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Acquisition Escrows in Tennessee: An Annotated Model Tennessee Acquisition Escrow Agreement

Joan MacLeod Heminway
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**ACQUISITION ESCROWS IN TENNESSEE:
AN ANNOTATED MODEL TENNESSEE
ACQUISITION ESCROW AGREEMENT**

Joan MacLeod Heminway* & Timothy M. McLemore**

PRELIMINARY NOTE

This Annotated Model Tennessee Acquisition Escrow Agreement (the “Tennessee Escrow Agreement”) is a short-form escrow agreement. It is annotated with explanatory footnotes and is intended to serve more as a reference tool than as a template acquisition escrow agreement. It has been drafted and annotated with an emphasis on Tennessee law and practice. Accordingly, we have provided in Section 8 of the Tennessee Escrow Agreement that Tennessee law will govern this transaction. The authors’ stylistic preferences and “practice points” are reflected in this Tennessee Escrow Agreement. Sources of general application, as well as those reflecting Tennessee law and practice, are cited in support of the authors’ drafting choices, ideas and perspectives, as applicable. Capitalized terms used and not defined in this Preliminary Note have the meanings assigned to them in the text of the Tennessee Escrow Agreement. Annotation footnotes in the Tennessee Escrow Agreement use terms as they are defined in the Tennessee Escrow Agreement.

The intent of the Tennessee Escrow Agreement and related annotations is to benefit drafters for both buyers and sellers in mergers, asset purchases and stock purchase transactions.¹ The essential purpose of an escrow in a merger or

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¹ Escrow arrangements are almost nonexistent when the target corporation is a public company (a corporation with a class of securities registered under the Securities Exchange Act of 1934, as amended, 15 U.S.C. §§ 78a – 78lll), but they are more common in public-private and private-private mergers. See JAMES C. FREUND, ANATOMY OF A MERGER: STRATEGIES AND TECHNIQUES FOR NEGOTIATING CORPORATE ACQUISITIONS 160 (1975) (“The public stockholders will generally not be

acquisition transaction is to afford the acquiror and the target or seller more equal bargaining power in the event that the parties cannot or do not ascertain certain matters at or before the time of closing. These matters most often are handled through indemnification for breaches of representations and warranties.² The Tennessee Escrow Agreement is a near-final form of agreement intended to serve this purpose. It originally was drafted by counsel for the Buyer in an asset purchase transaction and has been negotiated. In the transaction, Buyer, a Delaware limited partnership³ with its principal place of business in Boston, Massachusetts, is acquiring substantially all of the assets of Seller, a Tennessee manager-managed limited liability company governed by the Tennessee Revised Limited Liability Company Act, as amended,⁴ with its principal place of business in Knoxville, Tennessee. The assets to be conveyed in the transaction consist of a ten-story high-rise office building located in Knoxville, Tennessee, and the land on which the building sits (the “Assets”). Buyer’s title company serves as the escrow agent under the Tennessee Escrow Agreement.⁵

The aggregate purchase price for the Assets, negotiated by Buyer and Seller, is \$10,000,000, payable by Buyer at the closing. Buyer requested, and Seller

amenable to a holdback of part of the consideration they have coming to them in order to enforce indemnification”); Broc Romanek et al., *Negotiating Public-Private Mergers*, 6 M&A LAW. 1 (July/Aug. 2002) (panel discussion) (comments of Richard Climan) (“Acquirers often demand escrow/holdbacks in public-private mergers to protect their post-closing indemnification rights.”). As many as 75% of private company acquisition transactions involve indemnification escrows, according to a recent American Bar Association study of publicly available private company acquisition agreements (128 in total) completed in 2004. AMERICAN BAR ASSOCIATION M&A MARKET TRENDS SUBCOMMITTEE, PRIVATE TARGET MERGERS & ACQUISITIONS DEAL POINTS STUDY 67 (2006), available at <http://www.abanet.org/abanet/common/login/securedarea.crm?areaType=committee&role=CL560000&url=/buslaw/committees/CL560000/materials/matrends/study27Mar06.pdf> (available to American Bar Association Members only).

² See FREUND, *supra* note 1, at 384 (noting that escrow arrangements in this context serve “to equalize bargaining strengths at that future moment when a claim for indemnification is made” and explaining the reasons why this is so); 1 LOU R. KLING & EILEEN T. NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 15.06[3] (2003) (noting that an escrow “somewhat equalizes bargaining strengths in the event of a claim for indemnification”); see also AMERICAN BAR ASSOCIATION COMMITTEE ON NEGOTIATED AGREEMENTS, MODEL ASSET PURCHASE AGREEMENT WITH COMMENTARY: EXHIBITS, ANCILLARY DOCUMENTS AND APPENDICES 51 (2001) [hereinafter ABA MODEL ASSET PURCHASE AGREEMENT EXHIBITS].

³ Delaware limited partnerships are organized and exist under the Delaware Revised Uniform Limited Partnership Act. See generally DEL. CODE ANN. tit. 6 §§ 17-101 to -1111 (2005).

⁴ TENN. CODE ANN. §§ 48-249-101 to -1133 (2005).

⁵ See *infra* note 18.

consented to, an escrow of 10%⁶ of the aggregate purchase price to provide for possible damages to Buyer—value diminution, costs and expenses—resulting from Seller’s breaches of its warranties and representations in the Purchase Agreement.⁷ These warranties and representations include, for example, Seller’s valid organization and existence as a Tennessee limited liability company; Seller’s power and authority to execute, deliver and perform its obligations under the Purchase Agreement and the Escrow Agreement; the accuracy of Seller’s rent roll; and Seller’s clear record title to the Assets. The Purchase Agreement provides for a delayed closing to allow the parties time to complete their due diligence. The Purchase Agreement outlines the basic terms of the escrow, references the Tennessee Escrow Agreement and includes as a condition to closing the execution and delivery of the Tennessee Escrow Agreement substantially in the form attached to the Purchase Agreement.⁸ Under the Purchase Agreement, Buyer is entitled to indemnification for “Losses” that it suffers as a result of any breach of these warranties and representations.⁹ The Tennessee Escrow Agreement effectively funds that indemnification to the level of the Escrow Funds.¹⁰ Under the terms of the Purchase Agreement, Seller’s warranties

⁶ See FREUND, *supra* note 1, at 385 (noting that “[t]here is no magic formula” for determining the portion of the purchase price made subject to an escrow); KLING & NUGENT, *supra* note 2, at § 15.06[3][a].

⁷ See Terry W. Gentle, Jr. & Joan MacLeod Heminway, *Buying Stock in Tennessee: An Annotated Model Tennessee Stock Purchase Agreement*, 5 TRANSACTIONS: TENN. J. BUS. L. 211, 222 n.22 (2004).

⁸ See, e.g., *id.* at 266 (Section 5.02(i)); Angela Humphreys Hamilton & Joan MacLeod Heminway, *Buying Assets in Tennessee: An Annotated Model Tennessee Asset Purchase Agreement*, 4 TRANSACTIONS: TENN. J. BUS. L. 209, 243, 245 (2003) (Sections 6.1(j) & 6.2(g)).

⁹ See, e.g., Gentle & Heminway, *supra* note 7, at 273-79 (Article VII); Hamilton & Heminway, *supra* note 8, at 250-53 (Article 9). This indemnification is generally not included in agreements for the acquisition of public companies. See FREUND, *supra* note 1, at 160 (“Generally speaking, there is no indemnification section in acquisition agreements between two public companies”); Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 282 (1984) (“Indemnification is typically used if the seller is a private company, but not if the seller is a public company.”).

¹⁰ See generally AMERICAN BAR ASSOCIATION COMMITTEE ON NEGOTIATED ACQUISITIONS, MODEL STOCK PURCHASE AGREEMENT WITH COMMENTARY 206 (1995) [hereinafter ABA MODEL STOCK PURCHASE AGREEMENT] (noting that an escrow may be used “to secure performance of the Sellers’ indemnification obligations”); FREUND, *supra* note 1, at 385 (“In the usual case, if and when the escrow fund is exhausted by indemnifiable claims, the purchaser can go directly against the indemnifying parties personally for any excess.”); KLING & NUGENT, *supra* note 2, at § 15.06[3][b] (discussing the use and benefits of an escrow arrangement in this context); Lou R. Kling et al., *Summary of Acquisition Agreements*, 51 U. MIAMI L. REV. 779, 807 (1997) (describing and discussing the use of an escrow as one “means by which a buyer can collect in respect of an indemnifiable claim”). A target or seller may, however, insist that recovery be capped at the amount of the escrowed funds.

and representations survive the closing of the asset purchase for twelve months from the closing date. This means that Buyer may make claims against Seller for breach of the warranties and representations during, but not after, that twelve-month period.¹¹

The Tennessee Escrow Agreement has been drafted using “plain English” (or “plain language”) drafting conventions.¹² Legalese (i.e., “witnesseth,” “hereof,” “thereof,” “hereunder,” “thereunder,” “hereby,” “thereby,” “whereof,” “wheretofore” and “whereas”) is avoided throughout the Agreement.¹³ Additionally, “under” replaces “pursuant to,” and the demonstrative adjectives “such” and “said” (too frequently used in contract drafting) have been eliminated from the Tennessee Escrow Agreement.¹⁴ Finally, the discretionary comma before the conjunction used

See ABA MODEL ASSET PURCHASE AGREEMENT EXHIBITS, *supra* note 2, at 51; ABA MODEL STOCK PURCHASE AGREEMENT, *supra*, at 206-07; KLING & NUGENT, *supra* note 2, at § 15.06[3][b].

¹¹ See KLING & NUGENT, *supra* note 2, at § 15.02[2] (discussing the survival of representations and warranties in acquisition agreements); Gentle & Heminway, *supra* note 7, at 275 n.84. These survival provisions are common in private company mergers and acquisitions. See FREUND, *supra* note 1, at 160 (noting that, in public company mergers and acquisitions, “the agreement usually states that the respective representations and warranties terminate upon the closing.”); Samuel C. Thompson, Jr., *Introduction to this Symposium and a Guide to Issues in Mergers and Acquisitions*, 51 U. MIAMI L. REV. 533, 573 (1997) (“[I]n a private deal, the representations and warranties generally survive the closing, whereas in a public acquisition they generally do not survive.”). Other claims, including claims of fraud, however, may be made until expiration of the applicable statute of limitations or repose. In Tennessee, common law fraud in inducing a contract generally is subject to a three-year statute of limitations. TENN. CODE ANN. § 28-3-105 (2005); *Am. Fid. Fire Ins. Co. v. Tucker*, 671 S.W.2d 837, 840-41 (Tenn. Ct. App. 1983). Contracts claims not otherwise provided for generally are subject to a six-year limitations period. TENN. CODE ANN. § 28-3-109 (2005).

¹² For a general discussion of plain English and other conventions in contract drafting, see GEORGE W. KUNEY, *THE ELEMENTS OF CONTRACT DRAFTING: WITH QUESTIONS AND CLAUSES FOR CONSIDERATION* (2002); see also SCOTT J. BURNHAM, *DRAFTING AND ANALYZING CONTRACTS: A GUIDE TO THE PRACTICAL APPLICATION OF THE PRINCIPLES OF CONTRACT LAW* 271-75 (3d ed. 2003) (describing generally these drafting rules); RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 61 (4th ed. 1998) (advising against the use of “lawyerisms” that confuse non-lawyers and mask poor drafting); Thomas E. Tyner, *Drafting Principles: Strategy, Standards, and Ethics*, in *DRAFTING BUSINESS CONTRACTS: PRINCIPLES, TECHNIQUES & FORMS* 25, 31, 42-44.1 (Wendy L. Brown & David Peyerwold eds., 2004) (listing typical characteristics of a plain English contract and offering a list of plain English alternatives to legalese).

¹³ See HOWARD DARMSTADTER, *HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING* 5-6 (2002); see also THOMAS R. HAGGARD, *CONTRACT LAW FROM A DRAFTING PERSPECTIVE: AN INTRODUCTION TO CONTRACT DRAFTING FOR LAW STUDENTS* 27 (2003); ROBERT J. MARTINEAU & MICHAEL B. SALERNO, *LEGAL, LEGISLATIVE, AND RULE DRAFTING IN PLAIN ENGLISH* 59 (2005); WYDICK, *supra* note 12, at 61; Tyner, *supra* note 12, at 30.

¹⁴ See KENNETH A. ADAMS, *A MANUAL OF STYLE FOR CONTRACT DRAFTING* 165-67 (2004); HAGGARD, *supra* note 13, at 27; MARTINEAU & SALERNO, *supra* note 13, at 39.

before the last item in a series has been omitted throughout this Preliminary Note and the Tennessee Escrow Agreement.¹⁵ These stylistic preferences create a more clear and readable form.

¹⁵ Attorneys often omit the last comma in series in their drafting. See LYNNE TRUSS, EATS, SHOOTS & LEAVES: THE ZERO TOLERANCE APPROACH TO PUNCTUATION 81 (2003); David Franklin, *Terms of Art: Pardon My Law French*, 2 GREEN BAG 2D 421, 423 (1999). But see Bryan A. Garner, *Don't Know Much About Punctuation: Notes on a Stickler Wannabe*, 83 TEX. L. REV. 1443, 1449 (2005) (reviewing LYNNE TRUSS, EATS, SHOOTS & LEAVES: THE ZERO TOLERANCE APPROACH TO PUNCTUATION (2003)) (asserting that only British lawyers omit the last comma in series). Many disagree with the omission of this comma. See MARTINEAU & SALERNO, *supra* note 13, at 68 (advising consistent use of the comma before the words “and” and “or” in a series); Garner, *supra*, at 1449 n.63 (citing significant authority supporting the consistent use of the serial comma); Jacquelyn E. Gentry, *The Dirty Dozen—And How to Defeat Them*, 45 ORANGE COUNTY LAW. 14, 16 (2003). It is clear that this matter has long been open to debate. See John Minor Wisdom, *Wisdom's Idiosyncrasies*, 109 YALE L.J. 1273, 1274 (2000) (noting, in a list of idiosyncrasies, the “[c]omma before ‘and’ in a series of three or more.”); Scott J. Atlas, *Foreword to Volume 75: Why Did We Do It?*, 75 TEX. L. REV. 9, 9 (1996) (asking, with respect to Texas Law Review members, “Why would so many law students, most with excellent academic records and attractive work prospects, agree to spend two years of late nights and long weekends...debating endlessly the relative merits of whether to include a comma before the ‘and’ among items in a series?”).

PURCHASE PRICE HOLDBACK ESCROW AGREEMENT¹⁶

THIS PURCHASE PRICE HOLDBACK ESCROW AGREEMENT (this "Agreement"), dated as of the ____ day of _____, 2006, by and among **DOWNTOWN CENTER LIMITED PARTNERSHIP**, a Delaware limited partnership ("Buyer"), **ABC FAMILY PARTNERSHIP, LLC**, a Tennessee limited liability company ("Seller"), and **TENNESSEE TITLE INSURANCE CO.** ("Escrow Agent").¹⁷

In consideration of the mutual covenants and premises contained in this Agreement, and intending to be legally bound, the parties to this Agreement agree as follows:

¹⁶ The parties should consider, in entering into a merger or acquisition escrow, that interests in the escrow fund may constitute securities, the offer and sale of which may be regulated by federal and state law. This may be of particular concern to the parties in the rare instance that an escrow is used in a public company acquisition or in any other circumstance in which a large number of sellers is involved in the merger or acquisition. See KLING & NUGENT, *supra* note 2, at § 16.04.

¹⁷ Defined terms are underlined throughout this Agreement for the reader's convenience. See CHARLES M. FOX, WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU 29 (2002) ("underlining the defined term...will help the reader find the buried definitions."). Cross-referenced sections also are underlined, for the same reason.

1. Buyer and Seller appoint Escrow Agent¹⁸ to be and act as the escrow agent under this Agreement, and Escrow Agent accepts its appointment to hold in an escrow account (the “Escrow Account”) the sum of One Million Dollars (\$1,000,000.00)¹⁹ (together with any interest earned on that sum²⁰ and less amounts paid out of that sum in accordance with the terms and provisions of this Agreement,²¹ the “Escrow Funds”) upon the terms and conditions set forth in this

¹⁸ Generally, the escrow agent is expected to be neutral. See FREUND, *supra* note 1, at 387 (“The escrow agent should be truly independent of both parties.”); KLING & NUGENT, *supra* note 2, at § 15.06[3][d] (“The escrow agent should be an independent third party”). However, the selection of an escrow agent is a matter for negotiation. If the nature of the transaction is that the seller will be entitled to the escrowed funds absent a breach, the seller will typically have more input in the selection of an escrow agent. In a real estate transaction, the title company often serves as escrow agent, as is the case in this Agreement. An affiliate (or fiduciary department or division) of the lender in a financed transaction may be imposed on the parties or suggested by the buyer to serve as the escrow agent. See FREUND, *supra* note 1, at 387 (“Banks are usually the first choice for this task.”); KLING & NUGENT, *supra* note 2, at § 15.06[3][d] (“The escrow agent...usually is a bank.”); see also Gentle & Heminway, *supra* note 7, at 221 n.21. In rare instances, counsel to the buyer or seller will serve as escrow agent, but this solution is generally not preferable. See ABA MODEL ASSET PURCHASE AGREEMENT EXHIBITS, *supra* note 2, at 52 (“Occasionally, a party may propose that its counsel act as escrow agent. In most cases, this is a role that counsel should avoid.”); ABA MODEL STOCK PURCHASE AGREEMENT, *supra* note 10, at 301 (same); FREUND, *supra* note 1, at 387 (observing that “[l]awyers for the parties run a poor second” in the choice of an escrow agent). “Needless to say, each party has to be convinced of the fairness of the escrow agent for the situation to work; and the escrow agent must be careful to treat the matter on an absolutely even-handed basis.” FREUND, *supra* note 1, at 388.

¹⁹ The parties negotiate the amount placed into escrow, which is typically either the maximum amount that a party may recover or simply the amount the Seller is willing to defer to provide security for the Buyer. See ABA MODEL STOCK PURCHASE AGREEMENT, *supra* note 10, at 206 (“The amount...of the escrow will be determined by negotiation, based on the parties’ analyses of the magnitude and probability of potential claims”); FREUND, *supra* note 1, at 385-86; Gentle & Heminway, *supra* note 7, at 221 n.20; Hamilton & Heminway, *supra* note 8, at 221 n.30. In this Agreement, the drafter expresses the Escrow Amount and other significant numbers in the text in both words and arabic numerals. Some practitioners prefer to include important dollar amounts and other numerical expressions in words on the theory that the practitioners are less likely to make a mistake or transposition with words than with arabic numerals. These practitioners also then may express the dollar amount or other number in arabic numerals in parentheses following the words as a “double check.” In the event of an inconsistency, the drafter typically then would argue that the expression of the number in words should control.

²⁰ See ABA MODEL STOCK PURCHASE AGREEMENT, *supra* note 10, at 303 (“Interest and other earnings on the funds held in escrow are retained by the Escrow Agent and are thus available to satisfy claims. Occasionally, [t]he Sellers will seek to provide that these amounts are to be paid to them currently.”).

²¹ In this Agreement, Sections 3 and 5 (depending on how Section 5 ultimately is drafted) may result in disbursements from the amounts deposited into the Escrow Account.

Agreement. The Escrow Account shall be segregated from all other accounts and shall name Seller as beneficiary. Seller's Federal Tax I.D. Number is

²³

2. The Escrow Agent shall invest the Escrow Funds in one or more money market account(s), federally insured deposit account(s) or U.S. Treasury security(ies) with a maturity of not longer than [**12 months from closing date**], as directed by Seller from time to time, for the benefit of Seller.²⁴ The taxable income earned on the Escrow Account shall be allocated to Seller.²⁵ The Escrow Agent shall not be responsible for any loss, diminution in value or failure to achieve a greater profit as a result of any investment made in accordance with this paragraph 2. Also, the Escrow Agent assumes no responsibility for, nor shall the Escrow Agent be held liable for, any loss that arises from the fact that the Escrow Funds exceed \$100,000

²² If the property the Seller deposits into escrow is not cash or a cash equivalent, the drafter must provide for control and care of the escrowed property during the time that the escrow is in effect, including the right to vote and/or sell securities, the right to dividends and distributions on any securities, the valuation of securities for deposit and distribution purposes and the acquisition and maintenance of insurance for tangible assets. See KLING & NUGENT, *supra* note 2, at § 15.06[3][a] (noting issues that arise when securities are used as escrow collateral); *id.* at § 15.06[3][d] (noting the need to provide for dividends on securities held in escrow). Moreover, federal income tax effects may be different, especially if the stock is issued in a tax-deferred reorganization. See *id.* at §§ 3.03[6], 3.04[1][b].

²³ An escrow agent must file an information return with the Internal Revenue Service and typically will provide a Form W-9 to the party entitled to receive the earnings on the escrowed funds to obtain that party's taxpayer identification number. See generally KLING & NUGENT, *supra* note 2, at § 15.06[3][d] (discussing federal income tax issues relating to merger or acquisition escrow arrangements). Under this Agreement, Seller is entitled to receive the earnings, or interest, on the Escrow Funds unless those earnings are needed to satisfy Buyer's claims. See *infra* note 25 and accompanying text.

²⁴ See ABA MODEL ASSET PURCHASE AGREEMENT EXHIBITS, *supra* note 2, at 53 ("It is customary for the Escrow Agreement to require that funds held in escrow be invested only in highly liquid, short-term investments"); ABA MODEL STOCK PURCHASE AGREEMENT, *supra* note 10, at 304 (same). The investment of escrowed funds instead may be: (a) delegated to the escrow agent with a full release for failure to produce an acceptable yield; or (b) within the discretion of one of the parties. The nature and applicable maturity date of any investment permitted or required to be made with escrowed funds is negotiated by the parties and may depend upon the duration of the escrow, see *infra* note 27, the estimated probability that escrowed funds will be released to the buyer during escrow period and other factors.

²⁵ See FREUND, *supra* note 1, at 387 (describing generally the seller's entitlement to interest on the escrowed funds). The parties may want to explicitly delegate in their escrow agreement the responsibility for reporting any income on the escrowed funds and paying any taxes due on that income. See ABA MODEL ASSET PURCHASE AGREEMENT EXHIBITS, *supra* note 2, at 57 (setting forth a model provision of this kind); ABA MODEL STOCK PURCHASE AGREEMENT, *supra* note 10, at 309 (same). See generally KLING & NUGENT, *supra* note 2, at § 3.02[4] (describing the income tax effects of a standard merger or acquisition escrow arrangement).

and that the excess amount is not insured by the Federal Deposit Insurance Corporation if Seller directs that the funds be invested in a specific institution(s).²⁶

3. The parties acknowledge that the Escrow Funds have been placed in escrow with Escrow Agent under the terms of Section ___ of the Agreement of Purchase and Sale (the “Purchase Agreement”) for the sale of the property commonly known as Highrise Tower, Knoxville, Tennessee (the “Property”). Escrow Agent shall hold the Escrow Funds, which Escrow Agent acknowledges have been received by Escrow Agent, in escrow in accordance with the terms of this Agreement and shall disburse the Escrow Funds only under the terms of this Agreement. If Buyer has not given a notice to Escrow Agent and Seller on or before _____, 2007 [***12 months from closing date***]²⁷ (the “Termination Date”), that Buyer claims it is entitled to all or any portion of the Escrow Funds as a result of a breach by Seller of any of its warranties or representations²⁸ contained in Section

²⁶ The last two sentences of Section 2 alternatively could be inserted in Section 4 (with other provisions relating to the rights and responsibilities of the parties). The earlier placement of these sentences in this Agreement is designed to confirm at the outset that the Escrow Agent’s burdens under this Agreement are accompanied by certain important limitations on its liability.

²⁷ The term of the escrow period is often tied to the private “statute of limitations” included in the purchase agreement—the section in the purchase agreement that provides for the survival of representations and warranties after the closing. See ABA MODEL ASSET PURCHASE AGREEMENT EXHIBITS, *supra* note 2, at 54 (commenting that the term of the escrow “is often the same as the general time limit provided for assertion of claims in the acquisition agreement”); ABA MODEL STOCK PURCHASE AGREEMENT, *supra* note 10, at 306 (same); FREUND, *supra* note 1, at 386; KLING & NUGENT, *supra* note 2, at § 15.06[3][c].

²⁸ The “trigger” for release of some or all of the escrowed funds could be the occurrence of any breach under the purchase agreement (as is the case in this Agreement) or any other transactional document, any other specified event, etc. See *Ryan v. Tad’s Enters., Inc.*, 709 A.2d 682, 696 (Del. Ch. 1996) (describing an escrow to secure indemnification obligations in an asset acquisition); *Manor Healthcare Corp. v. Tolbert*, No. 8425, 1986 Del. Ch. LEXIS 419, at *2-4 (Del. Ch. May 13, 1986) (describing an escrow covering breaches of representations and warranties under an acquisition agreement); Richard D. Nix & Timothy Verrall, *Employee Benefit Issues in Mergers and Acquisitions*, 25 OKLA. CITY U. L. REV. 435, 464 (2000) (mentioning the potential for handling severance liabilities through an escrow). Acquirors in mergers and acquisitions commonly use escrows as risk allocation devices in acquiring businesses that are or may be subject to product liability or environmental claims. See *Ramirez v. Amsted Indus., Inc.*, 431 A.2d 811, 822-23 (N.J. 1981) (“a corporation planning the acquisition of another corporation’s manufacturing assets has certain protective devices available to insulate it from the full costs of accidents arising out of defects in its predecessor’s products.... [I]t can enter into full or partial indemnification or escrow agreements with the selling corporation.”); Eva M. Fromm et al., *Allocating Environmental Liabilities in Acquisitions*, 22 IOWA J. CORP. L. 429, 464 (1997) (“The purchaser may also need to consider establishing an escrow at closing (with the funds taken out of the purchase price) to address known environmental liabilities”); Kenneth S. Rivlin & Jamaica D. Potts, *Not So Fast: The Sealed Air Asbestos Settlement and Methods of Risk Management in the Acquisition of Companies with Asbestos Liabilities*, 11 N.Y.U. ENVTL. L.J. 626, 659 (2003) (mentioning an escrow as a possible means of dealing with contingent asbestos claims in corporate acquisitions); Anthony D.

___ of the Purchase Agreement (a “Claims Notice”),²⁹ then on _____, 2007 [*one day after the Termination Date*] (the “Disbursement Date”), Escrow Agent shall disburse the Escrow Funds to Seller.³⁰ The form of Claims Notice is attached as Exhibit A.³¹ If Buyer does provide a Claims Notice to Escrow Agent and Seller on or before the Termination Date, then Escrow Agent shall not disburse that portion of the Escrow Funds to which Buyer claims it is entitled (the “Claimed Funds”) until the Escrow Agent has received joint written instructions from Seller and Buyer or a final court order issued by a court of competent jurisdiction (after the expiration of any periods for further appeals, with no appeal then having been perfected)³² directing Escrow Agent as to how it should disburse the Claimed Funds.³³ If Escrow Agent does not receive notice from Seller acknowledging Buyer’s

Shaffer, Comment, *Successor Liability for the Predecessor's Defective Product: Should Predecessors Have Their Cake and Eat It Too?*, 23 CAP. U. L. REV. 1003, 1036 (1994) (noting the potential use of escrows in allocating the risk of product liability claims arising out of events occurring prior to the closing of a corporate acquisition). Regardless of the nature of the triggers for claims against an acquisition escrow, it is very important to draft the provisions regarding the triggers and the related claims procedures with exceptional clarity. See Howard L. Shecter, *Selected Risk Issues in Merger and Acquisition Transactions*, 51 U. MIAMI L. REV. 719, 758 (1997) (mentioning the prospects of litigation arising out of a lack of clarity in an escrow arrangement).

²⁹ See generally FREUND, *supra* note 1, at 387 (“If the purchaser has a claim against the fund, he gives written notice to the escrow agent”); KLING & NUGENT, *supra* note 2, at § 15.06[3] (“[T]he Buyer will notify the escrow agent of an asserted indemnification claim”).

³⁰ See FREUND, *supra* note 1, at 386 (“The terms of the usual escrow provide that if no claims are outstanding when it is scheduled to terminate, the entire remaining fund goes to the seller”).

³¹ Attaching (or otherwise specifying) a form of claims notice for use under an escrow agreement can be of great use to the parties. The parties can use the form of notice as a means of assuring clarity in the escrow triggers and claims procedures. See Schecter, *supra* note 28. This device allows a buyer merely to set forth, in accordance with the requirements of the form, the reasons for and evidence of the breach or other triggering event, and the seller and escrow agent each know what to expect in the event of a breach or other triggering event.

³² It is important that the language regarding the finality of a court order be as precise as possible so that the parties to the Agreement are clear on the timing of disbursements of Claimed Funds from the Escrow Account. A lack of clarity on this matter may result in further disputes among (and resultant expenditures by) the parties. See generally Shecter, *supra* note 28.

³³ See ABA MODEL ASSET PURCHASE AGREEMENT EXHIBITS, *supra* note 2, at 54 (“If disputed, the funds are held until ultimate resolution of the claim by the parties or litigation.... Funds that are the subject of a disputed claim continue to be held until resolution of the claim; if the amount of the disputed claim is unknown, all of the funds will continue to be held until resolution of the claim.”); ABA MODEL STOCK PURCHASE AGREEMENT, *supra* note 10, at 300 (“[T]he typical institutional Escrow Agreement provides that the Escrow Agent may ‘freeze’ and retain the funds at issue until conflicting demands are resolved by agreement of the parties or a non-appealable court order.”); FREUND, *supra* note 1, at 386 (“[I]f claims have been made against the escrow which are not resolved as of [the date of termination of the escrow], then an amount equal to the aggregate claims is retained

right to the Claimed Funds within _____ (__) business days³⁴ of Escrow Agent's receipt of the Claims Notice, then Seller shall be deemed to have objected to the Claims Notice.³⁵ If Buyer gives one or more Claims Notices on or before the Termination Date for less (in the aggregate) than the Escrow Funds, then on the Disbursement Date, the excess of the Escrow Funds over the Claimed Funds (in the aggregate) shall be disbursed to Seller.³⁶ Any Claims Notice given by Buyer shall include a certification, on which Escrow Agent may conclusively rely, that Buyer has given to Seller a copy of the Claims Notice under the terms of this Agreement simultaneously with the giving of the Claims Notice to Escrow Agent.

Under the Purchase Agreement, Buyer must initiate litigation in a state or federal court located in Knox County, Tennessee, within ninety (90) days after a

by the escrow agent, pending resolution of the matters.”); *id.* at 387 (“The escrow agent is entitled to the insertion of provisions permitting it to hold the funds in the event of a dispute until the parties agree on the disposition, or a court issues an order on the point.”); KLING & NUGENT, *supra* note 2, at § 15.06[3] (“If the Seller does dispute the claim, the escrow agent will retain such amount in escrow pending resolution of the dispute.”).

³⁴ Some parties will include a definition of “business day” in their agreement to avoid dealing with questions regarding differences in holidays under corporate policies, state laws, and federal laws. *See* Gentle & Heminway, *supra* note 7, at 223 n.24; Hamilton & Heminway, *supra* note 8, at 219 n.25. For example, Patriots’ Day is a state holiday in Massachusetts. State offices and some Massachusetts businesses are closed on that day. *See* Massachusetts Secretary of State, Citizen Information Service, *Massachusetts Legal Holidays*, <http://www.sec.state.ma.us/cis/cishol/holidx.htm> (last visited Feb. 12, 2006). The Buyer here uses a Massachusetts street address, making Patriots’ Day potentially relevant to this Agreement. *See infra* Section 6.

³⁵ The use of a default provision here is important because the parties may or may not be attentive to the specifics of their obligations under this Agreement at the time a claim is made. Moreover, Escrow Agent may demand the insertion of a provision of this kind in order to clarify its responsibilities and obligations in the absence of any communication from Seller. In many circumstances, Seller’s failure to object would be interpreted as an acceptance of the validity of Buyer’s claim, absent an express provision in the Escrow Agreement. *See* ABA MODEL ASSET PURCHASE AGREEMENT EXHIBITS, *supra* note 2, at 51 (noting, with respect to model provisions for an included form of escrow agreement, “[i]f a claim for indemnification is made and not disputed within thirty days, it is treated as admitted and paid by the Escrow Agent.”); ABA MODEL STOCK PURCHASE AGREEMENT, *supra* note 10, at 305 (same); FREUND, *supra* note 1, at 387 (stating, in describing standard escrow mechanics, that where “the seller does not object in writing to the claim within a specified short period of time, the escrow agent pays the amount of the claim to the purchaser.”); KLING & NUGENT, *supra* note 2, at § 15.06[3] (“[I]f Seller does not dispute the Buyer’s claim, the escrow agent will release from the escrow to the Buyer the amount of such claim.”).

³⁶ *See* FREUND, *supra* note 1, at 386 (“The seller should always insist that if the amount claimed is less than the total in the escrow fund, the excess should promptly be released to the seller at the end of the fixed escrow period.”).

Claims Notice is issued.³⁷ Buyer shall provide Escrow Agent with a copy of any complaint filed and summons issued as to matters raised in a Claims Notice within ninety (90) days of each Claims Notice.³⁸

4. The parties to this Agreement understand and agree to the matters set forth below.

(a) The Escrow Agent is not a trustee for any party for any purpose and is merely acting as a depository and in a ministerial capacity under this Agreement with the limited responsibilities and other obligations³⁹ prescribed in this Agreement.⁴⁰

³⁷ The escrow agent may require that all legal actions relating to the escrow be brought in the same jurisdiction in which its office is located. See ABA MODEL ASSET PURCHASE AGREEMENT EXHIBITS, *supra* note 2, at 59; see also *infra* note 46.

³⁸ In the alternative, the parties could have provided for arbitration or mediation in the Purchase Agreement. Cf. ABA MODEL ASSET PURCHASE AGREEMENT EXHIBITS, *supra* note 2, at 54 (noting that, when the agreement calls for arbitration, “the Escrow Agreement should be modified to provide for release of funds on the basis of the arbitral award”); ABA MODEL STOCK PURCHASE AGREEMENT, *supra* note 10, at 305 (same). It is important to note here that the merger or acquisition agreement may provide for the method of dispute resolution. These merger or acquisition agreement provisions, if broadly drafted, also may govern disputes under an ancillary agreement, including an escrow agreement. Accordingly, it is critical that the parties to a merger or acquisition transaction clearly draft any alternative dispute resolution provisions governing some or all aspects of the transaction. See generally *Frounfelker v. Identity Group, Inc.*, No. M2001-02542-COA-R3-CV, 2002 Tenn. App. LEXIS 390, at *9-10 (Tenn. Ct. App. June 5, 2002) (declining to apply an arbitration provision in an acquisition agreement to a claim under an ancillary employment agreement because the parties’ intent to arbitrate employment disputes was not clear); Patrick V. Fiel, Jr., Case Commentary, *Employment agreement providing judicial remedies for dispute supercedes asset purchase agreement’s arbitration clause*, 4 TRANSACTIONS: TENN. J. BUS. L. 283, 283 (2003) (commenting on *Frounfelker*).

³⁹ The words “responsibilities and other obligations” denominate the tasks the Escrow Agent has agreed to perform under this Agreement. An effort has been made to use these words consistently throughout the Agreement. See FOX, *supra* note 17, at 78-79 (extolling the virtues of consistency in legal drafting).

⁴⁰ This provision and other exculpatory provisions in this Agreement are customary in escrow transactions of this type. See ABA MODEL ASSET PURCHASE AGREEMENT EXHIBITS, *supra* note 2, at 54-57 (including various provisions limiting the liability of the escrow agent in Sections 5 and 6 of a model escrow agreement); ABA MODEL STOCK PURCHASE AGREEMENT, *supra* note 10, at 306-09 (same); FREUND, *supra* note 1, at 387 (“The usual exculpatory provisions, narrowly defining the role of the escrow agent, are very much in order.”); KLING & NUGENT, *supra* note 2, at § 15.06[3][d] (“The escrow agent will require that exculpatory provisions, narrowly defining its role, as well as an agreement by both Buyer and Seller to indemnify the escrow agent (with the usual exception for willful misconduct and negligence/gross negligence), be inserted into the escrow agreement.”). In

(b) The Escrow Agent has no responsibility in respect of any notice, instruction or certificate given to it, other than faithfully to carry out its responsibilities and other obligations under this Agreement and to follow the directions in any notice or instruction given in accordance with the terms of this Agreement.

(c) The Escrow Agent shall not be liable for any action taken or omitted by it in good faith and may rely upon, and act in accordance with, the advice of its counsel without liability on its part for any action taken or omitted in accordance with that advice.

(d) The Escrow Agent may conclusively rely upon, and act in accordance with, any notice (given in a manner permitted by Section 6 below) reasonably believed to be genuine and to have been signed or communicated by the proper party or parties.

(e) Escrow Agent shall not be required to defend any legal proceeding that may be instituted against it in respect of the subject matter of this Agreement unless it is requested to do so by Buyer or Seller and unless Escrow Agent is indemnified to its satisfaction against the cost and expense of its defense (including without limitation the reasonable fees and disbursements of counsel). If any legal proceeding is instituted against it in respect to the subject matter of this Agreement, Escrow Agent agrees promptly to give notice of the proceeding to both Buyer and Seller. Escrow Agent shall not be required to institute legal proceedings of any kind, except as provided in paragraph (h) of this Section 4. In the event of any dispute, Escrow Agent may file an interpleader in the Chancery Court for Knox County, Tennessee. In any interpleader filed by Escrow Agent in the Chancery Court, upon deposit of the entire Escrow Account with that court, Escrow Agent shall have no further responsibilities or other obligations under this Agreement, and

general, escrow agents, especially institutions, desire to limit their obligations and liabilities as much as possible in these arrangements. See ABA MODEL STOCK PURCHASE AGREEMENT, *supra* note 10, at 300 (“Institutional Escrow Agents are generally unwilling to submit themselves to any risk resulting from the conflicting demands by the Buyer and the Sellers.”). Institutions and individuals who frequently serve as escrow agents may have preferred forms of exculpatory language that they want included in the agreement. See ABA MODEL ASSET PURCHASE AGREEMENT EXHIBITS, *supra* note 2, at 51-52; ABA MODEL STOCK PURCHASE AGREEMENT, *supra* note 10, at 301 (“Counsel will normally find that negotiation of the Escrow Agreement is expedited if the Escrow Agent is invited to supply its own preferred version of the exculpatory provisions to be included in the Escrow Agreement.”). In cases where the escrow agent or an affiliate is otherwise being compensated in connection with the transaction, the escrow agent typically is not separately compensated for its services as escrow agent. In that case, the parties typically would include language in this paragraph to that effect (e.g., by adding the words “without charging a fee” at the end of the last sentence of the paragraph).

Escrow Agent shall be released and discharged from its responsibilities and other obligations under this Agreement.⁴¹

(f) Each of Seller and Buyer jointly and severally indemnifies the Escrow Agent for, and holds it harmless against, any loss, liability or expense incurred without negligence or bad faith on the part of Escrow Agent arising out of or in connection with the acceptance or performance of its responsibilities and other obligations under this Agreement, as well as the costs and expenses, including reasonable attorneys' fees and disbursements, of defending against any claim or liability arising under this Agreement (an "Indemnified Expense"); provided, however, that if the Indemnified Expense is incurred because of the fault of either Seller or Buyer, then, as between Seller and Buyer, the party at fault shall be responsible for the cost and indemnifies the other party for any loss, cost or expense (including reasonable attorneys' fees, costs and disbursements) incurred as a result.

(g) Upon disbursement in full of the Escrow Funds in accordance with this Agreement, this Agreement shall terminate, and all rights, responsibilities and other obligations of the Escrow Agent shall be deemed to have been satisfied.

(h) The Escrow Agent (and any successor Escrow Agent) may at any time resign from service under this Agreement by giving fourteen (14) days' written notice to all other parties to this Agreement, provided: (i) the Escrow Agent returns all fees paid to it; (ii) the Escrow Agent delivers the Escrow Funds (including any interest that is part of the Escrow Funds) to the successor Escrow Agent appointed pursuant to this provision; and (iii) the Escrow Agent continues to serve until the successor Escrow Agent is appointed. In the event of a resignation by an Escrow Agent, Buyer and Seller shall attempt to agree in writing upon a successor Escrow Agent. If Buyer and Seller do not reach a written agreement within ten (10) days following notice from the Escrow Agent of its resignation, the Escrow Agent shall file a petition in the Chancery Court for Knox County, Tennessee, requesting the court to appoint a successor Escrow Agent. The Escrow Agent may be removed and replaced at any time by an instrument signed by all other parties to this Agreement and delivered to the Escrow Agent.⁴²

⁴¹ A mandatory arbitration provision is an alternative. *See supra* note 38.

⁴² Although parties to escrow agreements often overlook a provision regarding resignation, removal and replacement of an escrow agent, this type of provision may prove useful. *See* ABA MODEL ASSET PURCHASE AGREEMENT EXHIBITS, *supra* note 2, at 56 ("The parties may wish to include a provision permitting them to replace the Escrow Agent."); ABA MODEL STOCK PURCHASE AGREEMENT, *supra* note 10, at 308 (same).

5. For its services, the Escrow Agent shall be paid a fee of _____ dollars (\$ _____) to be paid _____.⁴³

6. Each notice, instruction or certificate required or permitted by the terms of this Agreement shall be in writing and shall be communicated (by a party to this Agreement or its counsel) by personal delivery, recognized overnight delivery service or facsimile transmission (but only by a machine that produces acknowledgment of delivery of the transmission, with an original forwarded the same day as the facsimile transmission by a recognized overnight delivery service) to the parties to this Agreement at their respective addresses shown below or, in the case of any party, at any other address designated by that party in a notice to each of the others.⁴⁴

⁴³ Typically, an escrow agent receives a fixed fee for its services. The fee (a) may be paid in full by either party (in a lump sum or on a periodic basis) or out of the escrowed funds; or (b) may be apportioned between the buyer and seller and paid at closing. See ABA MODEL ASSET PURCHASE AGREEMENT EXHIBITS, *supra* note 2, at 56 (“The allocation of responsibility for the Escrow Agent’s fees and expenses is often the subject of negotiation.”); ABA MODEL STOCK PURCHASE AGREEMENT, *supra* note 10, at 309 (same); FREUND, *supra* note 1, at 387 (“Escrow fees can either be split or paid by the purchaser for whose benefit the escrow exists.”); KLING & NUGENT, *supra* note 2, at § 15.06[3][d] (“Escrow fees can either be split or paid by the Buyer for whose benefit the escrow exists.”). Where more lengthy escrows (over one year in duration) are arranged, the parties may agree that one or the other will pay the escrow agent’s fees on a periodic (often quarterly) basis.

⁴⁴ See ABA MODEL ASSET PURCHASE AGREEMENT EXHIBITS, *supra* note 2, at 57-58 (including a similar provision in Section 8 of a model escrow agreement).

To Seller: ABC FAMILY PARTNERSHIP, LLC
1354 South Gay Street
Knoxville, Tennessee 37902
Attention: B.I.G. Cheese
Telephone: (865) 555-7777
Facsimile: (865) 555-5555

with a copy to: GENTRY, TIPTON & MCLEMORE, P.C.
900 South Gay Street
Suite 2300 Riverview Tower
Knoxville, Tennessee 37902
Attention: Timothy M. McLemore, Esq.
Telephone: (865) 525-5300
Facsimile: (865) 523-7315

To Buyer: DOWNTOWN CENTER LIMITED
PARTNERSHIP
200 Maine Street
Boston, Massachusetts 02109
Attention: Ira Dealmaker
Telephone: (617) 555-2050
Facsimile: (617) 555-2054

with a copy to: BIG FIRM, P.C.
1500 Atlantic Avenue
Boston, Massachusetts 02110
Attention: Ima Powerbroker, Esq.
Telephone: (617) 555-4020
Facsimile: (617) 555-7569

To Escrow Agent: TENNESSEE TITLE INSURANCE CO.
Suite 1500 First Tennessee Plaza
800 South Gay Street
Knoxville, Tennessee 37902
Attention: Terry Title, Esq.
Telephone: (865) 555-6254
Facsimile: (865) 555-6749

All notices, instructions or certificates given under this Agreement shall be effective: (a) upon delivery; or (b) upon attempted delivery by (i) recognized overnight delivery service or (ii) facsimile transmission (provided that the transmitting machine has produced an acknowledgment of delivery). Copies delivered to counsel in accordance with this Section 6 shall not constitute notice to the party represented by that counsel.

7. This Agreement may be modified, altered, amended, canceled or terminated only by the written agreement of all of the parties to this Agreement.⁴⁵

8. This Agreement shall be governed by and construed in accordance with the laws of the State of Tennessee⁴⁶ and shall be binding upon and shall inure to the benefit of the parties to this Agreement and their respective successors in interest and assigns.

9. This Agreement may be executed in two (2) or more counterparts, each of which shall constitute an original and all of which together shall constitute one agreement.⁴⁷

⁴⁵ See *id.* at 59 (including a similar provision in Section 13 of a model escrow agreement).

⁴⁶ The purchase agreement will typically include negotiated choice of law and venue provisions when the parties are from different states. The escrow agent may insist that the law of its state control the obligations that the escrow agreement creates. See *id.* (“The Escrow Agent will often require that the governing law of the state in which its office is located be chosen..., even if different from the governing law...specified by the Model Asset Purchase Agreement.”). Counsel for the parties must ensure that the drafting of the choice of law provision in the merger or acquisition agreement and the drafting of the choice of law provision in the escrow agreement and other ancillary agreements do not conflict. See FOX, *supra* note 17, at 80 (“It is not at all unlikely that the boilerplate provisions, such as the governing law, notice, assignment and consent to jurisdiction provisions, will be different in form (and perhaps in substance) in each of the precedents. The draftsman should work at making these provisions consistent.”).

⁴⁷ See ABA MODEL ASSET PURCHASE AGREEMENT EXHIBITS, *supra* note 2, at 58 (including a similar provision in Section 10 of a model escrow agreement).

The parties to this Agreement have caused this Agreement to be executed by their duly authorized agents on the day and year first above written as an instrument under seal.⁴⁸

ESCROW AGENT:

TENNESSEE TITLE INSURANCE CO.

By: _____
Terry Title
President

SELLER:

ABC FAMILY PARTNERSHIP, LLC,
a Tennessee limited liability company

By: _____
Joe Smith
Chief Manager⁴⁹

BUYER:

DOWNTOWN CENTER LIMITED
PARTNERSHIP,
a Delaware limited partnership

⁴⁸ The execution of a document under seal is required or recommended in particular jurisdictions for specified purposes. See FOX, *supra* note 17, at 159; Joan MacLeod Heminway & Jackie G. Prester, *Bank Mergers in Tennessee: An Annotated Model Tennessee Bank Merger Agreement*, 6 TRANSACTIONS: TENN. J. BUS. L. 247, 318 n.105 (2005).

⁴⁹ As Chief Manager of Seller, Joe Smith likely is a manager of Seller and, accordingly, is likely authorized to execute this Agreement on Seller's behalf. See TENN. CODE ANN. § 48-249-402(b)(1) (2005). Nevertheless, it is customary for Buyer and Escrow Agent to request a certificate attesting to Joe Smith's authority to execute the agreement on Seller's behalf. See HAGGARD, *supra* note 13, at 20 ("If the intent is to bind a business entity, then the drafter should ensure that the person signing the contract on behalf of the entity has the authority to do so."). These certificates frequently are called "incumbency certificates." See Stephan Hutter, *The Corporate Opinion in International Transactions*, 1989 COLUM. BUS. L. REV. 427, 444-45 (1989) (describing incumbency certificates).

By: Downtown Center, Inc.,
its General Partner

By: _____
Bob Jones
President and Treasurer⁵⁰

⁵⁰ A signature block like this one is commonly used for limited partner signatories. *See* FOX, *supra* note 17, at 155 (noting the propriety of this type of signature block for execution of a contract by a partnership). Although the general partner of a Delaware limited partnership has default statutory authority to bind the partnership, DEL. CODE ANN. tit. 6, § 17-403 (2005), and the President of a corporation often has authority to bind the corporation, Nelson P. Lovins, *Corporate Officer and Director Authority: The Parameters*, 6 SUFFOLK J. TRIAL & APP. ADVOC. 1, 2-4 (2001), Seller and Escrow Agent typically would request incumbency certificates from Buyer and its general partner confirming these signatory authorities. *See* Hutter, *supra* note 49, at 444-51.

Exhibit A

Form of Claims Notice

[date]

TENNESSEE TITLE INSURANCE CO.

Suite 1500 First Tennessee Plaza

800 South Gay Street

Knoxville, Tennessee 37902

Attention: Terry Title, Esq.

ABC FAMILY PARTNERSHIP, LLC

1354 South Gay Street

Knoxville, Tennessee 37902

Attention: B.I.G. Cheese

Re: Escrow Agreement, dated as of _____, 2006 among DOWNTOWN CENTER LIMITED PARTNERSHIP, ABC FAMILY PARTNERSHIP, LLC and TENNESSEE TITLE INSURANCE CO. (the "Escrow Agreement")

Ladies and Gentlemen:

In accordance with Section 3 of the Escrow Agreement, we advise you that we assert a claim against the Escrow Funds as a result of a breach by Seller of any of its warranties or representations contained in Section __ of the Purchase Agreement. This letter is a Claims Notice under Section 3 of the Escrow Agreement. Specifically, we assert a breach by Seller of each of the following warranties or representations for the reasons set forth opposite the section reference:

Paragraph in Section __ of the Purchase Agreement	Brief Description of Facts Underlying the Asserted Breach

Based on the foregoing, we claim entitlement to \$_____ of the Escrow Funds as Claimed Funds in accordance with Section 3 of the Escrow Agreement. We

understand that the Claimed Funds shall not be disbursed by Escrow Agent except in accordance with Section 3 of the Escrow Agreement.

Capitalized terms used and not defined in this Claims Notice have the meanings that have been assigned to them in the Escrow Agreement. This Claims Notice shall be governed by and construed in accordance with the laws of the State of Tennessee.⁵¹

Very truly yours,

DOWNTOWN CENTER LIMITED
PARTNERSHIP,
a Delaware limited partnership

By: Downtown Center, Inc.,
its General Partner

By: _____
Name:
Title:⁵²

cc: GENTRY, TIPTON & MCLEMORE, P.C.
900 South Gay Street
Suite 2300 Riverview Tower
Knoxville, Tennessee 37902
Attention: Timothy M. McLemore, Esq.

⁵¹ The choice of law here should be the same as that specified in the Escrow Agreement. *See supra* note 46.

⁵² The Claims Notice should be signed by an officer of the general partner who has authority to execute this letter on behalf of the general partner under state law, corporate organizational documents (charter and bylaws), and applicable board resolutions. *See supra* note 50 and accompanying text.

