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Transactional Matter Files

APA - Purchase & Sale of Assets

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this Agreement, the date that is the reference date in calculating such period shall be excluded (for example, if an action is to be taken within two days of a triggering event, and such event occurs on a Tuesday, then the action must be taken by Thursday). If the last day of such period is a non-Business Day, the period in question shall end on the next succeeding Business Day.

(b) **Dollars.** Any reference in this Agreement to \$ shall mean U.S. dollars.

(c) **Schedules.** The Schedules to this Agreement are hereby incorporated and made a part hereof and are an integral part of this Agreement as if set forth in full herein. Any capitalized terms used in any Schedule but not otherwise defined therein shall be defined as set forth in this Agreement.

(d) **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.

(e) **No Drafting Presumptions.** The parties hereto have participated jointly in the negotiation and drafting of this Agreement and the other agreements contemplated hereby 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.

(f) **Construction.** Words used in this Agreement in the singular number shall include the plural, and vice versa, unless the context requires otherwise. Words of gender used in this Agreement may be read as masculine, feminine or neuter as the context may require. The terms "this Agreement," "hereto," "herein," "hereby," "hereunder," "hereof" and similar expressions refer to this Agreement (including the Schedules hereto) in its entirety and not to any particular provision or portion of this Agreement unless the context clearly provides otherwise. Whenever the words "include," "includes" or "including" are used herein, they shall be deemed to be followed by the words "without limitation."

ARTICLE II- PURCHASE AND SALE OF ASSETS

2.1 Purchase and Sale of Assets.

(a) At the Closing Seller will sell, assign, transfer and deliver to Buyer, and Buyer will purchase and acquire from Seller, all right, title and interest in and to the Acquired Assets, free and clear of all Liens, on the terms and subject to the conditions set forth in this Agreement. For purposes of this Agreement, "**Acquired Assets**" shall mean all of Seller's assets used or held for use in the Business, including the following (but excluding in all cases the Excluded Assets):

(i) the Acquired Intellectual Property, together with all rights associated

therewith, including the right to sue and collect for any past, present or future infringement, misappropriation or unauthorized use thereof, and any goodwill associated with any trademarks included therein;

(ii) the "Acquired Contracts" specified in Schedule 2.1(a)(ii);

(iii) all rights under or pursuant to warranties and guarantees made by suppliers, manufacturers or contractors in connection with products or services provided to the Business and all other claims and rights against third parties relating to the Acquired Assets or Assumed Liabilities;

(iv) any and all of Seller's and Seller's Affiliates' claims, causes of action, choses in action, rights of recovery, rights of setoff, rights of recoupment and other rights of any kind against third parties related to the conduct of the Business, the Acquired Assets or the Assumed Liabilities;

(v) except as otherwise provided in Schedule 2.1(a)(v), any rights in, relating to, or for use or exploitation of, any trademark, trade name, corporate name and domain name that includes, is based on, relates to or is likely to be confused with the terms "iCare," or any other similar term or derivative thereof; and

(vi) marketing and survey materials including customer contract information, mailing lists and other marketing, sales or customer prospect information relating to the Business and/or the iCare Software.

(b) Notwithstanding anything to the contrary contained in this Agreement, Seller shall retain all of its right, title and interest in and to, and will not sell, transfer, assign, convey or deliver to Buyer, and the Acquired Assets will not include the following (collectively, the "**Excluded Assets**"):

(i) any cash or cash equivalents, including any investment accounts, marketable securities or certificates of deposit, or any collected funds or items in the process of collection at Seller's financial institutions through and including the Closing Date except for any vendor deposits;

(ii) any accounts receivable or notes receivable;

(iii) inventory and supplies;

(iv) tangible personal property, including equipment, computers, servers, and peripheral equipment;

(v) any rights under any Tax allocation or sharing agreement;

(vi) any real property leased or owned by Seller and all fixtures thereon;

(vii) the Contracts set forth on Schedule 2.1(b)(vii) (the "**Excluded**

Contracts");

(viii) any rights of Seller or the Seller Indemnified Parties under this Agreement, the Buyer Documents and the Seller Documents;

(ix) the Books and Records; provided, however, that Buyer shall be entitled to acquire, at its own expense, copies of any materials reasonably necessary for its human resources, accounting, tax or legal purposes;

(x) any other assets, rights and properties set forth on Schedule 2.1(b)(xi); and

(xi) any other assets, Contracts, rights and properties not used or held for use in the Business.

2.2 Assumed and Excluded Liabilities.

(a) On the terms and subject to the conditions contained in this Agreement and except as otherwise provided in Section 2.2(b), at the Closing, Buyer will assume and thereafter timely pay, perform or otherwise discharge the following liabilities and obligations of Seller related exclusively to the Business (the "**Assumed Liabilities**"):

(i) At the Closing, Buyer will assume Seller's obligations under the Acquired Assets solely to the extent such obligations first arise and must be performed from and after the Closing Date, were incurred in the ordinary course and are not past due or the result of any action, inaction, breach, violation or default by Seller occurring on or prior to the Closing Date.

(b) Notwithstanding any other provision of this Agreement, other than the Assumed Liabilities, Seller shall retain, and Buyer shall not assume or become responsible or liable with respect to any, liabilities or obligations of Seller (collectively, the "**Excluded Liabilities**"). By way of example and not of limitation, Buyer will not be responsible or liable for any of the following liabilities or obligations of Seller (each of which will constitute an Excluded Liability):

(i) any liability or obligation of Seller or any of its Affiliates, or any of their respective directors, officers, security holders, members, managers or agents, that is imposed upon or assumed by such Persons pursuant to this Agreement or the transactions contemplated hereby;

(ii) any liability or obligation relating to, based in whole or in part on events or conditions occurring or existing in connection with, or arising out of, any Excluded Asset;

(iii) any liability or obligation arising out of, or relating to, Taxes of Seller, including any Taxes arising as a result of Seller's operation of the Business or ownership of the

Acquired Assets prior to the Closing Date, or any of the transactions contemplated by this Agreement;

(iv) any liability or obligation of Seller under any Environmental Law arising from or relating to the ownership, performance, operation, use or possession of the Business, Acquired Assets or Assumed Liabilities prior to the Closing Date;

(v) any indebtedness for borrowed money or guarantees, make-whole or keep well Contracts in connection therewith;

(vi) any liabilities and obligations arising out of or relating to Contracts between the Business, on the one hand, and Seller and/or any of its Affiliates, on the other hand;

(vii) any liabilities and obligations arising out of, or relating to, any intercompany payables, accounts and notes payable and other obligations of the Business to make payment in favor of, discharge or otherwise be responsible for the liabilities or obligations of Seller or any of its Affiliates;

(viii) any worker's compensation liabilities, liabilities arising out of, or relating to, any Legal Proceeding involving Seller or its Affiliates whether or not related to the Acquired Assets or the Business, and liabilities related to the use or ownership of the Acquired Assets or the Business by Seller or any predecessor in interest;

(ix) any liability or obligation arising out of, or relating to, the failure of Seller to obtain any Permits material to or necessary for the conduct of the Business prior to the Closing;

(x) any liabilities or obligations arising out of, or relating to, any current or former employees or consultants of the Business and their beneficiaries and other employee, employment related or compensation or benefit plan related liabilities, including (A) with respect to Laws regarding employment arising or incurred on or prior to the Closing Date or as a result of the transactions contemplated by this Agreement and (B) any liability arising out of, or relating to, any key employee retention plans, any "employee benefit plan" (as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended), and COBRA coverage for employees or consultants of Seller or the Business terminated prior to or as part of the consummation of the transactions contemplated by this Agreement;

(xi) any liabilities or obligations attributable to, arising out of or relating to, any actual or deemed breach or default, or any facts or circumstances that could give rise to such a breach or default, pursuant to any Contract other than the Acquired Contracts;

(xii) any liability for commissions or similar sales incentives payable to employees of the Business arising prior to the Closing; and

(xiii) the other liabilities specifically described on **Schedule 2.2(b)**.

2.3 Purchase Price; Royalties.

(a) At Closing, WKH will reimburse the Seller's development and operating costs related to the Acquired Assets that are listed on **Schedule 2.3(a)** and that are evidenced with appropriate support; such reimbursement not to exceed \$300,000.

(b) On January 31, 2011, WKH will pay iCare \$500,000 by bank wire transfer to an account specified in writing by Seller.

(c) Not later than April 1, 2012, WKH will pay iCare the 2011 iCare Royalty by bank wire transfer to an account specified in writing by Seller.

(d) Not later than February 15, 2013, WKH will pay iCare the Guarantee Amount by bank wire transfer to an account specified in writing by Seller. Not later than April 1, 2013, WKH will pay iCare the excess of the 2012 iCare Royalty over the Guarantee Amount, if any, by bank wire transfer to an account specified in writing by Seller.

(e) Not later than February 15, 2014, WKH will pay iCare the Guarantee Amount by bank wire transfer to an account specified in writing by Seller. Not later than April 1, 2014, WKH will pay iCare the excess of the 2013 iCare Royalty over the Guarantee Amount, if any, by bank wire transfer to an account specified in writing by Seller.

(f) Not later than February 15, 2015, WKH will pay iCare the Guarantee Amount by bank wire transfer to an account specified in writing by Seller. Not later than April 1, 2015, WKH will pay iCare the excess of the 2014 iCare Royalty over the Guarantee Amount, if any, by bank wire transfer to an account specified in writing by Seller.

(g) Not later than April 1, 2016, WKH will pay iCare the 2015 iCare Royalty by bank wire transfer to an account specified in writing by Seller.

(h) If iCare defaults in its obligations under the Master Consulting Agreement and the attached Statements of Work, the amounts otherwise due under **Sections 2.3(c)** through **(g)** above shall be reduced as provided in **Schedule 2.3(h)**.

(i) Pursuant to this Agreement, UT, its faculty and its nursing, other health care and veterinary students will be granted a royalty-free, non-transferrable license to use the then most recent iCare product. This usage grant is more particularly described in **Schedule 2.3(i)**.

(j) Buyer agrees that in the event of a Change of Control of WKH, the Guarantee Amounts due under **Sections 2.3(d)** through **(f)** above, to the extent not already paid, shall become immediately due and payable to the Seller.

2.4 Allocation of Purchase Price.

(a) Within 90 days after the Closing Date, Buyer and Seller shall mutually agree on the allocation of the purchase price (including Assumed Liabilities) among the

assets of the Business according to their relative fair market values on the Closing Date, provided that the parties agree that Buyer's noncompetition rights shall be valued at \$25,000. Within such 90 days, Buyer shall prepare and deliver to Seller a proposed schedule (the "**Allocation Schedule**") setting forth such allocation among the Acquired Assets. The Allocation Schedule as it relates to the Business will be prepared in accordance with Section 1060 of the Code and the rules and regulations promulgated thereunder. If Seller reasonably disagrees with the allocation reflected in the Allocation Schedule delivered by Buyer, Seller and Buyer shall cooperate in good faith to resolve such dispute and will revise the Allocation Schedule to incorporate any changes agreed to by the Parties.

(b) Unless Buyer and Seller are unable to agree to an Allocation Schedule, Buyer and Seller agree to file all tax returns consistent with the Allocation Schedule (including Buyer's completion of Form 8594, and any other forms, statements, or returns required by the Code, the IRS, or any applicable state or local taxing authority). If Buyer and Seller are unable to agree on an Allocation Schedule within 180 days after the Closing Date, each party will use its own allocation schedule consistent with its own allocation of the purchase price.

(c) Buyer and Seller agree to promptly provide the other party with any additional information and reasonable assistance required to complete all forms or compute taxes arising in connection with (or otherwise affected by) the transactions contemplated hereunder.

ARTICLE III - CLOSING

3.1 Closing.

The closing of the transactions contemplated hereby (the "**Closing**") shall be effectuated by electronic exchange of documents, with copies of original, executed documents subsequently exchanged at the convenience of the parties promptly after the Closing. The Closing may take place at the offices of Goldberg Kohn Ltd., 55 East Monroe, Suite 3300, Chicago, Illinois 60603 (or at such other place as Buyer and Seller may designate in writing) concurrent with the execution of this Agreement or at such other time and place as the parties mutually agree. The date on which the Closing shall occur is referred to in this Agreement as the "**Closing Date**." The Closing will be effective for all purposes at 12:01 a.m. (Central time) on the Closing Date.

ARTICLE IV- REPRESENTATIONS AND WARRANTIES OF SELLER

Seller represents and warrants to Buyer, as of the date hereof, that the following statements are true and correct. The Schedules have been arranged in sections that correspond to the sections contained in this **Article IV**.

4.1 Organization and Good Standing of Seller.