

## AGREEMENT AND PLAN OF MERGER - SAMPLE

**THIS AGREEMENT AND PLAN OF MERGER** (this “Agreement”), is made on [date] is by and between PARTY A, INC. (“Party A”), an Oregon corporation, and PARTY B, INC. (“Party B”), an Oregon corporation. The parties are referred to singularly as “Party” and jointly as “Parties.”

### RECITALS

**WHEREAS**, the Parties desire to effect a merger through the exchange of Party A equity for shares in Party B on the terms set forth in this Agreement.

**WHEREAS**, the Parties intend Party A to be merged with and into Party B. The separate existence of Party A will cease and Party B, as the acquiring entity, will survive as Party B (the “Surviving Corporation”).

**WHEREAS**, the Parties intend the merger to be a reorganization within the meaning of IRC §368(a)(1)(A).

**NOW, THEREFORE**, in consideration of the mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

### TERMS AND CONDITIONS

#### SECTION 1. Conversion of Equity

1.1 Conversion of Shares. On the Closing Date (as defined below):

(a) Each share of Party A that is issued and outstanding immediately before the Closing Date will be converted into [INSERT NUMBER] shares of fully paid and nonassessable common stock of the Surviving Corporation.

(b) Each share of common stock of Party B that is issued and outstanding immediately before the Closing Date will continue to be an issued and outstanding share of common stock of the Surviving Corporation.

1.2 Adjustment of Conversion Ratio. If, between the date of this Agreement and the Closing Date, Party A or Party B reclassifies, combines, or subdivides its common stock, or declares or pays any dividend or distribution in units or shares, or has agreed to do any of the foregoing as of a record date before the Closing Date, then an appropriate adjustment will be made in the number of shares of common stock of the Surviving Corporation into which units of Party A would otherwise be converted by the merger.

#### SECTION 2. Merger

2.1 Effect of Merger. Party B’s Articles of Incorporation, By-laws, and Board of Directors in effect immediately before the Closing Date will be the Articles of Incorporation, By-laws, and Board of Directors of the Surviving Corporation. As of the Closing Date, the Surviving Corporation will possess all the rights, privileges, and immunities of each of the Parties, all property belonging to Party A will be transferred to and vested in the Surviving Corporation without further act or deed, and the Surviving Corporation will be responsible for all liabilities of each of the Parties.

2.2 Certificates for Shares. As of the Closing Date, certificates that represent shares of Party B or shares of Party A will thereafter represent shares of common stock of the Surviving Corporation. Each unit holder of Party A whose units convert into shares of common stock of the Surviving

Corporation will receive, on the Closing Date, a certificate evidencing their respective ownership interest in the Surviving Corporation.

2.3 Further Assurances. From time to time after the Closing Date, the Managers of Party A will execute and deliver such deeds and other instruments, and will cause to be taken such further actions as will reasonably be necessary in order to vest or perfect in the Surviving Corporation title to and possession of all the property, interests, assets, rights, and privileges of Party A.

2.4 Closing. Subject to the satisfaction of the conditions set forth in Section 5, the closing of the transactions contemplated in this Agreement will occur at [INSERT LOCATION] on [INSERT DATE], or at another time and place mutually agreed to by the Parties (“Closing”). At Closing, the Parties will cause articles of merger to be filed with the Oregon Secretary of State (the “Closing Date”).

SEE THE TAX CODE FOR OTHER TAX FREE EXCHANGES. THERE ARE MULTIPLE OPTIONS DEPENDING ON HOW YOU WANT TO REORGANIZE THE COMPANY (ARE YOU SQUISHING THE TWO COMPANIES TOGETHER, OR DROPPING ONE AS A SUBSIDIARY, ETC.)

2.5 Tax-Free Intent. The Parties intend that the transactions contemplated in this Agreement be treated as a tax-free event under Section 368(a)(1)(A) of the Internal Revenue Code and/or Section 351 of the Internal Revenue Code and that the Party B shares be issued as the sole consideration for the Party A units. The Parties will not take a position on any tax return or before any taxing authority that is inconsistent with this Section 2.5 unless otherwise required by final and binding determination or resolution of a governmental body with appropriate jurisdiction, and each Party agrees to promptly notify the other Party of any assertion by a taxing authority of a position that is inconsistent with this Section 2.5.

THESE ARE VERY BASIC REPS. SEE ATTACHMENT FOR OTHER LANGUAGE.

### **SECTION 3. Representations and Warranties of Party A**

Except for the express representations and warranties in this Agreement, Party A expressly excludes all other warranties with respect to the transaction. Party A represents and warrants as follows:

3.1 Party A is a limited liability company duly organized, validly existing, and in good standing under the laws of the State of Oregon.

3.2 This Agreement is binding upon and enforceable against Party A in accordance with its terms, except as such enforceability may be limited by any bankruptcy, insolvency, reorganization, moratorium, or other similar laws now or hereafter in effect relating to creditors' rights and except as may be limited by principles of equity.

3.3 There is no litigation or other judicial, or administrative proceedings pending or, to the knowledge of Party A that would have a material adverse effect on the ability of Party A to consummate this Agreement.

3.4 Party A has obtained such consents and other approvals necessary to authorize Party B to enter into this Agreement and closing the transaction contemplated by this Agreement.

3.5 The execution, delivery, or performance of this Agreement will not: (a) violate any law, judgment, or order to which Party A is subject, or (b) breach any agreement to which Party A is bound.

3.6 Party A unit holders are acquiring the Party B shares for their own account for investment purposes only and not with a view to distribution or resale and is aware that it must bear the economic risk of its investment for an indefinite period of time because the Party B shares have not been registered under the Securities Act of 1933, as amended, or Oregon Securities laws, and therefore, cannot be sold

unless the Party B shares are subsequently registered under the Act and law or Party B receives an opinion of counsel satisfactory to Party B that exemptions from such registration become available.

3.7 Party A units are free and clear of any and all liens, claims and encumbrances.

3.8 The Party A units represent one hundred percent (100%) of the issued and outstanding units of Party A.

3.9 Party A has made available and delivered to Party B all information, statements, and records of Party A, including without limitation financing statements, shareholder records, and corporate documents, requested by Party B, and that the information, statements, and records are not misleading, were prepared in good faith, and fairly present the current operational and financial condition of Party A.

3.10 No representation, warranty, or statement made by Party A in this Agreement contains or will contain any untrue statement or omits or will omit any fact necessary to make the statements contained herein misleading.

#### **SECTION 4. Representations and Warranties of Party B**

Except for the express representations and warranties in this Agreement, Party B expressly excludes all other warranties with respect to the transaction. Party B represents and warrants as follows:

4.1 Party B is a corporation duly organized, validly existing, and in good standing under the laws of the State of Oregon.

4.2 This Agreement is binding upon and enforceable against Party B in accordance with its terms, except as such enforceability may be limited by any bankruptcy, insolvency, reorganization, moratorium, or other similar laws now or hereafter in effect relating to creditors' rights and except as may be limited by principles of equity.

4.3 There is no litigation or other judicial, administrative, or quasi-judicial proceedings pending or, to the knowledge of Party B that would have a material adverse effect on the ability of Party B to consummate this Agreement.

4.4 Party B authorized capital of the company is [INSERT NUMBER] shares of common stock, [INSERT NUMBER] shares of which are issued and outstanding immediately prior to the Closing Date. Party B has authorized and reserved [INSERT NUMBER] shares of common stock for issuance pursuant to this Agreement.

4.5 Party B has obtained such consents and other approvals necessary to authorize Party B to enter into this Agreement and closing the transaction contemplated by this Agreement.

4.6 The execution, delivery, or performance of this Agreement will not: (a) violate any law, judgment, or order to which Party B is subject, or (b) breach any agreement to which Party B is bound.

4.7 The Party B shares issued to Party A unit holders will, upon issuance, be duly authorized, legally and validly issued, and fully paid and nonassessable.

4.8 Party B has made available and delivered to Party A all information, statements, and records of Party B, including without limitation financing statements, shareholder records, corporate documents, and business prospects, requested by Party A, and that the information, statements, and records are not misleading, were prepared in good faith, and fairly present the current operational and the financial condition of Party B. Party B has corrected any errors identified by Party A, including without limitations the foreign registration with the Oregon Secretary of State.

4.9 No representation, warranty, or statement made by Party B in this Agreement contains or will contain any untrue statement or omits or will omit any fact necessary to make the statements

contained herein misleading. Party B has disclosed to Party A all facts that are material to the financial condition, operation, status, or prospects of Party B.

## **SECTION 5. Conditions**

The obligation of either Party to effect the merger is subject to the satisfaction or waiver of each of the following conditions:

- (a) The representations, warranties, and covenants made by either Party in Section 4 of this Agreement are true and correct as of the Closing Date;
- (b) There is no material adverse change in the business or financial condition of Party A from the date of this Agreement through the Closing Date;
- (c) This Agreement is approved by the board of directors and shareholders of Party B entitled to vote on the matter in accordance with Oregon law and Party B's governing documents;
- (d) This Agreement is approved by the board of directors and shareholders of Party A entitled to vote on the matter in accordance with Oregon law and Party A's governing documents; and
- (e) [INSERT OTHER CONDITIONS AS APPROPRIATE].

## **SECTION 6. Joint Statement**

The Parties will draft a joint statement regarding the transaction contemplated in this Agreement for distribution to customers and the general public, which will be signed on the Closing Date or any other time agreed to by the Parties. Any news release pertaining to the transaction contemplated in this Agreement will be reviewed and approved by both Parties prior to its release.

## **SECTION 7. Termination**

7.1 Failure to Obtain Shareholder/Member Approval. This Agreement will automatically terminate in the event that it is brought to a vote and not adopted by either: (a) the board of directors or shareholders of Party A entitled to vote on the matter, or (b) the board of directors or shareholders of Party B entitled to vote on the matter.

7.2 Other Termination. This Agreement may be terminated and the merger abandoned at any time before the Closing Date (a) by mutual written agreement of the Parties; (b) by either Party if any condition provided in this Agreement has not been satisfied or waived on or before the Closing Date; or (c) by either Party if there has been a material breach of this Agreement by the other Party.

7.3 Effect of Termination. Upon termination, this Agreement will become wholly void and of no effect, without liability or obligations on the part of either Party.

## **SECTION 8. Miscellaneous Provisions**

8.1 Waivers. No waiver will be binding unless it is in writing and signed by the Party making the waiver. A Party's waiver will not be a waiver of any other provision or a waiver of a subsequent breach of the same provision.

8.2 Amendment. This Agreement may be amended at any time before the Closing Date with the approval of the Parties, as long as the amendment will not change the conversion ratios set forth in Section 1 of this Agreement without the approval of the shareholders or members, as is applicable, of the Parties.

8.3 Governing Law. This Agreement will be governed by and construed in accordance with the laws of the State of Oregon, exclusive of conflicts of law.

8.4 Arbitration. Any controversy or claim arising out of this Agreement will be settled by arbitration before a single arbitrator in Portland, Oregon at the Arbitration Service of Portland (ASP) in accordance with the then applicable ASP Rules of Arbitration. If the Parties agree on an arbitrator, the arbitration will be held before the arbitrator selected by the Parties. If the Parties do not agree on an arbitrator, each Party will designate an arbitrator and the arbitration will be held before a third arbitrator selected by the designated arbitrators. Each arbitrator will be an attorney knowledgeable in the area of business law. The resolution of any controversy or claim as determined by the arbitrator will be binding on the Parties. A Party may seek from a court an order to compel arbitration, or any other interim relief or provisional remedies pending an arbitrator's resolution of any controversy or claim. Any such action or proceeding will be litigated in courts located in Multnomah County, Oregon.

8.5 Binding Effect. Except as provided otherwise herein, this Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective legal representatives, successors and assigns.

8.6 Severability. If a provision of this Agreement is determined to be unenforceable in any respect, the enforceability of the provision in any other respect and of the remaining provisions of this Agreement will not be impaired.

8.7 Headings. The section and other headings contained in this Agreement are for reference purposes only and shall not affect the meaning of this Agreement.

8.8 Expenses. All fees and expenses incurred by each Party in connection with this Agreement and the transaction contemplated in this Agreement shall be borne by that Party.

8.9 Survival. All provisions of this Agreement that would reasonably be expected to survive the termination of this Agreement will do so.

8.10 Attorney Fees. If any arbitration or litigation is instituted to interpret, enforce, or rescind this Agreement, including but not limited to any proceeding brought under the United States Bankruptcy Code, the prevailing party on a claim will be entitled to recover with respect to the claim, in addition to any other relief awarded, the prevailing Party's reasonable attorney's fees and other fees, costs, and expenses of every kind.

8.11 Entire Agreement. This Agreement constitutes the entire agreement among the Parties and supersedes any prior agreement or understanding among the Parties concerning its subject matter.

8.12 Assignment. This Agreement may not be transferred, assigned, pledged or hypothecated by either Party without the prior written consent of the other.

8.13 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original but all of which shall constitute one agreement. Furthermore, this Agreement may be executed by a Party's signature transmitted by facsimile or by electronic mail, and copies of this Agreement executed and delivered by means of faxed or electronic mail shall have the same force and effect as copies hereof executed and delivered with original signatures. All Parties hereto may rely upon faxed or electronic mail as if such signatures were originals.

[signature page to follow]

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

Party A:

[NAME]

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Name:  
Title:  
Address:

Party B:

[NAME]

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Name:  
Title:  
Address: