreement to the contrary, no provision of this Agreement is intended to, or does, constitute the establishment or adoption of, or an amendment to, any Employee Benefit Plan and no Person shall have any claim or cause of action, under ERISA or otherwise, in respect of any provision of this Agreement as it relates to any such Employee Benefit Plan, employment or otherwise.

(e) Accrued Vacation. Except as required by applicable Law, Purchaser shall be responsible for all Liabilities with respect to Transferred Employees attributable to their accrued and unused vacation and sick days through the Closing Date.

## **ARTICLE IX TITLE TO REAL PROPERTY**

9.1 Title Commitment. Within 15 Business Days after the Signing Date, Seller will deliver or cause the Title Company to deliver to Purchaser a current commitment for title insurance for the Owned Properties (the "**Title Commitment**"), together with copies of the exception documents referenced therein:



9.2 Survey. At least five Business Days prior to expiration of the Title Objection Period, Seller will obtain, at Purchaser's expense, an ALTA survey of the Owned Properties (the "**Survey**"):

9.3 Objections. During the Title Objection Period, Purchaser may deliver to Seller its objections in writing to any liens, encumbrances and other matters reflected by the Title Commitment or the Survey (any such matters to which Purchaser so objects, the "**Objection Matters**"). If Seller is willing to cause the cure or removal of any of the Objection Matters, then Seller will so notify Purchaser in writing (the "**Objection Notice**") within five Business Days of Seller's receipt of Objection Notice (the "**Seller Response Due Date**"). If Seller does not respond, or chooses not to cure or remedy the Objection Matters (other than those which Seller is obligated to cure in accordance with this Section), Purchaser may elect either: (i) if the defects identified in the Objection Notice have or would reasonably be expected to result in a Material Adverse Effect on the Business or Seller Properties, to terminate this Agreement by delivery of written notice to Seller three Business Days following the Seller Response Due Date; or (ii) to waive such objection and to complete the transaction as otherwise contemplated by this Agreement, without any abatement of the Purchase Price or any deduction, offset, credit, lost profits or other damages or claims against the Seller relating to the objection. If Seller elects in writing to cure or remove any title or survey matters objected to by Purchaser that are reasonably likely to result in a Material Adverse Effect on the Business or Seller Properties, and Seller cannot thereafter cure or remove the same by Closing, Seller will have the right, but not the obligation, to postpone the Closing for a period of up to 60 days to attempt to cure or remove such exceptions or defects, and if Seller has not cured or removed the same by the end of such 60-day period, Purchaser shall have the right to terminate this Agreement by written notice to Seller given to Seller on or before the earlier to occur of (a) five Business Days after such 60-day period and (b) the cure of such item, time being of the essence with respect thereto. Seller shall have no obligation to cure Objection Matters except financing liens of an ascertainable amount created by Seller, any exceptions or encumbrances to title which are voluntarily created by Seller after the Signing Date without Purchaser's consent, failure of Seller to hold fee simple title to the Owned Properties and delinquent ad valorem property taxes and assessments owed by Seller against the Owned Properties. Any Objection Matters that Seller has expressly elected to cure, remove or insure around prior to the expiration of the Title Objection Period (or that Seller is obligated to cure) shall be designated as "**Non-Permitted Exceptions**"; *provided, however*, that in no event shall any lien, encumbrance or other matter created by, through or under Purchaser constitute a Non-Permitted Exception. All liens, encumbrances and other matters that are not designated as Non-Permitted Exceptions shall be Permitted Exceptions. Seller's failure to cure, remove or insure around any Non-Permitted Exceptions at or prior to Closing (with Seller having the right to apply the Purchase Price or a portion thereof for such purpose) shall be a failure of a Purchaser's closing condition under Section 10.1(b) below:

**ARTICLE X**  
**CONDITIONS TO CLOSING**

10.1 Conditions Precedent to Obligations of Purchaser. The obligation of Purchaser to consummate the transactions contemplated by this Agreement is subject to the fulfillment, on or prior to the Closing Date, of each of the following conditions (any or all of which may be waived by Purchaser in whole or in part to the extent permitted by applicable Law):

(a) The representations and warranties of Seller set forth in this Agreement shall be true and correct in all material respects at and as of the Closing, except to the extent such representations and warranties relate to an earlier date (in which case such representations and warranties shall be true and correct on and as of such earlier date); *provided, however*, that in the event of a breach of a representation or warranty the condition set forth in this Section 10.1(a) shall be deemed satisfied unless the effect of all such breaches of representations and warranties taken together result in a Material Adverse Effect, and Purchaser shall have received a certificate signed by an authorized officer of Seller, dated the Closing Date, to the foregoing effect;

(b) Seller shall have performed and complied in all material respects with all obligations and agreements required in this Agreement to be performed or complied with by it prior to the Closing Date, and Purchaser shall have received a certificate signed by an authorized officer of Seller, dated the Closing Date, to the foregoing effect;

(c) No action, suit, or proceeding shall be pending or threatened before any court or quasi-judicial or administrative agency of any federal, state, local, or foreign jurisdiction or before any arbitrator wherein an unfavorable injunction, judgment, order, decree, ruling, or charge would (i) prevent consummation of any of the transactions contemplated by this Agreement, (ii) cause any of the transactions contemplated by this Agreement to be rescinded following consummation, or (iii) affect adversely the right of Purchaser to own the Purchased Assets or to operate the Business (and no such injunction, judgment, order, decree, ruling, or charge shall be in effect);

(d) Seller shall have delivered, or caused to be delivered, to Purchaser a duly executed counterpart to the Assignment and Assumption Agreement;

(e) Seller shall have delivered, or caused to be delivered, to Purchaser a Bill of Sale;

(f) Seller shall have delivered, or caused to be delivered, to Purchaser the Deed;

(g) Seller shall have delivered, or caused to be delivered, to Purchaser a duly executed counterpart to the Offtake Agreement;

(h) Seller shall have delivered, or caused to be delivered, to Purchaser a duly executed counterpart to the Transition Services Agreement;

(i) Seller shall have delivered, or caused to be delivered, to Purchaser, a properly completed certificate described in Treasury Regulations Section 1.1445-2 dated on or before the Closing Date stating that Seller (or Seller's regarded parent if Seller is a "disregarded entity" for U.S. federal income Tax purposes under Treasury Regulations §§ 301.7701-2 and 301.7701-3) is not a foreign Person;

(j) if required by Purchaser, Seller shall have delivered, or caused to be delivered, to Purchaser an owner's affidavit in form and substance reasonably acceptable to Seller and the Title Company, sufficient to issue to Purchaser the Title Policy at Closing free of any Liens, other than any purchase money liens created by Purchaser and the Permitted Exceptions;

(k) a quit claim deed for the Owned Properties in conformance with the Survey; and

(l) if prior to Closing all or part of the Purchased Assets are damaged or destroyed by any cause, Seller shall have assigned, transferred and set over to Purchaser any sums of insurance money paid for any such damage or destruction, and all Seller's right, title and interest in and to any insurance awards that may thereafter be made for such damage or destruction.

**10.2 Conditions Precedent to Obligations of Seller.** The obligations of Seller to consummate the transactions contemplated by this Agreement are subject to the fulfillment, prior to or on the Closing Date, of each of the following conditions (any or all of which may be waived by Seller in whole or in part to the extent permitted by applicable Law):

(a) The representations and warranties of Purchaser set forth in this Agreement qualified as to materially shall be true and correct, and those not so qualified shall be true and correct in all material respects, at and as of the Closing, except to the extent such representations and warranties relate to an earlier date (in which case such representations and warranties qualified as to materially shall be true and correct, and those not so qualified shall be true and correct in all material respects, on and as of such earlier date), and Seller shall have received a certificate signed by an authorized officer of Purchaser, dated the Closing Date, to the foregoing effect;

(b) Purchaser shall have performed and complied in all respects with all obligations and agreements required by this Agreement to be performed or complied with by Purchaser on or prior to the Closing Date, and Seller shall have received a certificate signed by an authorized officer of Purchaser, dated the Closing Date, to the foregoing effect;

(c) there shall not be in effect any Order by a Governmental Body of competent jurisdiction that makes illegal, enjoins or otherwise prohibits the consummation of the transactions contemplated hereby;

(d) Purchaser shall have delivered, or caused to be delivered, to Seller evidence of the wire transfers referred to in Section 3.2;

(e) Purchaser shall have delivered, or caused to be delivered, to Seller a duly executed counterpart to the Assignment and Assumption Agreement;

(f) Purchaser shall have delivered, or caused to be delivered, to Seller a duly executed counterpart to the Offtake Agreement; and

(g) Purchaser shall have delivered, or caused to be delivered, to Seller a duly executed counterpart to the Transition Services Agreement.

10.3 Frustration of Closing Conditions. Neither Seller nor Purchaser may rely on the failure of any condition set forth in Sections 10.1 or 10.2, as the case may be, if such failure was caused by such party's failure to comply with any provision of this Agreement.

## **ARTICLE XI RELEASE; INDEMNIFICATION**

11.1 Survival of Representations and Warranties. Subject to the limitations and other provisions of this Agreement, the representations and warranties contained herein shall survive the Closing and shall remain in full force and effect until the date that is twelve months from the Closing Date; *provided* that (a) any claim arising out of (i) any breach of, or any inaccuracy in, any Seller Fundamental Representation, (ii) fraud, willful misrepresentation or willful misconduct or (iii) any Current Litigation Matter will commence on the date of this Agreement and continue indefinitely, (b) none of the representations regarding environmental matters in Section 5.14 shall survive the Closing and (c) each of the Tax representations shall survive until 30 days after the expiration of the statute of limitations (including any and all extensions thereof) applicable to such Tax representation. The covenants and agreements of the parties contained in this Agreement that by their nature are required to be performed on or prior to the Closing shall expire at the Closing and have no further force and effect, and the covenants and agreements of the parties contained in this Agreement that by their terms survive the Closing or contemplate performance after the Closing shall survive the Closing until fully performed; *provided* that each party's covenants, rights and obligations with respect to any Tax or Tax matter covered by this Agreement shall survive the Closing and shall not terminate until 30 days after the expiration of the statute of limitations (including any and all extensions thereof) applicable to such Tax (or the assessment thereof) or Tax matter. Notwithstanding the foregoing, no indemnifying party shall be liable for any Losses that are subject to indemnification under this Article XI unless the indemnified party delivers a written notice in accordance with Section 11.5 of this Agreement in good faith and with reasonable specificity (to the extent known at such time) to the indemnifying party with respect to such indemnifiable claim prior to 5:00 p.m. Central Time on the expiration date of the survival period for such claim; *provided* that any claim for indemnification under this Agreement that is brought prior to such time shall survive until such matter is resolved.

11.2 Seller Release. Purchaser acknowledges that it has had the opportunity to inspect the Seller Properties and to observe its physical characteristics and existing conditions as Purchaser deems necessary, and Purchaser hereby FOREVER RELEASES AND DISCHARGES Seller from all responsibility and liability (other than that arising under the representations, warranties or covenants of Seller expressly set forth in this Agreement or due to Seller's fraud), including without limitation, liabilities and responsibilities for the physical, environmental or legal compliance status of the Seller Properties, whether arising before or after the Signing Date, and regarding the condition, valuation, salability or utility of the Seller Properties, or its suitability for any purpose whatsoever (including, but not limited to, with respect to the presence in the soil, air, structures and surface and subsurface waters, of Hazardous Material or other materials or substances that have been or may in the future be determined to be toxic, hazardous, undesirable or subject to regulation and that may need to be specially treated, handled and/or removed from the Seller Properties under current or future federal, state and local laws, regulations or guidelines, and any structural and geologic conditions, subsurface soil and water conditions and solid and hazardous waste and Hazardous Material on, under, adjacent to or otherwise affecting the Seller Properties). Except as to representations, warranties or covenants of Seller expressly set forth in this Agreement, Purchaser further hereby WAIVES (and by Closing this transaction will be deemed to have WAIVED) any and all objections and complaints (including, but not limited to, federal, state and local statutory and common law based actions, and any private right of action under any federal, state or local laws, regulations or guidelines to which the Seller Properties is or may be subject, including, but not limited to, Environmental Laws) concerning the physical characteristics and any existing conditions of the Seller Properties, including, without limitation, the lessor's obligations under the Real Property Leases relating to the physical, environmental or legal compliance status of the Seller Properties, whether arising before or after the Signing Date. Purchaser further hereby assumes the risk of changes in applicable laws and regulations relating to past, present and future environmental conditions on the Seller Properties and, except as to representations or warranties of Seller expressly set forth in this Agreement, the risk that adverse physical characteristics and conditions, including, without limitation, the presence of Hazardous Materials or other contaminants, may not have been revealed by its investigation.

#### 11.3 Indemnification by Seller.

(a) Subject to Section 11.6 hereof, Seller hereby agrees to indemnify and hold Purchaser and its directors, officers, employees, Affiliates, agents, attorneys, representatives, successors and permitted assigns harmless from and against:

(i) any and all losses, liabilities, obligations and damages (individually, a “ **Loss**” and, collectively, “**Losses**”) to the extent based upon or to the extent arising from any breach of the representations, warranties, covenants or agreements made by Seller in this Agreement; and

(ii) any and all notices, actions, suits, proceedings, claims, demands, assessments, judgments, costs, penalties and expenses, including attorneys’ and other professionals’ fees and disbursements (collectively, “**Expenses**”) incident to any and all Losses with respect to which indemnification is provided hereunder.

(b) Purchaser acknowledges and agrees that Seller shall not have any liability under any provision of this Agreement for any Loss to the extent that such Loss relates to action taken by Purchaser or any other Person (other than Seller in breach of this Agreement) after the Closing Date. Purchaser shall take and shall cause its Affiliates to take all reasonable steps to mitigate any Loss upon becoming aware of any event which would reasonably be expected to, or does, give rise thereto, including incurring costs only to the minimum extent necessary to remedy the breach which gives rise to the Loss.

#### 11.4 Indemnification by Purchaser.

(a) Subject to Section 11.6 hereof, Purchaser hereby agrees to indemnify and hold Seller and its directors, officers, employees, Affiliates, agents, attorneys, representatives, successors and permitted assigns harmless from and against:

(i) any and all Losses to the extent based upon or to the extent arising from any breach of the representations, warranties, covenants or agreements made by Purchaser in this Agreement;

(ii) any and all Losses to the extent based upon or to the extent arising out of any Assumed Liability;

(iii) any and all Losses to the extent based upon or to the extent arising out of any Purchased Asset or Purchaser's operation of the Business after the Closing Date; and

(iv) any and all Expenses incident to any and all Losses with respect to which indemnification is provided hereunder.

(b) Seller shall take and cause its Affiliates to take all reasonable steps to mitigate any Loss upon becoming aware of any event which would reasonably be expected to, or does, give rise thereto, including incurring costs only to the minimum extent necessary to remedy the breach which gives rise to the Loss.

#### 11.5 Indemnification Procedures.

(a) In the event that any Legal Proceedings shall be instituted or that any claim or demand (" **Claim**") shall be asserted by any Person in respect of which payment may be sought under Section 11.3 and 11.4 hereof (regardless of the limitations set forth in Section 11.6), the indemnified party shall reasonably and promptly cause written notice of the assertion of any Claim of which it has knowledge which is covered by this indemnity to be forwarded to the indemnifying party. The indemnifying party shall have the right, at its sole option and expense, to be represented by counsel of its choice, which must be reasonably satisfactory to the indemnified party, and to defend against, negotiate, settle or otherwise deal with any Claim which relates to any Losses indemnified against hereunder. If the indemnifying party elects to defend against, negotiate, settle or otherwise deal with any Claim which relates to any Losses indemnified against hereunder, it shall within 30 days (or sooner, if the nature of the Claim so requires) notify the indemnified party of its intent to do so. If the indemnifying party elects not to defend against, negotiate, settle or otherwise deal with any Claim which relates to any Losses indemnified against hereunder, the indemnified party may defend against, negotiate, settle or otherwise deal with such Claim. If the indemnifying party shall assume the defense of any Claim, the indemnified party may participate, at his or its own expense, in the defense of such Claim; provided, however, that such indemnified party shall be entitled to participate in any such defense with separate counsel at the expense of the indemnifying party if (i) so requested by the indemnifying party to participate or (ii) in the reasonable opinion of counsel to the indemnified party a conflict or potential conflict exists between the indemnified party and the indemnifying party that would make such separate representation advisable; provided, further, that the indemnifying party shall not be required to pay for more than one such counsel for all indemnified parties in connection with any Claim. The parties hereto agree to cooperate fully with each other in connection with the defense, negotiation or settlement of any such Claim. Notwithstanding anything in this Section 11.5 to the contrary, neither the indemnifying party nor the indemnified party shall, without the written consent of the other party, settle or compromise any indemnifiable Claim or permit a default or consent to entry of any judgment unless the claimant and such party provide to such other party an unqualified release from all liability in respect of the indemnifiable Claim. Notwithstanding the foregoing, if a settlement offer solely for money damages is made by the applicable third party claimant, and the indemnifying party notifies the indemnified party in writing of the indemnifying party's willingness to accept the settlement offer and, subject to the applicable limitations of Sections 11.6 and 11.7, pay the amount called for by such offer, and the indemnified party declines to accept such offer, the indemnified party may continue to contest such indemnifiable Claim, free of any participation by the indemnifying party, and the amount of any ultimate liability with respect to such indemnifiable Claim that the indemnifying party has an obligation to pay hereunder shall be limited to the lesser of (A) the amount of the settlement offer that the indemnified party declined to accept plus the Losses of the indemnified party relating to such indemnifiable Claim through the date of its rejection of the settlement offer or (B) the aggregate Losses of the indemnified party with respect to such indemnifiable Claim. If the indemnifying party makes any payment on any indemnifiable Claim, the indemnifying party shall be subrogated, to the extent of such payment, to all rights and remedies of the indemnified party to any insurance benefits or other Claims of the indemnified party with respect to such indemnifiable Claim.

(b) After any final judgment or award shall have been rendered by a Governmental Body of competent jurisdiction and the expiration of the time in which to appeal therefrom, or a settlement shall have been consummated, or the indemnified party and the indemnifying party shall have arrived at a mutually binding agreement with respect to a Claim hereunder, the indemnified party shall forward to the indemnifying party notice of any sums due and owing by the indemnifying party pursuant to this Agreement with respect to such matter.

#### 11.6 Certain Limitations on Indemnification.

(a) Notwithstanding anything herein to the contrary, Purchaser must give notice to Seller of any Claim in writing in reasonable detail prior to the expiration of the six month anniversary of the Closing Date. Any Claim not made by Purchaser on or prior to that date will be irrevocably and unconditionally released and waived.

(b) Notwithstanding the provisions of this Article XI, neither party shall have any indemnification obligations for Losses under Section 11.3(a)(i), Section 11.4(a)(i), Section 11.4(a)(ii) and Section 11.4(a)(iii), (i) for any individual item where the Loss relating thereto is less than \$25,000, (ii) in respect of each individual item where the Loss relating thereto is equal to or greater than \$25,000, unless the aggregate amount of all such Losses exceeds \$200,000, and then only to the extent of such excess and (iii) in an aggregate amount in excess of \$2,000,000; provided, that the limitations set forth in clauses (i), (ii) and (iii) shall not apply to obligations for Losses to the extent resulting from a breach of any Seller Fundamental Representation. In no event shall the aggregate indemnification to be paid by Seller or Purchaser under this Article XI exceed \$4,000,000.

(c) No representation or warranty of Seller contained herein shall be deemed untrue or incorrect, and Seller shall not be deemed to have breached a representation or warranty, as a consequence of the existence of any fact, circumstance or event of which (a) is disclosed as part of the Seller Schedules, including any supplements pursuant to Section 7.9(b) or (b) Purchaser is aware as of the Closing Date.

#### 11.7 Calculation of Losses.

(a) The amount of any Losses for which indemnification is provided under this Article XI shall be net of any amounts actually recovered or recoverable by the indemnified party under insurance policies or otherwise with respect to such Losses (net of any Tax or expenses incurred in connection with such recovery).

11.8 Tax Treatment of Indemnity Payments. Seller and Purchaser agree to treat any indemnity payment made pursuant to this Article XI as an adjustment to the Purchase Price for federal, state, local and foreign income tax purposes.

11.9 No Consequential Damages. Notwithstanding anything to the contrary elsewhere in this Agreement, no party shall, in any event, be liable to any other Person for any consequential, incidental, indirect, special or punitive damages of such other Person, including loss of future revenue, income or profits, diminution of value or loss of business reputation or opportunity relating to the breach or alleged breach hereof (provided that such limitation with respect to lost profits shall not limit Seller's right to recover contract damages in connection with Purchaser's failure to close in violation of this Agreement).

11.10 Exclusive Remedy. The sole and exclusive remedy for any breach or inaccuracy, or alleged breach or inaccuracy, of any representation or warranty in this Agreement or any covenant or agreement to be performed on or prior to the Closing Date, shall be indemnification in accordance with this Article XI. In furtherance of the foregoing, the parties hereby waive, to the fullest extent permitted by applicable Law, any and all other rights, claims and causes of action (including rights of contributions, if any) known or unknown, foreseen or unforeseen, which exist or may arise in the future, that it may have against Seller or Purchaser, as the case may be, arising under or based upon any federal, state or local Law (including any such Law relating to environmental matters or arising under or based upon any securities Law, common Law or otherwise).

### **ARTICLE XII MISCELLANEOUS**

#### 12.1 Payment of Sales, Use or Similar Taxes.

(a) Purchaser shall be responsible for (and shall indemnify and hold harmless Seller against) any sales taxes applicable to the Purchased Assets and for all other applicable sales, use, stamp, documentary, filing, recording, transfer or similar fees or taxes or governmental charges (including real property transfer gains taxes, UCC-3 filing fees, FAA, ICC, DOT, real estate and motor vehicle registration, title recording or filing fees and other amounts payable in respect of transfer filings) in connection with the transactions contemplated by this Agreement (other than taxes measured by or with respect to income imposed on Seller or its Affiliates). Seller shall file all necessary documents (including all Tax Returns) with respect to all such amounts in a timely manner.

(b) For purposes of clause (b) of the definition of Excluded Liabilities, in the case of a taxable period that includes the Closing Date, Taxes relating to the Purchased Assets shall be allocated to the periods before and after the Closing Date as follows: (i) in the case of Taxes such as property taxes, such Taxes shall be allocated to periods before and after the Closing Date on a per diem basis and (ii) in the case of Taxes based on net or gross income, or transactional taxes such as sales taxes, the portion of such Taxes allocable to the period before the Closing Date shall be computed on the assumption that the taxable period ended on the Closing Date.



12.2 Expenses. Except as otherwise provided in this Agreement, each of Seller and Purchaser shall bear its own expenses incurred in connection with the negotiation and execution of this Agreement and the Ancillary Documents and the consummation of the transactions contemplated hereby and thereby.

12.3 Governing Law. THIS AGREEMENT AND THE LEGAL RELATIONS BETWEEN THE PARTIES AND ALL DISPUTES OR CONTROVERSIES ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, USA WITHOUT REGARD TO ANY PRINCIPLES OF CONFLICTS OF LAWS THAT WOULD PERMIT OR REQUIRE THE APPLICATION OF LAWS OF ANY OTHER JURISDICTION.

12.4 Exclusive Jurisdiction; Consent to Service of Process. Each of the parties hereto hereby irrevocably and unconditionally submits, for itself and its property, to the exclusive jurisdiction of the courts of the State of New York located in the County of Oswego, or of the United States of America sitting in the Northern District of New York, and any appellate court from any thereof, in any proceeding arising out of or relating to this Agreement or any other Ancillary Document or any agreements contemplated hereby or thereby for any reason other than the failure to serve process in accordance with this Section 12.4, and irrevocably waive the defense of an inconvenient forum or an improper venue to the maintenance of any such proceeding. Any service of process to be made in such proceeding may be made by delivery of process in accordance with the notice provisions contained in Section 12.7. The consents to jurisdiction set forth in this Section 12.4 shall not constitute general consents to service of process in the State of New York and shall have no effect for any purpose except as provided in this Section 12.4 and shall not be deemed to confer rights on any Person other than the parties hereto. The parties hereto agree that a final judgment in any such proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by applicable Law. In addition, each of the parties hereto agrees that it will not attempt to deny or defeat such personal jurisdiction by motion or other request for leave from any such court.

12.5 Waiver of Jury Trial.

(a) EACH PARTY ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY WHICH MAY ARISE UNDER THIS AGREEMENT OR ANY OTHER ANCILLARY DOCUMENT IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES, AND THEREFORE EACH OF THE PARTIES TO THIS AGREEMENT HEREBY IRREVOCABLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OTHER ANCILLARY DOCUMENT OR ANY AGREEMENTS CONTEMPLATED HEREBY OR THEREBY. THE PARTIES HERETO ALSO WAIVE ANY BOND OR SURETY OR SECURITY UPON SUCH BOND THAT MIGHT, BUT FOR THIS WAIVER, BE REQUIRED. THE SCOPE OF THIS WAIVER IS INTENDED TO BE ALL ENCOMPASSING OF ANY AND ALL DISPUTES THAT MAY BE FILED IN ANY COURT AND THAT RELATE TO THE SUBJECT MATTER OF THIS TRANSACTION, INCLUDING CONTRACT CLAIMS, TORT CLAIMS, BREACH OF DUTY CLAIMS AND ALL OTHER COMMON LAW AND STATUTORY CLAIMS. THIS WAIVER IS IRREVOCABLE, MEANING THAT IT MAY NOT BE MODIFIED EITHER ORALLY OR IN WRITING, AND THE WAIVER SHALL APPLY TO ANY SUBSEQUENT AMENDMENTS, RENEWALS, SUPPLEMENTS OR MODIFICATIONS TO THIS AGREEMENT. IN THE EVENT OF LITIGATION, THIS AGREEMENT MAY BE FILED AS A WRITTEN CONSENT TO A TRIAL BY THE COURT.

(b) If there are any proceedings arising out of or relating to this Agreement or any other Ancillary Document or the transactions contemplated hereby or thereby, after the entry of a final written non-appealable order and if one party has prevailed in the dispute, that party shall be entitled to recover from the other party all court costs, fees and expenses relating to such proceeding, including reasonable attorneys' fees that are specifically included in such court award.

12.6 Entire Agreement; Amendments and Waivers. This Agreement (including the Schedules and exhibits hereto) and the Confidentiality Agreement represent the entire understanding and agreement between the parties hereto with respect to the subject matter hereof. This Agreement can be amended, supplemented or changed, and any provision hereof can be waived, only by written instrument making specific reference to this Agreement signed by the party against whom enforcement of any such amendment, supplement, modification or waiver is sought. No action taken pursuant to this Agreement shall be deemed to constitute a waiver by the party taking such action of compliance with any representation, warranty, covenant or agreement contained herein. The waiver by any party hereto of a breach of any provision of this Agreement shall not operate or be construed as a further or continuing waiver of such breach or as a waiver of any other or subsequent breach. No failure on the part of any party to exercise, and no delay in exercising, any right, power or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of such right, power or remedy by such party preclude any other or further exercise thereof or the exercise of any other right, power or remedy.

12.7 Notices. All notices and other communications under this Agreement shall be in writing and shall be deemed given (i) when delivered personally by hand (with written confirmation of receipt), (ii) when sent by facsimile (with written confirmation of transmission) or (iii) one Business Day following the day sent by overnight courier (with written confirmation of receipt), in each case at the following addresses and facsimile numbers (or to such other address or facsimile number as a party may have specified by notice given to the other party pursuant to this provision):

If to Seller, to:

Sunoco Retail LLC  
8111 Westchester Drive, Suite 400  
Dallas, Texas 75225  
Attention: Arnold Dodderer  
Email: arnold.dodderer@sunoco.com

And for all communication under Section 9.3 (email only):

Sunoco Retail LLC  
Attention: Beth Tiggelaar  
Email: beth.tiggelaar@sunoco.com

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

Vinson & Elkins L.L.P.  
1001 Fannin, Suite 2500  
Houston, Texas 77002  
Attention: Lande A. Spottswood  
Email: lspottswood@velaw.com

If to Purchaser, to:

Attis Ethanol Fulton, LLC  
12540 Broadwell Road, Suite 2104  
Milton, Georgia 30004  
Attn: Greg Pilewicz  
Email: gpilewicz@attisind.com

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

Richard J. Dreger, Attorney at Law, P.C.  
11660 Alpharetta Highway, Suite 730  
Roswell, Georgia 30076  
Attn: Richard J. Dreger, Esq.  
Email: Rick@rdregerlaw.com

12.8 Severability. If any term or other provision of this Agreement is invalid, illegal, or incapable of being enforced by any law or public policy, all other terms or provisions of this Agreement shall nevertheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner materially adverse to any party. Upon such determination that any term or other provision is invalid, illegal, or incapable of being enforced, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in an acceptable manner in order that the transactions contemplated hereby are consummated as originally contemplated to the greatest extent possible.

12.9 Binding Effect; Assignment. This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. Nothing in this Agreement shall create or be deemed to create any third party beneficiary rights in any person or entity not a party to this Agreement except as provided below. No assignment of this Agreement or of any rights or obligations hereunder may be made by either Seller or Purchaser, directly or indirectly (by operation of law or otherwise), without the prior written consent of the other parties hereto and any attempted assignment without the required consents shall be void. No assignment of any obligations hereunder shall relieve the parties hereto of any such obligations. Upon any such permitted assignment, the references in this Agreement to Purchaser shall also apply to any such assignee unless the context otherwise requires.

12.10 Non-Recourse. No past, present or future director, officer, employee, incorporator, member, partner, stockholder, Affiliate, agent, attorney or representative of Seller or its Affiliates shall have any liability for any obligations or liabilities of Seller under this Agreement or the Ancillary Documents of or for any claim based on, in respect of, or by reason of, the transactions contemplated hereby and thereby.

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

*[Signature Pages Follow]*

SIGNATURE PAGE TO  
SECOND AMENDED AND RESTATED  
ASSET PURCHASE AGREEMENT

**PURCHASER:**

**ATTIS ETHANOL FULTON, LLC**

By: /s/ Jeffrey S. Cosman

Name: Jeffrey S. Cosman

Title: Manager

SIGNATURE PAGE TO  
SECOND AMENDED AND RESTATED  
ASSET PURCHASE AGREEMENT

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NEITHER THIS SECURITY NOR THE SECURITIES FOR WHICH THIS SECURITY IS EXERCISABLE HAVE BEEN REGISTERED WITH THE SECURITIES AND EXCHANGE COMMISSION OR THE SECURITIES COMMISSION OF ANY STATE IN RELIANCE UPON AN EXEMPTION FROM REGISTRATION UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"), AND, ACCORDINGLY, MAY NOT BE OFFERED OR SOLD EXCEPT PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT UNDER THE SECURITIES ACT OR PURSUANT TO AN AVAILABLE EXEMPTION FROM, OR IN A TRANSACTION NOT SUBJECT TO, THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT AND IN ACCORDANCE WITH APPLICABLE STATE SECURITIES LAWS AS EVIDENCED BY A LEGAL OPINION OF COUNSEL TO THE TRANSFEROR TO SUCH EFFECT, THE SUBSTANCE OF WHICH SHALL BE REASONABLY ACCEPTABLE TO THE COMPANY. THIS SECURITY AND THE SECURITIES ISSUABLE UPON EXERCISE OF THIS SECURITY MAY BE PLEDGED IN CONNECTION WITH A BONA FIDE MARGIN ACCOUNT OR OTHER LOAN SECURED BY SUCH SECURITIES.

## COMMON STOCK PURCHASE WARRANT

### ATTIS INDUSTRIES INC.

Warrant Shares: 550,000

Issue Date: May 31, 2019  
Initial Exercise Date: November 30, 2019

THIS COMMON STOCK PURCHASE WARRANT (the "Warrant") certifies that, for value received, Highscore Capital LLC, a New York limited liability company (the "Holder") is entitled, upon the terms and subject to the limitations on exercise and the conditions hereinafter set forth, at any time on or after the date that is six months after the date hereof (the "Initial Exercise Date") and on or prior to the close of business on the five year anniversary of the Initial Exercise Date (the "Termination Date") but not thereafter, to subscribe for and purchase from Attis Industries Inc., a New York corporation (the "Company"), up to 550,000 shares (the "Warrant Shares") of Common Stock. The purchase price of one share of Common Stock under this Warrant shall be equal to the Exercise Price, as defined in Section 2(b).

Section 1. Definitions. For the purposes hereof, in addition to the terms defined elsewhere in this Warrant, (a) capitalized terms not otherwise defined herein shall have the meanings set forth in the Purchase Agreement and (b) the following terms shall have the following meanings:

"Business Day" means any day except any Saturday, any Sunday, any day which shall be a federal legal holiday in the United States or any day on which banking institutions in the State of New York are authorized or required by law or other governmental action to close.

"Common Stock Equivalents" means any securities of the Company or the Subsidiaries which would entitle the holder thereof to acquire at any time Common Stock, including, without limitation, any debt, preferred stock, rights, options, warrants or other instrument that is at any time convertible into or exercisable or exchangeable for, or otherwise entitles the holder thereof to receive Common Stock.

"Note" means the Company's Promissory Note due on January 17, 2020 issued by the Company to the Holder dated May 31, 2019.

"Person" means an individual or corporation, partnership, trust, incorporated or unincorporated association, joint venture, limited liability company, joint stock company, government (or an agency or subdivision thereof) or other entity of any kind.

"Purchase Agreement" means, collectively, the Loan and Security Agreement, dated as of May 31, 2019 between the Company, certain subsidiaries thereof and the original Holder, as amended, modified or supplemented from time to time in accordance with its terms.

"Securities Act" means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder.

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"Trading Day" means a day on which the New York Stock Exchange is open for business.

"Trading Market" means the following markets or exchanges on which the Common Stock is listed or quoted for trading on the date in question: the NYSE American, the Nasdaq Capital Market, the Nasdaq Global Market, the Nasdaq Global Select Market, the New York Stock Exchange, the OTCQB or the OTCQX.

"Loan Documents" shall have the meaning set forth in the Purchase Agreement.

"VWAP" means, for or as of any date, the dollar volume-weighted average price for such security on the market or exchange on which the Common Stock is listed or quoted for trading on the date in question during the period beginning at 9:30:01 a.m., New York time, and ending at 4:00:00 p.m., New York time, as reported by Bloomberg through its "HP" function (set to weighted average) or, if the foregoing does not apply, the dollar volume-weighted average price of such security in the over-the-counter market on the electronic bulletin board for such security during the period beginning at 9:30:01 a.m., New York time, and ending at 4:00:00 p.m., New York time, as reported by Bloomberg, or, if no dollar volume-weighted average price is reported for such security by Bloomberg for such hours, the average of the highest closing bid price and the lowest closing ask price of any of the market makers for such security as reported in the "pink sheets" by OTC Markets Group Inc. (formerly Pink Sheets LLC). If the VWAP cannot be calculated for such security on such date on any of the foregoing bases, the VWAP of such security on such date shall be the fair market value as mutually determined by the Company and the Holder. All such determinations shall be appropriately adjusted for any stock dividend, stock split, stock combination, recapitalization or other similar transaction during such period.

## Section 2. Exercise.

a) Exercise of Warrant. Exercise of the purchase rights represented by this Warrant may be made, in whole or in part, at any time or times on or after the Initial Exercise Date and on or before the Termination Date by delivery to the Company (or such other office or agency of the Company as it may designate by notice in writing to the registered Holder at the address of the Holder appearing on the books of the Company) of a duly executed facsimile copy of the Notice of Exercise Form annexed hereto; and, within 14 Trading Days of the date said Notice of Exercise is delivered to the Company, the Company shall have received payment of the aggregate Exercise Price of the shares thereby purchased by wire transfer or cashier's check drawn on a United States bank. Notwithstanding anything herein to the contrary, the Holder shall not be required to physically surrender this Warrant to the Company until the Holder has purchased all of the Warrant Shares available hereunder and the Warrant has been exercised in full, in which case, the Holder shall surrender this Warrant to the Company for cancellation within 3 Trading Days of the date the final Notice of Exercise is delivered to the Company. Partial exercises of this Warrant resulting in purchases of a portion of the total number of Warrant Shares available hereunder shall have the effect of lowering the outstanding number of Warrant Shares purchasable hereunder in an amount equal to the applicable number of Warrant Shares purchased. The Holder and the Company shall maintain records showing the number of Warrant Shares purchased and the date of such purchases. **The Holder and any assignee, by acceptance of this Warrant, acknowledge and agree that, by reason of the provisions of this paragraph, following the purchase of a portion of the Warrant Shares hereunder, the number of Warrant Shares available for purchase hereunder at any given time may be less than the amount stated on the face hereof.**

b) Exercise Price. The exercise price per share of the Common Stock under this Warrant shall be equal to \$2.85, subject to adjustment hereunder (the "Exercise Price").

c) Cashless Exercise. Unless the Warrant Shares are duly registered pursuant to an effective registration statement under the Securities Act, this Warrant may also be exercised at any time after the Initial Exercise Date by means of a "cashless exercise" in which the Holder shall be entitled to receive a certificate for the number of Warrant Shares equal to the quotient obtained by dividing [(A-B) (X)] by (A), where:

(A) = the VWAP on the Trading Day immediately preceding the date of such election;

(B) = the Exercise Price of this Warrant, as adjusted; and

(X) = the number of Warrant Shares issuable upon exercise of this Warrant in accordance with the terms of this Warrant by means of a cash exercise rather than a cashless exercise.



Notwithstanding anything herein to the contrary, except as otherwise provided in Section 2(e)(iv) or Section 6, the Company shall not be required to make any cash payments or net cash settlement to the Holder in lieu of delivery of the Warrant Shares.

d) Exercise Limitations. Holder shall not have the right to exercise any portion of this Warrant, pursuant to Section 2 or otherwise, to the extent that after giving effect to such issuance after exercise, the Holder (together with the Holder's affiliates, and any other person or entity acting as a group together with the Holder or any of the Holder's affiliates), would beneficially own in excess of the Beneficial Ownership Limitation (as defined below). For purposes of the foregoing sentence, the number of shares of Common Stock beneficially owned by the Holder and its Affiliates shall include the number of shares of Common Stock issuable upon conversion of this Warrant with respect to which such determination is being made, but shall exclude the number of shares of Common Stock which are issuable upon (i) conversion of the remaining, unconverted principal amount of this Warrant beneficially owned by the Holder or any of its Affiliates and (ii) exercise or conversion of the unexercised or unconverted portion of any other securities of the Company subject to a limitation on conversion or exercise analogous to the limitation contained herein (including, without limitation, any other Warrants) beneficially owned by the Holder or any of its Affiliates. Except as set forth in the preceding sentence, for purposes of this Section 2(d), beneficial ownership shall be calculated in accordance with Section 13(d) of the Exchange Act and the rules and regulations promulgated thereunder. To the extent that the limitation contained in this Section 2(d) applies, the determination of whether this Warrant is convertible (in relation to other securities owned by the Holder together with any Affiliates) and of which principal amount of this Warrant is convertible shall be in the sole discretion of the Holder, and the submission of a Notice of Conversion shall be deemed to be the Holder's determination of whether this Warrant may be converted (in relation to other securities owned by the Holder together with any Affiliates) and which principal amount of this Warrant is convertible, in each case subject to the Beneficial Ownership Limitation. To ensure compliance with this restriction, the Holder will be deemed to represent to the Company each time it delivers a Notice of Conversion that such Notice of Conversion has not violated the restrictions set forth in this paragraph and the Company shall have no obligation to verify or confirm the accuracy of such determination. In addition, a determination as to any group status as contemplated above shall be determined in accordance with Section 13(d) of the Exchange Act and the rules and regulations promulgated thereunder. For purposes of this Section 2(d), in determining the number of outstanding shares of Common Stock, the Holder may rely on the number of outstanding shares of Common Stock as stated in the most recent of the following: (i) the Company's most recent periodic or annual report filed with the Commission, as the case may be, (ii) a more recent public announcement by the Company, or (iii) a more recent written notice by the Company or the Company's transfer agent setting forth the number of shares of Common Stock outstanding. Upon the written or oral request of a Holder, the Company shall within two Trading Days confirm orally and in writing to the Holder the number of shares of Common Stock then outstanding. In any case, the number of outstanding shares of Common Stock shall be determined after giving effect to the conversion or exercise of securities of the Company, including this Warrant, by the Holder or its affiliates since the date as of which such number of outstanding shares of Common Stock was reported. The "Beneficial Ownership Limitation" shall be 4.99% of the number of shares of the Common Stock outstanding immediately after giving effect to the issuance of shares of Common Stock issuable upon exercise of this Warrant held by the Holder. The Holder, upon not less than 61 days' prior notice to the Company, may increase or decrease the Beneficial Ownership Limitation provisions of this Section 2(d), provided that the Beneficial Ownership Limitation in no event exceeds 4.99% of the number of shares of the Common Stock outstanding immediately after giving effect to the issuance of shares of Common Stock upon conversion of this Warrant held by the Holder and the Beneficial Ownership Limitation provisions of this Section 2(d) shall continue to apply. Any such increase or decrease will not be effective until the 61<sup>st</sup> day after such notice is delivered to the Company. Notwithstanding anything to contrary set forth herein, the Holder will not exercise any conversion under this Warrant that results in such Holder beneficially owning more than 19.99% of the number of shares of the Common Stock outstanding immediately after giving effect to the issuance of shares of Common Stock issuable upon exercise of this Warrant held by the Holder. The Beneficial Ownership Limitation provisions of this paragraph shall be construed and implemented in a manner otherwise than in strict conformity with the terms of this Section 2(d) to correct this paragraph (or any portion hereof) which may be defective or inconsistent with the intended Beneficial Ownership Limitation contained herein or to make changes or supplements necessary or desirable to properly give effect to such limitation. The limitations contained in this paragraph shall apply to a successor holder of this Warrant.

e) Mechanics of Exercise.

i. Delivery of Certificates Upon Exercise. Certificates for shares purchased hereunder shall be transmitted by the Company's transfer agent (the "Transfer Agent") to the Holder by crediting the account of the Holder's prime broker with the Depository Trust Company through its Deposit Withdrawal Agent Commission ("DWAC") system if the Company is then a participant in such system and either (A) there is an effective registration statement permitting the issuance of the Warrant Shares to or resale of the Warrant Shares by the Holder or (B) the shares are eligible for resale without volume or manner-of-sale limitations pursuant to Rule 144, and otherwise by physical delivery of certificates to the address specified by the Holder in the Notice of Exercise within 4 Trading Days from the delivery to the Company of the Notice of Exercise Form, surrender of this Warrant (if required) and payment of the aggregate Exercise Price as set forth above, together with any letters, documents or materials completed and signed by Holder as required by the Company's Transfer Agent or counsel necessary to cause the issuance of the certificates to the Holder (the "Warrant Share Delivery Date"). This Warrant shall be deemed to have been exercised on the date the Exercise Price is received by the Company. The Warrant Shares shall be deemed to have been issued, and Holder or any other person so designated to be named therein shall be deemed to have become a holder of record of such shares for all purposes, as of the date the Warrant has been exercised by payment to the Company of the Exercise Price (or by cashless exercise, if permitted) and all taxes required to be paid by the Holder, if any, pursuant to Section 2(f)(vi) prior to the issuance of such shares, have been paid. If the Company fails for any reason to deliver to the Holder certificates evidencing the Warrant Shares subject to a Notice of Exercise by the Warrant Share Delivery Date, the Company shall pay to the Holder, in cash, as liquidated damages and not as a penalty, for each \$1,000 of Warrant Shares subject to such exercise, \$10 per Trading Day (increasing to \$20 per Trading Day on the seventh Trading Day after such liquidated damages begin to accrue) for each Trading Day after such Warrant Share Delivery Date until such certificates are delivered.

ii. Delivery of New Warrants Upon Exercise. If this Warrant shall have been exercised in part, the Company shall, at the request of a Holder and upon surrender of this Warrant certificate, at the time of delivery of the certificate or certificates representing Warrant Shares, deliver to Holder a new Warrant evidencing the rights of Holder to purchase the unpurchased Warrant Shares called for by this Warrant, which new Warrant shall in all other respects be identical with this Warrant.

iii. Rescission Rights. If the Company fails to cause the Transfer Agent to transmit to the Holder a certificate or the certificates representing the Warrant Shares pursuant to Section 2(f)(i) by the Warrant Share Delivery Date, then, the Holder will have the right to rescind such exercise.

iv. No Fractional Shares or Scrip. No fractional shares or scrip representing fractional shares shall be issued upon the exercise of this Warrant. As to any fraction of a share which Holder would otherwise be entitled to purchase upon such exercise, the Company shall, at its election, either pay a cash adjustment in respect of such final fraction in an amount equal to such fraction multiplied by the Exercise Price or round up to the next whole share.

v. Charges, Taxes and Expenses. Issuance of certificates for Warrant Shares shall be made without charge to the Holder for any issue or transfer tax or other incidental expense in respect of the issuance of such certificate, all of which taxes and expenses shall be paid by the Company, and such certificates shall be issued in the name of the Holder or in such name or names as may be directed by the Holder; provided, however, that in the event certificates for Warrant Shares are to be issued in a name other than the name of the Holder, this Warrant when surrendered for exercise shall be accompanied by the Assignment Form attached hereto duly executed by the Holder and the Company may require, as a condition thereto, the payment of a sum sufficient to reimburse it for any transfer tax incidental thereto. The Company shall pay all Transfer Agent fees required for same-day processing of any Notice of Exercise.

vi. Closing of Books. The Company will not close its stockholder books or records in any manner which prevents the timely exercise of this Warrant, pursuant to the terms hereof.

### Section 3. Certain Adjustments.

a) Stock Dividends and Splits. If the Company, at any time while this Warrant is outstanding: (i) pays a stock dividend or otherwise make a distribution or distributions on shares of its Common Stock or any other equity or equity equivalent securities payable in shares of Common Stock (which, for avoidance of doubt, shall not include any shares of Common Stock issued by the Company upon exercise of this Warrant or any other convertible securities of the Company), (ii) subdivides all outstanding shares of Common Stock into a larger number of shares, (iii) combines (including by way of reverse stock split) all outstanding shares of Common Stock into a smaller number of shares or (iv) issues by reclassification of shares of the Common Stock any shares of capital stock of the Company to all holders of Common Stock, then in each case the Exercise Price shall be multiplied by a fraction of which the numerator shall be the number of shares of Common Stock (excluding treasury shares, if any) outstanding immediately before such event and of which the denominator shall be the number of shares of Common Stock outstanding immediately after such event and the number of shares issuable upon exercise of this Warrant shall be proportionately adjusted such that the aggregate Exercise Price of this Warrant shall remain unchanged. Any adjustment made pursuant to this Section 3(a) shall become effective immediately after the record date for the determination of stockholders entitled to receive such dividend or distribution and shall become effective immediately after the effective date in the case of a subdivision, combination or re-classification.

b) Adjustment Upon Issuance of Shares of Common Stock. If the Company issues or sells, or in accordance with this Section 3(b) is deemed to have issued or sold, any shares of Common Stock or Common Stock Equivalents (including the issuance or sale of shares of Common Stock owned or held by or for the account of the Company, but excluding any Exempt Issuances (as defined hereunder) issued or sold or deemed to have been issued or sold) for a consideration per share (the "New Issuance Price") less than a price equal to the Exercise Price in effect immediately prior to such issuance or sale or deemed issuance or sale (such Exercise Price then in effect is referred to herein as the "Applicable Price") (the foregoing a "Dilutive Issuance"), then immediately after such Dilutive Issuance, the Exercise Price then in effect shall be reduced to an amount equal to the New Issuance Price. For all purposes of the foregoing (including, without limitation, determining the adjusted Exercise Price and the New Issuance Price under this Section 3(b)), the following shall be applicable:

i. Issuance of Options. If the Company in any manner grants or sells any rights, warrants or options to subscribe for or purchase shares of Common Stock ("Options") or any stock or other security that is at any time and under any circumstances, directly or indirectly, convertible into, exercisable or exchangeable for, or which otherwise entitles the holder thereof to acquire, any shares of Common Stock ("Convertible Securities") and the lowest price per share for which one share of Common Stock is at any time issuable upon the exercise of any such Option or upon conversion, exercise or exchange of any Convertible Securities issuable upon exercise of any such Option or otherwise pursuant to the terms thereof is less than the Applicable Price, then such share of Common Stock shall be deemed to be outstanding and to have been issued and sold by the Company at the time of the granting or sale of such Option for such price per share. For purposes of this Section 3(b)(i), the "lowest price per share for which one share of Common Stock is at any time issuable upon the exercise of any such Options or upon conversion, exercise or exchange of any Convertible Securities issuable upon exercise of any such Option or otherwise pursuant to the terms thereof" shall be equal to (1) the lower of (x) the sum of the lowest amounts of consideration (if any) received or receivable by the Company with respect to any one share of Common Stock upon the granting or sale of such Option, upon exercise of such Option and upon conversion, exercise or exchange of any Convertible Security issuable upon exercise of such Option or otherwise pursuant to the terms thereof and (y) the lowest exercise price set forth in such Option for which one share of Common Stock is issuable (or may become issuable assuming all possible market conditions) upon the exercise of any such Options or upon conversion, exercise or exchange of any Convertible Securities issuable upon exercise of any such Option or otherwise pursuant to the terms thereof minus (2) the sum of all amounts paid or payable to the holder of such Option (or any other Person) upon the granting or sale of such Option, upon exercise of such Option and upon conversion, exercise or exchange of any Convertible Security issuable upon exercise of such Option or otherwise pursuant to the terms thereof plus the value of any other consideration received or receivable by, or benefit conferred on, the holder of such Option (or any other Person). Except as contemplated below, no further adjustment of the Exercise Price shall be made upon the actual issuance of such shares of Common Stock or of such Convertible Securities upon the exercise of such Options or otherwise pursuant to the terms of or upon the actual issuance of such shares of Common Stock upon conversion, exercise or exchange of such Convertible Securities.

ii. Issuance of Convertible Securities. If the Company in any manner issues or sells any Convertible Securities and the lowest price per share for which one share of Common Stock is at any time issuable upon the conversion, exercise or exchange thereof or otherwise pursuant to the terms thereof is less than the Applicable Price, then such share of Common Stock shall be deemed to be outstanding and to have been issued and sold by the Company at the time of the issuance or sale of such Convertible Securities for such price per share. For the purposes of this Section 3(b)(ii), the "lowest price per share for which one share of Common Stock is at any time issuable upon the conversion, exercise or exchange thereof or otherwise pursuant to the terms thereof" shall be equal to (1) the lower of (x) the sum of the lowest amounts of consideration (if any) received or receivable by the Company with respect to one share of Common Stock upon the issuance or sale of the Convertible Security and upon conversion, exercise or exchange of such Convertible Security or otherwise pursuant to the terms thereof and (y) the lowest conversion price set forth in such Convertible Security for which one share of Common Stock is issuable (or may become issuable assuming all possible market conditions) upon conversion, exercise or exchange thereof or otherwise pursuant to the terms thereof minus (2) the sum of all amounts paid or payable to the holder of such Convertible Security (or any other Person) upon the issuance or sale of such Convertible Security plus the value of any other consideration received or receivable by, or benefit conferred on, the holder of such Convertible Security (or any other Person). Except as contemplated below, no further adjustment of the Exercise Price shall be made upon the actual issuance of such shares of Common Stock upon conversion, exercise or exchange of such Convertible Securities or otherwise pursuant to the terms thereof, and if any such issuance or sale of such Convertible Securities is made upon exercise of any Options for which adjustment of this Warrant has been or is to be made pursuant to other provisions of this Section 3(b), except as contemplated below, no further adjustment of the Exercise Price shall be made by reason of such issuance or sale.

iii. Change in Option Price or Rate of Conversion. If the purchase or exercise price provided for in any Options, the additional consideration, if any, payable upon the issue, conversion, exercise or exchange of any Convertible Securities, or the rate at which any Convertible Securities are convertible into or exercisable or exchangeable for shares of Common Stock increases or decreases at any time (other than proportional changes in conversion or exercise prices, as applicable, in connection with an event referred to in Section 3(a)), the Exercise Price in effect at the time of such increase or decrease shall be adjusted to the Exercise Price which would have been in effect at such time had such Options or Convertible Securities provided for such increased or decreased purchase price, additional consideration or increased or decreased conversion rate, as the case may be, at the time initially granted, issued or sold. For purposes of this Section 3(b)(iii), if the terms of any Option or Convertible Security that was outstanding as of the date of the Purchase Agreement are increased or decreased in the manner described in the immediately preceding sentence, then such Option or Convertible Security and the shares of Common Stock deemed issuable upon exercise, conversion or exchange thereof shall be deemed to have been issued as of the date of such increase or decrease.

iv. Calculation of Consideration Received. If any Option and/or Convertible Security and/or Adjustment Right (as defined below) is issued in connection with the issuance or sale or deemed issuance or sale of any other securities of the Company (as determined by the Holder, the "Primary Security", and such Option and/or Convertible Security and/or Adjustment Right, the "Secondary Securities" and together with the Primary Security, each a "Unit"), together comprising one integrated transaction, the aggregate consideration per share of Common Stock with respect to such Primary Security shall be deemed to be the lowest of (x) the purchase price of such Unit, (y) if such Primary Security is an Option and/or Convertible Security, the lowest price per share for which one share of Common Stock is at any time issuable upon the exercise or conversion of the Primary Security in accordance with Section 3(b)(i) or 3(b)(ii) above and (z) the lowest VWAP of the Common Stock on any Trading Day during the four Trading Day period immediately following the public announcement of such Dilutive Issuance (for the avoidance of doubt, if such public announcement is released prior to the opening of the Principal Market on a Trading Day, such Trading Day shall be the first Trading Day in such four Trading Day period). If any shares of Common Stock, Options or Convertible Securities are issued or sold or deemed to have been issued or sold for cash, the consideration received therefor will be deemed to be the net amount of consideration received by the Company therefor. If any shares of Common Stock, Options or Convertible Securities are issued or sold for a consideration other than cash, the amount of such consideration received by the Company will be the fair value of such consideration, except where such consideration consists of publicly traded securities, in which case the amount of consideration received by the Company for such securities will be the arithmetic average of the VWAPs of such security for each of the five (5) Trading Days immediately preceding the date of receipt. If any shares of Common Stock, Options or Convertible Securities are issued to the owners of the non-surviving entity in connection with any merger in which the Company is the surviving entity, the amount of consideration therefor will be deemed to be the fair value of such portion of the net assets and business of the non-surviving entity as is attributable to such shares of Common Stock, Options or Convertible Securities (as the case may be). The fair market value of any consideration other than cash or publicly traded securities will be determined jointly by the Company and the Holder. If such parties are unable to reach agreement within ten (10) days after the occurrence of an event requiring valuation (the "Valuation Event"), the fair market value of such consideration will be determined within five (5) Trading Days after the tenth (10th) day following such Valuation Event by an independent, reputable appraiser jointly selected by the Company and the Holder. The determination of such appraiser shall be final and binding upon all parties absent manifest error and the fees and expenses of such appraiser shall be borne by the Company. As used herein, "Adjustment Right" means any right granted with respect to any securities issued in connection with, or with respect to, any issuance or sale (or deemed issuance or sale in accordance with this Section 3) of shares of Common Stock (other than rights of the type described in Section 3(d) hereof) that could result in a decrease in the net consideration received by the Company in connection with, or with respect to, such securities (including, without limitation, any cash settlement rights, cash adjustment or other similar rights).

v. Voluntary Adjustment By Company. The Company may reduce the then current Exercise Price of this Warrant to any amount and for any period of time deemed appropriate by the board of directors of the Company with the prior written consent of the Holder with the number of Warrant Shares issuable hereunder increasing such that the aggregate Exercise Price payable hereunder, after taking into account the reduction in the Exercise Price, shall be unchanged.

vi. Record Date. If the Company takes a record of the holders of shares of Common Stock for the purpose of entitling them (A) to receive a dividend or other distribution payable in shares of Common Stock, Options or in Convertible Securities or (B) to subscribe for or purchase shares of Common Stock, Options or Convertible Securities, then such record date will be deemed to be the date of the issuance or sale of the shares of Common Stock deemed to have been issued or sold upon the declaration of such dividend or the making of such other distribution or the date of the granting of such right of subscription or purchase (as the case may be).

vii. Exempt Issuances. "Exempt Issuance" means the issuance of (a) shares of Common Stock or options to employees, officers or directors of the Company pursuant to any stock or option plan duly adopted for such purpose, or to a consultant, by a majority of the non-employee members of the Board of Directors or a majority of the members of a committee of non-employee directors established for such purpose for services rendered to the Company, (b) securities upon the exercise or exchange of or conversion of any Securities issued hereunder and/or other securities exercisable or exchangeable for or convertible into shares of Common Stock issued and outstanding on the date of this Agreement, provided that such securities have not been amended since the date of this Agreement to increase the number of such securities or to decrease the exercise price, exchange price or conversion price of such securities (other than in connection with stock splits or combinations) or to extend the term of such securities, and not taking into account any anti-dilution or price adjustment provisions contained in such securities or agreements, and (c) securities issued pursuant to acquisitions or strategic transactions approved by a majority of the disinterested directors of the Company, provided that such securities are issued as "restricted securities" (as defined in Rule 144).

c) Subsequent Rights Offerings. In addition to any adjustments pursuant to Section 3(a) above, if at any time the Company grants, issues or sells any Common Stock Equivalents or rights to purchase stock, warrants, securities or other property pro rata to the record holders of any class of shares of Common Stock (the "Purchase Rights"), then the Holder will be entitled to acquire, upon the terms applicable to such Purchase Rights, the aggregate Purchase Rights which the Holder could have acquired if the Holder had held the number of shares of Common Stock acquirable upon complete conversion of this Warrant (without regard to any limitations on exercise hereof, including without limitation, the Beneficial Ownership Limitation) immediately before the date on which a record is taken for the grant, issuance or sale of such Purchase Rights, or, if no such record is taken, the date as of which the record holders of shares of Common Stock are to be determined for the grant, issue or sale of such Purchase Rights (provided, however, to the extent that the Holder's right to participate in any such Purchase Right would result in the Holder exceeding the Beneficial Ownership Limitation, then the Holder shall not be entitled to participate in such Purchase Right to such extent (or beneficial ownership of such shares of Common Stock as a result of such Purchase Right to such extent) and such Purchase Right to such extent shall be held in abeyance for the Holder until such time, if ever, as its right thereto would not result in the Holder exceeding the Beneficial Ownership Limitation).

d) Fundamental Transaction. If, at any time while this Warrant is outstanding, (i) the Company effects any merger or consolidation of the Company with or into another Person, (ii) the Company effects any sale of all or substantially all of its assets in one or a series of related transactions, (iii) any tender offer or exchange offer (whether by the Company or another Person) is completed pursuant to which holders of Common Stock are permitted to tender or exchange their shares for other securities, cash or property or (iv) the Company effects any reclassification of the Common Stock or any compulsory share exchange pursuant to which the Common Stock is effectively converted into or exchanged for other securities, cash or property (each "Fundamental Transaction"), then, upon any subsequent exercise of this Warrant, the Holder shall have the right to receive, for each Warrant Share that would have been issuable upon such exercise immediately prior to the occurrence of such Fundamental Transaction, the number of shares of Common Stock of the successor or acquiring corporation or of the Company, if it is the surviving corporation, and any additional consideration (the "Alternate Consideration") receivable as a result of such merger, consolidation or disposition of assets by a holder of the number of shares of Common Stock for which this Warrant is exercisable immediately prior to such event. For purposes of any such exercise, the determination of the Exercise Price shall be appropriately adjusted to apply to such Alternate Consideration based on the amount of Alternate Consideration issuable in respect of one share of Common Stock in such Fundamental Transaction, and the Company shall apportion the Exercise Price among the Alternate Consideration in a reasonable manner reflecting the relative value of any different components of the Alternate Consideration. If holders of Common Stock are given any choice as to the securities, cash or property to be received in a Fundamental Transaction, then the Holder shall be given the same choice as to the Alternate Consideration it receives upon any exercise of this Warrant following such Fundamental Transaction. To the extent necessary to effectuate the foregoing provisions, any successor to the Company or surviving entity in such Fundamental Transaction shall issue to the Holder a new warrant consistent with the foregoing provisions and evidencing the Holder's right to exercise such warrant into Alternate Consideration. The terms of any agreement pursuant to which a Fundamental Transaction is effected shall include terms requiring any such successor or surviving entity to comply with the provisions of this Section 3(d) and insuring that this Warrant (or any such replacement security) will be similarly adjusted upon any subsequent transaction analogous to a Fundamental Transaction. Notwithstanding anything to the contrary, in the event of a Fundamental Transaction that is (1) an all cash transaction, (2) a "Rule 13e-3 transaction" as defined in Rule 13e-3 under the Exchange Act, or (3) a Fundamental Transaction involving a person or entity not traded on a national securities exchange, the Nasdaq Global Select Market, the Nasdaq Global Market, or the Nasdaq Capital Market, the Company or any successor entity shall pay at the Holder's option, exercisable at any time concurrently with or within 30 days after the consummation of the Fundamental Transaction, an amount of cash equal to the value of this Warrant as determined in accordance with the Black Scholes Option Pricing Model obtained from the "OV" function on Bloomberg L.P. using (A) a price per share of Common Stock equal to the VWAP of the Common Stock for the Trading Day immediately preceding the date of consummation of the applicable Fundamental Transaction, (B) a risk-free interest rate corresponding to the U.S. Treasury rate for a 30 day period immediately prior to the consummation of the applicable Fundamental Transaction, (C) an expected volatility equal to the 100 day volatility obtained from the "HVT" function on Bloomberg L.P. determined as of the Trading Day immediately following the public announcement of the applicable Fundamental Transaction and (D) a remaining option time equal to the time between the date of the public announcement of such transaction and the Termination Date; provided that in each case where Bloomberg L.P. data is being relied upon, Holder shall provide to the Company a copy of such information for the Company's records.

e) Calculations. All calculations under this Section 3 shall be made to the nearest cent or the nearest 1/100th of a share, as the case may be. For purposes of this Section 3, the number of shares of Common Stock deemed to be issued and outstanding as of a given date shall be the sum of the number of shares of Common Stock (excluding treasury shares, if any) issued and outstanding.

f) Notice to Holder.

i. Adjustment to Exercise Price. Whenever the Exercise Price is adjusted pursuant to any provision of this Section 3, the Company shall promptly mail to the Holder a notice setting forth the Exercise Price after such adjustment and setting forth a brief statement of the facts requiring such adjustment.

ii. Notice to Allow Exercise by Holder. If (A) the Company shall declare a dividend (or any other distribution in whatever form) on the Common Stock, (B) the Company shall declare a special nonrecurring cash dividend on or a redemption of the Common Stock, (C) the Company shall authorize the granting to all holders of the Common Stock rights or warrants to subscribe for or purchase any shares of capital stock of any class or of any rights, (D) the approval of any stockholders of the Company shall be required in connection with any reclassification of the Common Stock, any consolidation or merger to which the Company is a party, any sale or transfer of all or substantially all of the assets of the Company, of any compulsory share exchange whereby the Common Stock is converted into other securities, cash or property, or (E) the Company shall authorize the voluntary or involuntary dissolution, liquidation or winding up of the affairs of the Company, then, in each case, the Company shall cause to be mailed to the Holder at its last address as it shall appear upon the Warrant Register of the Company, at least 20 calendar days prior to the applicable record or effective date hereinafter specified, a notice stating (x) the date on which a record is to be taken for the purpose of such dividend, distribution, redemption, rights or warrants, or if a record is not to be taken, the date as of which the holders of the Common Stock of record to be entitled to such dividend, distributions, redemption, rights or warrants are to be determined or (y) the date on which such reclassification, consolidation, merger, sale, transfer or share exchange is expected to become effective or close, and the date as of which it is expected that holders of the Common Stock of record shall be entitled to exchange their shares of the Common Stock for securities, cash or other property deliverable upon such reclassification, consolidation, merger, sale, transfer or share exchange; provided that the failure to mail such notice or any defect therein or in the mailing thereof shall not affect the validity of the corporate action required to be specified in such notice. The Holder is entitled to exercise this Warrant during the period commencing on the date of such notice to the effective date of the event triggering such notice.

#### Section 4. Transfer of Warrant.

a) Transferability. Subject to compliance with any applicable securities laws and the conditions set forth in Section 4(d) herein and to the provisions of the Purchase Agreement, this Warrant and all rights hereunder (including, without limitation, any registration rights) are transferable, in whole or in part, upon surrender of this Warrant at the principal office of the Company or its designated agent, together with a written assignment of this Warrant substantially in the form attached hereto duly executed by the Holder or its agent or attorney and funds sufficient to pay any transfer taxes payable upon the making of such transfer. Upon such surrender and, if required, such payment, the Company shall execute and deliver a new Warrant or Warrants in the name of the assignee or assignees, as applicable, and in the denomination or denominations specified in such instrument of assignment, and shall issue to the assignor a new Warrant evidencing the portion of this Warrant not so assigned, and this Warrant shall promptly be cancelled. The Warrant, if properly assigned, may be exercised by a new holder for the purchase of Warrant Shares without having a new Warrant issued.

b) New Warrants. This Warrant may be divided or combined with other Warrants upon presentation hereof at the aforesaid office of the Company, together with a written notice specifying the names and denominations in which new Warrants are to be issued, signed by the Holder or its agent or attorney. Subject to compliance with Section 4(a), as to any transfer which may be involved in such division or combination, the Company shall execute and deliver a new Warrant or Warrants in exchange for the Warrant or Warrants to be divided or combined in accordance with such notice. All Warrants issued on transfers or exchanges shall be dated the Initial Exercise Date and shall be identical with this Warrant except as to the number of Warrant Shares issuable pursuant thereto.

c) Warrant Register. The Company shall register this Warrant, upon records to be maintained by the Company for that purpose (the “Warrant Register”), in the name of the record Holder hereof from time to time. The Company may deem and treat the registered Holder of this Warrant as the absolute owner hereof for the purpose of any exercise hereof or any distribution to the Holder, and for all other purposes, absent actual notice to the contrary.

d) Transfer Restrictions. If, at the time of the surrender of this Warrant in connection with any transfer of this Warrant, the transfer of this Warrant shall not be either (i) registered pursuant to an effective registration statement under the Securities Act and under applicable state securities or blue sky laws or (ii) eligible for resale without volume or manner-of-sale restrictions pursuant to Rule 144, the Company may require, as a condition of allowing such transfer, that the Holder or transferee of this Warrant, as the case may be, comply with the provisions of the Purchase Agreement.

Section 5. Demand Registration Rights. Subsequent to the Company's effective registration of certain securities pursuant to, and to the extent of, its obligations under that certain Registration Rights Agreement dated February 22, 2018, that certain Registration Rights Agreement dated May 25, 2018 and that certain Registration Rights Agreement dated August 29, 2018, the Holder has the right to demand in writing that the Company prepare and file with the U.S. Securities and Exchange Commission (the "SEC") a Registration Statement on Form S-1 or such other Registration Statement as the Company then qualifies to use (other than on Form S-8 or S-4), as determined by the Company in its sole discretion, to effect a registration of the Warrant Shares covering the resale of the Warrant Shares. The Company will utilize commercially reasonable efforts to prepare and file such Registration Statement with the SEC within one hundred twenty (120) days after such demand. The Company may also include in such Registration Statement, in its sole discretion, securities for sale by the Company or the Company may file a separate Registration Statement covering securities to be sold by the Company before, at the same time, or after the Company files a Registration Statement covering resale of the Warrant Shares by the Holder. Notwithstanding anything to contrary set forth herein, the registration rights granted to the Holder pursuant to this Section 5 will terminate at such time as Rule 144 or another similar exemption under the Securities Act is available for the sale of all of the Holder's Warrant Shares without registration.

Section 6. Put Right. Notwithstanding anything herein to the contrary, on or after July 31, 2019, if, and only if, the Common Stock is not listed on a Trading Market (other than OTCQX or OTCQB) on such date, and, otherwise, following the first anniversary of the date of issuance of this Warrant, if the Holder has not then exercised this Warrant in full on or prior to such date, at Holder's option (such option being the "Put Right"), in lieu of exercising Holder's purchase rights hereunder (and without the payment of any Exercise Price or other consideration and without the issuance of any equity to the Holder by the Company), the Company shall repurchase from Holder this Warrant, at \$1.00 per Warrant Share. To exercise the Put Right, the Holder must deliver to the Company an irrevocable written notice (a "Put Notice"), indicating therein the portion of unexercised portion of this Warrant to which such notice applies. Any unexercised portion of this Warrant to which the Put Notice does not pertain will be unaffected by such Put Notice. Subject again to the provisions of this Section 6, the Holder may deliver subsequent Put Notices for any unexercised portion of this Warrant. The Company must deliver to the Holder in cash all amounts owed pursuant to a Put Notice by not later than three (3) Trading Days from the date of the Company's receipt of such Put Notice. If the Holder elects to deliver a Put Notice to the Company covering all of the remaining Warrant Shares unexercised under this Warrant, the Holder shall present this Warrant to the Company at its principal executive offices for cancellation.

Section 7. Miscellaneous.

a) No Rights as Stockholder Until Exercise. This Warrant does not entitle the Holder to any voting rights or other rights as a stockholder of the Company prior to the exercise hereof.

b) Loss, Theft, Destruction or Mutilation of Warrant. The Company covenants that upon receipt by the Company of evidence reasonably satisfactory to it of the loss, theft, destruction or mutilation of this Warrant or any stock certificate relating to the Warrant Shares, and in case of loss, theft or destruction, of indemnity or security reasonably satisfactory to it (which, in the case of the Warrant, shall not include the posting of any bond), and upon surrender and cancellation of such Warrant or stock certificate, if mutilated, the Company will make and deliver a new Warrant or stock certificate of like tenor and dated as of such cancellation, in lieu of such Warrant or stock certificate.

c) Saturdays, Sundays, Holidays, etc. If the last or appointed day for the taking of any action or the expiration of any right required or granted herein shall not be a Business Day, then, such action may be taken or such right may be exercised on the next succeeding Business Day.



d) Authorized Shares.

The Company represents and warrants that the Warrant was duly authorized and validly issued and covenants that, during the period the Warrant is outstanding, it will reserve from its authorized and unissued Common Stock one hundred (100%) percent of the number of shares to provide for the issuance of the Warrant Shares upon the exercise of any purchase rights under this Warrant. In case such amount of Common Stock is insufficient at any time, the Company shall call and hold a special meeting to increase the number of authorized common stock. Management of the Company shall recommend to stockholders to vote in favor of increasing the number of authorized common stock.

The Company further covenants that its issuance of this Warrant shall constitute full authority to its officers who are charged with the duty of executing stock certificates to execute and issue the necessary certificates for the Warrant Shares upon the exercise of the purchase rights under this Warrant. The Company will take all such reasonable action as may be necessary to assure that such Warrant Shares may be issued as provided herein without violation of any applicable law or regulation, or of any requirements of the Trading Market upon which the Common Stock may be listed. The Company covenants that all Warrant Shares which may be issued upon the exercise of the purchase rights represented by this Warrant will, upon exercise of the purchase rights represented by this Warrant, be duly authorized, validly issued, fully paid and nonassessable and free from all taxes, liens and charges created by the Company in respect of the issue thereof (other than taxes in respect of any transfer occurring contemporaneously with such issue).

Except and to the extent as waived or consented to by the Holder, the Company shall not by any action, including, without limitation, amending its certificate of incorporation or through any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms of this Warrant, but will at all times in good faith assist in the carrying out of all such terms and in the taking of all such actions as may be necessary or appropriate to protect the rights of Holder as set forth in this Warrant against impairment. Without limiting the generality of the foregoing, the Company will (i) not increase the par value of any Warrant Shares above the amount payable therefor upon such exercise immediately prior to such increase in par value, (ii) take all such action as may be necessary or appropriate in order that the Company may validly and legally issue fully paid and nonassessable Warrant Shares upon the exercise of this Warrant and (iii) use commercially reasonable efforts to obtain all such authorizations, exemptions or consents from any public regulatory body having jurisdiction thereof, as may be, necessary to enable the Company to perform its obligations under this Warrant.

Before taking any action which would result in an adjustment in the number of Warrant Shares for which this Warrant is exercisable or in the Exercise Price, the Company shall obtain all such authorizations or exemptions thereof, or consents thereto, as may be necessary from any public regulatory body or bodies having jurisdiction thereof.

e) Jurisdiction. All questions concerning the construction, validity, enforcement and interpretation of this Warrant shall be determined in accordance with the provisions of the Purchase Agreement.

f) Restrictions. The Holder acknowledges that the Warrant Shares acquired upon the exercise of this Warrant, if not registered, will have restrictions upon resale imposed by state and federal securities laws.

g) Nonwaiver and Expenses. No course of dealing or any delay or failure to exercise any right hereunder on the part of Holder shall operate as a waiver of such right or otherwise prejudice Holder's rights, powers or remedies, notwithstanding the fact that all rights hereunder terminate on the Termination Date. If the Company willfully and knowingly fails to comply with any provision of this Warrant, which results in any material damages to the Holder, the Company shall pay to Holder such amounts as shall be sufficient to cover any costs and expenses including, but not limited to, reasonable attorneys' fees, including those of appellate proceedings, incurred by Holder in collecting any amounts due pursuant hereto or in otherwise enforcing any of its rights, powers or remedies hereunder.

h) Notices. Any notice, request or other document required or permitted to be given or delivered to the Holder by the Company shall be delivered in accordance with the notice provisions of the Purchase Agreement.

i) Limitation of Liability. No provision hereof, in the absence of any affirmative action by Holder to exercise this Warrant to purchase Warrant Shares, and no enumeration herein of the rights or privileges of Holder, shall give rise to any liability of Holder for the purchase price of any Common Stock or as a stockholder of the Company, whether such liability is asserted by the Company or by creditors of the Company.

j) Remedies. The Holder, in addition to being entitled to exercise all rights granted by law, including recovery of damages, will be entitled to specific performance of its rights under this Warrant. The Company agrees that monetary damages would not be adequate compensation for any loss incurred by reason of a breach by it of the provisions of this Warrant and hereby agrees to waive and not to assert the defense in any action for specific performance that a remedy at law would be adequate.

k) Successors and Assigns. Subject to applicable securities laws, this Warrant and the rights and obligations evidenced hereby shall inure to the benefit of and be binding upon the successors of the Company and the successors and permitted assigns of Holder. The provisions of this Warrant are intended to be for the benefit of all Holders from time to time of this Warrant and shall be enforceable by the Holder or holder of Warrant Shares.

l) Amendment. This Warrant may be modified or amended or the provisions hereof waived with the written consent of the Company and Holders holding Warrants at least equal to a majority of the Warrant Shares issuable upon exercise of all then outstanding Warrants. In addition, the Company may decrease (but not increase) the exercise price of this Warrant in its sole discretion.

m) Severability. Wherever possible, each provision of this Warrant shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Warrant shall be prohibited by or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provisions or the remaining provisions of this Warrant.

n) Headings. The headings used in this Warrant are for the convenience of reference only and shall not, for any purpose, be deemed a part of this Warrant.

\*\*\*\*\*

IN WITNESS WHEREOF, the Company has caused this Warrant to be executed by its officer thereunto duly authorized as of the date first above indicated.

**ATTIS INDUSTRIES INC.**

By: /s/ Jeffrey Cosman  
Name: Jeffrey Cosman  
Title: Chief Executive Officer

NOTICE OF EXERCISE

TO: **ATTIS INDUSTRIES INC.,**

(1) The undersigned hereby elects to purchase \_\_\_\_\_ Warrant Shares of the Company pursuant to the terms of the attached Warrant (only if exercised in full), and tenders herewith payment of the exercise price in full, together with all applicable transfer taxes, if any.

(2) Payment shall take the form of (check applicable box):

☐ in lawful money of the United States; or

☐ [if permitted] the cancellation of such number of Warrant Shares as is necessary, in accordance with the formula set forth in subsection 2(c), to exercise this Warrant with respect to the maximum number of Warrant Shares purchasable pursuant to the cashless exercise procedure set forth in subsection 2(c).

(3) Please issue a certificate or certificates representing said Warrant Shares in the name of the undersigned or in such other name as is specified below:

\_\_\_\_\_

The Warrant Shares shall be delivered to the following DWAC Account Number or by physical delivery of a certificate to:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(4) Accredited Investor. The undersigned is an "accredited investor" as defined in Regulation D promulgated under the Securities Act of 1933, as amended.

[SIGNATURE OF HOLDER]

Name of Investing Entity: \_\_\_\_\_

*Signature of Authorized Signatory of Investing Entity:* \_\_\_\_\_

Name of Authorized Signatory: \_\_\_\_\_

Title of Authorized Signatory: \_\_\_\_\_

Date: \_\_\_\_\_

# ASSIGNMENT FORM

(To assign the foregoing warrant, execute  
this form and supply required information.  
Do not use this form to exercise the warrant.)

FOR VALUE RECEIVED, [ ] all of or [ ] shares of the foregoing Warrant and all rights evidenced thereby are hereby assigned to

whose address is

.

Dated: ,

Holder's Signature:

Holder's Address:

Signature Guaranteed:

NOTE: The signature to this Assignment Form must correspond with the name as it appears on the face of the Warrant, without alteration or enlargement or any change whatsoever, and must be guaranteed by a bank or trust company. Officers of corporations and those acting in a fiduciary or other representative capacity should file proper evidence of authority to assign the foregoing Warrant.

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**LOAN AND SECURITY AGREEMENT**

dated as of May 31, 2019

among

**ATTIS ETHANOL FULTON, LLC**

as Borrower

**ATTIS INDUSTRIES INC.**

**AND THE OTHER GUARANTORS FROM TIME TO TIME PARTY HERETO**

as Guarantors

**HIGHSCORE CAPITAL LLC**

as Lender

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## LOAN AND SECURITY AGREEMENT

This Loan and Security Agreement, dated as of May 31, 2019, is among Attis Ethanol Fulton, LLC, a Georgia limited liability company ("**Borrower**"), Attis Biofuels, LLC, a Georgia limited liability company ("**Parent**"), Attis Industries Inc., a New York corporation ("**Attis**"), Jeffrey S. Cosman ("**Cosman**") and Highscore Capital LLC, a New York limited liability company ("**Lender**").

### RECITALS

WHEREAS Borrower has requested that Lender make a Loan to Borrower on the terms and conditions contained herein, and Lender has agreed to make such loan;

NOW, THEREFORE, in consideration of the premises and the mutual covenants contained herein and for other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged), the parties agree as follows:

### AGREEMENT

#### ARTICLE I.

#### CERTAIN DEFINED TERMS; CERTAIN RULES OF CONSTRUCTION

##### Section 1.01. CERTAIN DEFINED TERMS.

As used herein:

"**Account Debtor**" means any Person who is or may become obligated with respect to, or on account of, an Account, Chattel Paper or General Intangible (including a payment intangible (as that term is defined in the Uniform Commercial Code)).

"**Account(s)**" means, as to any Person, all accounts (as that term is defined in the Uniform Commercial Code) now owned or hereafter acquired by such Person (or in which such Person has rights or the power to transfer rights to a secured party), including: (a) all "accounts" (as that term is defined in the Uniform Commercial Code), "payment intangibles" (as that term is defined in the Uniform Commercial Code), other receivables, book debts, all other rights to payment and/or reimbursement of every kind and description, including under governmental entitlement programs, and all other forms of obligations (other than forms of obligations evidenced by Chattel Paper or Instruments) (including any such obligations that may be characterized as an account or contract right under the Uniform Commercial Code); (b) all of such Person's rights in, to and under all purchase orders or receipts for goods or services; (c) all of such Person's rights to any goods represented by any of the foregoing (including unpaid Seller' rights or rescission, replevin, reclamation and stoppage in transit and rights to returned, reclaimed or repossessed goods); (d) all rights to payment due to such Person for Goods or other property sold, leased, licensed, assigned or otherwise disposed of, for a policy of insurance issued or to be issued, for a secondary obligation incurred or to be incurred, for energy provided or to be provided, for the use or hire of a vessel under a charter or other contract, arising out of the use of a credit card or charge card, or for services rendered or to be rendered by such Person or in connection with any other transaction (whether or not yet earned by performance on the part of such Person); and (e) all collateral security of any kind given by any Account Debtor or any other Person with respect to any of the foregoing.

"**Acquisition**" means the purchase by Borrower of the Facility from Seller, as more particularly set forth in the Acquisition Agreement.

"**Acquisition Agreement**" means the Asset Purchase Agreement dated as of January 16, 2019 by and between Seller and Borrower, as amended to date.

**"Acquisition Documents"** means collectively, the Acquisition Agreement and the Ancillary Documents (as defined in the Acquisition Agreement).

**"Affiliate"** means, with respect to any Person, another Person that directly, or indirectly through one or more intermediaries, Controls or is Controlled by or is under common Control with the Person specified.

**"Agreement"** means this Loan and Security Agreement.

**"Anti-Terrorism Law"** means, collectively: (a) the Patriot Act; (b) the Executive Order; (c) the Trading With the Enemy Act (50 U.S.C. § 1 *et seq.*); and (d) any similar Law enacted in the United States following the date of this Agreement.

**"Approved Bank"** has the meaning ascribed thereto in the definition of **"Cash Equivalents"** contained herein.

**"Assignment of Leases and Rents"** means the Assignment of Leases and Rents, dated as of the date hereof, executed and delivered by Borrower in favor of Lender, in accordance with the provisions hereof.

**"Attributable Debt"** means, on any date of determination: (a) in respect of any capital lease of any Person, the capitalized amount thereof that would appear on a balance sheet of such Person prepared as of such date in accordance with GAAP; and (b) in respect of any Synthetic Lease Obligation, the capitalized amount of the remaining lease payments under the relevant lease that would appear on a balance sheet of such Person prepared as of such date in accordance with GAAP if such lease were accounted for as a capital lease.

**"Bankruptcy Code"** means the federal Bankruptcy Reform Act of 1978 (11 U.S.C. Sections 101 *et seq.*).

**"Bankruptcy Laws"** means, collectively: (a) the Bankruptcy Code; and (b) all other liquidation, conservatorship, bankruptcy, assignment for the benefit of creditors, moratorium, rearrangement, receivership, insolvency, reorganization, or similar debtor-relief Laws of the United States or other applicable jurisdictions from time to time in effect and affecting the rights of creditors generally.

**"Books and Records"** means, as to any Person, all of such Person's books and records including ledgers, Tax Returns, records regarding such Person's assets or liabilities, business operations or financial condition, and all computer programs or storage or any equipment containing such information.

**"Borrower"** has the meaning set forth in the preamble to this Agreement (including all permitted successors and assigns).

**"Business Day"** means any day other than a Saturday, Sunday or other day on which commercial banks are authorized to close under the Laws of, or are in fact closed in, New York City.

**"Capital Expenditures"** means, with respect to any Person, all expenditures by such Person for the acquisition or leasing of fixed or capital assets or additions to equipment (including replacements, capitalized repairs and improvements during such period) that are required to be capitalized under GAAP on a balance sheet of such Person. For purposes of this definition: (a) the purchase price of equipment that is purchased simultaneously with the trade-in of existing equipment owned by such Person thereof or with insurance proceeds shall be included in Capital Expenditures only to the extent of the gross amount of such purchase price *minus* the credit granted by the seller of such equipment for such equipment being traded in at such time, or the amount of such proceeds, as the case may be; and (b) an acquisition to the extent made with the proceeds of a Disposition in accordance with **Section 7.05(c)** shall not constitute a **"Capital Expenditure."**

**"Cash Equivalents"** means, as to any Person: (a) securities issued or directly and fully and unconditionally guaranteed or insured by the United States or any agency or instrumentality thereof (but only so long as the full faith and credit of the United States is pledged in support thereof) having maturities of not more than twelve months from the date of acquisition; (b) securities issued by any state of the United States or any political subdivision of any such state or any public instrumentality thereof having maturities of not more than ninety (90) days from the date of acquisition and having one of the two highest ratings from either S&P or Moody's; (c) certificates of deposit, denominated solely in Dollars, maturing within two years after the date of acquisition, issued by any commercial bank organized under the laws of the United States or any state thereof or the District of Columbia or that is a U.S. Subsidiary of a foreign commercial bank; in each of the foregoing cases, solely to the extent that: (i) such commercial bank's short-term commercial paper is rated at least A-1 or the equivalent by S&P or at least P-1 or the equivalent thereof by Moody's (any such commercial bank, an **"Approved Bank"**); or (ii) the par amount of all certificates of deposit acquired from such commercial bank are fully insured by the Federal Deposit Insurance Corporation; or (d) commercial paper issued by any Approved Bank (or by the parent company thereof), in each case maturing not more than two hundred seventy (270) days after the date of acquisition.

**"Change in Law"** means the occurrence, after the date of this Agreement, of any of the following: (a) the adoption or taking effect of any law, rule, regulation or treaty; (b) any change in any law, rule, regulation or treaty or in the administration, interpretation, implementation or application thereof by any Governmental Authority; or (c) the making or issuance of any request, rule, guideline or directive (whether or not having the force of law) by any Governmental Authority; *provided that*, notwithstanding anything to the contrary contained herein the Dodd-Frank Wall Street Reform and Consumer Protection Act and all requests, rules, guidelines or directives thereunder or issued in connection therewith shall in each case be deemed to be a **"Change in Law"** regardless of the date enacted, adopted or issued.

**"Change of Control"** means: (a) the acquisition of ownership, directly or indirectly, beneficially or of record, by any Person or group (within the meaning of the Exchange Act and the rules of the Securities Exchange Commission thereunder), of Equity Interests in Parent (or in any Person of which Parent is a direct or indirect wholly-owned Subsidiary) representing more than twenty percent (20%) of the aggregate ordinary voting power represented by the issued and outstanding Equity Interests in Parent (or such Person), or (b) persons who were (i) directors of Borrower on the date hereof, (ii) nominated by the board of directors of Borrower or (iii) appointed or elected by directors that were directors of Borrower on the date hereof, or directors nominated as provided in the preceding clause (ii), in each case other than any Person whose initial nomination or appointment occurred as a result of an actual or threatened solicitation of proxies or consents for the election or removal of one or more directors on the board of directors of Borrower (other than any such solicitation made by the board of directors of Borrower), ceasing to occupy a majority of the seats (excluding vacant seats) on the board of directors of Borrower; or (c) the failure of Attis to own directly or indirectly, beneficially and of record, one hundred percent (100%) of the aggregate ordinary voting power and economic interests represented by the issued and outstanding Equity Interests of Parent, or the failure of Parent to own directly or indirectly, beneficially and of record, one hundred percent (100%) of the aggregate ordinary voting power and economic interests represented by the issued and outstanding Equity Interests of Borrower, except where such failure occurs as a result of a transaction or circumstance otherwise expressly permitted by the Loan Documents.

**"Chattel Paper"** means, as to any Person, all chattel paper (as that term is defined in the Uniform Commercial Code), including electronic chattel paper (as that term is defined in the Uniform Commercial Code), now owned or hereafter acquired by such Person (or in which such Person has rights or the power to transfer rights to a secured party).

**"Claims"** means, collectively, any claim or cause of action based upon or arising out of this Agreement, the other Loan Documents or any of the transactions contemplated hereby or thereby, including contract claims, tort claims, breach of duty claims, and all other common law or statutory claims.

**"Code"** means the Internal Revenue Code of 1986., and, as applicable, the Treasury Regulations promulgated thereunder, or, if applicable, any successor Laws.

**"Collateral"** means, collectively, all right, title and interest of Borrower or Parent, whether now owned or hereafter acquired or arising (or in which such Borrower or Parent has rights or the power to transfer rights to a secured party), in, to or upon all Accounts, Chattel Paper, Collateral Accounts, commercial tort claims, Documents, Equipment, General Intangibles, Goods, Instruments, Inventory, Investment Property, Letter-of-Credit Rights, Permits, Supporting Obligations, Books and Records, real property, motor vehicles and other title vehicles, and all other assets, tangible and intangible, real and personal, of Borrower or Parent and all Proceeds (in whatever form or nature) of the foregoing; *provided that*, notwithstanding the foregoing, **"Collateral"** shall not include Excluded Property of Borrower or Parent.

**"Collateral Access Agreement"** means a landlord waiver, bailee letter, or acknowledgment agreement of any lessor, warehouseman, processor, consignee, or other Person in possession of, having a Lien upon, or having rights or interests in any Collateral, in each case, in form and substance reasonably satisfactory to Lender.

**"Collateral Accounts"** means all commodity accounts, deposit accounts and securities accounts (in each case, as defined in the Uniform Commercial Code) of Parent and its Subsidiaries, other than the Excluded Accounts.

**"Collateral Documents"** means, collectively: (a) this Agreement; (b) any Control Agreement entered into in connection with this Agreement; (c) any Intellectual Property assignment or security agreement, each in form and substance satisfactory to Lender, entered into in connection with this Agreement; (d) the Mortgage; (e) the Assignment of Leases and Rents, (f) the Environmental Indemnity, and any security agreement or other document similar to or supplemental to the documents referred to in clauses (a) through (f) of this definition executed on or after the Effective Date pursuant to the terms hereof or otherwise in connection with the transactions contemplated hereby; and (g) all financing statements (or comparable documents now or hereafter filed in accordance with the Uniform Commercial Code or other comparable Law) against Borrower or any other Loan Party, as debtor, in favor of Lender, as secured party.

**"Contractual Obligation"** means, as to any Person, any agreement, instrument or other document to which such Person is a party or by which it or any of its property is bound.

**"Control"** means (other than when used in the terms **"Change of Control"** and **"Control Agreement"**) the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ability to exercise voting power, by contract or otherwise. The terms **"Controlling"** and **"Controlled"** have meanings correlative thereto. Without limiting the generality of the foregoing, a Person shall be deemed to be Controlled by another Person if such other Person possesses, directly or indirectly, the power to vote ten percent (10%) or more of the securities having ordinary voting power for the election of directors, managing general partners or the equivalent.

**"Control Agreement"** means any agreement entered into among a depository institution at which a Loan Party maintains a Collateral Account, such Loan Party and Lender, pursuant to which Lender obtains control (within the meaning of the Uniform Commercial Code) over such Collateral Account.

**"Copyright License"** means, as to any Person, all rights under any written document now owned or hereafter acquired by such Person (or in which such Person has rights or the power to transfer rights to a secured party) granting the right to use any Copyright or Copyright registration.

**"Copyrights"** means, as to any Person, all of the following now owned or hereafter adopted or acquired by such Person: (a) all copyrights in any original work of authorship fixed in any tangible medium of expression, now known or later developed, all registrations and applications for registration of any such copyrights in the United States or any other country, including registrations, recordings and applications, and supplemental registrations, recordings, and applications in the United States Copyright Office; and (b) all proceeds of the foregoing, including license royalties and proceeds of infringement suits, the right to sue for past, present and future infringements, all rights corresponding thereto throughout the world and all renewals and extensions thereof.

**"Cosman"** means Jeffrey S. Cosman.

**"Credit Extensions"** means the Loan, all Protective Advances, all other loans, advances or extensions of credit that Lender may make to Borrower or any other Person pursuant to this Agreement.

**"Debt"** means, as to any Person as of any date of determination, without duplication, all of the following, whether or not included as indebtedness or liabilities in accordance with GAAP: (a) all obligations of such Person for borrowed money and all obligations of such Person evidenced by bonds, debentures, notes, loan agreements or other similar instruments; (b) all direct or contingent obligations of such Person arising under letters of credit (including standby and commercial letters of credit), bankers' acceptances, bank guaranties, surety bonds and similar instruments; (c) the swap termination value under all Swap Contracts or hedge contracts to which such Person is a party; (d) all obligations of such Person to pay the deferred purchase price of property or services (other than trade accounts payable in the ordinary course of business not past due for more than sixty (60) days after the date on which such trade account payable was created); (e) indebtedness (excluding prepaid interest thereon) secured by a Lien on property owned or being purchased by such Person (including indebtedness arising under conditional sales or other title retention agreements), whether or not such indebtedness shall have been assumed by such Person or is limited in recourse; (f) the amount of Attributable Debt in respect of all capital lease obligations and Synthetic Lease Obligations of such Person; (g) all obligations of such Person to purchase, redeem, retire, defease or otherwise make any payment in respect of any Disqualified Equity Interest, valued, in the case of a Disqualified Equity Interest that is a redeemable preferred interest, at the greater of its voluntary or involuntary liquidation preference *plus* accrued and unpaid dividends; and (h) all Guarantees of such Person in respect of any Debt referred to in the immediately preceding clauses (a) through (g). For all purposes hereof, the Debt of any Person shall include the Debt of any partnership or joint venture (other than a joint venture that is itself a corporation or limited liability company) in which such Person is a general partner or a joint venture, unless such Debt is expressly made non-recourse to such Person.

**"Default"** means any Event of Default or any event or condition that, with the giving of notice, the passage of time, or both, would constitute an Event of Default.

**"Default Rate"** in any period means interest equal 105% of the interest otherwise payable for such period.

**"Deposit Account"** means any deposit account (as that term is defined in the Uniform Commercial Code).

**"Disposition"** means the sale, assignment transfer, conveyance, license, lease or other disposition (including any sale and leaseback transaction) of any property by any Person, including any sale, assignment, transfer, conveyance or other disposal, with or without recourse, of any notes or accounts receivable or any rights and claims associated therewith. The term **"Dispose"** has a meaning correlative thereto.

**"Disqualified Equity Interest"** means any Equity Interest of any Person that, by its terms (or by the terms of any Equity Interest or other security into which it is convertible or for which it is exchangeable at the option of the holder thereof), or upon the happening of any event or circumstance, matures or is mandatorily redeemable, pursuant to a sinking fund obligation or otherwise, or is redeemable at the option of the holder thereof, in whole or in part, or requires or mandates payments or distributions in cash, on or prior to the date that is one year after the Maturity Date.

**"Documents"** means, as to any Person, all documents (as that term is defined in the Uniform Commercial Code) now owned or hereafter acquired by such Person (or in which such Person has rights or the power to transfer rights to a secured party), wherever located, including all bills of lading, dock warrants, dock receipts, warehouse receipts, and other documents of title, whether negotiable or non-negotiable.

**"Dollar"** and **"\$"** mean lawful money of the United States.

**"Effective Date"** means the first date on which all of the conditions precedent in **Section 4.01** are satisfied (or waived in accordance with **Section 10.01**) and on which the Loan is made and the Loan proceeds delivered to Borrower.

**"Environmental Claims"** means all claims, however asserted, by any Governmental Authority or other Person alleging Environmental Liabilities.

**"Environmental Indemnity"** means the Environmental Indemnity Agreement dated as of the date hereof among the Loan Parties and Lender

**"Environmental Laws"** means all existing or future federal, state and local statutes, ordinances, regulations, rules, executive orders, standards, permits, approvals and requirements, including requirements imposed by common law, relating to pollution, the protection of health or the environment or the release of any materials into the environment, including those related to Hazardous Materials, air emissions and discharges to waste or public systems.

**"Environmental Liability"** means any liability, contingent or otherwise (including any liability for damages, costs of environmental remediation, fines, penalties or indemnities), of Borrower, any other Loan Party or any of their respective Subsidiaries directly or indirectly resulting from or based upon: (a) violation of any Environmental Law; (b) the generation, use, handling, transportation, storage, treatment or disposal of any Hazardous Materials; (c) exposure to any Hazardous Materials; (d) the release or threatened release of any Hazardous Materials into the environment; or (e) any contract, agreement or other consensual arrangement pursuant to which liability is assumed or imposed with respect to any of the foregoing.

**"Equipment"** means, as to any Person, all equipment (as that term is defined in the Uniform Commercial Code) now owned or hereafter acquired by such Person (or in which such Person has rights or the power to transfer rights to a secured party), wherever located, including any and all machinery, apparatus, equipment, fittings, furniture, fixtures, motor vehicles and other tangible personal property (other than Inventory) of every kind and description, and all parts, accessories and accessions thereto and substitutions and replacements therefor.

**"Equity Pledge Agreement"** means a Pledge Agreement given by the Equity Holder Pledgors in favor of Lender, upon request by Lender, pursuant to which the Equity Holder Pledgors pledge and hypothecate to Lender the Equity Interests of any Loan Party owned by such Equity Holder Pledgors.

**"Equity Holder Pledgors"** means and refers to those Persons more fully identified on **Schedule 1.01-A** hereto.

**"Equity Interests"** means, with respect to any Person, all of the shares of capital stock of (or other ownership or profit interests in) such Person, all of the warrants, options or other rights for the purchase or acquisition from such Person of shares of capital stock of (or other ownership or profit interests in) such Person, all of the securities convertible into or exchangeable for shares of capital stock of (or other ownership or profit interests in) such Person or warrants, rights or options for the purchase or acquisition from such Person of such shares (or such other interests), and all of the other ownership or profit interests in such Person (including partnership, member or trust interests therein), whether voting or nonvoting, and whether or not such shares, warrants, options, rights or other interests are outstanding on any date of determination.

**"ERISA"** means the Employee Retirement Income Security Act of 1974.

**"ERISA Affiliate"** means any trade or business (whether or not incorporated) under common control with Parent or any Subsidiary thereof within the meaning of Section 414(b) or (c) of the Code (and Sections 414(m) and (o) of the Code for purposes of provisions relating to Section 412 of the Code).

**"ERISA Event"** means any of the following: (a) a Reportable Event with respect to a Pension Plan; (b) the incurrence by Parent or any ERISA Affiliate of any liability with respect to a withdrawal by Parent or any ERISA Affiliate from a Pension Plan subject to Section 4063 of ERISA during a plan year in which it was a substantial employer (as defined in Section 4001(a)(2) of ERISA) or a cessation of operations that is treated as such a withdrawal under Section 4062(e) of ERISA; (c) the incurrence by Parent or any ERISA Affiliate of any liability with respect to a complete or partial withdrawal by Parent or any ERISA Affiliate from a Multiemployer Plan or the receipt by Parent or an ERISA Affiliate of notification that a Multiemployer Plan is in reorganization; (d) the filing of a notice of intent to terminate, the treatment of a Plan amendment as a termination under Sections 4041 or 4041A of ERISA, or the commencement of proceedings by the PBGC to terminate a Pension Plan or Multiemployer Plan; (e) an event or condition that constitutes grounds under Section 4042 of ERISA for the termination of, or the appointment of a trustee to administer, any Pension Plan or Multiemployer Plan; or (f) the imposition of any liability under Title IV of ERISA, other than for PBGC premiums due but not delinquent under Section 4007 of ERISA, upon Parent or any ERISA Affiliate.

**"Event of Default"** has the meaning ascribed thereto in **Section 8.01**.

**"Event of Loss"** means, with respect to any property of any Loan Party, any of the following: (a) any loss, destruction or damage of such property; or (b) any actual condemnation, seizure or taking, by exercise of the power of eminent domain or otherwise, of such property, or confiscation of such property or the requisition of the use of such property.

**"Exchange Act"** means the Securities Exchange Act of 1934.

**"Excluded Accounts"** means, with respect to any Loan Party: (a) such Loan Party's payroll accounts; (b) such Loan Party's pension and pension reserve accounts; and (c) such Loan Party's employee benefit account(s).

**"Excluded Property"** means collectively, all right, title and interest of each Loan Party, whether now owned or hereafter acquired or arising (or in which such Loan Party has rights or the power to transfer rights to a secured party), in, to or upon:

(a) any rights or interest in any contract, lease, Permit, license, charter or license agreement covering real or personal property of any Loan Party if, under the terms of such contract, lease, Permit, license, charter or license agreement, or applicable Laws with respect thereto, the grant of a Lien therein is prohibited as a matter of law or under the terms of such contract, lease, Permit, license, charter or license agreement, except, in each of the foregoing cases, to the extent (i) any described prohibition or restriction is unenforceable under Section 9-406, 9-407, 9-408 or 9-409 of the Uniform Commercial Code or other applicable Laws, or (ii) any consent or waiver has been obtained that would permit the Lien notwithstanding the prohibition or restriction on the pledge of such asset;

(b) Equity Interests of (i) any first tier Subsidiary of any Loan Party that is organized under the laws of a jurisdiction outside the United States of America, its territories or its possessions that is a "controlled foreign corporation" (as such term is defined in Section 957(a) of the Code or a successor provision thereof) in excess of sixty-six (66%) percent (or such greater percentage to the extent such greater percentage would not result in a material adverse tax consequence to the Loan Parties under Treasury Regulation Section 1.956-2) of all of the issued and outstanding shares of Equity Interests of such Subsidiary entitled to vote (within the meaning of Treasury Regulation Section 1.957-1 (b)), and (ii) any Subsidiary of any first tier Subsidiary that is organized under the laws of a jurisdiction outside the United States of America, its territories or its possessions that is a "controlled foreign corporation" (as such term is defined in Section 957(a) of the Code or a successor provision thereof);

(c) any property now owned or hereafter acquired by any Loan Party that is subject to a purchase money Lien or a capital lease permitted hereunder if the contractual obligation pursuant to which such Lien is granted (or the documentation providing for such purchase money Lien or capital lease) validly prohibits the creation by such Loan Party of a Lien thereon or expressly requires the consent of any Person other than a Loan Party or its Affiliates which consent has not been obtained as a condition to the creation of any other Lien on such property;

(d) any "intent to use" Trademark applications for which a statement of use has not been filed (but only until such statement is filed);

(e) any motor vehicle having a fair market value of less than \$10,000 individually;

(f) all Excluded Accounts and all amounts deposited therein or credited thereto except to the extent any such amounts were deposited therein or credited thereto other than for the purposes for which such Excluded Accounts were established;

*provided that:* (i) **"Excluded Property"** shall not include any Proceeds, products, substitutions or replacements of any Excluded Property (unless such Proceeds, products, substitutions or replacements would otherwise constitute Excluded Property); and (ii) if any assets constitute **"Excluded Property"** as a result of the failure of the applicable Loan Party to obtain consent as described in clauses (a) and (b) of this definition, such Loan Party shall use commercially reasonable efforts to obtain such consent, and, upon obtaining such consent, such property shall cease to constitute **"Excluded Property."**

**"Excluded Taxes"** means any of the following Taxes imposed on or with respect to Lender or required to be withheld or deducted from a payment to Lender: (a) Taxes imposed on or measured by net income (however denominated), franchise Taxes, and branch profits Taxes, in each case, (i) imposed as a result of Lender being organized under the laws of, or having its principal office or its applicable lending office located in, the jurisdiction imposing such Tax (or any political subdivision thereof) or (ii) that are Other Connection Taxes, (b) U.S. federal withholding Taxes imposed on amounts payable to or for the account of Lender with respect to an applicable interest in the Loan or Commitment pursuant to Laws in effect on the date on which (i) Lender acquires such interest in the Loan or Commitment or (ii) Lender changes its lending office, except in each case to the extent that, pursuant to **Section 2.8**, amounts with respect to such Taxes were payable either to Lender's assignor immediately before Lender became a party hereto or to Lender immediately before it changed its lending office, (c) Taxes attributable to Lender's failure to comply with **Section 2.8(d)** and (d) any U.S. federal withholding Taxes imposed under FATCA.

**"Executive Order"** means Executive Order No. 13224 of September 23, 2001 (effective September 24, 2001), Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism.

**"Existing Guaranteed Obligations"** has the meaning ascribed thereto in **Section 10.14(j)**.

**"Extraordinary Receipts"** means any payments received by any Loan Party or any of its Subsidiaries not in the ordinary course of business (and not consisting of proceeds relating to an Event of Loss or Disposition, as described in **Section 2.03(c)(ii)** of this Agreement) consisting of (a) proceeds of judgments, proceeds of settlements, or other consideration of any kind received in connection with any cause of action or claim, (b) indemnity payments (other than to the extent such indemnity payments are immediately payable to a Person that is not an Affiliate of any Loan Party or any of its Subsidiaries, and (c) any purchase price adjustment (other than working capital and other similar adjustments) made pursuant to any acquisition document and/or indemnification payments made pursuant to any acquisition document (other than such indemnification payments to the extent that the amounts so received are applied by a Loan Party for the purpose of replacing, repairing or restoring any assets or properties of a Loan Party, thereby satisfying the condition giving rise to the claim for indemnification, or otherwise covering any out-of-pocket expenses incurred by any Loan Party in obtaining such payments)

**"Facility"** has the meaning given in the Acquisition Agreement.

**"Facility Fee"** has the meaning given in **Section 2.04(a)**.

**"FATCA"** means Sections 1471 through 1474 of the Code, as of the date of this Agreement (or any amended or successor version that is substantively comparable and not materially more onerous to comply with), any current or future regulations or official interpretations thereof and any agreements entered into pursuant to Section 1471(b)(1) of the Code.

**"Fiscal Month"** means, as of any date of determination with respect to Loan Parties, each calendar month occurring during each Fiscal Year.

**"Fiscal Quarter"** means, as of any date of determination with respect to Loan Parties, each calendar quarter occurring during each Fiscal Year.

**"Fiscal Year"** means, as of any date of determination with respect to Loan Parties, the fiscal year of Loan Parties, which begins on January 1 and ends on December 31 in each calendar year.

**"FRB"** means the Board of Governors of the Federal Reserve System of the United States.

**"GAAP"** means generally accepted accounting principles in the United States set forth in the opinions and pronouncements of the Accounting Principles Board and the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board or such other principles as may be approved by a significant segment of the accounting profession in the United States, that are applicable to the circumstances as of the date of determination, consistently applied.



**"General Intangibles"** means, as to any Person, all general intangibles (as that term is defined in the Uniform Commercial Code) now owned or hereafter acquired by such Person (or in which such Person has rights or the power to transfer rights to a secured party), including all right, title and interest that such Person may now or hereafter have under any contract, all payment intangibles (as that term is defined in the Uniform Commercial Code), customer lists, licenses, Intellectual Property, interests in partnerships, joint ventures and other business associations, permits, proprietary or confidential information, inventions (whether or not patented or patentable), technical information, procedures, designs, knowledge, know-how, Software, databases, data, skill, expertise, experience, processes, models, drawings, materials, Books and Records, Goodwill (including Goodwill associated with any Intellectual Property), all rights and claims in or under insurance policies (including insurance for fire, damage, loss, and casualty, whether covering personal property, real property, tangible rights or intangible rights, all liability, life, key-person, and business interruption insurance, and all unearned premiums), uncertificated securities, choses-in-action, rights to receive tax refunds and other payments, rights to receive dividends, distributions, cash, Instruments and other property in respect of or in exchange for Equity Interests and other Investment Property, and rights of indemnification.

**"Goods"** means, as to any Person, all goods (as that term is defined in the Uniform Commercial Code) now owned or hereafter acquired by such Person (or in which such Person has rights or the power to transfer rights to a secured party), wherever located, including embedded software to the extent included in goods (as that term is defined in the Uniform Commercial Code) and fixtures (as that term is defined in the Uniform Commercial Code).

**"Goodwill"** means, as to any Person, all goodwill, trade secrets, proprietary or confidential information, technical information, procedures, formulae, quality control standards, designs, operating and training manuals, customer lists, and distribution agreements now owned or hereafter acquired by such Person (or in which such Person has rights or the power to transfer rights to a secured party).

**"Governmental Authority"** means the government of the United States or any other nation, or of any political subdivision thereof, whether state or local, and any agency, authority, instrumentality, regulatory body, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government.

**"Guarantee"** means, as to any Person, any obligation, contingent or otherwise, of such Person guaranteeing or having the economic effect of guaranteeing any Debt or other obligation payable or performable by another Person (the **"primary obligor"**) in any manner, whether directly or indirectly, and including any obligation of such Person, whether direct or indirect: (a) to purchase or pay (or advance or supply funds for the purchase or payment of) such Debt or other obligation; (b) to purchase or lease property, securities or services for the purpose of assuring the obligee in respect of such Debt or other obligation of the payment or performance of such Debt or other obligation; (c) to maintain working capital, equity capital or any other financial statement condition or liquidity or level of income or cash flow of the primary obligor so as to enable the primary obligor to pay such Debt or other obligation; or (d) entered into for the purpose of assuring in any other manner the obligee in respect of such Debt or other obligation of the payment or performance thereof or to protect such obligee against loss in respect thereof (in whole or in part). The amount of any Guarantee shall be deemed to be an amount equal to the stated or determinable amount of the related primary obligation, or portion thereof, in respect of which such Guarantee is made or, if not stated or determinable, the maximum reasonably anticipated liability in respect thereof as determined by the guaranteeing Person in good faith. The term **"Guarantee"** as a verb has a corresponding meaning.

**"Guaranteed Obligations"** has the meaning ascribed thereto in **Section 10.14(a)**.

**"Guarantor Subordinated Debt"** has the meaning ascribed thereto in **Section 10.14(i)**.

**"Guarantor Subordinated Debt Payments"** has the meaning ascribed thereto in **Section 10.14(i)**.

**"Guarantor"** means Parent, Attis, Cosman and any other Person who, after the date hereof pursuant to the terms of any Loan Document executes or is required to execute: (i) as a guarantor, a Guaranty of all or any portion of the Obligations; or (ii) as a pledgor, a third party pledge agreement in favor of Lender or Lender with respect to all or any portion of the Obligations.

**"Guaranty"** means any guaranty or third party pledge agreement, in form and substance satisfactory to Lender, made by a Person for the benefit of Lender and includes, without limitation the Guaranty set forth in **Section 10.14**.

**"Hazardous Materials"** means all explosive or radioactive substances or wastes, all hazardous or toxic substances, wastes, or pollutants, including petroleum or petroleum distillates, asbestos or asbestos-containing materials, polychlorinated biphenyls, radon gas, infectious or medical wastes, solid waste and all other substances or wastes of any nature regulated pursuant to any Environmental Law, and includes any "hazardous substance" and "hazardous waste" as such terms are defined in any Environmental Law.

**"Hedging Obligations"** means, with respect to any Loan Party, all liabilities of such Person under Swap Contracts.

**"IDA"** means the County of Oswego Industrial Development Agency, a body corporate and politic and a public benefit corporation of the State of New York.

**"IDA Project"** means the Sunoco, Inc. (R&M) Project with the IDA relating to the Facility.

**"Income Tax Purposes"** means U.S. federal income and applicable state, local and foreign income and franchise tax purposes.

**"Indemnified Taxes"** means (a) Taxes, other than Excluded Taxes, imposed on or with respect to any payment made by or on account of any obligation of any Loan Party under any Loan Document and (b) to the extent not otherwise described in clause (a), Other Taxes.

**"Indemnitees"** means, collectively, Lender and any member, manager, officer, employee or agent thereof.

**"Information"** has the meaning ascribed thereto in **Section 10.07**.

**"Instrument"** means, as to any Person, all instruments (as that term is defined in the Uniform Commercial Code) now owned or hereafter acquired by such Person (or in which such Person has rights or the power to transfer rights to a secured party), wherever located, including all promissory notes and other evidences of indebtedness, other than instruments that constitute, or are part of a group of writings that constitute, Chattel Paper.

**"Intellectual Property"** means, as to any Person, all Copyrights, Licenses, Patents, Trademarks, inventions, designs, trade secrets and customers lists now owned or hereafter acquired by such Person (or in which such Person has rights or the power to transfer rights to a secured party), wherever located.

**"Inventory"** means, as to any Person, all inventory (as that term is defined in the Uniform Commercial Code) now owned or hereafter acquired by such Person (or in which such Person has rights or the power to transfer rights to a secured party), wherever located, including all inventory, merchandise, goods and other personal property that are held by or on behalf of such Person for sale or lease or are furnished or to be furnished under a contract of service or that constitute raw materials, work in process, finished goods, returned goods or materials or supplies of any kind.

**"Investment"** means, as to any Person, any direct or indirect acquisition or investment by such Person in another Person, whether by means of: (a) the purchase or other acquisition of capital stock or other securities of another Person; (b) a loan, advance or capital contribution to, Guarantee or assumption of debt of, or purchase or other acquisition of any other debt or equity participation or interest in, another Person, including any partnership or limited liability company interest in such other Person and any arrangement pursuant to which the investor Guarantees Debt of such other Person; or (c) the purchase or other acquisition (in one transaction or a series of transactions) of assets of another Person that constitute a business unit. For purposes of covenant compliance, the amount of any Investment shall be the amount actually invested, without adjustment for subsequent increases or decreases in the value of such Investment.

**"Investment Property"** means, as to any Person, all investment property (as that term is defined in the Uniform Commercial Code) now owned or hereafter acquired by such Person (or in which such Person has rights or the power to transfer rights to a secured party), wherever located.

**"IRS"** means the United States Internal Revenue Service or, as applicable, any successor agency.

**"Key-Man Policy"** means the life insurance policy on the life of Cosman with a death benefit in the amount of \$15,000,000 as to which Lender is the primary beneficiary.

**"Laws"** means, collectively, all international, foreign, federal, state and local laws, statutes, treaties, rules, authorities, guidelines, regulations, ordinances, codes and administrative or judicial precedents or judgments, orders, decrees, permits and other governmental restrictions, including the interpretation or administration thereof by any Governmental Authority charged with the enforcement, interpretation or administration thereof, and all applicable administrative orders, directed duties, requests, licenses, authorizations, concessions, grants, franchises and permits of, and agreements with, any Governmental Authority, in each case whether or not having the force of law.

**"Lender"** has the meaning set forth in the preamble to this Agreement (including all permitted successors and assigns).

**"Letter-of-Credit Rights"** means, as to any Person, all letter-of-credit rights (as that term is defined in the Uniform Commercial Code) now owned or hereafter acquired by such Person (or in which such Person has rights or the power to transfer rights to a secured party), including rights to payment or performance under a letter of credit, whether or not such Person, as beneficiary, has demanded or is entitled to demand payment or performance thereunder.

**"Licenses"** means, as to any Person, all Copyright Licenses, Patent Licenses, Trademark Licenses or other licenses of rights or interests now held or hereafter acquired by such Person.

**"Lien"** means any mortgage, pledge, hypothecation, assignment, deposit arrangement, encumbrance, lien (statutory or other), charge, or preference, priority or other security interest or preferential arrangement in the nature of a security interest of any kind or nature whatsoever (including any conditional sale or other title retention agreement and any easement, right of way or other encumbrance on title to real property).

**"Loan Documents"** means, collectively, the Agreement, each Note, each Guaranty, each Collateral Document, all subordination agreements respecting Permitted Indebtedness (if any) and all other present or future documents entered into by any Loan Party for the benefit of Lender (or any of them), in connection with this Agreement.

**"Loan Parties"** means, collectively, Borrower and Guarantors.

**"Loan"** has the meaning set forth in **Section 2.01(a)**.

**"Make-Whole Amount"** means, in connection with any prepayment or repayment of all or any portion of the Outstanding Amount, three percent (3%) until August 30, 2019, two percent (2%) from August 31, 2019 until November 8, 2019, and one percent (1%) from November 9, 2019 until the Maturity Date of the Outstanding Amount being, or required to be, prepaid or repaid.

**"Material Adverse Effect"** means any of the following: (a) a material adverse change in or a material adverse effect upon (in either case, irrespective of whether occurring as a result of a specific event or circumstance or otherwise) the business, financial condition or results of operations of either: (i) Borrower; or (ii) Borrower and the other Loan Parties taken as a whole; (b) a material impairment (irrespective of whether occurring as a result of a specific event or circumstance or otherwise) of the ability of either (i) Borrower or (ii) the Loan Parties, taken as a whole, for either of them to perform their respective obligations under the Loan Documents; or (c) except if caused by actions or inactions of Lender, a material adverse effect (irrespective of whether occurring as a result of a specific event or circumstance or otherwise) upon: (i) the legality, validity, binding effect or enforceability of any Loan Document to which any Loan Party is a party against either: (A) Borrower; or (B) the Loan Parties taken as a whole; or (ii) the rights and remedies of Lender or any other Lender under or in respect of any Loan Document.

**"Material Contract"** means, with respect to Loan Parties: (a) each contract or agreement listed on the **Disclosure Schedule**; (b) each other contract or agreement, or series of contracts or agreements (irrespective of whether related to the same subject matter), to which any Loan Party is a party involving aggregate consideration under all such contract(s) and agreement(s) payable to any Loan Party, or by any Loan Party of \$500,000 or more in any calendar year; and (c) any other contract or agreement the loss of which could reasonably be expected to result in a Material Adverse Effect.

**"Maturity Date"** means, subject to the provisions hereof, January 17, 2020.

**"Maximum Rate"** means, at any time, the maximum rate of non-usurious interest permitted by applicable Laws.

**"Money Laundering Laws"** means, collectively: (a) the Currency and Foreign Transactions Reporting Act (31 U.S.C. §§ 5311-5330 and 12 U.S.C. §§ 1818(s), 1820(b) and 1951-1959); and (b) the applicable money laundering statutes of all jurisdictions, the rules and regulations thereunder and any related or similar rules, regulations or guidelines issued, administered or enforced by any Governmental Authority.

**"Moody's"** means Moody's Investors Service, Inc.

**"Mortgage"** means the Mortgage, dated as of the date hereof, executed and delivered to Lender pursuant to the terms hereof or otherwise in connection herewith by Borrower, as a Lien upon the Facility.

**"Multiemployer Plan"** means any employee benefit plan of the type described in Section 4001(a)(3) of ERISA to which Loan Parties or any ERISA Affiliate makes or is obligated to make contributions, or during the preceding five plan years, has made or been obligated to make contributions.

**"Negotiable Collateral"** means all now owned and hereafter acquired right, title, and interest of each Loan Party with respect to letters of credit, letter of credit rights, instruments, promissory notes, drafts, documents, documents of title, and Chattel Paper (including electronic Chattel Paper and tangible Chattel Paper), and all supporting obligations in respect of any of the foregoing.

**"Net Proceeds"** means, in respect of any Disposition or Event of Loss, the proceeds in cash or Cash Equivalents received by any Loan Party or any Subsidiary thereof with respect to or on account of such Disposition or Event of Loss, net of: (a) in the case of a Disposition, the direct costs of such Disposition then payable by the recipient of such proceeds, or, in the case of an Event of Loss, the direct costs of collecting insurance or other proceeds, in each case excluding amounts payable to any Loan Party or any Affiliate of any Loan Party; (b) sales and use taxes paid or payable by such recipient as a result thereof; and (c) amounts required to be applied to repay principal, interest and prepayment premiums and penalties on Debt secured by a Permitted Lien on the properties subject to such Disposition.

**"Note"** means the secured note executed and delivered by Borrower on the Effective Date payable to the order of Lender evidencing the Loan.

**"Obligations"** means, collectively, all advances, debts, liabilities, obligations, covenants and duties of each Loan Party to Lender, in each of the foregoing cases, under or in respect of any Loan Document, whether with respect to the Credit Extensions, any Make-Whole Amount or otherwise (including all Hedging Obligations), whether direct or indirect (including those acquired by assumption), absolute or contingent, due or to become due, now existing or hereafter arising and including interest and fees that accrue after the commencement by or against any Loan Party or any Affiliate thereof of any proceeding under any Bankruptcy Law naming such Person as the debtor in such proceeding, regardless of whether such interest and fees are allowed claims in such proceeding.

**"OFAC"** means the United States Department of Treasury's Office of Foreign Assets Control and any successor thereto.

**"Operating Account"** means that certain Deposit Account of Borrower maintained at Wells Fargo Bank and bearing account number 4943964346.

**"Order"** means any judgment, order, writ, decree, injunction, arbitral or other award, directive ruling or decision of any Governmental Authority.

**"Organizational Documents"** means: (a) with respect to any corporation, the certificate or articles of incorporation and the bylaws (or equivalent or comparable constitutive documents with respect to any non-U.S. jurisdiction) of such Person; (b) with respect to any limited liability company, the certificate or articles of formation or organization and operating agreement of such Person; and (c) with respect to any partnership, joint venture, trust or other form of business entity, the partnership, joint venture or other applicable agreement of formation or organization of such Person and any agreement, instrument, filing or notice with respect thereto filed in connection with such Person's formation or organization with the applicable Governmental Authority in the jurisdiction of its formation or organization and, if applicable, any certificate or articles of formation or organization of such Person.

**"Other Connection Taxes"** means Taxes imposed as a result of a present or former connection between Lender and the jurisdiction imposing such Tax (other than connections arising from Lender having executed, delivered, become a party to, performed its obligations under, received payments under, received or perfected a security interest under, engaged in any other transaction pursuant to or enforced any Loan Document, or sold or assigned an interest in the Loan or Loan Document).

**"Other Taxes"** means all present or future stamp, court or documentary, intangible, recording, filing or similar Taxes that arise from any payment made under, from the execution, delivery, performance, enforcement or registration of, from the receipt or perfection of a security interest under, or otherwise with respect to, any Loan Document, except any such Taxes that are Other Connection Taxes imposed with respect to an assignment.

**"Outstanding Amount"** means, with respect to any Loan or Protective Advances on any date, the aggregate outstanding principal amount thereof after giving effect to prepayments or repayments of such Loan occurring on such date or the making, or prepayments or repayments, of Protective Advances, as the case may be, occurring on such date.

**"paid in full"** or **"repaid in full"** (or any variation thereof, such as **"payment in full"** or **"repayment in full"**) means, with respect to any Obligations, the indefeasible payment in full of such Obligations in cash (or otherwise to the written satisfaction, in such holder's discretion, of the holder thereof), and, in the event any such Obligations are paid over time or modified pursuant to section 1129 of the Bankruptcy Code (or any similar provision of any other applicable Bankruptcy Law), shall further mean that the holder thereof shall have received the final payment due on account of such Obligations. For purposes of the foregoing, the "holder" of any applicable Obligations shall be deemed to be the Person entitled to receipt of payment thereof. Notwithstanding the foregoing, the Obligations shall not be deemed to have been "paid in full" until all Commitments have expired or been terminated.

**"Parent"** has the meaning set forth in the preamble to this Agreement (including all permitted successors and assigns).

**"Participant"** has the meaning ascribed thereto in **Section 10.06(d)**.

**"Patent License"** means, as to any Person, all rights under any written agreement now owned or hereafter acquired by such Person (or in which such Person has rights or the power to transfer rights to a secured party) granting any right with respect to any invention on which a Patent is in existence.

**"Patents"** means, as to any Person, all of the following in which such Person now holds or hereafter acquires any interest: (a) all letters patent of the United States or any other country, all registrations and recordings thereof, and all applications for letters patent of the United States or any other country, including registrations, recordings and applications in the United States Patent and Trademark Office or in any similar office or agency of the United States, any State or Territory thereof, or any other country; and (b) all reissues, continuations, continuations-in-part or extensions thereof.

**"Patriot Act"** means the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Title III of Pub. L. 107-56 (signed into law October 26, 2001)).

**"PBGC"** means the Pension Benefit Guaranty Corporation or, if applicable, any successor entity.

**"Pension Plan"** means any "employee pension benefit plan" (as that term is defined in Section 3(2) of ERISA), other than a Multiemployer Plan, that is subject to Title IV of ERISA and is sponsored or maintained by Loan Parties or any ERISA Affiliate or to which Loan Parties or any ERISA Affiliate contributes or has an obligation to contribute, or in the case of a multiple employer or other plan described in Section 4064(a) of ERISA, has made contributions at any time during the immediately preceding five plan years.

**"Permit"** means any permit, approval, authorization, certification, license, variance, accreditation or permission required from a Governmental Authority under an applicable Law or any accrediting organization.

**"Permitted Liens"** has the meaning ascribed thereto in **Section 7.01**.

**"Permitted Indebtedness"** means, collectively, any Debt which has been subordinated to the Obligations on terms and conditions, and pursuant to documents, satisfactory to Lender.

**"Permitted Protest"** means the right of Loan Parties and their respective Subsidiaries to protest any Lien (other than any Lien that secures the Obligations), taxes (other than Taxes subject to withholding or that are the subject of a United States federal tax lien), or rental payment, *provided* that (a) a reserve with respect to such obligation is established on its books and records in such amount as is required under GAAP, (b) any such protest is instituted promptly and prosecuted diligently by such Loan Parties and their respective Subsidiaries, and (c) Lender is satisfied that, while any such protest is pending, there will be no impairment of the enforceability, validity, or priority of any of Lender's Liens.

**"Person"** means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, Governmental Authority or other entity.

**"Plan"** means any "employee benefit plan" (as such term is defined in Section 3(3) of ERISA) established by Loan Parties or, with respect to any such plan that is subject to Section 412 of the Code or Title IV of ERISA, any ERISA Affiliate.

**"Proceeding"** means a suit, action, arbitration, audit, investigation or other proceeding before or by any Governmental Authority.

**"Proceeds"** means proceeds (as that term is defined in the Uniform Commercial Code).

**"Protective Advances"** has the meaning ascribed thereto in **Section 8.02(c)**.

**"Related Business"** means any business that is the same, similar or otherwise reasonably related, ancillary or complementary to the businesses of Borrower on the Effective Date.

**"Reportable Event"** means any of the events set forth in Section 4043(c) of ERISA, other than events for which the thirty-day notice period has been waived.

**"Responsible Officer"** means: (a) (i) with respect to any Loan Party or any of its Subsidiaries in connection with any request for any Loan, any Compliance Certificate or any other certificate or notice pertaining to any financial information required to be delivered by any Loan Party or any of its Subsidiaries hereunder or under any other Loan Document, the chief financial officer, treasurer or controller of such Person or of the managing member or manager of such Person; and (ii) otherwise, with respect to any Loan Party that is not a natural person, the chief executive officer, president, chief financial officer, treasurer or controller of such Person or of the managing member or manager of such Person; and (b) with respect to any Loan Party who is a natural person, such natural person.

**"Restricted Party"** means any Person listed: (a) in the Annex to the Executive Order; (b) on the "Specially Designated Nationals and Blocked Persons" list maintained by the OFAC; (c) in any successor list to either of the foregoing; (d) any Person that commits, threatens or conspires to commit or supports "terrorism" as defined in the Executive Order; or (e) any Person designated as the target of any Sanctions.

**"Restricted Payment"** means, as to any Person: (a) any dividend or other distribution by such Person (whether in cash, securities or other property) with respect to any Equity Interests of such Person; (b) any payment (whether in cash, securities or other property), including any sinking fund or similar deposit, on account of the purchase, redemption, retirement, acquisition, cancellation or termination of any such Equity Interest; (c) any payment of principal or interest or any purchase, redemption, retirement, acquisition or defeasance with respect to any Debt of such Person which is subordinated to the payment of the Obligations; (d) the acquisition for value by such Person of any Equity Interests issued by such Person or any other Person that Controls such Person; (e) any management, servicing or other similar fees payable to any Loan Party or any Affiliate thereof; and (f) any other transaction that has a similar effect as clauses (a) through (e) of this definition.

**"S&P"** means Standard & Poor's, a division of The McGraw-Hill Companies, Inc.

**"Sanctions"** means any sanctions administered or enforced by the OFAC, the United Nations Security Council or any other relevant sanctions authority.

**"Seller"** means Sunoco Retail LLC, a Pennsylvania limited liability company.

**"Software"** means, as to any Person, all software (as that term is defined in the Uniform Commercial Code) now owned or hereafter acquired by such Person (or in which such Person has rights or the power to transfer rights to a secured party), including all computer programs and all supporting information provided in connection with a transaction related to any program.

**"Solvent"** means, as to any Person at any time of determination, that: (a) the fair value of the property of such Person on a going concern basis is greater than the amount of such Person's liabilities (including contingent liabilities), as such value is established and such liabilities are evaluated for purposes of Section 101(32) of the Bankruptcy Code and, in the alternative, for purposes of any similar state Law applicable to such Person or any Subsidiary thereof; (b) the present fair salable value of the property of such Person is not less than the amount that will be required to pay the probable liability of such Person on its debts as they become absolute and matured; (c) such Person is able to realize upon its property and pay its debts and other liabilities (including contingent liabilities) as they mature in the normal course of business; (d) such Person does not intend to, and does not believe that it will, incur debts or liabilities beyond such Person's ability to pay as such debts and liabilities mature; and (e) such Person is not engaged in business or a transaction, and is not about to engage in business or a transaction, for which such Person's property would constitute unreasonably small capital.

**"Subsidiary"** of a Person means any other Person of which a majority of the Equity Interests having ordinary voting power for the election of directors or other governing body (other than securities or interests having such power only by reason of the happening of a contingency) are at the time beneficially owned, or the management of which is otherwise controlled, directly, or indirectly through one or more intermediaries, or both, by such Person. Unless otherwise specified, all references herein to a **"Subsidiary"** or to **"Subsidiaries"** shall refer to a Subsidiary or Subsidiaries of a Loan Party.

**"Supporting Obligations"** means all supporting obligations (as that term is defined in the Uniform Commercial Code), including letters of credit and guaranties issued in support of Accounts, Chattel Paper, Documents, General Intangibles, Instruments, or Investment Property.

**"Swap Contract"** means: (a) any and all rate swap transactions, basis swaps, credit derivative transactions, forward rate transactions, commodity swaps, commodity options, forward commodity contracts, equity or equity index swaps or options, bond or bond price or bond index swaps or options or forward bond or forward bond price or forward bond index transactions, interest rate options, forward foreign exchange transactions, cap transactions, floor transactions, collar transactions, currency swap transactions, cross-currency rate swap transactions, currency options, spot contracts, or any other similar transactions or any combination of any of the foregoing (including any options to enter into any of the foregoing), whether or not any such transaction is governed by or subject to any master agreement; and (b) any and all transactions of any kind, and the related confirmations, that are subject to the terms and conditions of, or governed by, any form of master agreement published by the International Swaps and Derivatives Association, Inc., any International Foreign Exchange Master Agreement, or any other master agreement including any such obligations or liabilities under any such master agreement (in each case, together with any related schedules).

**"Synthetic Lease Obligation"** means the monetary obligation of a Person under either: (a) a so-called synthetic, off-balance sheet or tax retention lease; or (b) an agreement for the use or possession of property creating obligations that do not appear on the balance sheet of such Person but which, upon the insolvency or bankruptcy of such Person, would be characterized as the indebtedness of such Person (without regard to accounting treatment).

**"Taxes"** means all present or future federal, state, local, county, foreign and other taxes, assessments or other government charges, including, without limitation, any income, alternative or add-on minimum tax, estimated gross income, gross receipts, sales, use, ad valorem, value added, transfer, capital, stock, franchise, profits, license, registration, recording, documentary, intangibles, conveyancing, gains, withholding, payroll, employment, social security (or similar), unemployment, disability, excise, severance, stamp, occupation, premium, property (real and personal), environmental or windfall profit tax, custom duty or other tax, governmental fee or other like assessment, charge, or tax of any kind whatsoever, together with any interest, penalty, addition to tax or additional amount imposed by any Governmental Authority responsible for the imposition of any such tax (domestic or foreign) whether such Tax is disputed or not.

**"Tax Return"** means any report, return, declaration, claim for refund or other information or statement or schedule supplied or required to be supplied to a Governmental Authority relating to Taxes, including any schedules or attachments thereto and any amendments thereof.

**"Loan"** has the meaning ascribed thereto in **Section 2.01(a)**.

**"Threshold Amount"** means \$500,000.

**"Trademark License"** means, as to any Person, all rights under any written document now owned or hereafter acquired by such Person (or in which such Person has rights or the power to transfer rights to a secured party) granting any right to use any Trademark or Trademark registration.

**"Trademarks"** means, as to any Person, all of the following now owned or hereafter adopted or acquired by such Person: (a) all trademarks, trade names, corporate names, business names, trade styles, service marks, logos, other source or business identifiers, prints and labels on which any of the foregoing have appeared or appear, designs and general intangibles of like nature (whether registered or unregistered), all registrations and recordings thereof, and all applications in connection therewith, including all registrations, recordings and applications in the United States Patent and Trademark Office or in any similar office or agency of the United States, any State or Territory thereof, or any other country or any political subdivision thereof; (b) all reissues, extensions or renewals thereof; and (c) all Goodwill associated with or symbolized by any of the foregoing.



**"Treasury Regulations"** means the temporary and final U.S. Treasury Regulations promulgated under the Code.

**"Unasserted Obligations"** means, at any time, Obligations consisting of obligations for taxes, costs, indemnifications, reimbursements, damages and other liabilities (except for the principal of and interest on, and fees relating to, any Debt) in respect of which no claim or demand for payment has been made (or, in the case of obligations for indemnification, no notice for indemnification has been issued by the Indemnitee) at such time.

**"Unfunded Pension Liability"** means the excess of a Pension Plan's benefit liabilities under Section 4001(a)(16) of ERISA, over the current value of that Pension Plan's assets, determined in accordance with the assumptions used for funding the Pension Plan pursuant to Section 412 of the Code for the applicable plan year.

**"Uniform Commercial Code"** means the Uniform Commercial Code as in effect in any applicable jurisdiction.

**"United States"** and **"U.S."** mean the United States of America.

**"Warrant"** means the Common Stock Purchase Warrant issued by Parent to Lender on the Effective Date.

## **Section 1.02. CERTAIN RULES OF CONSTRUCTION.**

### **(a) General Rules.**

(i) Unless the context otherwise clearly requires, the meaning of a defined term is applicable equally to the singular and plural forms thereof.

(ii) The words **"hereof," "herein," "hereunder"** and similar words refer to this Agreement as a whole and not to any particular provision of this Agreement.

(iii) The word **"documents"** includes agreements, instruments, certificates, indentures, notices and other writings and documents, however evidenced.

(iv) The words **"include"** and **"including"** are not limiting and, unless the context otherwise clearly requires, the word **"or"** is not exclusive.

(v) A "Default" or "Event of Default" hereunder referenced as **"continuing"** (or any variation thereof) shall (i) with respect to a Default that has not yet matured into an Event of Default, be deemed to be continuing unless and until cured within any applicable cure period set forth in this Agreement (if susceptible to cure), and (ii) with respect to an Event of Default, be deemed to be continuing unless and until waived in writing by Lender.

(vi) In the computation of periods of time from a specified date to a later specified date, the word **"from"** means **"from and including"**; the words **"to"** and **"until"** each mean **"to but excluding"** and the word **"through"** means **"to and including."**

(vii) Unless the context otherwise clearly requires, the words **"property," "properties," "asset"** and **"assets"** refer to both personal property (whether tangible or intangible) and real property.

(viii) Unless the context otherwise clearly requires: (A) Article, Section, subsection, clause, Schedule and Exhibit references are to this Agreement; (B) references to documents (including this Agreement) shall be deemed to include all subsequent amendments and other modifications thereto, but only to the extent such amendments and other modifications are not prohibited by the terms of any Loan Document; (C) references to any statute or regulation are to be construed as including all statutory and regulatory provisions consolidating, amending, replacing, supplementing or interpreting the statute or regulation; and (D) unless prohibited by the terms of any Loan Document, references to any Person shall be deemed to include such Person's successors and assigns.

(b) **Time References.** Unless the context otherwise clearly requires, all references herein to times of day shall be references to Eastern time (daylight or standard, as applicable).

(c) **Captions.** The titles, captions and headings of this Agreement are for convenience of reference only and shall not affect the interpretation of this Agreement.

(d) **Cumulative Nature of Certain Provisions.** This Agreement and the other Loan Documents may use several different limitations, tests or measurements to regulate the same or similar matters. All such limitations, tests and measurements are cumulative and shall be performed in accordance with their respective terms.

(e) **No Construction Against Any Party.** This Agreement and the other Loan Documents are the result of negotiations among, and have been reviewed by counsel to, the Loan Parties and Lender. Accordingly, they shall not be construed against Lender merely because of the involvement of any or all of the preceding Persons in their preparation.

(f) **GAAP.** Unless the context otherwise clearly requires, all accounting terms not expressly defined herein shall be construed, and all financial computations required under this Agreement shall be made, in accordance with GAAP applied in a consistent manner. Notwithstanding anything to the contrary contained herein, all financial statements delivered hereunder shall be prepared, and all financial covenants contained herein shall be calculated, without giving effect to any election under the Statement of Financial Accounting Standards No. 159 (or any similar accounting principle) permitting a Person to value its financial liabilities or Debt at the fair value thereof.

(g) **Reserved.**

(h) **Documents Executed by Responsible Officers.** Any document delivered hereunder that is signed by a Responsible Officer of a Loan Party shall be conclusively presumed to have been authorized by all necessary corporate or other organizational action on the part of such Loan Party and such Responsible Officer shall be conclusively presumed to have acted on behalf of such Loan Party.

## ARTICLE II. CREDIT EXTENSIONS

### Section 2.01. LOAN.

(a) **Loan.** Subject to the terms and conditions set forth herein, Lender agrees to make a Loan to Borrower (the "**Loan**") on the Effective Date in the principal amount of \$15,000,000.

(b) **Limit on Credit Extensions.** No Credit Extension (or any portion thereof) that has been repaid or prepaid may be re-borrowed. In no event shall Lender be obligated to make to Borrower, or Borrower be entitled to borrow or receive from Lender, any loan, advance or extension of credit hereunder other than the Loan.

### Section 2.02. INTEREST.

(a) **Interest.** Subject to the provisions hereof (including **Section 2.02(d)**), the Loan shall bear interest from the Effective Date advanced until repaid in full, payable in cash in accordance with **Schedule 2.02**.

(b) **Reserved.**

(c) **Payment Dates.** Interest hereunder shall be due and payable in accordance with the terms hereof both before and after judgment, and both before and after the commencement of any proceeding under any Bankruptcy Law. Subject to the provisions hereof, Borrower shall pay accrued and unpaid interest under **Section 2.02(a)**, from the Effective Date to but excluding such payment date, to Lender as follows: (i) on a calendar month basis in arrears on each Interest Payment Date; (ii) upon payment or prepayment of the principal balance of the Loan or any portion thereof, on the amount so paid or prepaid; and (iii) on the Maturity Date.

(d) **Default Rate.** Notwithstanding anything to the contrary contained in **Section 2.02(a)**, at any time that an Event of Default exists, then, unless Lender otherwise agrees and without affecting any of Lender's rights and remedies hereunder or in respect hereof, all (or, in the sole discretion of Lender, any portion) of the Obligations shall bear interest contemplated by **Section 2.02(a)**, at the Default Rate, such interest to be payable in cash upon demand therefor by Lender.

(e) **Compounding.** Subject to the other provisions of this **Section 2.02**, without affecting any of Lender's or Lender's rights and remedies hereunder or in respect hereof, all interest (including interest at the Default Rate) on the Loan that is not paid when due shall, at Lender's discretion, either be declared an Event of Default hereunder and subject to the Default Rate or be added to the Outstanding Amount thereof and thereafter bear interest at the rate then applicable to the Outstanding Amount.

### **Section 2.03. PAYMENT AND PREPAYMENTS OF PRINCIPAL.**

Subject to the provisions hereof:

(a) **Scheduled Payments.** Borrower shall repay the Outstanding Amount and all other Obligations in accordance with **Schedule 2.03**.

(b) **Voluntary Prepayments of the Loan.** Borrower may voluntarily prepay the Outstanding Amount in an amount not less than \$500,000 or an integral multiple of \$100,000 in excess thereof (or, if less, the entire Outstanding Amount), upon not less than five (5) days prior irrevocable written notice to Lender. In connection with any such voluntary prepayment, Borrower shall pay the sum of: (A) the Outstanding Amount being paid or prepaid; *plus* (B) the Make-Whole Amount *plus* (C) interest (at the rate then applicable to the Loan) on the amounts in the immediately preceding clause (A) through and including the date of repayment or prepayment. Any prepayments of the principal amount of the Loan made pursuant to this **Section 2.03(b)** shall be applied and credited against the regular payments of principal required by **Section 2.03(c)(i)** in inverse order of maturity but shall not relieve Borrower of making any mandatory prepayment of the Loan otherwise required pursuant to **Section 2.03(c)**.

(c) **Mandatory Repayments of the Loan.**

(i) Regular Payments. Borrower shall repay the Loan in 20 installments in the amount of \$750,000 with any principal balance payable on the Maturity Date. Any repayment of the Loan pursuant to this **Section 2.03(c)(i)** shall be accompanied by the payment of all accrued and unpaid interest on the amount of such repayment through to the date of repayment.

(ii) Loss and Disposition Payments. In the event that Net Proceeds resulting from any (A) Event of Loss or (B) Disposition or series of Dispositions by Borrower or any Subsidiary thereof undertaken pursuant to **Section 7.05(a)** or **Section 7.05(h)**, within any Fiscal Year exceed, in the aggregate, the Threshold Amount, Borrower shall prepay the Loan in an amount equal to the sum of: (1) 100% of such Net Proceeds that so exceed the Threshold Amount in such Fiscal Year *plus* (2) the interest (at the rate then applicable to the Loan) on the amounts in the immediately preceding clause (1) through and including the date of repayment or prepayment *plus* (3) the Make-Whole Amount that would apply if such Net Proceeds were used by Borrower to make a voluntary prepayment of the Loan pursuant to **Section 2.03(b)**; *provided that*, so long as (w) no Default or Event of Default shall have occurred and is continuing or would result therefrom, (x) Borrower shall have given Lender prior written notice of Borrower's intention to apply such monies to the costs of replacement of the properties or assets that are the subject of such sale or disposition or the cost of purchase or construction of other assets useful in the business of Loan Parties, (y) the monies are held in a Deposit Account in which Lender has a perfected first-priority security interest, and (z) Loan Parties complete such replacement, purchase, or construction within one hundred and eighty (180) days (or three hundred and sixty-five (365) days in the case of any involuntary disposition resulting from an Event of Loss) after the initial receipt of such monies, then the Loan Party whose assets were the subject of such disposition shall have the option to apply such monies to the costs of replacement of the assets that are the subject of such sale or disposition or the costs of purchase or construction of other assets useful in the business of such Loan Party unless and to the extent that such applicable period shall have expired without such replacement, purchase, or construction being made or completed, in which case, any amounts remaining in the Deposit Account referred to in clause (y) above shall be paid to Lender and applied in accordance with **Section 2.03(c)(ii)**; *provided that* Loan Parties shall not have the right to use such Net Proceeds to make such replacements, purchases, or construction in excess of \$5,000,000 in any given Fiscal Year. Nothing contained in this **Section 2.03(c)(ii)** shall permit Loan Parties to sell or otherwise dispose of any assets other than in accordance with **Section 7.05(a)** or **Section 7.05(h)**.

(iii) Payments In Respect Of Extraordinary Receipts. Within five (5) days of the date of receipt by Loan Parties of the Net Proceeds of any Extraordinary Receipts, Borrower shall repay the Loan in an amount equal to the sum of (A) the lesser of (1) 100% of such Net Proceeds received and (2) the Outstanding Amount *plus* (B) interest (at the rate then applicable to the Loan) on the amounts in the immediately preceding clause (A) through and including the date of repayment or prepayment *plus* (3) the Make-Whole Amount that would apply if such Net Proceeds were used by Borrower to make a voluntary prepayment of the Loan pursuant to **Section 2.03(b)**

(iv) Payments In Respect Of Debt. Within five (5) days of the date of receipt by Loan Parties of the Net Proceeds of any Debt incurred (other than Debt permitted under **Section 7.03**), Borrower shall repay the Loan in an amount equal to the sum of (A) the lesser of (1) 100% of such Net Proceeds received and (2) the Outstanding Amount *plus* (B) interest (at the rate then applicable to the Loan) on the amounts in the immediately preceding clause (A) through and including the date of repayment or prepayment *plus* (3) the Make-Whole Amount that would apply if such Net Proceeds were used by Borrower to make a voluntary prepayment of the Loan pursuant to **Section 2.03(b)**. The provisions of this **Section 2.03(c)(iv)** shall not be deemed to be implied consent to any incurrence of Debt otherwise prohibited by the terms of this Agreement.

(d) **Payments Under Certain Circumstances.** Notwithstanding anything to the contrary contained herein, at any time that an Event of Default exists (whether by virtue of the Obligations (other than Unasserted Obligations) not being paid in full on the Maturity Date or as a result of the acceleration of the Obligations in accordance with the provisions thereof or otherwise) when Borrower make or are required to make any payment or prepayment of the Loan, Borrower agree that (without notice or demand of any kind from Lender, such notice and demand being hereby expressly waived) Borrower shall be required to pay and shall pay the sum of: (i) the Outstanding Amount being paid or prepaid; *plus* (ii) the applicable Make-Whole Amount; *plus* (iii) interest (at the rate then applicable to the Loan) on the amounts in the immediately preceding clause (i) through and including the later of the first anniversary of the Effective Date and the date of prepayment or repayment.

(e) **Generally.** In connection with any such prepayment of the Loan pursuant to **Section 2.03(b) or 2.03(c)** requiring the payment of the Make-Whole Amount, Borrower acknowledge that such prepayment may result in Lender incurring additional costs, expenses or liabilities, and that, as of the date hereof, it is difficult to ascertain the full extent of such costs, expenses or liabilities. Accordingly, Borrower agrees that the Make-Whole Amount payable in connection with any such prepayment represents a reasonable estimate of the costs, expenses or liabilities of Lender in connection with any such prepayment. Without affecting any of Lender's rights and remedies hereunder or in respect hereof, if Borrower fails to pay the Make-Whole Amount when due, then the amount thereof shall thereafter bear interest until paid in full at the Default Rate. All prepayments of the Loan shall be applied to the Outstanding Amount on a *pro rata* basis in the inverse order of maturity. Borrower shall provide written notice of any payments made pursuant to **Section 2.03(c)** by at least 12:00 p.m. one Business Day prior to the proposed prepayment date, which notice shall state pursuant to which paragraph of **Section 2.03(c)** the prepayment is being made.

#### **Section 2.04. CERTAIN FEES.**

(a) **Transaction Fees.** As consideration for Lender making the Loan hereunder, Borrower shall pay to Lender, an origination and closing fee in the aggregate amount of \$1,005,000.00 (the "**Facility Fee**"), of which \$30,000 has been previously paid to Lender, \$495,000 is being paid on the Effective Date, and \$480,000 is to be paid within 45 days after the Effective Date. The entire amount of the Facility Fee shall be fully earned and non-refundable on the Effective Date.

(b) **Administrative Fee.** Until the loan has been repaid in full, Borrower shall pay to Lender: a loan and collateral administration fee equal to \$1,000 on the first business Day of each month, each installment of such fee shall be fully earned when due.

(c) **Other Provisions.** Except as otherwise expressly set forth herein, once paid, each fee (or portion thereof) referenced in this **Section 2.04** shall not be refundable under any circumstances and will not be subject to counterclaim or setoff or otherwise affected.

#### **Section 2.05. BROKERS AND FINANCIAL ADVISORS.**

In connection with the transactions contemplated hereby, Loan Parties have not engaged any advisors (financial or otherwise), brokers or arrangers, other than accountants and legal advisors. Loan Parties hereby agree to pay, and hereby indemnify each Indemnitee from and against, all fees, costs and expenses of any advisors (financial or otherwise), brokers or arrangers engaged by or on behalf of Loan Parties in connection with the transactions contemplated hereby (including the making of the Loan).

#### **Section 2.06. MANNER OF PAYMENTS.**

(a) **Invoices.** Lender agrees to endeavor to provide Borrower with an invoice setting forth the Outstanding Amount and stating the amount of interest due on any Interest Payment Date in reasonable detail, not later than five (5) days prior to such Interest Payment Date; *provided* that: (i) Lender shall have no liability for failing to do so; and (ii) any failure by Lender to provide any such invoice shall not affect Borrower' (or any other Loan Party's) obligation to pay when due any amounts owing hereunder in accordance with the provisions hereof.

(b) **Payments on Business Days.** If any payment hereunder becomes due and payable on a day (including an Interest Payment Date) that is not a Business Day, then such due date shall be extended to the next succeeding Business Day; *provided* that interest and fees shall continue to accrue during the period of any such extension.

(c) **Computations.** All interest and fees owing hereunder shall be computed on the basis of a year of three hundred and sixty (360) days and calculated in each case for the actual number of days elapsed.

(d) **Evidence of Debt.** The Loan shall be evidenced by one or more accounts or records maintained by Lender in the ordinary course of business. The accounts or records maintained by Lender shall be conclusive absent manifest error of the amount of the Loan made by Lender to Borrower and the interest and payments thereon. Any failure to so record or any error in doing so shall not, however, limit or otherwise affect the obligation of Borrower hereunder to pay any amount owing with respect to the Obligations. Upon the request of Lender, Borrower shall execute and deliver to Lender a Note, which shall evidence the Loan in addition to such accounts or records. Lender may attach schedules to its Note and endorse thereon the date, amount and maturity of the Loan, as applicable, and payments with respect thereto.

#### **Section 2.07. RESERVED.**

#### **Section 2.08. PAYMENTS FREE OF TAXES.**

(a) **Payments Free of Taxes.** Any and all payments by or on account of any obligation of any Loan Party under any Loan Document shall be made free and clear of and without deduction or withholding for any and all Indemnified Taxes, and all liabilities with respect thereto, now or hereafter imposed, levied, collected, withheld or assessed by any Governmental Authority. If any Indemnified Taxes are required to be withheld after the date hereof from or in respect of any sum payable under this Agreement or any other Loan Document, (i) the sum payable shall be increased as necessary so that after making all required deductions (including deductions applicable to additional sums payable under this **Section 2.08**) Lender receives an amount equal to the sum it would have received had no such deductions been made, (ii) Borrower shall make such deductions, (iii) Borrower shall timely pay the full amount deducted to the relevant taxation authority or other authority in accordance with applicable Laws, and (iv) Borrower shall furnish to Lender the original or a certified copy of a receipt evidencing payment thereof or other evidence of payment reasonably acceptable to Lender; *provided* that Borrower shall not be required to increase such amounts payable to Lender with respect to any Taxes (A) that are attributable to Lender's failure to comply with the requirements of paragraph (d) of this Section or (B) that are United States federal withholding taxes imposed on amounts payable to Lender at the time Lender becomes entitled to payment under this Agreement.

(b) As soon as practicable after any payment of Taxes by any of Borrower to a Governmental Authority pursuant to this **Section 2.08**, Borrower shall deliver to Lender the original or a certified copy of a receipt issued by such Governmental Authority evidencing such payment, a copy of the return reporting such payment or other evidence of such payment reasonably satisfactory to Lender.

(c) Borrower agrees to indemnify Lender for the full amount of Indemnified Taxes paid by Lender and any liability (including penalties, interest, and reasonable expenses) arising therefrom or with respect thereto.

(d) Without prejudice to the survival of any other agreement of Borrower hereunder, the agreements and obligations of Borrower contained in this **Section 2.08** shall survive the Obligations being paid in full.

**Section 2.09. RESERVED.**

**Section 2.10. PAYMENTS GENERALLY.**

All payments to be made by any Loan Party hereunder shall be made without condition or deduction for any counterclaim, defense, recoupment or setoff. Except as otherwise expressly provided herein, all payments by any Loan Party hereunder shall be made to Lender, to which such payment is owed, at Lender's Office in Dollars and in immediately available funds not later than 11:00 a.m. on the date specified herein. All payments received by Lender after 11:00 a.m. may, in Lender's sole discretion, be deemed received on the next succeeding Business Day and any applicable interest or fee shall continue to accrue.

**Section 2.11. BORROWER.**

Each Loan Party hereby irrevocably appoints Borrower as the borrowing agent and attorney-in-fact for each Loan Party which appointment shall remain in full force and effect unless and until Lender shall have received prior written notice signed by each Loan Party that such appointment has been revoked and that another Loan Party has been appointed for such purpose. Each Loan Party hereby irrevocably appoints and authorizes Borrower (i) to provide Lender with all notices with respect to Loan obtained for the benefit of any Loan Party and all other notices and instructions under this Agreement and (ii) to take such action as Borrower deems appropriate on its behalf to obtain Loan and to exercise such other powers as are reasonably incidental thereto to carry out the purposes of this Agreement. It is understood that the handling of the Loan and the Collateral of the Loan Parties in a combined fashion, as more fully set forth herein, is done solely as an accommodation to the Loan Parties in order to utilize the collective borrowing powers of the Loan Parties in the most efficient and economical manner and at their request, and that Lender shall not incur any liability to any Loan Party as a result hereof. Each Loan Party Loan Party expects to derive benefit, directly or indirectly, from the handling of Loan and the Collateral in a combined fashion since the successful operation of each Loan Party is dependent on the continued successful performance of the integrated group. To induce Lender to do so, and in consideration thereof, each Loan Party hereby jointly and severally agrees to indemnify Lender and hold it harmless against any and all liability, expense, loss or claim of damage or injury, made against Lender by any Loan Party or by any third party whosoever, arising from or incurred by reason of (a) the handling of the Collateral of the Loan Parties as herein provided, (b) Lender relying on any instructions of Borrower, or (c) any other action taken by Lender hereunder or under the other Loan Documents, except that the Loan Parties will have no liability under this **Section 2.11** with respect to any liability that has been finally determined by a court of competent jurisdiction to have resulted solely from the gross negligence or willful misconduct of Lender.

**ARTICLE III.  
THE COLLATERAL**

**Section 3.01. GRANT OF SECURITY INTEREST.**

Each of Borrower and Parent hereby grants, pledges and assigns a Lien in the Collateral to and for the benefit of Lender, to secure the prompt payment in full and performance when due of all of the Obligations. Each of Borrower and Parent represents, warrants and covenants to Lender that: (a) the Lien granted by it herein is and shall at all times continue to be a perfected, first priority (subject to Permitted Liens having priority by operation of law and except to the extent otherwise expressly provided in any Loan Document or expressly agreed to in writing by Lender) Lien in the Collateral (subject only to Permitted Liens); (b) it has rights in and the power to transfer each item of the Collateral upon which it purports to grant a Lien pursuant to the Loan Documents, free and clear of any and all Liens or claims of others, other than Permitted Liens; and (c) no effective security agreement, mortgage, deed of trust, financing statement (as that term is defined in the Uniform Commercial Code), or other security or Lien instrument covering all or any part of the Collateral is or will be on file or of record in any public office, except those relating to Permitted Liens. If Borrower or Parent shall acquire a commercial tort claim (as that term is defined in the Uniform Commercial Code), it shall promptly notify Lender in a writing of the details thereof and grant to Lender a security interest therein and in the proceeds thereof, all upon the terms of this Agreement, with such writing to be in form and substance reasonably satisfactory to Lender. Notwithstanding any termination of this Agreement, Lender's Lien in the Collateral shall continue until all Obligations (other than Unasserted Obligations) are repaid in full. At such time as the Obligations (other than Unasserted Obligations) have been paid in full and Lender shall have received a release of all Claims from the Loan Parties, Lender shall, at Borrower's sole cost and expense, release its Liens on the Collateral.

**Section 3.02. LENDER'S RIGHTS REGARDING THE COLLATERAL .**

(a) If an Event of Default then exists, Lender may, (i) at any time in Lender's own name or in the name of any Loan Party, communicate with Account Debtors and obligors in respect of Instruments, Chattel Paper or other Collateral to verify to Lender's satisfaction, the existence, amount and terms of, and any other matter relating to, Accounts, Instruments, Chattel Paper or other Collateral, and (ii) without prior notice to any Loan Party, notify Account Debtors or other Persons obligated on any Collateral that Lender has a Lien thereon and that payments shall be made directly to Lender. Upon the request of Lender, Borrower and Parent shall so notify such Account Debtors and other Persons. Each of Borrower and Parent hereby appoints Lender or Lender's designee as its attorney at any time an Event of Default exists, with power to endorse its name upon any notes, acceptance drafts, money orders or other evidences of payment of Collateral.

(b) Borrower or Parent, as the case may be, shall remain liable under any evidence of Collateral to observe and perform all the conditions and obligations to be observed and performed by it thereunder, and Lender shall not have any obligation or liability whatsoever to any Person under any such Collateral by reason of or arising out of the execution, delivery or performance of this Agreement or the other Loan Documents, and Lender shall not be required or obligated in any manner (i) to perform or fulfill any of the obligations of any Loan Party that is a party thereto, (ii) to make any payment or inquiry thereunder, or (iii) to take any action of any kind to collect, compromise or enforce any performance or the payment of any amounts that may have been assigned to it or to which it may be entitled at any time or times under or pursuant to any Collateral.

(c) In the event that any Collateral, including Proceeds, is evidenced by or consists of Negotiable Collateral, and if and to the extent that perfection or priority of Lender's security interest is dependent on or enhanced by possession, Borrower and Parent, immediately upon the request of Lender, shall endorse and deliver physical possession of such Negotiable Collateral and all agreements and documents related thereto, to Lender or to a custodian to hold on behalf of Lender. Upon the request of Lender, all Negotiable Collateral shall be delivered to Lender or a custodian for the benefit of Lender, duly endorsed as follows on the back of the signature page thereof or on a separate allonge affixed thereto:

Pay to the order of Highscore Capital LLC, as Lender  
[[Loan Parties]]

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

(d) Lender (through any of its officers, employees, or agents) shall have the right, from time to time upon reasonable prior notice during regular business hours (i) to inspect and examine the Books and Records and the Collateral, (ii) during the existence of an Event of Default, to communicate directly with any and all Account Debtors to verify the existence and terms of Collateral, and (iii) to check, test, and appraise the Collateral, or any portion thereof, in order to verify Loan Parties' financial condition or the amount, quality, value, condition of, or any other matter relating to, the Collateral, and Loan Parties shall permit any designated representative of Lender (which shall include Lender) to visit and inspect any of the properties of Loan Parties to inspect and to discuss its finances and properties and Collateral, during normal business hours. Without limiting the provisions of **Section 6.10**, each of Borrower and Parent shall, with respect to any Collateral owned, leased or otherwise controlled by it, upon reasonable prior appointment during normal business hours, will:

(i) provide access to such Collateral to Lender and its officers, employees and agents, as frequently as is commercially reasonable or, at any time an Event of Default exists, as frequently as Lender determines to be appropriate;

(ii) permit Lender or any of its officers, employees and agents to inspect, audit and make extracts and copies from all of such Loan Party's Books and Records; and

(iii) permit Lender to inspect, review, evaluate and make physical verifications and appraisals of the Inventory and other Collateral in any manner and through any means that Lender considers reasonably advisable, and such Loan Party agrees to render to Lender, at Borrower' sole cost and expense, such clerical and other assistance as may be reasonably requested with regard thereto;

*provided that*, if an Event of Default shall have occurred and be continuing, no advance notice (whether during normal business hours or otherwise) shall be required, and Lender shall have access at any and all times.

(e) Beyond the exercise of reasonable care to assure the safe custody of Collateral in Lender's possession and the accounting for moneys actually received by Lender hereunder, Lender shall not have any duty or liability to exercise or preserve any rights, privileges or powers pertaining to the Collateral.

(f) Parent and Borrower hereby represent and warrant that the Equity Interests of Borrower included in the Collateral are uncertificated limited liability interests. Borrower covenants and agrees not to amend its articles of organization or other charter documents or its operating agreement to provide for certificated Equity Interests. Parent and Borrower hereby consent to (i) the pledge and Lien granted to Lender hereunder in all the outstanding Equity Interests of Borrower, (ii) the acquisition and ownership of any or all such Equity Interests by Lender (or its assignee(s)) and the admission of Lender (or its assignee(s)) as member(s) of Borrower, and (iii) the acquisition and ownership of any or all such Equity Interests by the purchaser(s) thereof and the admission of such purchaser(s) as member(s) of Borrower if such Equity Interests are sold under UCC Section 9-610. Parent and Borrower shall take any necessary or appropriate action under Borrower's articles of organization, operating agreement or applicable Law to confirm the foregoing, including recording the pledge and Lien in the Books and Records of Borrower. The foregoing notwithstanding, unless and until an Event of Default has occurred and is continuing or if an Event of Default would result therefrom, any distributions on or in respect of such Equity Interests may be made to Parent if and to the extent otherwise permitted by **Section 7.06**.



**Section 3.03. GRANT OF LICENSE TO USE INTELLECTUAL PROPERTY COLLATERAL ; ADDITIONAL INTELLECTUAL PROPERTY.**

Each of Borrower and Parent hereby grants to Lender an irrevocable, non-exclusive license, exercisable upon the occurrence and during the continuance of an Event of Default without payment of royalty or other compensation to it, to use, transfer, license or sublicense any Intellectual Property now owned, licensed to, or hereafter acquired by it, and wherever the same may be located, and including in such license access to all media in which any of the licensed items may be recorded or stored and to all computer software and programs used for the compilation or printout thereof, and represents, promises and agrees that any such license or sublicense is not and will not be in conflict with the contractual or commercial rights of any third Person or applicable Laws; *provided* that such license will terminate on the date on which all Obligations (other than Unasserted Obligations) are paid in full; *provided further* that, upon the request of Lender, Borrower and Parent will use reasonable commercial efforts to obtain from any third party a security interest in any license of Intellectual Property granted by such third party to it. In addition, on such periodic basis as Lender shall require, Borrower and Parent shall: provide Lender with a report of all new patentable, copyrightable, or trademarkable materials acquired or generated by it during the prior period; and (ii) cause to be prepared, executed, and delivered to Lender supplemental schedules to the applicable Collateral Documents to identify such Intellectual Property as being subject to the security interests created thereunder.

**Section 3.04. AUTHORIZATION TO FILE FINANCING STATEMENTS.**

Each of Borrower and Parent hereby authorizes Lender to file, without notice to any Loan Party, financing statements under the Uniform Commercial Code with all appropriate jurisdictions to perfect, maintain, preserve or protect Lender's interest or rights hereunder or any Collateral Document in the Collateral, including a notice that any disposition of all or any such collateral that is not otherwise permitted hereunder, whether by any Loan Party or any other Person, shall be deemed to violate the rights of Lender hereunder and under applicable Laws. Without limiting the generality of the foregoing, each of Borrower and Parent hereby: (a) authorizes Lender to file, without notice to any Loan Party, financing statements under the Uniform Commercial Code with all appropriate jurisdictions listing all assets or all personal property as the collateral covered by such financing statements; and (b) ratifies and approves the filing of any financing statements by or on behalf of Lender prior to the Effective Date against Borrower or Parent, as the case may be, and listing the Collateral or all assets or all personal property of such Loan Party as the collateral covered by such financing statements.

**ARTICLE IV.  
CONDITIONS PRECEDENT**

**Section 4.01. CONDITIONS PRECEDENT To EFFECTIVENESS.**

This Agreement shall become binding on the parties hereto upon, and the obligation of Lender to make any Loan hereunder is subject to, the satisfaction of the following conditions precedent (all Loan Documents and other documents to be delivered to Lender or any other Lender pursuant to this **Section 4.01** shall be subject to prior approval as to form and substance (including as to results) by Lender, with delivery by Lender of its signature page to this Agreement evidencing acknowledgment that the conditions set forth in this **Section 4.01** have been satisfied, unless otherwise waived in writing):

(a) **Receipt of Certain Documents and Assurances.** Lender shall have had delivered to it all of the following, each of which shall be, unless otherwise specified herein or otherwise required by Lender, originals (or telefacsimiles or portable document format versions thereof, each, to the extent to be executed by a Loan Party, properly executed by a Responsible Officer of such Loan Party, each dated the Effective Date (or, in the case of certificates of governmental officials, a recent date before the Effective Date), all in sufficient number as Lender shall separately identify:

(i) counterparts of: (A) this Agreement, duly executed by each of the parties hereto; (B) the Mortgage and the Assignment of Leases and Rents, each duly executed by Borrower; (D) the Environmental Indemnity duly executed by each of the parties hereto, and (E) the Note executed by Borrower;

(ii) if requested by Lender, an Equity Pledge Agreement, duly executed by the Equity Holder Pledgors;

(iii) counterparts of each of the other Loan Documents (including all applicable other Collateral Documents), duly executed by each of the parties thereto, as requested by Lender:

(A) any certificated securities representing shares of Equity Interests owned by or on behalf of any Loan Party constituting Collateral as of the Effective Date, together with undated stock powers (or their equivalent) with respect thereto executed in blank;

(B) any promissory notes and other instruments evidencing all loan, advances and other debt owed or owing to any Loan Party constituting Collateral as of the Effective Date, together with undated instruments of transfer with respect thereto executed in blank;

(C) all other documents, including Uniform Commercial Code financing statements, required by applicable Laws or reasonably requested by Lender to be filed, registered or recorded to create or perfect the Liens intended to be created under the Collateral Documents existing on the Effective Date; and

(D) the results of a search of the Uniform Commercial Code (or equivalent) filings made and tax and judgment lien searches with respect to each of the Loan Parties (other than Cosman) in the jurisdictions required by Lender and copies of the financing statements (or similar documents) disclosed by such searches and evidence reasonably satisfactory to Lender that the Liens indicated by such financing statements (or similar documents) are permitted by **Section 7.01** or have been otherwise appropriately released or terminated;

(iv) such certificates of resolutions or other action, incumbency certificates or other certificates of Responsible Officers of each Loan Party that is not a natural person as Lender may reasonably require evidencing the identity, authority and capacity of each Responsible Officer thereof authorized to act as a Responsible Officer in connection with the Loan Documents to which such Loan Party is a party;

(v) such documents and certifications as Lender may reasonably require to evidence that each Loan Party is duly organized or formed, and that each Loan Party is validly existing, in good standing and qualified to engage in business in: (A) the State of its jurisdiction of organization or formation; and (B) each jurisdiction where its ownership, lease or operation of properties or the conduct of its business requires such qualification, except to the extent that failure to do so could not reasonably be expected to have a Material Adverse Effect;

(vi) a certificate of a Responsible Officer of Borrower either: (A) attaching copies of all consents, licenses and approvals required in connection with the execution, delivery and performance by each Loan Party and the validity against such Loan Party of the Loan Documents to which it is a party, and such consents, licenses and approvals shall be in full force and effect; or (B) stating that no such consents, licenses or approvals are so required;

(vii) the Warrant duly executed and delivered by Parent;

(viii) reserved;

(ix) evidence that all other insurance required to be maintained pursuant to the Loan Documents has been obtained and is in effect;

(x) evidence that: (A) all commitments under any secured facilities not otherwise permitted under **Section 7.03** have been terminated not later than the Effective Date, and all outstanding amounts thereunder paid in full; and (B) all Liens securing obligations under any secured facilities not otherwise permitted under **Section 7.03** have been released and terminated not later than the Effective Date;

(xi) all documentation and other information required by regulatory authorities under Anti-Terrorism Laws, Money Laundering Laws and "know your customer" Laws shall have been supplied to Lender, including a duly executed W-9 tax form (or other applicable tax form) for each Loan Party;

(xii) a loan policy of title insurance (together with an insured closing protection letter) insuring the Mortgage, for the full amount of the Obligations as a first Lien on the title of the Facility;

(xiii) an ALTA Survey of the Facility, certified to Lender;

(xiv) a Phase I environmental assessment report of the Facility in form and substance satisfactory to Lender and prepared by an environmental firm acceptable to Lender;

(xv) evidence of its property and/or builder's risk insurance on Form ACORD 28, which shall name Lender and its successors and assigns, as their respective interests may appear, as mortgagee, lender loss payee on a primary, non-contributory basis;

(xvi) agreements or other documentation, in form and substance acceptable to Lender, confirming the consent of the IDA to the Loan and the related transactions (including the granting of the Liens in favor of Lender pursuant hereto and under the Mortgage and the other Collateral Documents) and the subordination, to the extent set forth therein, of the rights and interests of the IDA under the IDA Project documents to the Liens in favor of Lender granted pursuant hereto and under the Collateral Documents;

(xvii) evidence and certifications from each applicable Governmental Authority that the Facility is in compliance with all applicable zoning, land development, building, safety, fire and other laws, ordinances, codes and regulations, and that no notices of any uncorrected violations are outstanding;

(xviii) evidence in form satisfactory to Lender that at least \$1,500,000 has been contributed to the equity of Borrower;

(xix) evidence, in form and substance satisfactory to Lender, that the Acquisition Agreement and the other Acquisition Documents have been duly executed and delivered by and to the appropriate parties thereto and the transactions contemplated under the terms of the Acquisition Agreement have been consummated prior to or contemporaneously with the execution of this Agreement;

(xx) a certificate, in form and substance satisfactory to Lender from a Responsible Officer of Borrower dated as of the Effective Date stating that, to the best of his or her knowledge after due inquiry that, immediately after giving effect to the Acquisition, the transactions contemplated hereunder and under the Acquisition Agreement, Borrower is Solvent; and

(xxi) such other assurances, certificates, documents, consents, reports or opinions as Lender or any other Lender may reasonably require.

(b) **Reserved.**

(c) **Truth and Correctness of Representations and Warranties ; No Default.** The representations and warranties of Borrower and each other Loan Party contained in **Article V** or any other Loan Document, or that are contained in any document furnished at any time under or in connection herewith or therewith, shall be true and correct on and as of the Effective Date, except to the extent that such representations and warranties specifically refer to an earlier date, in which case they shall be true and correct as of such earlier date. No Default shall then exist or shall result, or could reasonably be expected to result, from the use of proceeds of the Loan on the Effective Date.

(d) **Payment of Fees.** Borrower shall have paid all fees required to be paid to Lender on or before the Effective Date, except as otherwise expressly provided herein.

(e) **Other Matters.** Lender shall have received, in form and substance satisfactory to it, such other assurances, documents or consents related to the foregoing as Lender may reasonably require.

**Section 4.02. RESERVED.**

**ARTICLE V.**  
**REPRESENTATIONS AND WARRANTIES**

Each Loan Party represents and warrants to Lender that, except as disclosed on the Disclosure Schedule:

**Section 5.01. CORPORATE EXISTENCE AND POWER.**

Each of the Loan Parties (other than, with respect to **Section 5.01(a)** and **Section 5.01(c)**, any Loan Party who is a natural person): (a) is a corporation, partnership or limited liability company duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation, organization or formation (subject to such changes after the date hereof as are permitted under the Loan Documents); (b) has the power and authority and all governmental licenses, authorizations, consents and approvals: (i) to own its assets and carry on its business, except to the extent that any failure to have any of the foregoing could not reasonably be expected to have a Material Adverse Effect; and (ii) to execute, deliver, and perform its obligations under the Loan Documents to which each is a party; and (c) is duly qualified as a foreign corporation, partnership or limited liability company, as applicable, and is licensed and in good standing under the Laws of each jurisdiction where its ownership, leasing or operation of property or the conduct of its business requires such qualification or license, except to the extent that the failure to do so could not reasonably be expected to have a Material Adverse Effect. Attis Biodiesel Fulton, LLC, a Georgia limited liability company, is a wholly-owned subsidiary of Parent which has not engaged in any active business operations and does not own any material assets.

**Section 5.02. CORPORATE AUTHORIZATION; NO CONTRAVENTION.**

The execution and delivery by each of the Loan Parties (to the extent any such Subsidiary is party hereto or to any other Loan Document) of, and the performance by each of the Loan Parties of its obligations under, each Loan Document to which such Person is party have been (other than in the case of a Loan Party who is a natural person) duly authorized by all necessary corporate or other organizational action, and do not and will not: (a) other than in the case of a Loan Party who is a natural person, contravene the terms of any of such Person's Organizational Documents; (b) conflict with or result in any breach or contravention of, or the creation of any Lien under, or require any payment to be made under: (i) any Contractual Obligation to which such Person is a party or affecting such Person or the properties of such Person or any Subsidiary thereof or (ii) any order, injunction, writ or decree of any Governmental Authority or any arbitral award to which such Person or its property is subject; or (c) violate any Law. Each of the Loan Parties are in compliance with all Contractual Obligations referred to in clause (b)(i), except to the extent that any failure to be in compliance could not reasonably be expected to have a Material Adverse Effect. No Loan Party or any Subsidiary thereof is a party to or is bound by any Contractual Obligation, or is subject to any restriction in any Organizational Document, or any requirement of Law, which could reasonably be expected to have a Material Adverse Effect. Borrower has not engaged in any business activity or operations other than in connection with its organization, routine corporate formalities and the Acquisition.

**Section 5.03. GOVERNMENTAL AUTHORIZATION; COMPLIANCE WITH LAWS.**

(a) **Governmental Authorizations.** No approval, consent, exemption, authorization, or other action by, or notice to, or filing with, any Governmental Authority is necessary or required in connection with the execution and delivery by any Loan Party of, or the performance by any Loan Party of its obligations under, any Loan Document to which it is a party other than (i) such as have been obtained or made and are in full force and effect or (ii) filings necessary to perfect Liens created by the Loan Documents. Each Loan Party has all approvals, permits and authorizations issued by any Governmental Authority having jurisdiction and required for the operation of its business and the use of the Facility and is compliance therewith.

(b) **Compliance with Laws.** Loan Parties and each Subsidiary thereof are in compliance in all respects with the requirements of all Laws and all Orders applicable to it or to its properties, except in such instances in which: (i) such requirement of Law or Order is being contested in good faith by appropriate proceedings diligently conducted; or (ii) the failure to comply therewith, either individually or in the aggregate, could not reasonably be expected to have a Material Adverse Effect. Notwithstanding the foregoing:

(A) no Loan Party that is organized in the United States: (1) is, or is controlled by or is acting on behalf of, a Restricted Party; (2) has received funds or other property from a Restricted Party; or (3) is in breach of or, to Loan Parties' knowledge, is the subject of any action or investigation under any Anti-Terrorism Law;

(B) Loan Parties and each Subsidiary thereof, and to Loan Parties' knowledge, each other Loan Party, has taken reasonable measures to ensure compliance with the Anti-Terrorism Laws;

(C) the operations of Loan Parties and their Subsidiaries are and have been conducted at all times in compliance with applicable Anti-Terrorism Laws and Money Laundering Laws and without violation of the Sanctions, and Loan Parties and their Subsidiaries have instituted and maintain policies and procedures designed to ensure, and which are reasonably expected to continue to ensure, continued compliance therewith; and

(D) neither Loan Parties nor any of their Subsidiaries (or, to the knowledge of Loan Parties, any director, officer, employee, agent, affiliate or representative of Loan Parties or any of their Subsidiaries) is a Person currently the subject of any Sanctions, and neither Loan Parties nor any of their Subsidiaries is located, organized or resident in a country or territory that is the subject of any Sanctions. Each Loan Party represents that it will not directly or indirectly use the proceeds of any Credit Extension to fund any activities of or business with any Restricted Party or in any other manner that would result in a violation by any Person (including any Person participating in the transaction, whether as underwriter, advisor, investor or otherwise) of any Sanctions.

(c) **Certain Actions.** No Loan Party is engaged in or has engaged in any course of conduct that could subject any of their respective properties to any Lien, seizure or other forfeiture under any racketeer influenced and corrupt organizations law, whether civil or criminal, or other similar Laws.

#### **Section 5.04. BINDING EFFECT.**

This Agreement has been, and each other Loan Document (when delivered hereunder) will have been, duly executed and delivered by each Loan Party that is party thereto. This Agreement and each other Loan Document to which any Loan Party is a party constitute the legal, valid and binding obligations of such Loan Party, enforceable against such Loan Party in accordance with their respective terms, except as enforceability may be limited by applicable Bankruptcy Laws or other Laws of general application effecting enforcements of creditors' rights or general principles of equity.

#### **Section 5.05. LITIGATION.**

There are no Proceedings, claims or disputes pending, or to the knowledge of Loan Parties, threatened, against any Loan Party or any Subsidiary of Parent that: (a) purport to affect or pertain to any Loan Document or any of the transactions contemplated thereby; or (b) could reasonably be expected to have a Material Adverse Effect. No Order of any nature has been issued by any court or other Governmental Authority purporting to enjoin or restrain the execution, delivery or performance of this any Loan Document, or directing that the transactions provided for therein not be consummated as therein provided.

#### **Section 5.06. No DEFAULTS.**

No Default exists or could reasonably be expected to result from the incurring of any Obligations by any Loan Party or from the grant and perfection of the Liens upon the Collateral in favor of Lender. As of the Effective Date, no Loan Party is in default under or with respect to any Contractual Obligation in any respect that, individually or together with all such defaults, could reasonably be expected to have a Material Adverse Effect, or that would, if such default had occurred after the Effective Date, create an Event of Default under **Section 8.01(e)**.

#### **Section 5.07. EMPLOYEE BENEFIT PLANS.**

(a) **Compliance with ERISA Generally.** Each Plan is in compliance with the applicable provisions of ERISA, the Code and other applicable Laws. Each Plan which is intended to qualify under subsection 401(a) of the Code either (i) has obtained from the IRS a favorable determination letter from the IRS as to its qualified status under the Code, or the expiration of the requisite period under applicable regulations promulgated by the IRS under the Code or IRS pronouncements in which to apply for such determination letter and to make any amendments necessary to obtain a favorable determination has not occurred, or (ii) has been established under a prototype plan for which an IRS opinion letter has been obtained by the plan sponsor and is valid as to the adopting employer, and nothing has occurred that would cause the loss of such qualification.

(b) **No Actions.** There are no pending or, to the knowledge of Loan Parties, Proceedings, claims, or actions by any Governmental Authority, with respect to any Plan. There has been no prohibited transaction or violation of the fiduciary responsibility rules with respect to any Plan.

(c) **Certain Events.** (i) No ERISA Event has occurred or is reasonably expected to occur; (ii) no Pension Plan has any Unfunded Pension Liability; and (iii) no event or circumstance has occurred or exists that, if such event or circumstance had occurred or arisen after the Effective Date, would create an Event of Default under **Section 8.01(i)**.

#### **Section 5.08. USE OF PROCEEDS.**

Borrower is using the proceeds of the Loan solely to pay a portion of the purchase price payable by Borrower under the Acquisition Agreement, to pay related transaction fees and expenses, and for working capital and general corporate purposes permitted hereunder.

#### **Section 5.09. TITLE TO PROPERTIES.**

Loan Parties and each Subsidiary of Parent have good record and marketable title in fee simple to, or valid leasehold interests in, or valid rights to use (including easements) all real property, including the Facility, necessary to the ordinary conduct of their respective businesses, except for such defects in title as could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

#### **Section 5.10. TAXES.**

Each Loan Party and each Subsidiary of Parent have filed all Tax Returns required to be filed, and have paid all Taxes when due, regardless of whether shown on any Tax Return. There is no proposed tax assessment against any Loan Party or Subsidiary of Parent. Each Loan Party and each Subsidiary of Parent have made adequate provision in accordance with GAAP for all Taxes not yet due and payable. No Loan Party nor any Subsidiary of Parent is currently a party of any tax audit, proceeding or controversy or knows of any proposed Tax assessment against it that is not being actively contested by such Loan Party or such Subsidiary diligently, in good faith, and by appropriate proceedings and with respect to which it has made adequate reserves in conformity with GAAP.

#### **Section 5.11. RESERVED.**

#### **Section 5.12. ENVIRONMENTAL MATTERS.**

Loan Parties conduct in the ordinary course of business a review of the effect of existing Environmental Laws and existing Environmental Claims on its business, operations and properties (and the business, operations and properties of each of its Subsidiaries), and as a result thereof Loan Parties have reasonably concluded that such compliance with Environmental Laws and resolution of Environmental Claims, individually or in the aggregate, do not, and could not reasonably be expected to, result in liabilities in excess of the Threshold Amount.

**Section 5.13. MARGIN REGULATIONS; REGULATED ENTITIES.**

Neither Loan Parties nor any Subsidiary thereof is engaged or will engage, principally or as one of its important activities, in the business of purchasing or carrying margin stock (within the meaning of Regulation U issued by the FRB), or extending credit for the purpose of purchasing or carrying margin stock. None of the Loan Parties, any Subsidiary thereof or any Person controlling Loan Parties is an "investment company" within the meaning of the Investment Company Act of 1940. Loan Parties are not subject to regulation under the Federal Power Act, any state public utilities code or any other federal or state statute or regulation limiting its ability to incur Debt.

**Section 5.14. SWAP OBLIGATIONS.**

No Loan Party nor any Subsidiary of Parent has incurred any outstanding obligations under any Swap Contracts, other than obligations under Swap Contracts expressly permitted hereby. Each Loan Party and each Subsidiary of Parent have voluntarily entered into each Swap Contract to which it is a party based upon its own independent assessment of its consolidated assets, liabilities and commitments, in each case as an appropriate means of mitigating and managing risks associated with such matters, and has not relied on any swap counterparty or any Affiliate of any swap counterparty in determining whether to enter into any Swap Contract.

**Section 5.15. INTELLECTUAL PROPERTY.**

Borrower, each Subsidiary thereof and each other Loan Party owns or is licensed or otherwise has the right to use all of the Intellectual Property and other rights that are reasonably necessary for the operation of their respective businesses, except for those the failure of which to own or license could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. To the best knowledge of the Loan Parties, the use of such Intellectual Property by Borrower and its Subsidiaries and the operation of their respective businesses do not infringe any valid and enforceable intellectual property rights of any other Person, except to the extent any such infringement could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. No slogan or other advertising device, product, process, method, substance, part or other material now employed, or now contemplated to be employed, by Borrower or any Subsidiary thereof infringes upon any rights held by any other Person, except to the extent any such infringement could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. No claim or litigation regarding any of the foregoing is pending or, to the knowledge of Loan Parties, threatened, and no patent, invention, device, application, principle or any statute, law, rule, regulation, standard or code is pending or, to the knowledge of Loan Parties, proposed, which could, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

**Section 5.16. EQUITY INTERESTS AND INVESTMENT HELD BY LOAN PARTIES ; EQUITY INTERESTS IN LOAN PARTIES .**

As of the Effective Date: (a) Parent has no Subsidiary other than those listed on the Disclosure Schedule; and (b) Parent holds no Equity Interest in any other Person or Investments in any other Person, other than those specifically disclosed on the Disclosure Schedule; and (c) the holders of all Equity Interests in Borrower and Parent are those listed on the Disclosure Schedule. All of the outstanding Equity Interests in Borrower and Parent thereof have been validly issued and are fully paid and nonassessable.

**Section 5.17. INSURANCE.**

The properties of each Loan Party (other than any Loan Party who is a natural person) are insured with financially sound and reputable insurance companies that are not Affiliates of any of the Loan Parties, in such amounts, with such deductibles and covering such risks as are customarily carried by companies engaged in similar businesses and owning similar properties in localities where such Loan Party or its Subsidiary operates.

#### **Section 5.18. COLLATERAL AND COLLATERAL DOCUMENTS.**

(a) **Enforceable and Perfected Security Interest.** The provisions of this Agreement and each of the other Collateral Documents, when delivered, are effective to create in favor of Lender a valid and enforceable Lien in all right, title, and interest of Borrower or Parent, as the case may be, in the collateral described therein. Each such Lien in favor of Lender, to the extent the same may be perfected by the filing of a Uniform Commercial Code financing statement or by control (within the meaning of the Uniform Commercial Code), has, except as otherwise expressly provided in any Collateral Document, been perfected. Except as otherwise expressly provided herein or in any other Collateral Document, each Lien in the Collateral described in any Collateral Document, constitutes a perfected, first-priority Lien in the subject Collateral (subject to Permitted Liens having priority by operation of law and except to the extent otherwise expressly provided in any Loan Document or expressly agreed to in writing by Lender), subject to no Liens other than Permitted Liens.

(b) **Truth and Correctness of Representations and Warranties.** All representations and warranties of each Loan Party in each Collateral Document are true and correct, *provided that*, if such representations and warranties expressly relate solely to a specified date, then such representations and warranties were true and correct as of such specified date.

#### **Section 5.19. LABOR RELATIONS.**

There are no strikes, lockouts or other material labor disputes against Loan Parties or any Subsidiary thereof, or to the knowledge of Loan Parties, threatened against or affecting Loan Parties or any Subsidiary thereof, and no significant unfair labor practice complaint is pending against Loan Parties or any Subsidiary thereof or, to the knowledge of Loan Parties, threatened against any of them before any Governmental Authority, in each case that could reasonably be expected to have a Material Adverse Effect. Except as set forth on the Disclosure Schedule: (a) Loan Parties are not a party to any collective bargaining agreements or contracts; and (b) no union representation exists and, to the knowledge of Loan Parties, no union organizing activities are taking place on any of the properties owned or operated by Loan Parties or any of their Subsidiaries.

#### **Section 5.20. SOLVENCY.**

After giving effect to the Acquisition, the transactions contemplated hereunder and under the Acquisition Agreement, Borrower is Solvent and Loan Parties on a consolidated basis are Solvent.

#### **Section 5.21. MATTERS RELATING TO THE FACILITY.**

(a) **Compliance; Zoning.** Loan Parties have complied with all Laws and all recorded instruments affecting the Facility. The use of the Facility complies with all Laws and Loan Parties have provided to Lender evidence of such compliance.

(b) **Utilities.** To the best of Loan Parties' knowledge, all utility services necessary for the full development, construction, equipping and operation of the Improvements are available at no cost or expenses and at the title lines of the Facility (or, if they pass through adjoining private land, in accordance with valid public or unencumbered private easements which inure to the benefit of Loan Parties and run with the Facility) including, without limitation, public sanitary sewer service, storm sewers, public water, electricity, gas and telephone service. To the best of Loan Parties' knowledge, all such utility services are non-interruptible. All permits and approvals have been obtained or are available so that the Improvements may be connected to the sanitary sewer service, which sanitary sewer service shall be available to the full extent required for the full operation of the Improvements and shall permit the discharge of sewage for the types and amounts anticipated to be produced from the Facility.



## **Section 5.22. FULL DISCLOSURE.**

To the knowledge of Loan Parties after due inquiry of each Responsible Officer of Loan Parties, none of the representations or warranties made by any Loan Party in the Loan Documents to which it is a party as of the date such representations and warranties are made or deemed made, and none of the statements contained in any exhibit, report, statement or certificate furnished by or on behalf of any Loan Party in connection with the Loan Documents (including the disclosure materials delivered by or on behalf of any Loan Party to Lender (or any of the foregoing Persons) prior to the Effective Date), contains any untrue statement of a material fact or omits any material fact required to be stated therein or necessary to make the statements made therein, in light of the circumstances under which they are made, not misleading as of the time when made or delivered; *provided* that, with respect to any projections and forecasts provided by Loan Parties (whether with respect of Borrower or any other Loan Party): (a) Loan Parties represent that such projections and forecasts were prepared in good faith based upon assumptions believed to be reasonable at the time of the preparation thereof; and (b) Lender acknowledge that such projections and forecasts are not to be viewed as facts and that actual results during the period or periods covered thereby may differ from the projected or forecasted results.

## **Section 5.23. INTERRELATED BUSINESSES.**

Borrower and Guarantors make up a related organization of various entities constituting an overall economic and business enterprise such that any benefit from the Loan or other financial accommodations hereunder received by any one of them benefits the others. Loan Parties render services to or for the benefit of other Loan Parties, purchase or sell and supply goods to or from or for the benefit of the others, make loans, advances and provide other financial accommodations to or for the benefit of the other Loan Parties and provide administrative, marketing, payroll and management services to or for the benefit of the other Loan Parties, as the case may be. Loan Parties have the same chief executive office, certain centralized accounting and legal services, certain common officers, directors and/or managers.

## **Section 5.24. CONSUMMATION OF THE ACQUISITION.**

(a) The Acquisition Agreement and the transactions contemplated thereunder have been duly executed, delivered and performed in accordance with their terms by the respective parties thereto in all respects, including the fulfillment (not merely the waiver, except as may be disclosed to Lender and consented to in writing by Lender in its good faith credit judgment, reasonably exercised) of all conditions precedent set forth therein and giving effect to the terms of the Acquisition Agreement and the assignments to be executed and delivered by Seller, Borrower has acquired and has good and marketable title to the Facility and the related business operations, free and clear of all claims, liens, pledges and encumbrances of any kind.

(b) All actions and proceedings required by the Acquisition Agreement, applicable law or regulation have been taken and the transactions required thereunder have been duly and validly taken and consummated.

(c) No court of competent jurisdiction has issued any injunction, restraining order or other order which prohibits consummation of the transactions described in the Acquisition Agreement and no governmental or other action or proceeding has been threatened or commenced, seeking any injunction, restraining order or other order which seeks to void or otherwise modify the transactions described in the Acquisition Agreement.

(d) Borrower has delivered, or caused to be delivered, to Lender true, correct and complete copies of the Acquisition Agreement and the other Acquisition Documents.

## **ARTICLE VI. AFFIRMATIVE COVENANTS**

So long as any Obligations (other than Unasserted Obligations) have not been repaid in full:

### **Section 6.01. FINANCIAL STATEMENTS.**

Borrower shall deliver or shall cause to be delivered to Lender:

(a) **Reserved.**

(b) **Fiscal Month Financial Statements.** As soon as available, but in any event within thirty (30) days after the end of each Fiscal Month (including the last Fiscal Month of each Fiscal Quarter and of each Fiscal Year), unaudited consolidated balance sheets for Attis and its Subsidiaries and for Parent and its Subsidiaries as at the end of such Fiscal Month, and the related consolidated statements of income or operations, shareholders' (or members') equity and cash flows for such Fiscal Month and the portion of the Fiscal Year then ended (setting forth, in each case in comparative form, (i) the figures for the corresponding portion of the previous Fiscal Year (if applicable) and (ii) the figures from the corresponding portion of Loan Parties' budget for the current Fiscal Year), all in reasonable detail, such consolidated statements to be certified by a Responsible Officer of Borrower as fairly presenting the financial condition, results of operations, shareholders' equity and cash flows in accordance with GAAP, subject only to normal year-end audit adjustments and the absence of footnotes; and

(c) **Collateral and Other Reporting.** Provide Lender with the following documents at the following times in form satisfactory to Lender:

- Monthly (or more frequently if so requested by Lender):
- (i) not later than thirty (30) days after each Fiscal Month: (A) accounts receivable listings and agings and Inventory reports for the preceding Fiscal Month; and (B) accounts payable listings and agings as at the preceding Fiscal month end; and
  - (ii) not later than thirty (30) after each Fiscal Month: a schedule including each new customer added in such month, each existing customer lost in such month and, as to each of such new customers and lost customers, the revenues associated with each such customer in such Fiscal Month (and in the case of a customer that has been lost, such revenues of that customer in the preceding Fiscal Month); and
  - (iii) not later than thirty (30) after each Fiscal Month: an updated sales pipeline for the preceding month; and
  - (iv) such additional reports as may reasonably be requested by Lender

## **Section 6.02. CERTIFICATES; OTHER INFORMATION.**

Loan Parties shall deliver or cause to be delivered to Lender:

(a) **Equity Interest Holder Reports and Certain Public Filings.** If and when applicable, promptly after the same are available, copies of each annual report, proxy or financial statement or other report or communication sent to the holders of Equity Interests of Attis, Parent or any Subsidiary of Parent and copies of all annual, regular, periodic and special reports and registration statements that Attis may file or be required to file with the Securities and Exchange Commission under Section 13 or Section 15(d) of the Exchange Act, and, in each case, not otherwise required to be delivered to Lender pursuant hereto;

(b) **Debt Holder Reports.** Promptly after the furnishing thereof, copies of any statement or report furnished to any holder of debt securities of any Loan Party pursuant to the terms of any indenture, loan or credit or similar agreement that are not otherwise required to be furnished to Lender pursuant to **Section 6.01** or any other clause of this **Section 6.02** (subject to appropriate confidentiality, as applicable);

(c) **Materials from or to Governmental Authorities.** Promptly, and in any event within five (5) Business Days after receipt thereof by any Loan Party, copies of each material notice or other correspondence received from, or delivered to, any Governmental Authority concerning any investigation or possible investigation or other inquiry by such agency regarding any material financial or other material operational results of any Loan Party or any Subsidiary thereof;

(d) **Changes in Officers and Directors**. Promptly, and in any event within five (5) Business Days of a Responsible Officer of Borrower becoming aware thereof, written notice of any change in the Persons constituting any of the officers, directors or managers of any Loan Party;

(e) **Tax Returns**. No later than five (5) Business Days after the date they are required to be filed (subject to any permitted extensions), copies of the executed and dated federal income tax returns of Loan Parties and each of their Subsidiaries and all related schedules, and copies of any extension requests; and

(f) **Additional Information**. Promptly upon (but no later than three (3) Business Days after) request therefor by Lender, such additional information regarding the business or the financial or corporate affairs of any Loan Party or any Subsidiary of Parent or the compliance by Loan Parties or any Subsidiary of Parent with the terms of the Loan Documents as Lender may from time to time reasonably request.

### **Section 6.03. NOTICES.**

Each Loan Party shall, upon any Responsible Officer of such Loan Party becoming aware thereof, promptly notify Lender in writing of:

(a) **Defaults**. The occurrence of any Default;

(b) **Matters Involving a Material Adverse Effect**. Any matter that has resulted or could reasonably be expected to result in a Material Adverse Effect, including any such matter arising from: (i) any breach or non-performance of, or any default under, a Contractual Obligation of any Loan Party or any Subsidiary thereof; (ii) any dispute, Proceeding or suspension between any Loan Party or any Subsidiary thereof and any Governmental Authority; (iii) the commencement of, or any material development in, any Proceeding affecting any Loan Party or any Subsidiary thereof, including pursuant to any applicable Environmental Laws; or (iv) the loss of all or any material portion of the Collateral;

(c) **ERISA Events**. The occurrence of any ERISA Event (together with a copy of any notice to or from the PBGC regarding such ERISA Event);

(d) **Swap Contracts**. Upon request from time to time of Lender, the swap termination values thereof, together with a description of the method by which such values were determined, relating to any then-outstanding Swap Contracts to which any Loan Party is a party;

(e) **Labor Controversies**. Any material labor controversy resulting in or threatening to result in any strike, work stoppage, boycott, shutdown or other material labor disruption against or involving any Loan Party or any Subsidiary thereof;

(f) **Financial Matters**. Any material change in accounting policies or financial reporting practices by any Loan Party;

(g) **Certain Dispositions**. Any material Disposition other than in the ordinary course of business of Collateral, or the incurrence of any Contractual Obligations with respect to any Disposition of collateral the subject of any Collateral Document, contemplated by: (i) **Section 7.05(e)** or **Section 7.05(f)**; or (ii) **Section 7.05(a)** or **Section 7.05(h)** if the aggregate cash and non-cash consideration (including assumption of Debt) in connection with such Disposition is (or could reasonably be expected to become) \$500,000,00 or more, which notice shall identify the related purchaser(s), the anticipated closing date of such Disposition and the aggregate cash and non-cash consideration (including assumption of Debt) to be paid in connection with such Disposition; and

(h) **Material Contracts**. Any termination (other than termination upon expiry of the stated term of the agreement) or loss of a Material Contract, any default or event of default (however defined) under a Material Contract that gives the non-defaulting party the right to terminate such Material Contract, or any modification, amendment, or supplement to a Material Contract that reduces the aggregate expected revenue from such Material Contract in any Fiscal Year by an amount equal to or greater than \$500,000.

Each notice pursuant to this **Section 6.03** shall be accompanied by a statement of a Responsible Officer of Borrower setting forth details of the occurrence referred to therein and stating what action, if any, Loan Parties (or the other applicable Person) has taken or proposes to take with respect thereto. Each notice given pursuant to **Section 6.03(a)** shall describe with particularity any and all provisions of this Agreement and any other Loan Document that have been (or could reasonably be expected to be) breached or violated.

#### **Section 6.04. PAYMENT OF CERTAIN OBLIGATIONS.**

Each Loan Party (other than Cosman) will pay in full before delinquency or before the expiration of any extension period all Taxes imposed, levied, or assessed against it, or any of its assets or in respect of any of its income, businesses, or franchises, except to the extent that the validity of such governmental assessment or Tax is the subject of a Permitted Protest. Each Loan Party (other than Cosman) will: (a) timely and correctly file all Tax Returns required to be filed by it; and (b) withhold, collect and remit all Taxes that it is required to collect, withhold or remit.

#### **Section 6.05. PRESERVATION OF EXISTENCE, ETC.**

Loan Parties (other than Cosman) shall to: (a) preserve, renew and maintain in full force and effect their respective legal existence and good standing under the Laws of the jurisdiction of their organization except in a transaction expressly permitted by **Section 7.04** or **Section 7.05**; (b) take all reasonable actions to maintain all rights, privileges, Permits, licenses and franchises necessary or desirable in the normal conduct of their respective businesses, except to the extent that the failure to do so could not reasonably be expected to have a Material Adverse Effect; (c) use the standard of care typical in the industry in the operation and maintenance of its facilities; and (d) preserve or renew all of their respective registered Intellectual Property, the non-preservation of which would have or could reasonably be expected to have a Material Adverse Effect.

#### **Section 6.06. MAINTENANCE OF PROPERTIES.**

Parent shall and shall cause each of its Subsidiaries to: (a) maintain, preserve and protect all of their respective material properties and material equipment necessary to the operation of their respective businesses in good working order and condition, ordinary wear and tear and permitted Dispositions hereunder excepted; (b) make all commercially reasonable repairs thereto and renewals and replacements thereof; in each of the foregoing clauses (a) and (b), except where the failure to do so does not have and could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect; and (c) operate the facilities owned, leased or operated by such Person now or in the future in a manner consistent with Environmental Laws, zoning codes, contractual requirements and applicable prevailing industry standards in the locations where the properties exist from time to time, except to the extent failure to do so does not and could not reasonably be expected to have a Material Adverse Effect. Each Loan Party shall maintain all records required to be maintained by all applicable Environmental Laws.

#### **Section 6.07. MAINTENANCE OF INSURANCE.**

Parent shall and shall cause its Subsidiaries to maintain, with financially sound and reputable insurance companies not Affiliates of any Loan Party, insurance with respect to their respective properties and businesses against loss or damage of the kinds customarily insured against by Persons engaged in the same or similar business, of such types and in such amounts as are customarily carried under similar circumstances by such other Persons. All property policies shall have Lender's loss payable endorsement showing Lender as primary loss payee and waive subrogation against Lender, and all liability policies shall show Lender, or have endorsements showing Lender, as an additional insured. All policies (or the loss payable and additional insured endorsements) shall provide that the insurer shall endeavor to give Lender at least thirty (30) days' notice before canceling, amending, or declining to renew its policy and ten (10) days' notice of any non-payment of premiums. At Lender's request, Parent shall deliver certified copies of all of the insurance policies of Parent and its Subsidiaries and evidence of all premium payments. Subject to the provisions hereof, proceeds payable under any policy shall, during the existence of an Event of Default, be payable to Lender on account of the Obligations. If any Loan Party fails to obtain insurance as required under this **Section 6.07** or to pay any amount or furnish any required proof of payment to third persons and Lender, Lender may make all or part of such payments or obtain such insurance policies required in this **Section 6.07** and take any action under the policies that Lender deem necessary or prudent.

#### **Section 6.08. COMPLIANCE WITH LAWS.**

Loan Parties shall and shall cause each of their respective Subsidiaries to comply in all material respects with the requirements of all Laws and all Orders applicable to them or to their respective properties or businesses, except in such instances in which: (a) such requirement of Law or Order is being contested in good faith by appropriate Proceedings timely instituted and diligently conducted; or (b) the failure to comply therewith could not reasonably be expected to have a Material Adverse Effect.

#### **Section 6.09. BOOKS AND RECORDS.**

Loan Parties shall: (a) maintain proper Books and Records, in which full, true and correct (in all material respects) entries in conformity with GAAP consistently applied are made of all financial transactions and matters involving their respective properties and businesses; and (b) maintain such Books and Records in material conformity with all applicable requirements of any Governmental Authority having regulatory jurisdiction over them, as the case may be.

#### **Section 6.10. INSPECTION RIGHTS; LENDER MEETINGS.**

Loan Parties shall permit representatives and independent contractors of Lender to visit and inspect any of their respective properties, including, without limitation, the Facility to examine their corporate, financial and operating records, and make copies thereof or abstracts therefrom, to examine and audit the Collateral and to discuss their respective affairs, finances and accounts with their respective directors, officers, members, managers and independent public accountants, at such reasonable times during normal business hours and as often as may be reasonably desired, upon reasonable advance notice (which the parties contemplate to be at least two (2) days advance notice, other than under exigent circumstances as determined in Lender's reasonable judgment, where less than two (2) days advance notice may be given) to such Person; *provided* that, unless an Event of Default exists, the cost of only two examinations and audits of the Collateral per calendar year shall be borne by Borrower at the then applicable rate charged by Lender (which rate is subject to change from time to time and is currently One Thousand Dollars (\$1,000) per eight hour day (including travel time) per analyst), plus actual and reasonable out of pocket expenses; *provided further* that, when an Event of Default exists, Lender (or any of its representatives or independent contractors) may do any of the foregoing at the expense of Borrower at any time and without advance notice and as many times as Lender may require. Loan Parties shall cause senior management to hold meetings with Lender in person (if requested by Lender), on a monthly basis, to discuss the Loan Parties' financial performance and projections. Loan Parties shall reimburse Lender if (but only if) a Default then exists for all reasonable out-of-pocket expenses incurred in connection with Lender's attendance at such meetings.

#### **Section 6.11. USE OF PROCEEDS.**

Borrower shall use the proceeds of the Loan solely to pay a portion of the purchase price payable by Borrower under the Acquisition Agreement, to pay related transaction fees and expenses, and for working capital and general corporate purposes permitted hereunder.

#### **Section 6.12. COLLATERAL ACCOUNTS AND EXCLUDED ACCOUNTS.**

The **Disclosure Schedule** sets forth details with respect to all Collateral Accounts and Excluded Accounts of Parent and its Subsidiaries in existence on the Effective Date. Parent shall and shall cause each of its Subsidiaries to provide Lender five (5) days (or such shorter period as Lender, in its sole discretion, may otherwise agree) prior written notice before: (a) establishing any Collateral Account or Excluded Account at or with any bank or other financial institution; or (b) terminating or otherwise materially modifying any Collateral Account or Excluded Account. In addition, for each Collateral Account that Parent or any of its Subsidiaries at any time maintains, Loan Parties shall (except to the extent specifically not required by Lender in writing) cause the applicable bank or financial institution at or with which such Collateral Account is maintained to execute and deliver a Control Agreement or other appropriate instrument with respect to such Collateral Account to perfect Lender's Lien in such Collateral Account in accordance with the terms hereof and the Collateral Documents.

**Section 6.13. RESERVED.**

**Section 6.14. PROTECTION OF INTELLECTUAL PROPERTY RIGHTS .**

Parent shall and shall cause each of its Subsidiaries to: (a) protect, defend and maintain the validity and enforceability of their respective Intellectual Property, except to the extent that the failure to do so does not and could not reasonably be expected to result in a Material Adverse Effect; (b) promptly advise Lender in writing of material infringements of their respective Intellectual Property; and (c) not allow any Intellectual Property that is material to the business of Parent or any of its Subsidiaries to be abandoned, forfeited or dedicated to the public without Lender's written consent.

**Section 6.15. LITIGATION COOPERATION.**

Loan Parties shall make available to Lender, without expense to Lender, each Loan Party and its officers, employees and agents and such Loan Party's Books and Records, to the extent that Lender may deem them reasonably necessary to prosecute or defend any third-party Proceeding instituted by or against Lender with respect to any collateral the subject of any Collateral Document or relating to such Loan Party.

**Section 6.16. ERISA COMPLIANCE.**

Loan Parties shall comply and shall cause each of their respective Subsidiaries to comply with the provisions of ERISA with respect to any Plans to which Loan Parties or any such Subsidiary is a party as employer.

**Section 6.17. ADDITIONAL ITEMS IN CONNECTION WITH THE FACILITIES .**

(a) **Payment of Claims.** Loan Parties shall pay and discharge all claims for labor done and materials and services furnished, and shall take all other steps to forestall the assertion of claims against or liens upon the Facility.

(b) **Compliance with Laws and Agreements.** Loan Parties shall comply with all Laws and with all contracts, leases, agreements and restrictions pertaining to the Facility.

**Section 6.18. POST CLOSING DELIVERIES.**

Borrower shall deliver:

(a) as requested by Lender, as soon as practicable and in any case within 30 days after request therefor, landlord waivers, in form and substance satisfactory to Lender, executed by each landlord of any office or other real property leased by Borrower or Parent, which evidences compliance with the terms of the lease by landlord and Borrower or Parent, as the case may be, including any outstanding amounts owed and commitments unsatisfied;

(b) as requested by Lender, as soon as practicable and in any case within 30 days after request therefor, a Collateral Access Agreement relating to Collateral in the possession, custody or control of any Person other than a Loan Party;

(c) as requested by Lender, as soon as practicable and in any case within 15 days after request therefor, a Control Agreement relating to the Operating Account and each other requested Collateral Account;

(d) as requested by Lender, as soon as practicable and in any case within 10 days after request therefor, an Equity Pledge Agreement; covering any Equity Interests included in the Collateral;

(e) prior to or on July 1, 2019, evidence of the issuance of the Key-Man Policy;

(f) such additional agreements and other documents as requested by Lender, as soon as practicable and in any case within 15 days after request therefor, evidencing and confirming the consent of the IDA to the Loan and the related transactions (including the granting of the Liens in favor of Lender pursuant hereto and under the Mortgage and the other Collateral Documents), and the subordination, to the extent set forth therein, of the rights and interests of the IDA under the IDA Project documents to the Liens in favor of Lender granted pursuant hereto and under the Collateral Documents.

#### **Section 6.19. FURTHER ASSURANCES.**

Promptly upon the written request by Lender, Loan Parties shall take such further acts (including the acknowledgment, execution, delivery, recordation, filing and registering of documents) as may reasonably be required from time to time to: (a) carry out more effectively the purposes of this Agreement or any other Loan Document; (b) subject to the Liens created by any of the Collateral Documents any of the properties, rights or interests covered by any of the Collateral Documents or any other properties, rights or interests (including real property) acquired by Loan Parties or any Subsidiary thereof following the Effective Date; (c) perfect and maintain the validity, effectiveness and priority of the Liens created or intended to be created by any of the Loan Documents; and (d) better assure, convey, grant, assign, transfer, preserve, protect and confirm to Lender the rights, remedies and privileges existing or granted or now or hereafter intended to be granted to such Persons under any Loan Document or other document executed in connection therewith. Without limiting the generality of the foregoing, Loan Parties hereby agree that, concurrently upon any Person becoming a Subsidiary of Parent (notwithstanding any provision of this Agreement prohibiting the creation or acquisition of any such Subsidiary) following the Effective Date, Loan Parties shall cause such Person to: (i) enter into a joinder agreement or otherwise deliver a Guaranty; and (ii) enter into such Collateral Documents as shall be required by Lender so as to create, perfect and protect a Lien in favor of Lender in all of the properties of such Person.

### **ARTICLE VII. NEGATIVE COVENANTS**

So long as any Obligations (other than Unasserted Obligations) have not been repaid in full, Parent shall not and shall not permit any Subsidiary of Parent directly or indirectly to do any of the following:

#### **Section 7.01. LIENS.**

Create, incur, assume or suffer to exist any Lien upon any of its property, assets or revenues, whether now owned or hereafter acquired, other than any of the following (collectively, "**Permitted Liens**"):

(a) any Lien created in favor of Lender under any Loan Document;

(b) any Lien existing on the date hereof and listed on the Disclosure Schedule and any renewals or extensions thereof, *provided* that: (i) the property encumbered thereby is not changed; (ii) the amount secured or benefited thereby is not increased; (iii) the direct or any contingent obligor with respect thereto is not changed; (iv) the priority of any Liens referenced in **Section 7.01(a)** are not adversely affected thereby; and (v) any renewal or extension of the obligations secured or benefited thereby is permitted by **Section 7.03(b)**;

(c) any Lien for tax liabilities, assessments and governmental charges or levies not yet due or to the extent that non-payment thereof is permitted by **Section 6.04**; *provided* that no notice of lien has been filed or recorded under the Code;

(d) any landlord's, supplier's, producer's, carrier's, warehouseman's, mechanic's, materialman's, repairman's or other like Lien arising in the ordinary course of business that is not overdue for a period of more than thirty (30) days or that is being contested in good faith and by appropriate Proceedings timely instituted and diligently conducted, if adequate reserves with respect thereto, if any are required under GAAP, are set aside on the financial statements of the applicable Person;

(e) any pledge or deposit in the ordinary course of business in connection with workers' compensation, unemployment insurance and other social security legislation, other than any Lien imposed by ERISA;

(f) any deposit to secure the performance of bids, trade contracts or leases (other than Debt), statutory obligations, surety bonds (other than bonds related to judgments or litigation), performance bonds and other obligations of a like nature, in each case incurred in the ordinary course of business;

(g) any sublease of real property in the ordinary course of business and any lease, sublease, easement, right-of-way, encroachment, restriction or other similar encumbrance affecting real property that, when aggregated with all other such Liens, does not in any case materially detract from the value of the property subject thereto or adversely affect the priority or value of any rights arising from or related to such property, or materially interfere with the ordinary conduct of the business of the applicable Person;

(h) any Lien securing a judgment for the payment of money not constituting an Event of Default under **Section 8.01(h)** or securing an appeal or other surety bond related to any such judgment;

(i) any Lien existing on any property prior to the acquisition thereof by any Loan Party or any Subsidiary thereof or existing on any property of any Person that becomes a Subsidiary of a Loan Party after the date hereof prior to the time such Person becomes a Subsidiary of such Loan Party; *provided* that: (i) such Lien is not created in contemplation of or in connection with such acquisition or such Person becoming a Subsidiary of a Loan Party, as the case may be; (ii) such Lien shall not apply to any other property or assets of a Loan Party or any Subsidiary thereof; (iii) such Lien shall secure only those obligations which it secures on the date of such acquisition or the date such Person becomes a Subsidiary of a Loan Party, as the case may be; and (iv) such Lien does not adversely affect the priority of any Liens referenced in **Section 7.01(a)**;

(j) any Lien securing obligations in respect of a capital lease on the assets subject to such lease; *provided* that such capital lease is otherwise permitted hereunder;

(k) any Lien arising solely by virtue of any statutory or common law provision relating to banker's liens, rights of set-off or similar rights and remedies as to deposit accounts or other funds maintained with a creditor depository institution; *provided* that: (i) such deposit account is not a dedicated cash collateral account and is not subject to restrictions against access by any Loan Party or any Subsidiary thereof in excess of those set forth by regulations promulgated by the FRB; and (ii) such deposit account is not intended by a Loan Party or any Subsidiary thereof to provide collateral to the depository institution;

(l) any Lien securing Debt permitted under **Section 7.03(d)(ii)** to the extent that the aggregate amount of all Debt at any time outstanding secured by all such Liens does not exceed \$500,000; *provided* that: (i) any such Lien does not at any time encumber any property other than the property financed by the related Debt; and (ii) the Debt secured thereby does not exceed the cost or fair market value, whichever is lower, of the property being acquired on the date of the acquisition thereof;

(m) the right of a licensee under a license agreement entered into by Parent or any Subsidiary thereof, as licensor, in the ordinary course of business for the use of intellectual property or other intangible assets of Parent or any such Subsidiary; *provided* that, in the case of any such license granted by Parent or any such Subsidiary on an exclusive basis: (i) such Person shall have determined in its reasonable business judgment that such intellectual property or other intangible assets are no longer useful in the ordinary course of business; (ii) such license is for the use of intellectual property or other intangible assets in geographic regions in which Parent or any Subsidiary thereof does not have material operations or in connection with the exploitation of any product not then produced or planned to be produced by Parent or any Subsidiary thereof; or (iii) such license is granted in connection with a transaction otherwise permitted by this Agreement in which a third party acquires the right to manufacture or sell any product covered by such intellectual property or other intangible assets from Parent or such Subsidiary; *provided further* that, in the case of clauses (ii) and (iii) of this subsection (m), Parent or such Subsidiary has determined that it is in its best economic interest to grant such license;



(n) any Lien securing Permitted Indebtedness; and

(o) any Lien on cash or certificates of deposit securing one or more letters of credit permitted under **Section 7.03(l)**.

#### **Section 7.02. INVESTMENTS.**

Make any Investments, except:

(a) Investments in cash and Cash Equivalents;

(b) Investments arising from transactions by a Loan Party or any Subsidiary thereof with customers or suppliers in the ordinary course of business, including Investments (including debt obligations) received in connection with the bankruptcy or reorganization of customers and suppliers and in settlement of delinquent obligations of, and other disputes with, customers or suppliers arising in the ordinary course of business;

(c) advances to officers, directors, shareholders, members, managers, partners or employees of Loan Parties or any Subsidiary thereof in the ordinary course of business consistent with past practices not to exceed, in the aggregate outstanding at any time, \$100,000;

(d) Investments of Loan Parties on the Effective Date disclosed on the Disclosure Schedule;

(e) Investments made for the benefit of employees of any Loan Party or any Subsidiary thereof for the purposes of deferred compensation in the ordinary course of business in accordance with past practices;

(f) Guarantees permitted by **Section 7.03(c)**;

(g) Investments consisting of Capital Expenditures permitted by **Section 7.07**; and

(h) Investments existing as of the date hereof and disclosed in the Disclosure Schedule.

#### **Section 7.03. DEBT.**

Create, incur, assume or suffer to exist any Debt, except:

(a) Debt under the Loan Documents;

(b) Debt outstanding on the date hereof and listed on the Disclosure Schedule, and any refinancings, refundings, renewals or extensions thereof; *provided that*: (i) the amount of such Debt is not increased at the time of such refinancing, refunding, renewal or extension except by an amount equal to a reasonable premium or other reasonable amount paid, and fees and expenses reasonably incurred, in connection with such refinancing and by an amount equal to any existing commitments unutilized thereunder; and (ii) the terms relating to principal amount, amortization, maturity, collateral (if any) and subordination (if any), and other material terms taken as a whole, of any such refinancing, refunding, renewing or extending Debt, and of any agreement entered into and of any instrument issued in connection therewith, are no less favorable in any material respect to the Loan Parties or Lender than the terms of any agreement or instrument governing the Debt being refinanced, refunded, renewed or extended and the interest rate applicable to any such refinancing, refunding, renewing or extending Debt does not exceed the then applicable market interest rate;

(c) Guarantees by a Loan Party or any Subsidiary thereof of Debt otherwise permitted hereunder of Loan Parties or any wholly-owned Subsidiary thereof; *provided that* the aggregate outstanding amount of all such Guarantees shall not at any time exceed \$500,000;

(d) Debt in respect of: (i) capital leases; and (ii) purchase money obligations for fixed or capital assets within the limitations set forth in **Section 7.01(j)** and **Section 7.01(l)**;

(e) Permitted Indebtedness;

(f) Debt in respect of: (i) workers' compensation claims or obligations in respect of health, disability or other employee benefits; (ii) property, casualty or liability insurance or self-insurance; (iii) completion, bid, performance, appeal or surety bonds issued for the account of Loan Parties or any Subsidiary thereof; (iv) taxes, assessments or other government charges not yet delinquent or which are being contested in compliance with **Section 6.04**; or (v) bankers' acceptances and other similar obligations not constituting Debt for borrowed money; in each of the foregoing cases, to the extent incurred in the ordinary course of business;

(g) intercompany Debt of a Loan Party or any Subsidiary owing to and held by a Loan Party or any Subsidiary; *provided* that (i) if Loan Parties or any Guarantor is the obligor on such Debt and any Subsidiary (other than a Guarantor) is the obligee thereof, such Debt must be unsecured and expressly subordinated to the prior payment in full in cash of all Obligations (including, with respect to any Guarantor, its obligations under **Section 10.14**), and (ii) Debt owed to Loan Parties or any Guarantor must be evidenced by an unsubordinated promissory note pledged to Lender under the applicable Collateral Document;

(h) Debt arising from the honoring by a bank or other financial institution of a check, draft or similar instrument inadvertently (except in the case of daylight overdrafts) drawn against insufficient funds in the ordinary course of business, *provided* that such Debt is promptly extinguished;

(i) Debt arising in connection with endorsement of instruments for deposit in the ordinary course of business;

(j) Debt of Loan Parties or any of their respective Subsidiaries that may be deemed to exist in connection with agreements providing for indemnification, contribution, earnouts, purchase price adjustments and payments and similar obligations (including letters of credit, surety bonds or performance bonds securing any obligations of Loan Parties or any Subsidiary pursuant to such agreements) in connection with Dispositions otherwise permitted hereunder;

(k) Debt of Loan Parties or any of their respective Subsidiaries arising from customary cash management services or in connection with any automated clearinghouse transfer of funds in the ordinary course of business;

(l) Debt of Borrower owed to Seller under the Acquisition Agreement; and

(m) Debt of Parent and its Subsidiaries, in an aggregate outstanding face amount not to exceed at any time \$500,000, arising under or in respect of letters of credit that secure obligations under real property leases and subleases.

In addition, neither Parent nor any of their Subsidiaries shall maintain any Collateral Account other than in accordance with the provisions of **Section 6.12**.

#### **Section 7.04. FUNDAMENTAL CHANGES.**

(a) Engage in any material line of business other than a Related Business;

(b) Merge, dissolve, liquidate, consolidate with or into another Person, or Dispose of (whether in one transaction or in a series of transactions) all or substantially all of its assets (whether now owned or hereafter acquired) to or in favor of any Person, except that:

(i) any Subsidiary of a Loan Party may merge with: (A) Borrower, *provided* that Borrower shall be the continuing or surviving Person; or (B) any one or more other Subsidiaries of Parent, *provided* that, when any wholly-owned Subsidiary of a Borrower is merging with another Subsidiary of Parent, the wholly-owned Subsidiary of a Borrower shall be the continuing or surviving Person; and

(ii) any Subsidiary of Loan Parties may Dispose of all or substantially all of its assets (upon voluntary liquidation or otherwise) to Parent or to another Subsidiary of Parent; *provided* that if the transferor in such a transaction is a wholly-owned Subsidiary of a Borrower, then the transferee must either be Borrower or a wholly-owned Subsidiary of a Borrower;

(c) Except as set forth on the **Disclosure Schedule**, make any voluntary, optional payment or prepayment on account of, or optional redemption or acquisition for value of any portion of, any Debt for borrowed money (other than that arising under: (i) the Loan Documents in accordance with the provisions thereof; and (ii) corporate credit cards to the extent such Debt is otherwise permitted under **Section 7.03**);

(d) Without at least thirty (30) days' prior written notice to Lender: (i) change its jurisdiction of organization; (ii) change its organizational structure or type; (iii) change its legal name; or

(e) Create or acquire any Subsidiary.

#### **Section 7.05. DISPOSITIONS.**

Make any Disposition or enter into any agreement to make any Disposition, except:

(a) Dispositions of used, obsolete, surplus or worn out property, whether now owned or hereafter acquired, in the ordinary course of business and the abandonment or other Disposition of intellectual property that is, in the reasonable judgment of the management of a Loan Party, no longer economically practicable to maintain or useful in the conduct of the business of such Loan Party and its Subsidiaries, taken as a whole;

(b) Dispositions of: (i) inventory or Intellectual Property in the ordinary course of business consistent with past practices; or (ii) Intellectual Property pursuant to licenses permitted by **Section 7.01(m)**;

(c) Dispositions of equipment to the extent that: (i) such property is exchanged for credit against the purchase price of similar replacement equipment; or (ii) the proceeds of such Disposition are reasonably promptly applied to the acquisition of such replacement equipment;

(d) Dispositions permitted by **Section 7.04(b)**;

(e) (i) the unwinding of any Swap Contract; (ii) to the extent permitted hereunder, Restricted Payments; and (iii) to the extent permitted hereunder and otherwise constituting Dispositions, Investments;

(f) Dispositions of cash and Cash Equivalents in the ordinary course of business;

(g) Dispositions of accounts receivable in connection with the compromise, settlement or collection thereof in the ordinary course of business; and

(h) Dispositions of property for cash consideration that are not otherwise permitted under this **Section 7.05** to Persons who are not Affiliates of any Loan Party if:

(i) (A) immediately prior to and immediately after giving effect to any such Disposition, there does not exist a Default; and (B) such Disposition could not reasonably be expected to result in a Default;

(ii) the aggregate fair market value of all assets so sold by Loan Parties does not exceed \$500,000 in any Fiscal Year; and

(iii) to the extent the Net Proceeds of such Disposition exceed, together with the other Dispositions permitted under **Section 7.05(a)**, \$1,000,000 in the aggregate for all such Dispositions in any Fiscal Year, such Net Proceeds are, if and to the extent required by **Section 2.03(c)**, applied within ninety (90) days of receipt thereof by Parent or any Subsidiary thereof to the repayment of the Obligations;

*provided* that a Responsible Officer of Borrower shall have notified Lender promptly after its determination to so apply or use the Net Proceeds and shall have certified the receipt of not less than fair market value for such property and the proper application of such Net Proceeds in accordance with this **Section 7.05(h)**;

*provided* that any Disposition pursuant to any of the foregoing subsections of this **Section 7.05** shall be for not less than fair market value.

#### **Section 7.06. RESTRICTED PAYMENTS.**

Declare or make, directly or indirectly, any Restricted Payment, or incur any obligation (contingent or otherwise) to do so, except that: (a) each Subsidiary may make Restricted Payments to Parent and to wholly-owned Subsidiaries; (b) Parent and each Subsidiary may declare and make dividend payments or other distributions payable solely in common Equity Interests of such Person; and (c) Parent and each Subsidiary may purchase, redeem or otherwise acquire shares of its common Equity Interests or warrants or options to acquire any such common Equity Interests (i) with the proceeds received from the substantially concurrent issue of new shares of its common Equity Interests or (ii) from service providers at cost upon termination of employment or service. Notwithstanding the foregoing, subject to any Change of Control that might occur by virtue thereof, nothing else contained herein shall restrict holders of securities convertible into Equity Interests of Parent or Borrower from converting such convertible securities into Equity Interests of Loan Parties pursuant to the terms applicable to such convertible securities.

#### **Section 7.07. CAPITAL EXPENDITURES.**

Make (whether in one transaction or a series of transactions) any financed or unfinanced Capital Expenditures in an aggregate amount for Loan Parties during any Fiscal Year of more than \$1,000,000.

#### **Section 7.08. TRANSACTIONS WITH AFFILIATES.**

Enter into any transaction of any kind with any Affiliate of Loan Parties, irrespective of whether in the ordinary course of business, other than on fair and reasonable terms substantially as favorable to Loan Parties or a Subsidiary of Loan Parties as would be obtainable by such Person at the time in a comparable arm's-length transaction with a Person other than an Affiliate, *provided* that the foregoing restriction shall not apply to: (a) transactions between or among Loan Parties; (b) Restricted Payments permitted hereunder; and (c) Guarantees permitted by **Section 7.03(c)**.

#### **Section 7.09. BURDENSOME AGREEMENTS.**

(a) Enter into any Contractual Obligation (other than this Agreement or any other Loan Document) that: (i) limits the ability: (A) of any Subsidiary of Loan Parties to make Restricted Payments to Loan Parties or to otherwise transfer property to Loan Parties; (B) of any Subsidiary of Loan Parties to Guarantee the Debt of Loan Parties; or (C) of Loan Parties or any Subsidiary thereof to create, incur, assume or suffer to exist Liens on property of such Person; *provided* that this subclause (C) shall not prohibit any negative pledge incurred or provided in favor of any holder of Debt under **Section 7.03(b)**, **Section 7.03(d)** or **Section 7.03(f)** solely to the extent that any such negative pledge relates to the property financed by or the subject of such Debt; or (ii) requires the grant of a Lien to secure an obligation of such Person if a Lien is granted to secure another obligation of such Person;

(b) (i) Amend, supplement, modify, waive or alter (or agree to do so): (A) any of its material rights or material obligations, including any of the foregoing arising under any Material Contract, without the express prior written consent of Lender unless no Default exists or could reasonably be expected to result by virtue thereof; or (B) its Organizational Documents unless no Default exists or could reasonably be expected to result by virtue thereof; or (ii) terminate any Material Contract other than as a result of a material breach by the counterparty(ies) thereunder or unless no Default exists or could reasonably be expected to result by virtue thereof ; or

(c) Pay salaries, bonuses, commissions, consultant fees or other compensation to any officer, director, manager, equity holder or consultant of any Loan Party or any of its Subsidiaries, or any family member of any of the foregoing unless the board of directors of such Loan Party, acting in good faith, has determined that such amounts are not excessive or unreasonable.

#### **Section 7.10. USE OF PROCEEDS.**

Use the proceeds of any Loan, whether directly or indirectly, and whether immediately, incidentally or ultimately, to purchase or carry margin stock (within the meaning of Regulation U of the FRB) or to extend credit to others for the purpose of purchasing or carrying margin stock or to refund indebtedness originally incurred for such purpose. This language is supplemental to, and not in lieu of the provisions of **Section 5.08**.

#### **Section 7.11. CERTAIN GOVERNMENTAL REGULATIONS.**

(a) Be or become subject at any time to any law, regulation, or list of any government agency (including the OFAC list) that prohibits or limits Lender from making any Loan or extensions of credit to any Loan Party or from otherwise conducting business with any Loan Party, or (b) fail to provide documentary and other evidence of any Loan Party's identity as may be requested by Lender at any time to enable Lender to verify any Loan Party's identity or to comply with any applicable Laws, including Section 326 of the Patriot Act.

#### **Section 7.12. DISQUALIFIED EQUITY INTERESTS.**

(a) Issue any Disqualified Equity Interests, or (b) be or become liable in respect of any obligation (contingent or otherwise) to purchase, redeem, retire, acquire or make any other payment in respect of any Equity Interests of any Parent or any Subsidiary, except as permitted under **Section 7.06**.

### **ARTICLE VIII. EVENTS OF DEFAULT AND REMEDIES**

#### **Section 8.01. EVENTS OF DEFAULT.**

Each of the following shall constitute an event of default hereunder (each, an "**Event of Default**"):

(a) **Non-Payment.** Borrower or any other Loan Party fails to pay (i) when and as required to be paid herein, any scheduled payment amount under the Loan, or (ii) within five (5) Business Days after the same becomes due, any other amount payable hereunder or under any other Loan Document; or

(b) **Specific Covenants.** (i) Loan Parties fail to perform or observe: (A) any term, covenant or agreement contained in any of **Section 6.01**, **Section 6.02**, **Section 6.03**, **Section 6.10**, **Section 6.11**, **Section 6.17** or **Article VII**; or (B) any other term, covenant or agreement contained in any Loan Document, which such failure is determined by Lender (acting reasonably) not to be capable of being cured; or (ii) any Guarantor fails to perform or observe any term, covenant or agreement contained in its Guaranty; or

(c) **Representations and Warranties.** Any representation, warranty, certification or statement of fact made or deemed made by or on behalf of Borrower or any other Loan Party herein, in any other Loan Document or in any document delivered in connection herewith or therewith shall be materially incorrect or misleading in any material respect when made or deemed made; or

(d) **Other Defaults.** Any Loan Party fails to perform or observe any other covenant or agreement (not specified in **Section 8.01(a)**, **Section 8.01(b)** or **Section 8.01(c)**) contained in any Loan Document on its part to be performed or observed and such failure continues for thirty (30) days; or

(e) **Cross-Default.** Other than as set forth in the Disclosure Schedule,, a Loan Party: (i) subject to any applicable cure period, fails to make any payment when due (whether by scheduled maturity, required prepayment, acceleration, demand, or otherwise) in respect of any Debt (other than Debt hereunder and Debt under Swap Contracts) having an aggregate principal amount (including undrawn committed or available amounts and including amounts owing to all creditors under any combined or syndicated credit arrangement) of more than the Threshold Amount; or (ii) subject to any applicable cure period fails to observe or perform any other agreement or condition relating to any such other Debt or contained in any document evidencing, securing or relating to any of the foregoing, or any other default or event occurs, the effect of which failure, default or other event is to cause, or to permit the holder or holders of such Debt (or a trustee or agent on behalf of such holder or holders) to cause, with the giving of notice if required, such Debt to be demanded or to become due or to be repurchased, prepaid, defeased or redeemed (automatically or otherwise), or an offer to repurchase, prepay, defease or redeem such Debt to be made, prior to its stated maturity; or

(f) **Insolvency Proceedings, Etc.** Any Loan Party institutes or consents to the institution of any Proceeding under any Bankruptcy Law, or makes an assignment for the benefit of creditors; or applies for or consents to the appointment of any receiver, trustee, custodian, conservator, liquidator, rehabilitator or similar officer for it or for all or any material part of its property; or any receiver, trustee, custodian, conservator, liquidator, rehabilitator or similar officer is appointed without the application or consent of such Person and the appointment continues undischarged or unstayed for sixty (60) days; or any proceeding under any Bankruptcy Law relating to any such Person or to all or any material part of its property is instituted without the consent of such Person and continues undismissed or unstayed for sixty (60) days, or an order for relief is entered in any such proceeding; or

(g) **Inability to Pay Debts; Attachment.** (i) Any Loan Party becomes unable or admits in writing its inability or fails generally to pay its debts as they become due; or (ii) any writ or warrant of attachment or execution or similar process is issued or levied against all or any material part of the property of any such Person and is not released, vacated or fully bonded within thirty (30) days after its issue or levy; or

(h) **Judgments.** There is entered against any Loan Party: (i) a final judgment or order for the payment of money in an aggregate amount exceeding the Threshold Amount (to the extent not covered by independent third-party insurance as to which the insurer does not dispute coverage); or (ii) any one or more non-monetary final judgments that have, or could reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect and, in either case: (A) enforcement proceedings are commenced by any creditor upon such judgment or order; or (B) there is a period of thirty (30) consecutive days during which a stay of enforcement of such judgment, by reason of a pending appeal or otherwise, is not in effect; or

(i) **ERISA.** (i) An ERISA Event occurs with respect to a Pension Plan or Multiemployer Plan which has resulted or could reasonably be expected to result in liability of Loan Parties under Title IV of ERISA to the Pension Plan, Multiemployer Plan or the PBGC in an aggregate amount in excess of the Threshold Amount; or (ii) Loan Parties or any ERISA Affiliate fails to pay when due, after the expiration of any applicable grace period, any installment payment with respect to its withdrawal liability under Section 4201 of ERISA under a Multiemployer Plan in an aggregate amount in excess of the Threshold Amount; or

(j) **Invalidity of Loan Documents.** Any Loan Document or any provision thereof, at any time after its execution and delivery and for any reason other than as expressly permitted hereunder or thereunder or the satisfaction in full of all of the Obligations (other than Unasserted Obligations) and other than as a result of an action or inaction by Lender, ceases to be in full force and effect other than in accordance with its terms; or any Loan Party or any other Person (other than Lender) contests in any manner in writing the validity or enforceability of any Loan Document or any provision thereof; or any Loan Party denies that it has any or further liability or obligation under any Loan Document, or purports to revoke, terminate or rescind any Loan Document or any provision thereof; or

(k) **Impairment of Collateral.** Any Lien purported to be created by any Collateral Document shall cease to be, or shall be asserted by any Loan Party not to be, a valid, perfected, first-priority security interest (except as otherwise expressly provided in this Agreement or such Collateral Document and subject to Permitted Liens) in the assets covered thereby, other than in respect of assets that, individually and in the aggregate, are not material to the Loan Parties, taken as a whole, or in respect of which the failure of the Lien therein to be a valid, perfected first priority (except as otherwise expressly provided in this Agreement or such Collateral Document) Lien could not in the reasonable judgment of Lender be expected to have a Material Adverse Effect; or

(l) **Reserved;** or

(m) **Certain Actions.** Any Loan Party or any of its senior officers is criminally indicted or convicted for (A) a felony, or (B) violating any state or federal law (including the Controlled Substances Act, Money Laundering Control Act of 1986 and Illegal Exportation of War Materials Act) that has resulted in, or could reasonably be expected to lead to, a forfeiture of any material property or any assets (including the Collateral) upon which such Loan Party has granted a Lien to Lender or the right to conduct a material part of its business; or

(n) **Change of Control.** There occurs a Change of Control; or

(o) **Material Contracts.** A Material Contract is terminated prior to its original termination date as a result of any default or event of default (however defined) by a Loan Party that permits the non-defaulting party to the Material Contract to terminate such contract;

(p) **Reserved;** or

(q) **Material Adverse Effect.** There occurs a Material Adverse Effect.

## **Section 8.02. RIGHTS AND REMEDIES.**

(a) **Rights and Remedies Generally.** While an Event of Default exists, Lender, without notice or demand, do any or all of the following:

(i) declare all Obligations (including the applicable Make-Whole Amount) immediately due and payable (but if an Event of Default described in **Section 8.01(f)** occurs, all Obligations (including any applicable Make-Whole Amount) shall immediately be due and payable without any action by Lender);

(ii) stop advancing money or extending credit for Borrower' benefit under this Agreement or under any other agreement among Borrower and Lender;

(iii) settle or adjust disputes and claims directly with Account Debtors on accounts of any Loan Party for amounts on terms and in any order that Lender considers advisable, notify any Person owing any Loan Party money of Lender's Lien on such funds, and verify the amount of such account. Each Loan Party shall collect all payments in trust for Lender and, if requested by Lender, immediately deliver the payments to Lender in the form received from the Account Debtor, with proper endorsement for deposit;

(iv) make any payments and do any acts it considers necessary or reasonable to protect the Collateral and/or its Lien upon the Collateral. Each Loan Party shall assemble the Collateral if Lender so requests and make it available as Lender so designates. Lender or Lender may enter the premises where the Collateral is located, take and maintain possession of any part of the Collateral, and pay, purchase, contest, or compromise any Lien which appears to be prior or superior to Lender's Lien thereon and pay all expenses incurred. Each Loan Party grants Lender a license to enter and occupy any of its premises, without charge, to exercise any of Lender's or any other Lender's rights or remedies;

(v) apply to the Obligations any (A) balances and deposits of any Loan Party that it holds, or (B) any amount held by Lender or Lender owing to or for the credit or the account of any Loan Party;

(vi) ship, reclaim, recover, store, finish, maintain, repair, prepare for sale, advertise for sale, and sell the Collateral. Lender is hereby granted a non-exclusive, royalty-free license or other right to use without charge, Loan Parties' or any of their respective Subsidiaries' labels, patents, copyrights, mask works, rights of use of any name, trade secrets, trade names, trademarks, service marks, and advertising matter, or any similar property as it pertains to the Collateral, in completing production of, advertising for sale, and selling any Collateral and, in connection with Lender's exercise of its rights under this Section, Loan Parties' and each of their Subsidiaries' rights under all licenses and all franchise agreements inure to the benefit of Lender;

(vii) place a "hold" on any account maintained with Lender and/or deliver a notice of exclusive control, any entitlement order, or other directions or instructions pursuant to any Control Agreement or similar agreements providing control of any Collateral;

(viii) demand and receive possession of the Books and Records of each Loan Party;

(ix) direct Borrower and any other Loan Party the Equity Interests of which shall have been pledged to Lender to record such Equity Interests in the name of Lender as assignee, to admit Lender as a member, to pay over any distributions on or in respect of the Equity Interests to Lender; and

(x) exercise all default rights and remedies available to Lender under the Loan Documents or at law or equity, including all default remedies provided under the Uniform Commercial Code (including disposal of the collateral (including all Collateral) pursuant to the terms thereof).

(b) **Power of Attorney.** Each Loan Party hereby irrevocably appoints Lender as its lawful attorney-in-fact, to: (i) if such Loan Party refuses to, or fails timely to execute and deliver any of the documents required to be delivered by it pursuant to the terms hereof, sign the name of such Loan Party on any of such documents; (ii) at any time that an Event of Default has occurred that has not been waived in writing by Lender: (A) endorse such Loan Party's name on any checks or other forms of payment or security, sign such Loan Party's name on any invoice or bill of lading for any account or drafts against Account Debtors or sign such Loan Party's name on any notices to Account Debtors; (B) endorse such Loan Party's name on any collection item that may come into Lender's possession; (C) make, settle, and adjust all claims under such Loan Party's policies of insurance and make all determinations and decisions with respect to such policies of insurance; (D) take control, in any manner, of any item of payment or proceeds relating to any Collateral; (E) prepare, file, and sign such Loan Party's name to a proof of claim in bankruptcy or similar document against any Account Debtor, or to any notice of lien, assignment, or satisfaction of lien or similar document in connection with any of the Collateral; (F) receive, open and dispose of all mail addressed to such Loan Party, and upon Lender's commencement of any enforcement action, notify postal authorities to change the address for delivery thereof to such address as Lender may designate; (G) use the information recorded on or contained in any data processing equipment, computer hardware, and software relating to the Collateral; (H) settle and adjust disputes and claims respecting the Accounts, Chattel Paper or General Intangibles directly with Account Debtors, for amounts and upon terms that Lender determines to be reasonable, and Lender may cause to be executed and delivered any documents and releases that Lender determines to be necessary; (I) cause an Account Debtor's insurers to add Lender as loss payee under the relevant insurance policy; (J) pay, contest or settle any Lien, charge or adverse claim in, to or upon any or all of the Collateral, or any judgment based thereon, or otherwise take any action to terminate or discharge the same; (K) transfer any Collateral into the name of Lender for the benefit of Lender or a third party as the Uniform Commercial Code permits; and (L) do all other acts and things necessary, in Lender's determination, to fulfill such Loan Party's obligations under this Agreement; and (iii) at any time: (A) send request for verification of Accounts; and (B) file UCC assignments reflecting Lender as assignee of such Loan Party with respect to any UCC-1 financing statements filed by such Loan Party in connection with Collateral. Each Loan Party hereby appoints Lender as its lawful attorney-in-fact to sign such Loan Party's name on any documents necessary to perfect or continue the perfection of any security interest in the Collateral regardless of whether an Event of Default has occurred until all Obligations (other than Unasserted Obligations) have been repaid in full. Lender's foregoing appointment as the attorney-in-fact for each Loan Party, and all of Lender's rights and powers, being coupled with an interest, are irrevocable until all Obligations (other than Unasserted Obligations) have been fully paid and performed when due (as applicable).

(c) **Protective Advances.** If any Loan Party fails to obtain the insurance required by the terms hereof or fails to pay any premium thereon or fails to pay any other amount which such Loan Party is obligated to pay under this Agreement, any other Loan Document or otherwise, Lender, in its sole discretion, may obtain such insurance or make such payment (any such amount so paid by Lender or Lender, a "**Protective Advance**"). Without limiting the generality of the foregoing, Lender shall be authorized, in its sole discretion, to make Protective Advances on behalf of the Loan Parties (or any of them), if and to the extent that Lender deem ssuch Protective Advances are necessary or desirable to preserve or protect Collateral or to enhance the collectability or repayment of the Obligations. Notwithstanding the foregoing, in no event shall Lender have any duty or obligation to make any Protective Advance(s). All Protective Advances paid shall constitute expenses reimbursable under **Section 10.04**, shall be immediately due and payable, shall bear cash interest until paid at the then highest interest rate applicable to any of the Obligations and shall be secured by the Collateral. Lender will use good faith commercially reasonable efforts (with no liability for failing to do so) to provide Borrower with notice of Lender obtaining any insurance on behalf of Borrower or any other Loan Party at the time it is obtained or within a reasonable time thereafter. The making of any Protective Advances shall not be or be deemed to be an agreement to make Protective Advances in similar or different circumstances in the future and shall not operate or be deemed to operate as a waiver by Lender or Lender of any Event of Default.



(d) **Application of Funds.**

(i) No Loan Party shall have the right to specify the order or the accounts to which Lender shall allocate or apply any payments required to be made by Borrower to Lender or otherwise received by Lender under this Agreement when any such allocation or application is not specified elsewhere in this Agreement.

(ii) All payments, prepayments, and proceeds or collateral (including the Collateral) and any other amounts received on account of the Obligations shall be applied by Lender until exhausted in the following order:

(A) *first*, to Lender, to pay all fees, costs, expenses and indemnification payments then due to Lender under the Loan Documents (excluding all Protective Advances made by Lender);

(B) *second* to Lender if it has made a Protective Advance, to pay all Protective Advances made;

(C) *third*, to Lender to pay all accrued but unpaid interest (including interest at the Default Rate) on the Loan;

(D) *fourth*, to Lender to pay the Outstanding Amount until such time as the Outstanding Amount has been paid in full; and

(E) *fifth* to Lender to pay all remaining Obligations owing to Lender.

After payment in full of all Obligations (other than Unasserted Obligations), any surplus remaining shall be paid to Borrower or other Persons legally entitled thereto; if any deficiency exists, Borrower shall remain liable to Lender for such deficiency. If Lender, in its good faith business judgment, directly or indirectly enters into a deferred payment or other credit transaction with any purchaser at any sale of any collateral (including the Collateral), Lender shall have the option, exercisable at any time, of either reducing the Obligations by the principal amount of the purchase price or deferring the reduction of the Obligations until the actual receipt by Lender of cash therefor.

(iii) Unless otherwise expressly provided for herein, all payments made to Lender on account of the Obligations (other than that portion of the Obligations consisting of the Outstanding Amount or any fees payable in connection with the retirement, prepayment or termination of all or a portion of the Obligations) shall be treated as interest for U.S. federal income tax purposes.

(e) **Lender's Liability for Collateral.** So long as Lender complies with reasonable practices regarding the safekeeping of any Collateral, Lender shall not be liable or responsible for: (i) the safekeeping of all or any such collateral; (ii) any loss or damage to all or any such collateral; (iii) any diminution in the value of all or any such collateral; or (iv) any act or default of any carrier, warehouseman, bailee, or other Person. Borrower bears all risk of loss, damage or destruction of any Collateral

(f) **No Waiver.** Lender's failure, at any time or times, to require strict performance by any Loan Party of any provision of this Agreement or any other Loan Document shall not waive, affect, or diminish any right of Lender thereafter to demand strict performance and compliance herewith or therewith. Lender have all rights and remedies provided under the Uniform Commercial Code, by law, or in equity. Any amounts paid by Lender on any Loan Party's behalf as provided herein are expenses reimbursable under **Section 10.04** and shall bear interest at the highest interest rate then applicable to any of the Obligations and shall be secured by the Collateral. No payments by Lender shall be deemed an agreement to make similar payments in the future or a waiver of any Event of Default by Lender.

**ARTICLE IX.  
RESERVED**

**ARTICLE X.  
GENERAL PROVISIONS**

**Section 10.01. AMENDMENTS, ETC.**

(a) No amendment or waiver of any provision of this Agreement or any other Loan Document, and no consent to any departure by Borrower or any other Loan Party therefrom, shall be effective unless in writing signed by Lender and Borrower or the applicable Loan Party, as the case may be, with receipt acknowledged by Lender, and each such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

(b) This Agreement may be executed in counterparts (and by different parties hereto in different counterparts), each of which shall constitute an original, but all of which when taken together shall constitute a single agreement.

(c) This Agreement and the other Loan Documents constitute the entire agreement among the parties relating to the subject matter hereof and supersede any and all previous documents, agreements and understandings, oral or written, relating to the subject matter hereof.

**Section 10.02. NOTICES; ELECTRONIC COMMUNICATIONS.**

(a) **Notices Generally.** All notices and other communications provided for herein shall be in writing and shall be delivered by hand or overnight courier service, mailed by certified or registered mail, sent by telefacsimile transmission or sent by approved electronic communication in accordance with **Section 10.02(b)**, and all notices and other communications expressly permitted to be given by telephone shall be made to the applicable telephone number, if to Borrower, any Guarantor or Lender, to the address, telefacsimile number, e-mail address or telephone number specified for such Person on the Disclosure Schedule.

Notices sent by hand or overnight courier service, or mailed by certified or registered mail, shall be deemed to have been given when received, and notices sent by telefacsimile transmission or by means of approved electronic communication shall be deemed to have been given when sent (except that, if not given during normal business hours for the recipient, shall be deemed to have been given at the opening of business on the next business day for the recipient); *provided* that notices delivered through electronic communications to the extent provided by **Section 10.02(b)** shall be effective as provided in such subsection (b).

(b) **Electronic Communications.**

Lender agrees that notices and other communications to it hereunder may be delivered or furnished by electronic communication (including e-mail and Internet or intranet websites) pursuant to procedures approved by Lender. Unless Lender otherwise prescribes: (A) notices and other communications sent to an e-mail address shall be deemed received upon the sender's receipt of an acknowledgment from the intended recipient (such as by the "return receipt requested" function, as available, return e-mail or other written acknowledgment); *provided* that, if such notice or other communication is not sent during the normal business hours of the recipient, such notice or communication shall be deemed to have been sent at the opening of business on the next business day for the recipient; and (B) notices or communications posted to an Internet or intranet website shall be deemed received upon the deemed receipt by the intended recipient at its e-mail address as described in the foregoing clause (A) of notification that such notice or communication is available and identifying the website address therefor.

(c) **Change of Address, Etc.** Borrower, for itself and for the Loan Parties, and Lender may change their respective address(es), telefacsimile number(s), telephone number(s) or e-mail address(es) for notices and other communications hereunder by notice to the other parties hereto. Lender may change its address(es), telefacsimile number(s), telephone number(s) or e-mail address(es) for notices and other communications hereunder by written notice to Borrower.

(d) **Reliance by Lender.** Lender shall be entitled to rely and act upon any notices purportedly given by or on behalf of any Loan Party even if: (i) such notices were not made in a manner specified herein, were incomplete or were not preceded or followed by any other form of notice specified herein; or (ii) the terms thereof, as understood by the recipient, varied from any confirmation thereof. Loan Parties shall indemnify each Indemnitee from all losses, costs, expenses and liabilities resulting from the reliance by such Person on each notice purportedly given by or on behalf of any Loan Party. All telephonic notices to and other telephonic communications with Lender may be recorded by Lender, and each of the parties hereto hereby consents to such recording.

**Section 10.03. No WAIVER; CUMULATIVE REMEDIES.**

No failure by Lender to exercise, and no delay by Lender in exercising, any right, remedy, power or privilege hereunder shall operate as a waiver thereof; no single or partial exercise of any right, remedy, power or privilege hereunder shall preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege. The rights, remedies, powers and privileges herein provided are cumulative and not exclusive of any rights, remedies, powers and privileges provided by Law.

**Section 10.04. EXPENSES; INDEMNITY; DAMAGE WAIVER.**

(a) **Costs and Expenses.** Borrower shall pay: (i) subject to clause (ii) of this **Section 10.04(a)** all actual and reasonable out-of-pocket expenses incurred by Lender (including the fees, charges and disbursements of any counsel for Lender), and shall pay all fees and time charges for attorneys, who may be employees of Lender, in connection with the enforcement or protection of its rights (A) in connection with this Agreement and the other Loan Documents, including its rights under this **Section 10.04**; or (B) in connection with the Loan, including all such actual and reasonable out-of-pocket expenses incurred during any workout or restructuring (or negotiations in connection with the foregoing) in respect of the Loan.

(b) **Indemnification by Loan Parties.** Subject to **Section 10.04(a)**, Loan Parties shall indemnify each Indemnitee against, and hold each Indemnitee harmless from, any and all losses, claims, damages, liabilities and related expenses (including the fees, charges and disbursements of any counsel for any Indemnitee), and shall indemnify and hold harmless each Indemnitee from all fees and time charges and disbursements for attorneys, who may be employees of any Indemnitee, incurred by any Indemnitee or asserted against any Indemnitee by any third party or by Loan Parties arising out of, in connection with, or as a result of: (i) the execution or delivery of this Agreement, any other Loan Document or any document contemplated hereby or thereby, the performance by the parties hereto of their respective obligations hereunder or thereunder or the consummation of the transactions contemplated hereby or thereby; (ii) any Loan or the use or proposed use of the proceeds thereof; (iii) any actual or alleged presence or release of Hazardous Materials on or from any property owned or operated by Loan Parties or any Subsidiary thereof or any Environmental Claim or Environmental Liability related in any way to Loan Parties or any Subsidiary thereof; or (iv) any actual or prospective claim, litigation, investigation or proceeding relating to any of the foregoing, whether based on contract, tort or any other theory, whether brought by a third party or by any Loan Party or any Subsidiary thereof, and regardless of whether any Indemnitee is a party thereto; *provided* that such indemnity shall not, as to any Indemnitee, be available to the extent that such losses, claims, damages, liabilities or related expenses are determined by a court of competent jurisdiction by a final and non-appealable judgment to have resulted result from the gross negligence or willful misconduct of such Indemnitee. This **Section 10.04(b)** shall not apply to Taxes other than any Taxes that constitute losses, claims, damages, liabilities or expenses arising from any non-Tax action, claim or Proceeding.

(c) **Reserved.**

(d) **Waiver of Consequential Damages, Etc.** To the fullest extent permitted by applicable Laws, each Loan Party shall not assert, and hereby waives, any claim against any Indemnitee, on any theory of liability, for special, indirect, consequential or punitive damages (as opposed to direct or actual damages) arising out of, in connection with, or as a result of, this Agreement, any other Loan Document or any document contemplated hereby, the transactions contemplated hereby or thereby, any of the Loan or the use of the proceeds thereof. No Indemnitee referred to in **Section 10.04(b)** shall be liable for any damages arising from the use by unintended recipients of any information or other materials distributed by it through telecommunications, electronic or other information transmission systems in connection with this Agreement or the other Loan Documents or the transactions contemplated hereby or thereby.

(e) **Payments.** All amounts due under this **Section 10.04** shall be payable not later than three (3) Business Days after demand therefor.

(f) **Survival.** The agreements in this **Section 10.04** shall survive the payment in full, satisfaction or discharge of all Obligations.

#### **Section 10.05. MARSHALLING; PAYMENTS SET ASIDE.**

Lender shall not be under any obligation to marshal any asset in favor of Loan Parties or any other Person or against or in payment of any or all of the Obligations. To the extent that any payment by or on behalf of Loan Parties is made to Lender or Lender exercises its right of setoff, and such payment or the proceeds of such setoff or any part thereof is subsequently invalidated, declared to be fraudulent or preferential, set aside or required (including pursuant to any settlement entered into by Lender in such Person's discretion) to be repaid to a trustee, receiver or any other party, in connection with any proceeding under any Bankruptcy Law or otherwise, then: to the extent of such recovery, the obligation or part thereof originally intended to be satisfied shall be revived and continued in full force and effect as if such payment had not been made or such setoff had not occurred.

#### **Section 10.06. SUCCESSORS AND ASSIGNS.**

(a) **Successors and Assigns Generally.** The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns permitted hereby, except that neither Borrower nor any other Loan Party may assign or otherwise transfer any of its rights or obligations hereunder without the prior written consent of Lender.

(b) **Assignments by Lender.** Lender may at any time assign to one or more assignees all or a portion of its rights and obligations under this Agreement, except that

(i) No such assignment shall be made to any Loan Party or any of its Affiliates or Subsidiaries; and

(ii) No such assignment shall be made to a natural person.

(c) **Reserved.**

(d) **Participations.** Lender may at any time, without the consent of, or notice to, Borrower, sell participations to any Person (other than a natural Person, any Loan Party or any Loan Party's Affiliates or Subsidiaries) (each, a "**Participant**") in all or a portion of Lender's rights and/or obligations under this Agreement (including all or a portion of its Commitments and/or the Loan owing to it); *provided* that (i) Lender's obligations under this Agreement shall remain unchanged, (ii) Lender shall remain solely responsible to the other parties hereto for the performance of such obligations and (iii) Borrower and Lender shall continue to deal solely and directly in connection with Lender's rights and obligations under this Agreement.

(e) **Reserved.**

(f) **Electronic Execution of Assignments.** The words “*execution*,” “*signed*,” “*signature*,” and words of like import in any Assignment and Assumption shall be deemed to include electronic signatures or the keeping of records in electronic form, each of which shall be of the same legal effect, validity or enforceability as a manually executed signature or the use of a paper-based recordkeeping system, as the case may be, to the extent and as provided for in any applicable Laws, including the Federal Electronic Signatures in Global and National Commerce Act or any other similar state laws based on the Uniform Electronic Transactions Act.

#### **Section 10.07. TREATMENT OF CERTAIN INFORMATION; CONFIDENTIALITY.**

Lender agrees to maintain the confidentiality of the Information, except that Information may be disclosed (a) to its Affiliates and to its and its Affiliates' respective partners, directors, officers, employees, agents, advisors, representatives and funding and financing sources (it being understood that the Persons to whom such disclosure is made will be informed of the confidential nature of such Information and agree to keep such Information confidential on the same terms as provided herein); (b) to the extent requested by any Governmental Authority, purporting to have jurisdiction over it (including any self-regulatory authority), *provided* that to the extent permitted by applicable Law, Lender will use reasonably commercial efforts to provide Borrower with notice of any such request so received prior to the release thereof; (c) to the extent required by applicable Laws or by any subpoena or similar legal process, *provided* that to the extent permitted by applicable Law, Lender will use reasonably commercial efforts to provide Borrower with notice of any such required disclosure prior to the release thereof; (d) to any other party hereto; (e) in connection with the exercise of any remedies hereunder or under any other Loan Document or any Proceeding relating to this Agreement or any other Loan Document or the enforcement of rights hereunder or thereunder; (f) unless an Event of Default has occurred and is continuing, subject to an agreement containing provisions substantially the same as those of this **Section 10.07** to: (i) any assignee of or Participant in, or any prospective assignee of or Participant in, any of its rights or obligations under this Agreement; or (ii) any actual or prospective counterparty (or its advisors) to any swap or derivative transaction relating to any Loan Party (it being understood that the Persons to whom such disclosure is made will be informed of the confidential nature of such Information and agree to keep such Information confidential on the same terms as provided herein); (g) with the consent of Borrower; or (h) to the extent such Information: (i) becomes publicly available other than as a result of a breach of this **Section 10.07**; or (ii) becomes available to Lender or any of its Affiliates on a non-confidential basis from a source other than any Loan Party and not in contravention of this **Section 10.07**. For purposes of this **Section 10.07**, “*Information*” means all information (including financial information) received from any Loan Party relating to such Loan Party or its business, other than any such information that is available to Lender or any other Lender on a nonconfidential basis, and not in contravention of this **Section 10.07**, prior to disclosure by such Loan Party. Any Person required to maintain the confidentiality of Information as provided in this **Section 10.07**: (A) shall be considered to have complied with its obligation to do so if such Person has exercised the same degree of care to maintain the confidentiality of such Information as such Person would accord to its own confidential information; and (B) shall not disclose any financial information concerning any Loan Party or its business (including any information based on any such financial information) or use any such financial information for commercial purposes without the prior written consent of the applicable Loan Party. Notwithstanding the foregoing, each Loan Party authorizes Lender to make appropriate announcements of the financial arrangements entered into among the Loan Parties and Lender, including announcements which are commonly known as “tombstones,” in such publications and to such selected parties as Lender may in its sole and absolute discretion deem appropriate.

#### **Section 10.08. RIGHT OF SETOFF.**

If an Event of Default shall have occurred and be continuing, each of Lender and its Affiliates is hereby authorized at any time and from time to time, to the fullest extent permitted by applicable Laws, to set off and apply any and all deposits (general or special, time or demand, provisional or final, in whatever currency) at any time held and other obligations (in whatever currency) at any time owing by Lender to or for the credit or the account of Borrower or any other Loan Party against any and all of the Obligations to Lender or such Affiliate, irrespective of whether or not Lender shall have made any demand under this Agreement or any other Loan Document and although such obligations of Borrower or such Loan Party may be contingent or unmatured. The rights of Lender and its Affiliates under this **Section 10.08** are in addition to other rights and remedies (including other rights of setoff) that Lender or its Affiliates may have. Lender agrees to notify Borrower promptly after any such setoff and application; *provided* that the failure to give such notice shall not affect the validity of such setoff and application.

#### **Section 10.09. INTEREST RATE LIMITATION.**

Notwithstanding anything to the contrary contained in any Loan Document, the interest paid or agreed to be paid under the Loan Documents shall not exceed the Maximum Rate. If Lender shall receive interest in an amount that exceeds the Maximum Rate, the excess interest shall be applied to the principal of the Loan or, if it exceeds such unpaid principal, refunded to Borrower. In determining whether the interest contracted for, charged, or received by Lender exceeds the Maximum Rate, Lender may, to the extent permitted by applicable Laws: (a) characterize any payment that is not principal as an expense, fee, or premium rather than interest; (b) exclude voluntary prepayments and the effects thereof; and (c) amortize, prorate, allocate, and spread in equal or unequal parts the total amount of interest throughout the contemplated term of the Obligations hereunder.

#### **Section 10.10. COUNTERPARTS; INTEGRATION.**

This Agreement may be executed in counterparts (and by different parties hereto in different counterparts), each of which shall constitute an original, but all of which when taken together shall constitute a single contract. This Agreement and the other Loan Documents constitute the entire agreement among the parties relating to the subject matter hereof and supersede any and all previous documents, agreements and understandings, oral or written, relating to the subject matter hereof.

#### **Section 10.11. SURVIVAL OF REPRESENTATIONS AND WARRANTIES.**

All representations and warranties made hereunder and in any other Loan Document or other document delivered pursuant hereto or thereto or in connection herewith or therewith shall survive the execution and delivery hereof and thereof. Such representations and warranties have been or will be relied upon by Lender, regardless of any investigation made by Lender or on its behalf and notwithstanding that Lender may have had notice or knowledge of any Default at the time of the making of any Loan, and shall continue in full force and effect as long as any Loan or any other Obligations (other than Unasserted Obligations) have not been paid in full.

#### **Section 10.12. SEVERABILITY.**

If any provision of this Agreement or the other Loan Documents is held to be illegal, invalid or unenforceable, (a) the legality, validity and enforceability of the remaining provisions of this Agreement and the other Loan Documents shall not be affected or impaired thereby and (b) the parties shall endeavor in good faith negotiations to replace the illegal, invalid or unenforceable provisions with valid provisions the economic effect of which comes as close as possible to that of the illegal, invalid or unenforceable provisions. The invalidity of a provision in a particular jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

#### **Section 10.13. PATRIOT ACT NOTICE .**

Lender hereby notifies Loan Parties that, pursuant to the requirements of the Patriot Act, it is required to obtain, verify and record information that identifies Loan Parties, which information includes the name and address of Loan Parties and other information that will allow Lender to identify Loan Parties in accordance with the Patriot Act.

#### **Section 10.14. GUARANTY.**

(a) **Guaranty.** Each Guarantor unconditionally and irrevocably guarantees to Lender the full and prompt payment when due (whether at stated maturity, by required prepayment, declaration, acceleration, demand or otherwise) and performance of the Obligations (the "**Guaranteed Obligations**"). The Guaranteed Obligations include interest that, but for a Proceeding under any Bankruptcy Law, would have accrued on such Guaranteed Obligations, whether or not a claim is allowed against Borrower for such interest in any such Proceeding.

(b) **Separate Obligation.** Each Guarantor acknowledges and agrees that: (i) the Guaranteed Obligations are separate and distinct from any Debt arising under or in connection with any other document, including under any provision of this Agreement other than this **Section 10.14**, executed at any time by such Guarantor in favor of Lender; and (ii) such Guarantor shall pay and perform all of the Guaranteed Obligations as required under this **Section 10.14**, and Lender may enforce any and all of their respective rights and remedies hereunder, without regard to any other document, including any provision of this Agreement other than this **Section 10.14**, at any time executed by such Guarantor in favor of Lender, irrespective of whether any such other document, or any provision thereof or hereof, shall for any reason become unenforceable or any of the Debt thereunder shall have been discharged, whether by performance, avoidance or otherwise. Each Guarantor acknowledges that, in providing benefits to Borrower, Lender is relying upon the enforceability of this **Section 10.14** and the Guaranteed Obligations as separate and distinct Debt of such Guarantor, and each Guarantor agrees that Lender would be denied the full benefit of its bargain if at any time this **Section 10.14** or the Guaranteed Obligations were treated any differently. The fact that the guaranty is set forth in this Agreement rather than in a separate guaranty document is for the convenience of Borrower and Guarantors and shall in no way impair or adversely affect the rights or benefits of Lender under this **Section 10.14**. Each Guarantor agrees to execute and deliver a separate document, immediately upon request at any time of Lender, evidencing such Guarantor's obligations under this **Section 10.14**. Upon the occurrence of any Event of Default, a separate action or actions may be brought against such Guarantor, whether or not Borrower, any Guarantor or any other Person is joined therein or a separate action or actions are brought against Borrower, any such Guarantor or any such other Person.

(c) **Limitation of Guaranty.** To the extent that any court of competent jurisdiction shall impose by final judgment under applicable Laws (including sections 544 and 548 of the Bankruptcy Code) any limitations on the amount of any Guarantor's liability with respect to the Guaranteed Obligations that Lender can enforce under this **Section 10.14**, Lender by its acceptance hereof accepts such limitation on the amount of such Guarantor's liability hereunder to the extent needed to make this **Section 10.14** fully enforceable and non-avoidable.

(d) **Liability of Guarantors.** The liability of any Guarantor under this **Section 10.14** shall be irrevocable, absolute, independent and unconditional, and shall not be affected by any circumstance that might constitute a discharge of a surety or guarantor other than the indefeasible payment and performance in full of all Guaranteed Obligations (other than Unasserted Obligations). In furtherance of the foregoing and without limiting the generality thereof, each Guarantor agrees as follows:

(i) such Guarantor's liability hereunder shall be the immediate, direct, and primary obligation of such Guarantor and shall not be contingent upon Lender's exercise or enforcement of any remedy it may have against Borrower or any other Person, or against any collateral or other security for any Guaranteed Obligations;

(ii) this Guaranty is a guaranty of payment when due and not merely of collectability;

(iii) Lender may enforce this **Section 10.14** upon the occurrence of an Event of Default notwithstanding the existence of any dispute among Lender and Borrower or any other Person with respect to the existence of such Event of Default;

(iv) such Guarantor's payment of a portion, but not all, of the Guaranteed Obligations shall in no way limit, affect, modify or abridge such Guarantor's liability for any portion of the Guaranteed Obligations remaining unsatisfied; and

(v) such Guarantor's liability with respect to the Guaranteed Obligations shall remain in full force and effect without regard to, and shall not be impaired or affected by, nor shall such Guarantor be exonerated or discharged by, any of the following events:

(A) any Proceeding under any Bankruptcy Law;

(B) any limitation, discharge, or cessation of the liability of Borrower or any other Person for any Guaranteed Obligations due to any Law, or any invalidity or unenforceability in whole or in part of any of the Guaranteed Obligations or the Loan Documents;

(C) any merger, acquisition, consolidation or change in structure of Borrower, any Subsidiary thereof or any other Guarantor or Person, or any sale, lease, transfer or other disposition of any or all of the assets or shares of Borrower or any other Person;

(D) any assignment or other transfer, in whole or in part, of Lender's interests in and rights under this Agreement (including this **Section 10.14**) or the other Loan Documents;

(E) any claim, defense, counterclaim or setoff, other than that of prior performance, that Borrower, any Guarantor or any other Person may have or assert, including any defense of incapacity or lack of corporate or other authority to execute any of the Loan Documents;

(F) Lender's amendment, modification, renewal, extension, cancellation or surrender of any Loan Document or any Guaranteed Obligations;

(G) Lender's exercise or non-exercise of any power, right or remedy with respect to any Guaranteed Obligations or any collateral;

(H) Lender's vote, claim, distribution, election, acceptance, action or inaction in any Proceeding under any Bankruptcy Law; or

(I) any other guaranty, whether by such Guarantor or any other Person, of all or any part of the Guaranteed Obligations or any other indebtedness, obligations or liabilities of Borrower to Lender.

(e) **Consents of Guarantors.** Each Guarantor hereby unconditionally consents and agrees that, without notice to or further assent from such Guarantor:

(i) the principal amount of the Guaranteed Obligations may be increased or decreased and additional indebtedness or obligations of Borrower under the Loan Documents may be incurred and the time, manner, place or terms of any payment under any Loan Document may be extended or changed, by one or more amendments, modifications, renewals or extensions of any Loan Document or otherwise;

(ii) the time for Borrower' (or any other Person's) performance of or compliance with any term, covenant or agreement on its part to be performed or observed under any Loan Document may be extended, or such performance or compliance waived, or failure in or departure from such performance or compliance consented to, all in such manner and upon such terms as Lender may deem proper;



(iii) Lender may request and accept other guaranties and may take and hold security as collateral for the Guaranteed Obligations, and may, from time to time, in whole or in part, exchange, sell, surrender, release, subordinate, modify, waive, rescind, compromise or extend such other guaranties or security and may permit or consent to any such action or the result of any such action, and may apply such security and direct the order or manner of sale thereof; and

(iv) Lender may exercise, or waive or otherwise refrain from exercising, any other right, remedy, power or privilege even if the exercise thereof affects or eliminates any right of subrogation or any other right of such Guarantor against Borrower.

(f) **Guarantor's Waivers.** Each Guarantor waives and agrees not to assert:

(i) any right to require Lender to proceed against Borrower, any other Guarantor or any other Person, or to pursue any other right, remedy, power or privilege of Lender whatsoever;

(ii) the defense of the statute of limitations in any action hereunder or for the collection or performance of the Guaranteed Obligations;

(iii) any defense arising by reason of any lack of corporate or other authority or any other defense of Borrower, such Guarantor or any other Person;

(iv) any defense based upon Lender's errors or omissions in the administration of the Guaranteed Obligations;

(v) any rights to set-offs and counterclaims;

(vi) without limiting the generality of the foregoing, to the fullest extent permitted by Law, any defenses or benefits that may be derived from or afforded by applicable Laws limiting the liability of or exonerating guarantors or sureties, or that may conflict with the terms of this **Section 10.14**; and

(vii) any and all notice of the acceptance of this guaranty, and any and all notice of the creation, renewal, modification, extension or accrual of the Guaranteed Obligations, or the reliance by Lender upon this Guaranty, or the exercise of any right, power or privilege hereunder. The Guaranteed Obligations shall conclusively be deemed to have been created, contracted, incurred and permitted to exist in reliance upon this Guaranty. Each Guarantor waives promptness, diligence, presentment, protest, demand for payment, notice of default, dishonor or nonpayment and all other notices to or upon Borrower, each Guarantor or any other Person with respect to the Guaranteed Obligations.

(g) **Financial Condition of Borrower.** No Guarantor shall have any right to require Lender to obtain or disclose any information with respect to: the financial condition or character of Borrower or the ability of Borrower to pay and perform the Guaranteed Obligations; any collateral or other security for any or all of the Guaranteed Obligations; the existence or nonexistence of any other guaranties of all or any part of the Guaranteed Obligations; any action or inaction on the part of Lender or any other Person; or any other matter, fact or occurrence whatsoever. Each Guarantor hereby acknowledges that it has undertaken its own independent investigation of the financial condition of Borrower and all other matters pertaining to this Guaranty and further acknowledges that it is not relying in any manner upon any representation or statement of Lender with respect thereto.

(h) **Subrogation.** Until the Guaranteed Obligations (other than Unasserted Obligations) shall be paid in full, each Guarantor shall not have, and shall not directly or indirectly exercise: (i) any rights that it may acquire by way of subrogation under this **Section 10.14**, by any payment hereunder or otherwise; (ii) any rights of contribution, indemnification, reimbursement or similar suretyship claims arising out of this **Section 10.14**; or (iii) any other right that it might otherwise have or acquire (in any way whatsoever) that could entitle it at any time to share or participate in any right, remedy or security of Lender as against Borrower or other Guarantors or any other Person, whether in connection with this **Section 10.14**, any of the other Loan Documents or otherwise. If any amount shall be paid to any Guarantor on account of the foregoing rights at any time when all the Guaranteed Obligations (other than Unasserted Obligations) shall not have been paid in full, such amount shall be held in trust for the benefit of Lender and shall forthwith be paid to Lender to be credited and applied to the Guaranteed Obligations, whether matured or unmatured, in accordance with the terms of the Loan Documents.

(i) **Subordination.** All payments on account of all indebtedness, liabilities and other obligations of Borrower to any Guarantor, whether now existing or hereafter arising, and whether due or to become due, absolute or contingent, liquidated or unliquidated, determined or undetermined (the "**Guarantor Subordinated Debt**") shall be subject, subordinate and junior in right of payment and exercise of remedies, to the extent and in the manner set forth herein, to the prior payment in full in cash or Cash Equivalents of the Guaranteed Obligations. As long as any of the Guaranteed Obligations (other than Unasserted Obligations) shall remain outstanding and unpaid, each Guarantor shall not accept or receive any payment or distribution by or on behalf of Borrower or any other Guarantor, directly or indirectly, or assets of Borrower or any other Guarantor, of any kind or character, whether in cash, property or securities, including on account of the purchase, redemption or other acquisition of Guarantor Subordinated Debt, as a result of any collection, sale or other disposition of collateral, or by setoff, exchange or in any other manner, for or on account of the Guarantor Subordinated Debt ("**Guarantor Subordinated Debt Payments**"), except that, so long as an Event of Default does not then exist, any Guarantor shall be entitled to accept and receive payments on its Guarantor Subordinated Debt and Cosman shall be entitled to receive compensation (including employee benefits) , , in accordance with past business practices of such Guarantor and Borrower (or any other applicable Guarantor) and not in contravention of any Law or the terms of the Loan Documents.

If any Guarantor Subordinated Debt Payments shall be received in contravention of this **Section 10.14**, such Guarantor Subordinated Debt Payments shall be held in trust for the benefit of Lender and shall be paid over or delivered to Lender for application to the payment in full in cash or Cash Equivalents of all Guaranteed Obligations remaining unpaid to the extent necessary to give effect to this **Section 10.14** after giving effect to any concurrent payments or distributions to Lender in respect of the Guaranteed Obligations.

(j) **Continuing Guaranty.** This Guaranty is a continuing guaranty and agreement of subordination and shall continue in effect and be binding upon each Guarantor until payment and performance in full of the Guaranteed Obligations, including Guaranteed Obligations which may exist continuously or which may arise from time to time under successive transactions, and each Guarantor expressly acknowledges that this Guaranty shall remain in full force and effect notwithstanding that there may be periods in which no Guaranteed Obligations exist. This Guaranty shall continue in effect and be binding upon each Guarantor until actual receipt by Lender of written notice from such Guarantor of its intention to discontinue this Guaranty as to future transactions (which notice shall not be effective until 11:00 a.m. on the day that is five (5) Business Days following such receipt); *provided* that no revocation or termination of this guaranty shall affect in any way any rights of Lender hereunder with respect to any Guaranteed Obligations arising or outstanding on the date of receipt of such notice, including any subsequent continuation, extension, or renewal thereof, or change in the terms or conditions thereof, or any Guaranteed Obligations made or created after such date to the extent made or created pursuant to a legally binding commitment of Lender in existence as of the date of such revocation (collectively, "**Existing Guaranteed Obligations**"), and the sole effect of such notice shall be to exclude from this Guaranty Guaranteed Obligations thereafter arising which are unconnected to any Existing Guaranteed Obligations.

(k) **Reinstatement.** This Guaranty shall continue to be effective or shall be reinstated and revived, as the case may be, if, for any reason, any payment of the Guaranteed Obligations by or on behalf of Borrower (or receipt of any proceeds of collateral) shall be rescinded, invalidated, declared to be fraudulent or preferential, set aside, voided or otherwise required to be repaid to Borrower, its estate, trustee, receiver or any other Person (including under any Bankruptcy Law), or must otherwise be restored by Lender, whether as a result of proceedings under any Bankruptcy Law or otherwise. All losses, damages, costs and expenses that Lender may suffer or incur as a result of any voided or otherwise set aside payments shall be specifically covered by the indemnity in favor of Lender contained in **Section 10.04**.

(l) **Substantial Benefits.** The Credit Extensions provided to or for the benefit of Borrower hereunder by Lender have been and are to be contemporaneously used for the benefit of Borrower and each Guarantor. It is the position, intent and expectation of the parties that Borrower and each Guarantor have derived and will derive significant and substantial benefits from the Credit Extensions to be made available by Lender under the Loan Documents. Each Guarantor has received at least "reasonably equivalent value" (as such phrase is used in Section 548 of the Bankruptcy Code and in comparable provisions of other applicable Laws) and more than sufficient consideration to support its obligations hereunder in respect of the Guaranteed Obligations. Immediately prior to and after and giving effect to the incurrence of each Guarantor's obligations under this Guaranty, such Guarantor will be Solvent.

(m) **Knowing and Explicit Waivers.** Each Guarantor acknowledges that it either has obtained the advice of legal counsel or has had the opportunity to obtain such advice in connection with the terms and provisions of this **Section 10.14**. Each Guarantor acknowledges and agrees that each of the waivers and consents set forth herein is made with full knowledge of its significance and consequences, that all such waivers and consents herein are explicit and knowing and that each Guarantor expects such waivers and consents to be fully enforceable.

If, while any Guarantor Subordinated Debt is outstanding, any Proceeding under any Bankruptcy Law is commenced by or against Borrower or their property, Lender is hereby irrevocably authorized and empowered (in the name of Lender or in the name of any Guarantor or otherwise), but shall have no obligation, to demand, sue for, collect and receive every payment or distribution in respect of all Guarantor Subordinated Debt and give acquittances therefor and to file claims and proofs of claim and take such other action (including voting the Guarantor Subordinated Debt) as it may deem necessary or advisable for the exercise or enforcement of any of the rights or interests of Lender; and each Guarantor shall promptly take such action as Lender may reasonably request: (A) to collect the Guarantor Subordinated Debt for the account of Lender and to file appropriate claims or proofs of claim in respect of the Guarantor Subordinated Debt; (B) to execute and deliver to Lender such powers of attorney, assignments and other instruments as it may request to enable it to enforce any and all claims with respect to the Guarantor Subordinated Debt; and (C) to collect and receive any and all Guarantor Subordinated Debt Payments.

**Section 10.15. TIME OF THE ESSENCE.**

Time is of the essence of the Loan Documents.

**Section 10.16. GOVERNING LAW; JURISDICTION; ETC.**

(a) **GOVERNING LAW.** THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAWS, OTHER THAN NEW YORK GENERAL OBLIGATIONS LAW 5-1401 AND 5-1402.

(b) **SUBMISSION TO JURISDICTION.** EACH LOAN PARTY HEREUNDER HERETO IRREVOCABLY AND UNCONDITIONALLY SUBMITS, FOR ITSELF AND ITS PROPERTY, TO THE NONEXCLUSIVE JURISDICTION OF THE COURTS OF THE STATE OF NEW YORK SITTING IN THE CITY AND COUNTY OF NEW YORK AND OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, AND ANY APPELLATE COURT FROM ANY THEREOF, IN ANY PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT TO WHICH EACH IS A PARTY, OR FOR RECOGNITION OR ENFORCEMENT OF ANY JUDGMENT, AND EACH OF THE PARTIES HERETO IRREVOCABLY AND UNCONDITIONALLY AGREES THAT ALL CLAIMS IN RESPECT OF ANY SUCH PROCEEDING MAY BE HEARD AND DETERMINED IN SUCH STATE COURTS OR, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, IN SUCH FEDERAL COURTS. EACH OF THE PARTIES HERETO AGREES THAT A FINAL JUDGMENT IN ANY SUCH PROCEEDING SHALL BE CONCLUSIVE AND MAY BE ENFORCED IN OTHER JURISDICTIONS BY SUIT ON THE JUDGMENT OR IN ANY OTHER MANNER PROVIDED BY LAW. NOTHING IN THIS AGREEMENT OR IN ANY OTHER LOAN DOCUMENT SHALL AFFECT ANY RIGHT THAT LENDER MAY OTHERWISE HAVE TO BRING ANY ACTION OR PROCEEDING RELATING TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT AGAINST ANY LOAN PARTY OR ANY OF ITS PROPERTIES IN THE COURTS OF ANY OTHER JURISDICTION.

(c) **WAIVER OF VENUE.** EACH OF THE PARTIES HERETO IRREVOCABLY AND UNCONDITIONALLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY OBJECTION THAT IT MAY NOW OR HEREAFTER HAVE TO THE LAYING OF VENUE OF ANY PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT IN ANY COURT REFERRED TO IN SUBSECTION (B) OF THIS SECTION 10.16. EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAWS, THE DEFENSE OF AN INCONVENIENT FORUM TO THE MAINTENANCE OF SUCH PROCEEDING IN ANY SUCH COURT.

(d) **SERVICE OF PROCESS.** EACH OF THE PARTIES HERETO IRREVOCABLY CONSENTS TO SERVICE OF PROCESS IN THE MANNER PROVIDED FOR NOTICES IN SECTION 10.02. NOTHING IN THIS AGREEMENT WILL AFFECT THE RIGHT OF ANY PARTY HERETO TO SERVE PROCESS IN ANY OTHER MANNER PERMITTED BY APPLICABLE LAWS.

**Section 10.17. WAIVER OF RIGHT TO JURY TRIAL.**

TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF THE PARTIES HERETO HEREBY WAIVES ITS RIGHT TO A JURY TRIAL OF ANY CLAIM. EACH OF THE PARTIES HERETO REPRESENTS THAT EACH HAS REVIEWED THIS WAIVER AND EACH KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL ON SUCH MATTERS. IN THE EVENT OF LITIGATION, A COPY OF THIS AGREEMENT MAY BE FILED AS A WRITTEN CONSENT TO A TRIAL BY THE COURT.

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

**Borrower:**

**ATTIS ETHANOL FULTON, LLC**

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

[SIGNATURES CONTINUED ON FOLLOWING PAGE]

*[Signature Page to Loan and Security Agreement – Attis]*

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[SIGNATURES CONTINUED FROM PREVIOUS PAGE]

**Guarantors:**

**ATTIS INDUSTRIES INC.**

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

**ATTIS BIOFUELS, LLC,**

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

/s/ Jeffrey S. Cosman  
Jeffrey S. Cosman

[SIGNATURES CONTINUED ON FOLLOWING PAGE]

*[Signature Page to Loan and Security Agreement – Attis]*

\_\_\_\_\_

[SIGNATURES CONTINUED FROM PREVIOUS PAGE]

**Lender:**

**HIGHSCORE CAPITAL LLC**

By: /s/ Moshe Mintz

Name: Moshe Mintz

Title: Managing Member

*[Signature Page to Loan and Security Agreement – Attis]*

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**SCHEDULE 1.01-A**

**Equity Pledgors**

Attis Biofuels, LLC  
Attis Ethanol Fulton, LLC

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## **SCHEDULE 2.02**

### **Interest Payments**

On June 30, 2019, an amount equal to three and one-half percent ( $3\frac{1}{2}\%$ ) of the outstanding principal balance, plus \$1,075,000.00.

On July 5, 2019 and on Friday of each succeeding week until the Outstanding Amount shall have been paid in full \$250,000.

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## **SCHEDULE 2.03**

### **Principal Payments**

Beginning on September 6, 2019, 20 equal weekly payments of \$750,000 on Friday of each week until the entire principal amount is paid in full.

Any Protective Advance or other Credit Extension will be payable on demand or in accordance with the terms and conditions specifically applicable thereto.

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## DISCLOSURE SCHEDULE

The provisions of **Articles III, V, VI and VII** are subject, as applicable, to the transactions provided in the IDA Project documents, which contain provisions and grant rights and remedies to the IDA that may, pending the delivery of such additional documents as may be required pursuant to **Section 6.18(e)**, limit, condition or otherwise adversely impact the rights and remedies of Lender hereunder; provided however, that the Loan Parties represent and warrant that, and covenant to take all necessary and appropriate actions so that, notwithstanding that such provisions of the IDA Project documents may so limit, condition or otherwise adversely affect the enforcement of the remedial provisions with respect to the Collateral contained herein and in the Collateral Documents, such provisions do not affect the validity of the Loan Documents, taken as a whole, and the Loan Documents, taken as a whole, together with applicable Law, contain adequate provisions for the practical realization of the benefits intended to be provided thereby.

5.03. The Oswego County IDA must approve the conveyance of any security interest in the Facility.

5.14 Borrower will be a party to various derivative and/or hedge agreements in the ordinary course of its business.

6.03(h) Material Contracts:

1. Asset Purchase Agreement by and between Sunoco Retail, LLC, as Seller, and Attis Ethanol Fulton, LLC, as Purchaser, dated January 16, 2019, as amended.
2. Agreement for the Sale of CO2 by and between Sunoco Retail LLC (as successor in interest to Sunoco, Inc. (R&M)) and Linde Merchant Production, Inc., dated July 12, 2010.
3. Natural Gas Agreement by and between Sunoco Retail LLC and Sprague Operating Resources LLC, dated September 20, 2018.
4. PackageCare Agreement, dated June 30, 2014, by and between Ingersoll-Rand Company and Sunoco, Inc. (R&M).
5. Amendment to Master Service Contract No. C-9016, dated October 22, 2013, by and between SMBC Rail Services LLC (as successor in interest to American Railcar Leasing LLC) and Sunoco, Inc. (R&M), amending that certain Master Service Contract No. C-9016, dated February 13, 2012, by and between SMBC Rail Services LLC (as successor in interest to American Railcar Leasing LLC) and Sunoco, Inc. (R&M).
6. Amended and Restated Company Lease Agreement by and between Sunoco Retail LLC (as successor in interest to Sunoco, Inc. (R&M)) and the County of Oswego Industrial Development Agency, dated March 1, 2016.
7. Amended and Restated Agency Lease Agreement by and between Sunoco Retail LLC (as successor in interest to Sunoco, Inc. (R&M)) and the County of Oswego Industrial Development Agency, dated March 1, 2016.
8. Lease Agreement by and between Sunoco Retail LLC (as successor in interest to Northeast Biofuels, LLC) and Linde Merchant Production, Inc. (as successor in interest to The BOC Group, Inc.), dated June 12, 2006.
9. Attis Ethanol Fulton, LLC and County of Oswego Industrial Development Agency 3<sup>rd</sup> Amended and Restated Pilot Agreement.

6.12 The Operating Account

7.04(c) Borrower may prepay any or all of the Seller Debt at any time.

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# ASSIGNMENT AND ASSUMPTION AGREEMENT

This **ASSIGNMENT AND ASSUMPTION AGREEMENT**, dated as of May 31, 2019 (this "**Assignment**"), by and between Sunoco, LLC, a Delaware limited liability company ("**Assignor**") and Attis Ethanol Fulton, LLC, a Georgia limited liability company ( "**Assignee**").

## WITNESSETH:

**WHEREAS**, certain affiliates of Assignor are parties to the Purchased Contracts (as defined in the Agreement) (collectively, the "**Sunoco Affiliate Parties**" and each, a "**Sunoco Affiliate Party**");

**WHEREAS**, Assignor, directly or indirectly, owns 100% of the limited liability company interests of the Sunoco Affiliate Parties; and

**WHEREAS**, in accordance with the terms of that certain Second Amended and Restated Asset Purchase Agreement, dated as of May 31, 2019 (as amended, amended and restated and supplemented to date, the "**Agreement**"), providing for, among other things, the purchase and sale of the Purchased Assets, including the Purchased Contracts and the Assumed Liabilities, Assignor, on behalf of each of the Sunoco Affiliate Parties, and Assignee have agreed to enter into this Assignment, providing for (a) the assignment from the applicable Sunoco Affiliate Party, to Assignee of all of such Sunoco Affiliate Party's right, title and interest in, under and to the Purchased Contracts from and after the Closing, on and subject to the terms of the Agreement and this Assignment, and (b) the acceptance by Assignee of such assignment and the assumption by Assignee of (i) all obligations to be performed by the applicable Sunoco Affiliate Party, under the Purchased Contracts on and after the Closing Date and (ii) the other Assumed Liabilities.

**NOW, THEREFORE**, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto, intending to be legally bound hereby, agree as follows:

1. Assignment. In accordance with and subject to the terms of the Agreement, Assignor, on behalf of each of the Sunoco Affiliate Parties, hereby sells, assigns, transfers and conveys to Assignee, to the extent that such are legally assignable and any necessary consents to assignment have been obtained, all of the applicable Sunoco Affiliate Party's right, title and interest in, under and to the Purchased Contracts from and after the Closing.

2. Acceptance and Assumption. In accordance with and subject to the terms of the Agreement, Assignee hereby (a) purchases and accepts the assignment, transfer and conveyance, to the extent that such are legally assignable and necessary consents to assignment have been obtained, of each Sunoco Affiliate Party's right, title and interests in, under and to the Purchased Contracts; (b) unconditionally and irrevocably assumes, undertakes and agrees, subject to valid claims and defenses, to pay, satisfy, perform and discharge in full, as and when due, and release and discharge Assignor, each applicable Sunoco Affiliate Party and their respective successors and assigns completely and forever from, all obligations and liabilities of any kind arising out of, or required to be performed under, such assigned Purchased Contracts from and after the Closing and (c) unconditionally and irrevocably assumes, undertakes and agrees to pay, satisfy, perform and discharge in full, as and when due, and release and discharge Assignor, each applicable Sunoco Affiliate Party and their respective successors and assigns completely and forever from, all of the Assumed Liabilities and all obligations and liabilities of any kind arising out of Assignee's assumption of the Assumed Liabilities.

3. Conflict. In the event of any conflict or inconsistency between the terms of the Agreement and the terms hereof, the Agreement shall govern.

4. Parties in Interest. This Assignment shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

5. Counterparts. This Assignment may be executed by the parties hereto in separate counterparts, each of which when so executed and delivered shall be an original, and all of which together shall constitute one and the same instrument.

6. Governing Law. This Assignment and the rights and obligations of the parties hereunder shall be governed by, and construed in accordance with, the laws of the State of Texas as applied to contracts made and performed entirely in such state.

7. Definitions. Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Agreement.

*[Signature Pages Follow]*

IN WITNESS WHEREOF, the parties hereto have duly executed and delivered this Assignment as of the date first written above.

**ASSIGNOR:**

**SUNOCO, LLC**

By: /s/ Karl Fails

Name: Karl Fails

Title: President

SIGNATURE PAGE TO  
ASSIGNMENT AND ASSUMPTION AGREEMENT

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**ASSIGNEE:**

**ATTIS ETHANOL FULTON, LLC**

By: /s/ Jeffrey S. Cosman

Name: Jeffrey S. Cosman

Title: Manager

SIGNATURE PAGE TO  
ASSIGNMENT AND ASSUMPTION AGREEMENT

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## SUBORDINATION AGREEMENT

**THIS AGREEMENT** is made as of May 29, 2019 by the **County of Oswego Industrial Development Agency**, a public benefit corporation of the State of New York with an address of 44 West Bridge Street, Oswego, New York 13216 ("**Agency**") in favor of **Highscore Capital LLC**, with an address of 2233 Nostrand Avenue, 3<sup>rd</sup> Floor, Brooklyn, New York 11210 ("**Lender**").

## WITNESSETH:

**WHEREAS**, Sunoco, Inc. (R&M), a Pennsylvania corporation ("**Sunoco R&M**"), was a party to certain documents, including but not limited to an amended and restated company lease (the "**Amended and Restated Company Lease**"), an amended and restated agency lease agreement (the "**Amended and Restated Agency Agreement**"), an environmental compliance and indemnification agreement (the "**Environmental Compliance and Indemnification Agreement**") and a second amended and restated payment in lieu of tax agreement (the "**Second Amended and Restated PILOT Agreement**") and, together with all other documents executed or assumed by the Company in connection with the Project (as defined herein), the "**Company Documents**") in conjunction with a project undertaken by the Agency (the "**Project**") consisting of: (A) (i) the acquisition of a leasehold interest in approximately 90 acres of improved real property located at 1850 County Route 57, Fulton, Town of Volney, County of Oswego, and State of New York (aka 376 Owens Road, Fulton, NY) (the "**Original Land**"), (ii) the reconstruction of three existing buildings aggregating approximately 300,000 square feet (the "**Existing Facility**"), and the construction of five additional buildings aggregating approximately 15,000 square feet (the "**Original Facility**"), all for use as a corn to ethanol production facility, and (iii) the acquisition and installation of certain furnishings, fixtures, machinery and equipment (collectively the "**Original Equipment**") in the Existing Facility (the Original Land, the Existing Facility, the New Facility and the Original Equipment hereinafter collectively referred to as the "**Original Project Facility**"); (B) (i) the acquisition or continuation of a leasehold interest in approximately 91-119 acres of improved real property located at 376 Owen Road in the Town of Volney, New York, Oswego County (the "**New Land**" and together with the Original Land, the "**Land**"); (ii) construction and equipping of an approximate 1,260 square foot scale house for use in conjunction with the production of ethanol; the renovation, reconstruction, repair, equipping and improvements of approximately: (a) 10,500 square feet on the first floor and 24,000 square feet on the second floor of building 4 on the Land to be used in connection with the production of malt barley; (b) 49,000 square feet of building 5 on the Land to be used in connection with the production of malt barley and other uses; (c) 41,000 square feet in building 14 on the Land to be used for biorefining; (d) 33,500 square feet in building 25 on the Land for expansion of tank additions; and (e) 7,200 square feet in building 28 on the Land for future expansion (collectively the "**New Facility**" and together with the Original Facility, the "**Facility**"); (C) the acquisition and installation of machinery and equipment located in the Facility to be used in the production of ethanol (collectively the "**Equipment**") (the Land, Facility and Equipment are hereinafter collectively referred to as the "**Project Facility**"); (D) the granting of certain financial assistance in the form of exemption from sales and use taxation, mortgage recording tax, if any, and real property tax (collectively, the "**Financial Assistance**"); and (E) the lease of the Project Facility by the Agency pursuant to a lease agreement and the lease of the Project Facility back to Sunoco R&M pursuant to a sublease agreement; and

**WHEREAS**, in March 2016 Sunoco R&M merged (the "**Merger**") with a related company, Sunoco Retail LLC (the "**Company**"); and

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**WHEREAS**, as part of the Merger, and with the approval of the Agency, Sunoco R&M transferred the Project Facility to the Company and the Company agreed to accept same (the "**Transfer**"); and

**WHEREAS**, as part of the Transfer, and with the approval of the Agency, Sunoco R&M assigned all of the Company Documents to the Company and the Company assumed all of Sunoco R&M's obligations thereunder (the "**Assignment**"); and

**WHEREAS**, the Company notified the Agency that it intended to sell the Project Facility to Attis Ethanol Fulton, LLC (" **Attis**"); and

**WHEREAS**, the Company requested that the Agency consent to the sale by the Company of the Project Facility to Attis (the " **2019 Transfer**") and the assignment by the Company and the assumption by Attis (the "**2019 Assignment**") of the Amended and Restated Company Lease, the Amended and Restated Agency Agreement, the Second Amended and Restated PILOT Agreement, the Environmental Compliance and Indemnification Agreement and the other Company Documents (collectively, the "**Assumed Documents**"); and

**WHEREAS**, at the request of the Company, by resolution dated February 25, 2019 (the " **2019 Approving Resolution**"), the Agency approved the 2019 Transfer and the 2019 Assignment; and

**WHEREAS**, in connection with the 2019 Transfer and the 2019 Assignment, Lender has made a loan to Attis in the aggregate principal amount of \$15,000,000.00, which loan is secured by [enter names of the mortgage and other security documents] (collectively, the "**Mortgage**"); and

**WHEREAS**, Lender requires that the Amended and Restated Agency Lease and the Amended and Restated Company Lease be subordinated to the Mortgage.

**NOW, THEREFORE**, in consideration of these premises and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged that the Agency agrees with the Lender that the Amended and Restated Agency Lease and the Amended and Restated Company Lease are subject and subordinate to the lien of the Mortgage with the same effect, in law and in equity, as if the Mortgage were executed, delivered and recorded immediately prior thereto, including all interest accruing and advances made now or hereafter thereunder and all extensions, renewals or modifications thereof.

This Agreement may not be changed or terminated orally and shall bind and inure to the benefit of the parties hereto and their respective successors and/or assigns.



IN WITNESS WHEREOF, the Agency has duly executed this agreement the day and year first above written.

**COUNTY OF OSWEGO INDUSTRIAL DEVELOPMENT  
AGENCY**

By: /s/ Gary Toth  
Name: Gary Toth  
Title: Chairman

STATE OF NEW YORK            )  
  )ss:  
COUNTY OF OSWEGO         )

On the 29<sup>th</sup> day of May, in the year 2019 before me, the undersigned, personally appeared **GARY TOTH** personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individuals or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public

**SECURED NOTE**

\$15,000,000.00

May 31, 2019

**THIS NOTE** (this "Note") is made and issued as of May 31, 2019 by Attis Ethanol Fulton, LLC, a Georgia limited liability company having an address at 12540 Broadwell Road, Suite 2104, Milton, Georgia 30004 ("Borrower") to Highscore Capital LLC, a New York limited liability company ISAOA/ATIMA having an address at 2233 Nostrand Avenue, 3<sup>rd</sup> Floor, Brooklyn, New York 11210 ("Lender"). This Note is issued pursuant to, and in accordance with the terms and conditions of, the Loan and Security Agreement dated the date hereof among Borrower Lender and certain other parties named therein (as the same may be amended, restated, supplemented, replaced or otherwise modified from time to time, the "Loan Agreement"). All capitalized terms not defined herein shall have the respective meanings set forth in the Loan Agreement.

FOR VALUE RECEIVED, Borrower hereby promises to pay to the order of Lender, at its address set forth above, or at such other address(es) or to such account (s) and/or to such other person(s) as Lender may from time to time designate in writing, the principal sum of Fifteen Million and 00/100 Dollars (\$15,000,000.00) in lawful money of the United States of America, with interest thereon to be computed from the date of this Note in accordance with the terms of this Note and the Loan Agreement.

**ARTICLE 1: PAYMENT TERMS**

Borrower agrees to pay in immediately available funds the principal sum of this Note and interest on the unpaid principal sum of this Note and all other amounts due under this Note, the Loan Agreement and the other Loan Documents from time to time outstanding, in the amounts, at the rates and at the times specified in the Loan Agreement, and any outstanding balance of the principal sum of this Note and all accrued and unpaid interest thereon and all other amounts due under this Note, the Loan Agreement and the other Loan Documents shall be due and payable on the Maturity Date.

**ARTICLE 2: DEFAULT AND ACCELERATION**

Upon the occurrence of an Event of Default, Lender shall be entitled to all the rights and remedies prescribed in the Loan Agreement and the other Loan Documents.

**ARTICLE 3: LOAN DOCUMENTS**

This Note is secured by the Mortgage and the other Loan Documents. All of the terms, covenants and conditions contained in the Loan Agreement, the Mortgage and the other Loan Documents are hereby made part of this Note to the same extent and with the same force as if they were fully set forth herein. In the event of a conflict or inconsistency between the terms of this Note and the Loan Agreement, the terms and provisions of the Loan Agreement shall govern.

#### ARTICLE 4: SAVINGS CLAUSE

Notwithstanding anything to the contrary contained herein, (a) all agreements and communications between Borrower and Lender are hereby and shall automatically be limited so that, after taking into account all amounts deemed to constitute interest, the interest contracted for, charged or received by Lender shall never exceed the maximum non-usurious interest rate, if any, that at any time or from time to time may be contracted for, taken, reserved, charged or received on the indebtedness evidenced by this Note and as provided for herein or the other Loan Documents, under the Laws of such State or States whose Laws are held by any court of competent jurisdiction to govern the interest rate provisions of the Loan (the "Maximum Legal Rate"), (b) in calculating whether any interest exceeds the Maximum Legal Rate, all such interest shall be amortized, prorated, allocated and spread over the full amount and term of all principal indebtedness of Borrower to Lender, and (c) if through any contingency or event, Lender receives or is deemed to receive interest in excess of the Maximum Legal Rate, any such excess shall be deemed to have been applied toward the payment of the principal of any and all then outstanding indebtedness of Borrower to Lender, or if there is no such indebtedness, shall immediately be returned to Borrower.

#### ARTICLE 5: NO ORAL CHANGE

This Note may not be modified, amended, waived, extended, changed, discharged (except upon the full performance and satisfaction of all of Borrower's obligations hereunder, including the payment in full of all amounts payable hereunder) or terminated orally or by any act or failure to act on the part of Borrower or Lender, but only by an agreement in writing signed by Borrower and Lender.

#### ARTICLE 6: WAIVERS

Borrower and all others who may become liable for the payment of all or any part of this Note do hereby jointly and severally waive presentment and demand for payment, notice of dishonor, notice of intention to accelerate, notice of acceleration, protest and notice of protest and non-payment and all other notices of any kind. No release of any security for this Note or extension of time for payment of this Note or any installment hereof, and no alteration, amendment or waiver of any provision of this Note, the Loan Agreement or any other Loan Document made by agreement between Lender and any other Person shall release, modify, amend, waive, extend, change, discharge, terminate or affect the liability of Borrower or any other Person who may become liable for the payment of all or any part of this Note or under the Loan Agreement or the other Loan Documents. No notice to or demand on Borrower shall be deemed to be a waiver of the obligation of Borrower or of the right of Lender to take further action without further notice or demand as provided for in this Note, the Loan Agreement or the other Loan Documents. If Borrower is a partnership or limited liability company, the agreements herein contained shall remain in force and be applicable, notwithstanding any changes in the Persons comprising the partnership or limited liability company, and the term "Borrower," as used herein, shall include any alternate or successor partnership or limited liability company, but any predecessor partnership or limited liability company and its partners or members shall not thereby be released from any liability. If Borrower is a corporation, the agreements contained herein shall remain in full force and be applicable, notwithstanding any changes in the shareholders comprising, or the officers and directors relating to, the corporation, and the term "Borrower," as used herein, shall include any alternative or successor corporation, but any predecessor corporation shall not be relieved of liability hereunder. (Nothing in the foregoing two sentences shall be construed as a consent to, or a waiver of, any prohibition or restriction on transfers of interests in such partnership, limited liability company or corporation which may be set forth in the Loan Agreement, the Mortgage or any other Loan Document.)

#### ARTICLE 7: SECURITY

This Note is secured by a Mortgage (the "Mortgage") made by the Borrower to the Lender of even date herewith covering premises situated in the State of New York and Town of Volney known by the address 376 Owens Road and 1850 County Route 57, Fulton, New York , and designated as Section 254 Block 5, Lot 04.03; 04.08; 04.06; 04.11; 04.12 in the County of Oswego.

#### ARTICLE 8: SUCCESSORS AND ASSIGNS

This Note shall be binding upon, and shall inure to the benefit of, Borrower and Lender and their respective successors and permitted assigns. Lender shall have the right to assign or transfer its rights under this Note in connection with any assignment of the Loan and the Loan Documents. Any assignee or transferee of Lender shall be entitled to all the benefits afforded to Lender under this Note and the Loan Documents. Borrower shall not have the right to assign or transfer its rights or obligations under this Note without the prior written consent of Lender, as provided in the Loan Agreement, and any attempted assignment without such consent shall be null and void. Upon the transfer of this Note by Lender, Lender may deliver all the collateral mortgaged, granted, pledged or assigned pursuant to the Loan Documents, or any part thereof, to the transferee who shall thereupon become vested with all the rights herein or under applicable Law given to Lender with respect thereto, and Lender shall thereafter forever be relieved and fully discharged from any liability or responsibility in the matter; but Lender shall retain all rights hereby given to it with respect to any liabilities and the collateral not so transferred.

#### ARTICLE 9: GOVERNING LAW

THIS NOTE WILL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE of NEW YORK, PROVIDED THAT TO THE EXTENT ANY OF SUCH LAWS MAY NOW OR HEREAFTER BE PREEMPTED BY FEDERAL LAW, IN WHICH CASE SUCH FEDERAL LAW SHALL SO GOVERN AND BE CONTROLLING.

#### ARTICLE 10: WAIVER OF JURY TRIAL

BORROWER HEREBY AGREES NOT TO ELECT A TRIAL BY JURY OF ANY ISSUE TRIABLE OF RIGHT BY JURY, AND FOREVER WAIVES ANY RIGHT TO TRIAL BY JURY FULLY TO THE EXTENT THAT ANY SUCH RIGHT SHALL NOW OR HEREAFTER EXIST, WITH REGARD TO THIS NOTE, THE MORTGAGE OR THE OTHER LOAN DOCUMENTS, OR ANY CLAIM, COUNTERCLAIM OR OTHER ACTION ARISING IN CONNECTION THEREWITH. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS GIVEN KNOWINGLY AND VOLUNTARILY BY BORROWER AND IS INTENDED TO ENCOMPASS INDIVIDUALLY EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A TRIAL BY JURY WOULD OTHERWISE ACCRUE. LENDER IS HEREBY AUTHORIZED TO FILE A COPY OF THIS PARAGRAPH IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER BY BORROWER.

ARTICLE 11: RESERVED

ARTICLE 13: NOTICES

All notices or other written communications hereunder shall be delivered in accordance with Section 10 of the Loan Agreement.

ARTICLE 14: JOINT AND SEVERAL LIABILITY

If Borrower consists of more than one Person, the obligations and liabilities of each such Person constituting Borrower hereunder and under the other Loan Documents shall be joint and several.

[Remainder of page intentionally left blank. Signature page follows.]

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## Attis Industries Completes Acquisition of Corn Ethanol Plant from Sunoco LP

### 100 Million Gallon Per Year Plant will be Basis for State-of-the-Art Green Tech Campus

**MILTON, GEORGIA – JUNE 3, 2019:** Attis Industries Inc. (NASDAQ: ATIS) (the "Company" or "Attis"), a diversified innovation and technology holding company today announced that it completed the acquisition of the corn ethanol plant and grain malting operation in Fulton, New York from Sunoco LP (NYSE: SUN) ("Sunoco"). The ethanol plant immediately becomes an essential element of Attis' current operations and will be pivotal in the Company's expanding technology portfolio as it develops the site into a state-of-the-art Green Tech campus.

"We are incredibly excited to announce the acquisition of the Fulton corn ethanol plant and grain malting operations," said Jeff Cosman, Chief Executive Officer of Attis Industries. "This acquisition is an important milestone for Attis as we embark on our mission to be a significant contributor to the global renewable fuel market."

Attis acquired the nameplate 100 million gallon per year corn ethanol plant and grain malting operations for \$20 million in cash with non-dilutive financing. The transaction includes a six-month transition services agreement as well as a 10-year offtake agreement for the ethanol produced at the facility, creating exceptional stability for Attis as it expands the capabilities of the facility over the next two years.

"When evaluating potential locations for Attis to establish a foothold in the renewable fuel space, the Fulton site was an obvious choice based on its strategic location to the strong northeastern fuel market, state-of-the-art and well-maintained facility as well as site expandability for future upgrades in operations," continued Cosman. "These desirable site attributes, as well as the state of New York's continued commitment to the growth of green energy, made Fulton an ideal fit for Attis."

Today, the United States consumes roughly 19 billion gallons of renewable fuel on an annual basis; however, Attis believes firmly that through the deployment of its innovative and transformative suite of green technologies, yearly production can nearly double while taking advantage of more carbon neutral feedstocks. Desperately needed innovation is required to realign existing production to the Renewable Fuel Standard's goal of 36 billion gallons by 2022.

"We appreciate the opportunity to have worked with Sunoco on this acquisition and look forward to continuing our strong relationship for the next decade," concluded Cosman. "As a company, we have established aggressive growth goals for the deployment of our transcendent green technology portfolio and look forward to relentlessly pursuing future milestones as we position Attis as the premier green energy producer in the world."

#### Attis Industries Inc.

Attis Industries Inc. (NASDAQ: ATIS) is a holding company focused on developing and building businesses that play important roles in the new economy, which include renewable fuels, bio-based plastics, healthcare and communications infrastructure. We strive to encourage our employees to be entrepreneurs focused on innovation and technology. We will remain dynamic, persistent and motivated to our mission of winning. The growth of our company will rely on our integrity and our vision for the future. Attis Industries will continue to fulfill essential needs in healthcare, energy independence and digital communications. Today, each of these sectors provide high growth opportunities that collectively account for more than a third of our nation's GDP. For more information, visit: [www.attisind.com](http://www.attisind.com).

#### Forward-Looking Statements

Any statements contained in this press release that do not describe historical facts may constitute forward-looking statements as that term is defined in the Private Securities Litigation Reform Act of 1995. You can identify forward-looking statements by words such as "anticipate," "believe," "could," "estimate," "expect," "intend," "may," "plan," "should," "would" or similar words. You should consider these statements carefully because they discuss our plans, targets, strategies, prospects and expectations concerning our business, operating results, financial condition and other similar matters. These statements are subject to certain risks, uncertainties, and assumptions, including, but not limited to, risks and uncertainties relating to the Company's ability to develop, market and sell products based on its technology; the expected benefits and efficacy of the Company's products and technology; the availability of substantial additional funding for the Company to continue its operations and to conduct research and development, clinical studies and future product commercialization; and, the Company's business, research, product development, regulatory approval, marketing and distribution plans and strategies; the ability of the Company to continue to meet the listing requirements of NASDAQ; the ability of the Company to execute on a business plan that permits the technologies and innovations businesses to provide sufficient growth, revenue, liquidity and cash flows for sustaining the Company's go-forward business and meeting any of its obligations under its indebtedness for borrowed money, and the risks identified and discussed under the caption "Risk Factors" in the Attis Annual Report on Form 10-K for the fiscal year ended December 31, 2017, filed with the Securities and Exchange Commission (the "SEC") on April 16, 2018 and the other documents Attis files with the SEC from time to time. There will be events in the future, however, that Attis is not able to predict accurately or control. Attis's actual results may differ materially from the expectations that Attis describes in its forward-looking statements. Factors or events that could cause Attis's actual results to materially differ may emerge from time to time, and it is not possible for Attis to accurately predict all of them. Any forward-looking statement made by Attis in this press release speaks only as of the date on which Attis makes it. Attis undertakes no obligation to update or revise any forward-looking statements, whether as a result of new information, future events or otherwise, except as required by law.

Corporate Investor Relations:  
[ir@attisind.com](mailto:ir@attisind.com)

## Attis Industries Acquired Corn Ethanol Plant Expected to Generate Approximately \$150 Million in Revenue

*Appraised Asset Value of \$57 Million*

### *Strategic Plan Over the Next Two Years to Build Premier Green Tech Campus*

**MILTON, GEORGIA – June 4, 2019 – GlobeNewswire** - Attis Industries Inc. (NASDAQ: ATIS) (the “Company” or “Attis”), a diversified innovation and technology holding company, is pleased to announce that its recently acquired corn ethanol plant in Fulton, NY is expected to generate over \$150 million in revenue under its current operating conditions. This corn ethanol plant is just the base platform for the Company’s strategic plan to develop a state-of-the-art green tech campus in Fulton, NY.

On June 3rd, Attis announced it had finalized the \$20 million purchase of Sunoco LP’s nameplate 100 million gallon per year corn ethanol plant and grain malting operation in Fulton, NY. The acquisition provides the Company with an operational asset that produces revenue immediately and will be the centerpiece of its proposed green tech campus. In addition to the ethanol produced, today the Fulton facility is producing or capturing about the following on an annual basis:

- 360 million pounds of CO2 for sale into food, beverage or industrial applications
- 455 million pounds of DDGS for use in animal feed
- 18 million pounds of distillers corn oil for use as a feedstock in biodiesel and animal feed
- 4 million pounds of malted grain

Beyond these operational capabilities, Attis has identified several projects at the site that will enhance the profitability and overall production capacity of the site and create roughly 100 high skilled jobs. Tapping into its already deep portfolio of proprietary biobased process technologies, Attis will focus on byproduct optimization of the corn ethanol plant and the new production of advanced biofuels and biobased products such as bioplastics and carbon fiber. Attis will also look to generate “green” power, thus reducing the overall carbon footprint of the Fulton campus and taking advantage of valuable carbon credits to increase the site’s profitability.

“Our recent acquisition of the Fulton, NY corn ethanol plant from Sunoco was a milestone moment for Attis,” said Jeff Cosman, Chairman and CEO of Attis Industries. “Over the past 13 months Attis has eliminated over \$100MM of debt associated with a \$55MM revenue traditional solid waste company that continued to face headwinds in a very challenging competitive market. By eliminating the debt and focusing on building a company with advanced technology in renewable fuels and biobased products, we have transformed this company to a leader in the green economy. The Fulton plant is an amazing asset that is projected to generate over \$150 million in annual revenue, contribute solid EBITDA, has an appraised asset value of \$57 million, has six miles of private rail and one of the largest Craft Malting facilities in the US. With less than 4 million shares outstanding, three times the size of our previous revenue prospects in solid waste, comparable EBITDA and 60% to 70% less debt, the market cap of Attis will greatly improve as we begin to fulfill other milestones expected to be cleared up in the coming weeks. However, the ethanol and grain malting operation are just the beginning. We want to transform the Fulton, NY site into the advanced green technology epicenter of the globe where Attis can showcase its myriad of technologies that bring real, sustainable, and profitable solutions to the world.”

The suite of technologies Attis plans to roll out over the next two years will capitalize on the available efficiencies and renewable resources present in the New York market. Attis plans to immediately begin the process of deploying its patented biorefinery technology to further diversify the biofuel and biobased product manufacturing at the campus. By tapping into a vibrant local market for woody biomass, Attis will convert extracted pulp into cellulosic fuels and lignin into bioplastics, carbon fiber and advanced fuels like renewable diesel and jet fuel.

Attis will also look to improve upon the quality and volume of coproducts currently being produced at the Fulton ethanol plant by implementing its patented and licensed corn oil extraction technology that will almost double the current corn oil production yields at the plant and provide an augmented revenue stream. The additional oil extraction system will serve a dual purpose as it will open a local market for the ethanol plant’s distiller grains; Attis’ new low-oil distiller grains will be better suited for dairy cow consumption. As New York is the third largest dairy producing state, this provides considerable value.



In addition to coproduct optimization and biobased products, Attis will also look to leverage the state's abundant supply of local renewable biomass to install a boiler on-site to generate green power necessary to run the state-of-the-art campus.

Cosman continued, "We have lofty goals for the Fulton, NY campus and look forward to showcasing the full breadth of Attis' capabilities. We hope that the successful transformation of a traditional corn ethanol plant into an integrated and highly profitable green tech campus will catalyze future projects and usher in a new era for Attis Industries. I believe in the mission of Attis so much, I have once again personally guaranteed the financing of this transaction for the shareholders."

#### **Attis Industries Inc.**

Attis Industries Inc. (NASDAQ: ATIS) is a diversified innovation and technology holding company focused on developing and building businesses in the healthcare, sustainable materials and renewable fuel markets. We strive to encourage our employees to be entrepreneurs focused on innovation and technology. We will remain dynamic, persistent and motivated to our mission of winning. The growth of our company will rely on our integrity and our vision for the future. Today, each of Attis business sectors provide high growth opportunities that collectively account for more than a third of our nations GDP. For more information, visit: [www.attisind.com](http://www.attisind.com).

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