

Bassil Ned M.  
Form 3  
December 01, 2011

**FORM 3 UNITED STATES SECURITIES AND EXCHANGE COMMISSION**  
**Washington, D.C. 20549**

OMB APPROVAL

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**INITIAL STATEMENT OF BENEFICIAL OWNERSHIP OF SECURITIES**

Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934,  
Section 17(a) of the Public Utility Holding Company Act of 1935 or Section  
30(h) of the Investment Company Act of 1940

(Print or Type Responses)

1. Name and Address of Reporting Person *		2. Date of Event Requiring Statement	3. Issuer Name and Ticker or Trading Symbol	
Â Bassil Ned M.		(Month/Day/Year)	BlueLinx Holdings Inc. [BXC]	
(Last)	(First)	(Middle)	12/01/2011	
4300 WILDWOOD PARKWAY			4. Relationship of Reporting Person(s) to Issuer	5. If Amendment, Date Original Filed(Month/Day/Year)
(Street)			(Check all applicable)	
ATLANTA, GA 30339			<input type="checkbox"/> Director	<input type="checkbox"/> 10% Owner
(City)	(State)	(Zip)	<input checked="" type="checkbox"/> Officer	<input type="checkbox"/> Other
			(give title below)	(specify below)
			Chief Supply Chain Officer	
			6. Individual or Joint/Group Filing(Check Applicable Line)	
			<input checked="" type="checkbox"/> Form filed by One Reporting Person	
			<input type="checkbox"/> Form filed by More than One Reporting Person	

**Table I - Non-Derivative Securities Beneficially Owned**

1. Title of Security (Instr. 4)	2. Amount of Securities Beneficially Owned (Instr. 4)	3. Ownership Form: Direct (D) or Indirect (I) (Instr. 5)	4. Nature of Indirect Beneficial Ownership (Instr. 5)
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Reminder: Report on a separate line for each class of securities beneficially owned directly or indirectly.

SEC 1473 (7-02)

**Persons who respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB control number.**

**Table II - Derivative Securities Beneficially Owned (e.g., puts, calls, warrants, options, convertible securities)**

1. Title of Derivative Security (Instr. 4)	2. Date Exercisable and Expiration Date (Month/Day/Year)	3. Title and Amount of Securities Underlying Derivative Security (Instr. 4)	4. Conversion or Exercise Price of Derivative Security	5. Ownership Form of Derivative Security: Direct (D) or Indirect (I) (Instr. 5)	6. Nature of Indirect Beneficial Ownership (Instr. 5)
	Date Exercisable	Expiration Date			
		Title	Amount or Number of Shares		

## Reporting Owners

Reporting Owner Name / Address	Relationships			
	Director	10% Owner	Officer	Other
Bassil Ned M. 4300 WILDWOOD PARKWAY ATLANTA, GA 30339	Â	Â	Â Chief Supply Chain Officer	Â

## Signatures

/s/ Sara E. Epstein,  
Attorney-in-Fact

12/01/2011

\_\_Signature of Reporting Person

Date

## Explanation of Responses:

### No securities are beneficially owned

- \* If the form is filed by more than one reporting person, *see* Instruction 5(b)(v).
- \*\* Intentional misstatements or omissions of facts constitute Federal Criminal Violations. *See* 18 U.S.C. 1001 and 15 U.S.C. 78ff(a).

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### Remarks:

No securities are beneficially owned.

Note: File three copies of this Form, one of which must be manually signed. If space is insufficient, *See* Instruction 6 for procedure. Potential persons who are to respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB number. ; a proper proxy statement must have been sent soliciting stockholder approval of the business combination.

As used in the Yellow Roadway certificate of incorporation, a business combination includes:

any merger or consolidation with or into any substantial stockholder or its affiliate, or

any sale, lease, exchange, mortgage, pledge, transfer or other disposition to or with any substantial stockholder or its affiliate of Yellow Roadway's assets having an aggregate fair market value of at least \$5,000,000, or

the issuance or transfer of Yellow Roadway securities to any substantial stockholder or its affiliate in exchange for consideration with a fair market value of at least \$5,000,000, or

the adoption of a plan for liquidation or dissolution of Yellow Roadway proposed by or on behalf of a substantial stockholder or an affiliate of the substantial stockholder, or

any reclassification of securities or similar transaction which increases the proportionate share of any class of equity or convertible securities of Yellow Roadway or any of its subsidiaries owned by a substantial stockholder or a substantial stockholder's affiliate.

Neither USF's bylaws nor its certificate of incorporation contains a similar provision.



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**Arrangements Between the Corporation and Others.** Under Yellow Roadway's certificate of incorporation, arrangements or compromises between Yellow Roadway and its creditors and compromises or arrangements between Yellow Roadway and its stockholders must be agreed upon by three-fourths of the creditors and/or three-fourths of the stockholders, and sanctioned by a Delaware court as described in Yellow Roadway's certificate of incorporation in order to be binding on all the creditors and/or stockholders, and on Yellow Roadway.

Under USF's bylaws, a contract or transaction between USF and one or more of its directors, or between USF and any other corporation, partnership, association, or other organization in which one or more of the directors or officers are directors or officers, have a financial interest, is not void or voidable solely for this reason or solely because the director or officer is present at or participates in the meeting of the board or committee which authorizes such contract or transaction, or solely because his or their votes are counted for such purpose if:

the material facts as to such person's relationship or interest and as to the contract or transaction are disclosed and known to the board or committee, and the board or committee, in good faith, authorizes such by the affirmative votes of a majority of the disinterested directors, even though less than quorum; or

the material facts as to such person's relationship or interest and as to the contract or transaction are disclosed or known to the stockholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the stockholders; or

the contract or transaction is fair as to USF at the time it is authorized, approved or ratified by the board, or committee thereof, or stockholders.

## **Stockholder Meetings**

### *Annual Meetings*

Under Yellow Roadway's bylaws, annual meetings of stockholders must be held on a date as fixed annually by Yellow Roadway's board of directors. USF's bylaws provide that annual meetings of stockholders will be held on any date designated by USF's board of directors or, if not so designated, at 10:00 a.m. on the third Tuesday in April of each year, if not a legal holiday, and, if a legal holiday, at the same hour on the next succeeding work day.

### *Special Meetings*

Under Yellow Roadway's bylaws, a special meeting of the stockholders may be called by the Chairman of the Board, the Chief Executive Officer, or a majority of the Yellow Roadway board of directors. Yellow Roadway's certificate of incorporation stipulates that a special meeting may be called only by the board of directors pursuant to a resolution approved by a majority of the board of directors or by the Chairman of the Board or President, upon timely written notice. USF's bylaws specify that special meetings of stockholders may be called by the USF board of directors, or by any committee of the board of directors that has been duly designated by the board and given the power to call such meeting in a resolution of the board. Yellow Roadway's bylaws require that special meetings be held at the principal office of Yellow Roadway in Overland Park, Kansas. USF's bylaws provide that special meetings of stockholders may be held at such place as designated in the notice thereof.

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**Notice of Meetings to Stockholders.** Both Yellow Roadway's and USF's bylaws, as well as Yellow Roadway's certificate of incorporation, specify that written notice of stockholder meetings must be given not less than 10 and no more than 60 days prior to the meeting. Under USF's bylaws, any stockholder may waive this requested notice in writing or electronically, either before or after such meeting. The attendance of any stockholder at a meeting constitutes a waiver of notice of such meeting, except when the stockholder attends the meeting for the express purpose of objecting, at the beginning of the meeting, to the transaction of any business on the ground that the meeting is not lawfully called or convened.

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**Adjournment and Notice of Adjournment of Stockholder Meetings.** Under Yellow Roadway's bylaws, if a quorum fails to attend a meeting of stockholders, the chairman of the meeting, or the holders of a majority of the shares entitled to vote who are present in person or by proxy at the meeting, may adjourn the meeting to another date or time. If a quorum does attend a Yellow Roadway meeting of stockholders, the meeting may be adjourned by a majority of the votes cast on a proposal to adjourn or postpone the meeting. Under USF's bylaws, any meeting of stockholders may adjourn from time to time to reconvene at the same or some other place. Under Yellow Roadway's bylaws, written notice need not be given of an adjourned meeting if its place, date and time are announced at the meeting at which the adjournment is taken, and the adjourned meeting is held no later than 14 days after the date of the original meeting. Under USF's bylaws, notice of the adjourned meeting need not be given if the time and place to which it is adjourned are announced at the meeting at which the adjournment is taken. However, if the adjournment is for more than 30 days, or if after the adjournment a new record date is fixed for the adjourned meeting, a notice of the adjourned meeting must be given to each stockholder entitled to vote at the meeting.

**Quorum at a Stockholder Meeting.** Under Yellow Roadway's bylaws, the holders of a majority of the outstanding shares entitled to vote at a meeting of stockholders, present in person or by proxy, constitutes a quorum, unless or except where the presence of a larger number of holders is required by law. Yellow Roadway's bylaws also provide that, if notice of an adjourned special meeting of stockholders is sent to all stockholders entitled to vote at the adjourned special meeting that states that the adjourned special meeting will be held with those present constituting a quorum, then, except as otherwise required by law, those present at the adjourned special meeting will constitute a quorum, and all matters will be determined by a majority of votes cast at the adjourned special meeting. Under USF's bylaws, the presence in person or by proxy of the holders of record of a majority of the USF shares entitled to vote at the meeting constitutes a quorum, except as otherwise provided by law.

**Notice of Stockholder Business.** Yellow Roadway's bylaws provide that notice of business to be brought by a particular stockholder before an annual meeting must be received not less than 60 nor more than 90 days prior to the annual meeting, unless the meeting is held on less than 70 days' notice or prior public disclosure of the meeting date, in which case notice must be received by the tenth day following the day on which notice of the date of the annual meeting was mailed or such public disclosure was made. Additionally, Yellow Roadway's bylaws provide that, to be in proper written form, such notice must contain, for each matter:

a brief description of the matter,

the name and address of the stockholder,

the class and number of shares beneficially owned by the stockholder, and

a description of the material interest of the stockholder in the matter.

USF's bylaws provide that notice of stockholder business must be delivered to or by mailed and received at USF's principal executive office not less than 30 nor more than 60 days prior to the annual meeting, unless the meeting is held on less than 40 days' notice or prior public disclosure of the meeting date, in which case notice must be received by the tenth day following the day on which notice of the date of the annual meeting was mailed or such public disclosure was made. Additionally, USF's bylaws provide that, to be in proper written form, the notice must contain:

a brief description of each item of proposed business and the reasons for conducting such business at the annual meeting,

the name and address of the person proposing business,

the class and number of shares beneficially owned by the stockholder, and

a description of the material interest of the stockholder in the proposed business.

**Proxies and Voting.** Under Yellow Roadway's bylaws, each stockholder has one vote for every share of stock. Both USF's bylaws and USF's certificate of incorporation provide that each stockholder has one vote for every share of common stock.

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Yellow Roadway's bylaws provide that all voting may be by a voice vote unless a stock vote is demanded. The certificate of incorporation of USF provides that the election of directors need not be by written ballot, unless required by the bylaws. USF's bylaws provide that, unless otherwise required by law or directed by the chairman of the meeting, the vote at any meeting of the stockholders on any question need not be by ballot.

Under Yellow Roadway's bylaws, all elections must be determined by a plurality of the votes cast, and all other matters, except as otherwise required by law or under the Yellow Roadway certificate of incorporation or bylaws, must be determined by a majority of the votes cast. USF's bylaws provide that all questions except the election of directors, which requires a plurality of the votes cast, will be decided by a majority of the votes that could be cast by the holders of all shares of stock that are present in person or represented by proxy and that are entitled to vote on such questions unless otherwise provided by law or by USF's certificate of incorporation. Under Yellow Roadway's bylaws, votes taken by ballot must be counted by an inspector or inspectors appointed by the chairman of the meeting. USF's bylaws provide that prior to any meeting the board of directors will appoint one or more inspectors of elections, and may designate one or more alternate inspectors. In the event no inspector or alternate is available to act, USF's bylaws provide that the person presiding at the meeting shall appoint one or more inspectors to act at the meeting.

**Nomination of Directors.** Under Yellow Roadway's bylaws, written nominations must be properly delivered or mailed not less than 14 and no more than 50 days prior to the election meeting. If less than 21 days' notice of the meeting is given to the stockholders, however, written nominations must be properly delivered or mailed by the end of the seventh day following the day on which notice of the meeting was mailed to the stockholders. Under USF's bylaws, written nominations must be delivered to and received by the Secretary of USF not less than 60 days and no more than 90 days prior to the first anniversary of the preceding year's annual meeting. However, if the date of the annual meeting is advanced by more than 30 days or delayed by more than 60 days from the anniversary date, written nominations must be properly delivered and received not earlier than the 90th day prior to such annual meeting and not later than the close of business on the later of the 60th day prior to such annual meeting and the 10th day following the day on which the public announcement of the date of such meeting is first made. Notwithstanding the foregoing, USF's bylaws provide that in the event that the number of directors is increased and no public announcement naming all of the nominees or specifying the size of the increased board is made at least 70 days before the first anniversary of the preceding year's annual meeting a stockholder's notice will be considered timely, but only with respect to the nominees for new positions created by such increase, if it is delivered to the Secretary of USF not later than the close of business on the 10th day following the day on which such public announcement is first made.

Proper nominations of candidates for Yellow Roadway's board of directors must include the name, age, and certain addresses of the nominee, the principal occupation/employment of the nominee and the number of shares beneficially owned by the nominee. Proper nominations of candidates for USF's board of directors must include the name, age, business address and residence address of the nominee; the principal occupation or employment of the nominee; the number of shares of stock of USF which are beneficially owned by the nominee; and any other information relating to the nominee that is required to be disclosed in connection with the solicitation of proxies for election of directors, or as otherwise required, in each case pursuant to Regulation 14A under the Securities Exchange Act of 1934, and any other applicable laws or rules or regulations of any governmental authority or of any national securities exchange or similar body overseeing any trading market on which shares of USF are traded. Such nominations of candidates for USF's board of directors must also include the name and address of the stockholder making the nomination and of the beneficial owner, if any, on whose behalf the nomination is made; and the class and number of shares of USF which are owned beneficially and of record by such stockholder and such beneficial owner.

**Number of Directors on Board.** Yellow Roadway's certificate of incorporation provides that the board of directors may, from time to time, set the number of directors, provided that the number is not less than 5 and no more than 15. Currently, the bylaws of Yellow Roadway specify that the board of directors must consist of seven members. Under USF's bylaws, the number of directors will be determined from time to time by resolution(s)



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adopted by the affirmative vote of a majority of the total number of directors which USF would have if there were no vacancies. The bylaws and certificate of incorporation of USF provide that the board of directors shall consist of not less than 3 nor more than 21 directors.

**Vacancies of Directors.** Vacant positions on Yellow Roadway's board of directors, under Yellow Roadway's bylaws and certificate of incorporation, may be filled by a majority vote of the directors remaining in office, even if less than a quorum. Under USF's certificate of incorporation and bylaws, new positions and vacancies on USF's board of directors will be filled by a majority vote of the remaining directors, even if less than a quorum, or by the sole remaining director, subject to the rights of the holders of preferred stock. However, USF's bylaws establish that only the stockholders may fill any vacancy which results from the removal of a director by the stockholders.

**Removal of Directors.** A director of Yellow Roadway, under Yellow Roadway's bylaws, may be removed for cause by a majority vote of the stockholders entitled to vote in the election of directors. The certificate of incorporation of Yellow Roadway expressly indicates that a director may only be removed from office if that director is convicted of a felony and the conviction cannot be appealed, or if that director has been adjudged by a court to be incompetent or liable for negligence or misconduct in his duty to Yellow Roadway, and the adjudication cannot be appealed. Under both the USF bylaws and certificate of incorporation, a director of USF may be removed for cause by the vote of the holders of a majority in voting interest of the shares entitled to vote in the election of directors.

**Quorum of the Board of Directors.** The bylaws of Yellow Roadway provide that one-third of the total number of the whole board, though not less than two directors, will constitute a quorum for all purposes. USF's bylaws provide that a majority of the directors then in office constitutes a quorum.

**Amendment of Bylaws.** The Yellow Roadway bylaws may be amended by the affirmative vote at an annual or special meeting of 75% of the outstanding shares entitled to vote at the meeting if the notice of the meeting included the amendment of the bylaws as a purpose of the meeting, or by the affirmative vote of a majority of the board of directors at the meeting. The USF bylaws may be amended by the vote of a majority of the Board, subject to the power of the holders of  $\frac{2}{3}$  of the outstanding stock of USF entitled to vote in respect thereof by their vote given at an annual or special meeting to amend, alter or repeal an bylaw made by the board.

**Amendment of Certificates of Incorporation.** Under the USF certificate of incorporation, the company reserves the right to amend the certificate of incorporation. However, the certificate of incorporation for USF requires the affirmative vote of the holders of at least 75% of the voting power of the then outstanding voting stock of USF, voting together as a single class, to amend the provision relating to liability of directors subject to requirements of law, other provisions of the certificate of incorporation and the rights of any class or series of capital stock having a preference over common stock. The certificate of incorporation of Yellow Roadway has a similar provision, requiring the affirmative vote of the holders of at least 80% of the outstanding shares entitled to vote in the election of directors, unless the amendment to specific certificate of incorporation provisions is recommended by a majority of continuing directors.

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**PROPOSED FINANCINGS**

Yellow Roadway currently has in place a \$450 million receivables financing facility secured by certain receivables of Yellow Transportation and Roadway Express ( ABS Facility ). Yellow Roadway also has a \$500 million senior unsecured revolving credit facility, including a \$375 million letter of credit subfacility ( Revolving Credit Facility ). If the merger occurs, it is contemplated that at the effective time of the merger the aggregate amounts available for borrowing under each of the ABS Facility and the Revolving Credit Facility will be increased to \$600 million and \$750 million (including a \$500 million letter of credit subfacility), respectively. Yellow Roadway expects that the cash portion of the merger consideration and Yellow Roadway's capital and liquidity needs (including refinancing of certain existing indebtedness of Yellow Roadway and USF) will be financed with a combination of proceeds from the sale of debt securities, borrowings under the ABS Facility and the Revolving Credit Facility and cash on hand. The merger agreement does not include a financing condition.

In addition to the proposed financings, following consummation of the merger of USF into Yellow Roadway, USF LLC, as a subsidiary of Yellow Roadway, and its subsidiaries will continue to be obligated on USF's \$150 million aggregate principal amount of 8.5% senior notes due April 15, 2010, and USF's \$100 million aggregate principal amount of 6.5% senior notes due May 1, 2009.

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**LEGAL MATTERS**

The validity of the shares of Yellow Roadway common stock to be issued in the merger will be passed on for Yellow Roadway by Fulbright & Jaworski L.L.P., counsel to Yellow Roadway. Certain tax consequences of the merger will be passed on for Yellow Roadway by Fulbright & Jaworski L.L.P. and for USF by Sullivan & Cromwell LLP.

**EXPERTS**

The consolidated financial statements and schedule of Yellow Roadway as of December 31, 2004 and 2003, and for each of the years in the three-year period ended December 31, 2004, and management's assessment of the effectiveness of internal control over financial reporting as of December 31, 2004, have been incorporated in this joint proxy statement/prospectus by reference to Yellow Roadway's Annual Report on Form 10-K, in reliance on the reports of KPMG LLP, independent registered public accounting firm, and upon the authority of said firm as experts in auditing and accounting.

The consolidated financial statements of USF Corporation and subsidiaries as of December 31, 2004 and 2003, and for each of the three years in the period ended December 31, 2004, the related financial statement schedule, and management's report on the effectiveness of internal control over financial reporting as of December 31, 2004 incorporated in this joint proxy statement/prospectus by reference to USF's Annual Report on Form 10-K for the year ended December 31, 2004 have been audited by Deloitte & Touche LLP, an independent registered public accounting firm, as stated in their reports, which are incorporated herein by reference, and have been so incorporated in reliance upon the reports of such firm given upon their authority as experts in accounting and auditing.

**STOCKHOLDER PROPOSALS**

Yellow Roadway must receive Yellow Roadway stockholders' proposals, or if the merger is consummated, Yellow Roadway stockholders' proposals, intended to be presented at the 2006 annual meeting by December 10, 2005 to be eligible for inclusion in the proxy materials relating to that meeting. Stockholder proposals as to which we receive notice that are proposed to be brought before the 2006 annual meeting (outside the process of the Securities and Exchange Commission's rule on stockholder proposals described in the preceding sentence) will be considered not properly brought before that meeting, and will be out of order, unless we receive the notice as to that matter not less than 60 days nor more than 90 days prior to the date of the 2006 annual meeting, in accordance with our bylaws. If, however, Yellow Roadway gives less than 70 days notice of the date of the 2006 annual meeting, then, to be timely, Yellow Roadway must receive notice of a stockholder proposal by the 10th day following the day that we mail notice of, or publicly disclose, the date of the 2006 annual meeting. Yellow Roadway may use its discretionary authority to preclude any stockholder proposal received after that time from presentment at the 2006 annual meeting.

Stockholders who wish to suggest qualified candidates to stand for election to Yellow Roadway's board of directors may write to the Secretary, Yellow Roadway Corporation, 10990 Roe Avenue, Overland Park, Kansas 66211, stating in detail and in accordance with Yellow Roadway's bylaws the qualifications of the persons they recommend. To be considered at the 2006 annual meeting, you must mail or deliver a recommendation to us not less than 14 days nor more than 50 days prior to the date of the 2006 annual meeting. If, however, Yellow Roadway gives less than 21 days notice of the date of the 2006 annual meeting, you must mail or deliver a recommendation by the seventh day following the day that Yellow Roadway mails notice of the date of the 2006 annual meeting. The Governance Committee of the board of directors will consider these suggestions.

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USF does not currently expect to hold a 2005 annual meeting of stockholders, except in the case where the Merger Agreement is terminated prior to December 31, 2005 and there is sufficient time to hold a meeting prior

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to such date in compliance with applicable law. If the Merger Agreement is terminated and such a meeting is held in 2005, stockholders may propose matters to be presented at the 2005 annual meeting of stockholders and may also nominate a person or persons to be director, in each case in accordance with the requirements stated below.

Stockholder proposals submitted for evaluation as to inclusion in the proxy materials for USF's 2005 annual meeting of stockholders, if such a meeting is held, pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, as amended, must be received by the Secretary of USF at USF's principal executive offices at 8550 W. Bryn Mawr Avenue, Suite 700, Chicago, Illinois 60631, no later than July 1, 2005, and must otherwise comply with the requirements of Rule 14a-8.

Stockholder proposals submitted outside the processes of Rule 14a-8 must be received by the Secretary of USF in a timely fashion. To be timely, such notice and certain information regarding the proposal and the stockholder as provided for in USF's By-laws must be delivered to or mailed and received by the Secretary of USF at the USF's principal executive offices not less than 30 days nor more than 60 days prior to the annual meeting; provided, however, that in the event that less than 40 days' notice or prior public disclosure of the date of the annual meeting is given or made to stockholders, notice by the stockholder to be timely must be received not later than the close of business on the 10th day following the day on which such notice of the date of the annual meeting was mailed or such public disclosure was made.

**WHERE YOU CAN FIND MORE INFORMATION**

Yellow Roadway and USF file annual, quarterly and current reports, proxy statements and other information with the Securities and Exchange Commission. You may read and copy materials that Yellow Roadway and USF have filed with the Securities and Exchange Commission at the following Securities and Exchange Commission public reference room:

450 Fifth Street, N.W.

Room 1024

Washington, D.C. 20549

Please call the Securities and Exchange Commission at 1-800-SEC-0330 for further information on the operation of the public reference room.

The Yellow Roadway common stock and the USF common stock are traded on the Nasdaq National Market under the symbols YELL and USFC, respectively, and our Securities and Exchange Commission filings can also be read at the following address:

Nasdaq Operations, 1735 K Street, N.W., Washington, D.C. 20006

Our Securities and Exchange Commission filings are also available to the public on the Securities and Exchange Commission's internet website at <http://www.sec.gov>, which contains reports, proxy and information statements and other information regarding companies that file

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electronically with the Securities and Exchange Commission. In addition, Yellow Roadway's Securities and Exchange Commission filings are also available to the public on Yellow Roadway's website, <http://www.yellowroadway.com> and USF's filings with the Securities and Exchange Commission are also available to the public on USF's website, <http://www.usfc.com>. Information contained on Yellow Roadway's web site and USF's web site is not incorporated by reference into this prospectus, and you should not consider information contained on those web sites as part of this prospectus.

We incorporate by reference into this joint proxy statement/prospectus the documents listed below and any future filings Yellow Roadway or USF make with the Securities and Exchange Commission under Sections 13(a), 13(c), 14 or 15(d) of the Securities Exchange Act of 1934, including any filings after the date of this joint

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proxy statement/prospectus, until the special meetings. The information incorporated by reference is an important part of this joint proxy statement/prospectus. Any statement in a document incorporated by reference into this joint proxy statement/prospectus will be deemed to be modified or superseded for purposes of this joint proxy statement/prospectus to the extent a statement contained in this joint proxy statement/prospectus or any other subsequently filed document that is incorporated by reference into this joint proxy statement/prospectus modifies or supersedes such statement. Any statement so modified or superseded will not be deemed, except as so modified or superseded, to constitute a part of this joint proxy statement/prospectus.

**Yellow Roadway Securities and Exchange Commission Filings**

Commission file number 000-12255

Yellow Roadway's Annual Report on Form 10-K for the fiscal year ended December 31, 2004 (including the financial statements filed as Exhibits 99.1 and 99.2 thereto).

Yellow Roadway's definitive proxy statement filed on April 1, 2005.

Yellow Roadway's Current Report on Form 8-K filed on February 28, 2005 (excluding the information that was furnished, but not filed, pursuant to Item 7.01).

**USF Securities and Exchange Commission Filings**

Commission file number 000-19791

USF's Annual Report on Form 10-K for the fiscal year ended December 31, 2004.

USF's Current Reports on Form 8-K filed on January 27, 2005, February 7, 2005, March 3, 2005 and March 3, 2005.

The documents incorporated by reference into this joint proxy statement/prospectus are available from us upon request. We will provide a copy of any and all information that is incorporated by reference into this joint proxy statement/prospectus (not including exhibits to the information unless those exhibits are specifically incorporated by reference into this joint proxy statement/prospectus) to any person without charge, upon written or oral request.

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**ANNEX A**

**AGREEMENT AND PLAN OF MERGER**

**By and Among**

**YELLOW ROADWAY CORPORATION,**

**YANKEE II LLC**

**and**

**USF CORPORATION**

**Dated as of February 27, 2005**



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**AGREEMENT AND PLAN OF MERGER**

This Agreement and Plan of Merger (this *Agreement* ) is dated as of February 27, 2005 by and among Yellow Roadway Corporation, a Delaware corporation ( *Parent* ), Yankee II LLC, a Delaware limited liability company and a wholly owned subsidiary of Parent ( *Merger Sub* ), and USF Corporation, a Delaware corporation (the *Company* ). Merger Sub and the Company are sometimes hereinafter collectively referred to as the *Constituent Entities* .

**RECITALS**

WHEREAS, the respective boards of directors of each of Parent and the Company and the sole member of Merger Sub have approved the merger of the Company with and into Merger Sub (the *Merger* ) and approved the Merger upon the terms and subject to the conditions set forth in this Agreement;

WHEREAS, it is intended that, for U.S. federal income tax purposes, the Merger will qualify as a reorganization under the provisions of Section 368(a) of the Internal Revenue Code of 1986, as amended, and the rules and regulations promulgated thereunder (the *Code* ); and

WHEREAS, the Company, Parent and Merger Sub desire to make certain representations, warranties, covenants and agreements in connection with this Agreement.

NOW, THEREFORE, in consideration of the premises, and of the representations, warranties, covenants and agreements contained herein, the parties hereto agree as follows:

**ARTICLE I**

**The Merger; Closing; Effective Time**

1.1. *The Merger*. Upon the terms and subject to the conditions set forth in this Agreement, at the Effective Time (as defined in Section 1.3) the Company shall be merged with and into Merger Sub and the separate corporate existence of the Company shall thereupon cease. Merger Sub shall be the surviving entity in the Merger (sometimes hereinafter referred to as the *Surviving Entity* ), and the separate corporate existence of Merger Sub with all its rights, privileges, immunities, powers and franchises shall continue unaffected by the Merger. The Merger shall have the effects specified in the Delaware General Corporation Law, as amended (the *DGCL* ) and the Delaware Limited Liability Company Act, as amended (the *DLLCA* ).

1.2. *Closing*. Unless otherwise mutually agreed in writing between the Company and Parent, the closing of the Merger (the *Closing* ) shall take place at the offices of Fulbright & Jaworski L.L.P., 666 Fifth Avenue, New York, New York 10103-3198, at 9:00 A.M. (Eastern Time) on the

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first business day (the *Closing Date* ) following the day on which the last to be fulfilled or waived of the conditions set forth in Article VII (other than those conditions that by their nature are to be satisfied at the Closing, but subject to the fulfillment or waiver of those conditions) shall be satisfied or waived in accordance with this Agreement.

1.3. *Effective Time*. As soon as practicable following the Closing, the Company and Parent will cause a Certificate of Merger (the *Delaware Certificate of Merger* ) to be executed and filed with the Secretary of State of the State of Delaware as provided in Section 257 of the DGCL and Section 18-209 of the DLLCA. The Merger shall become effective at the time when the Delaware Certificate of Merger has been duly filed with the Secretary of State of the State of Delaware or at such later time as may be agreed by the parties and specified in the Delaware Certificate of Merger (the *Effective Time* ).

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**ARTICLE II**

**Certificate of Formation and  
Limited Liability Company Agreement of the Surviving Entity**

2.1. *The Certificate of Formation.* The certificate of formation of Merger Sub as in effect immediately prior to the Effective Time shall be the certificate of formation of the Surviving Entity (the *Certificate of Formation* ), until thereafter amended as provided therein or by applicable Law (as defined in Section 5.1(j)), except that the Certificate of Formation shall be amended to change the name of the Surviving Entity to USF LLC .

2.2. *Limited Liability Company Agreement.* The limited liability company agreement of Merger Sub as in effect at the time Effective Time shall be the limited liability company agreement of the Surviving Entity (the *Limited Liability Company Agreement* ), until thereafter amended as provided therein or by applicable Law.

**ARTICLE III**

**Officers and Managers of the Surviving Entity**

3.1. *Managers.* From and after the Effective Time, the persons set forth on Exhibit A-1 attached hereto shall be the managers of the Surviving Entity until their successors have been duly elected or appointed and qualified or until their earlier death, resignation or removal in accordance with the Limited Liability Company Agreement.

3.2. *Officers.* From and after the Effective Time, the persons set forth on Exhibit A-2 attached hereto shall be the officers of the Surviving Entity, with each such person having the offices set forth opposite his or her name, until their successors have been duly elected or appointed and qualified or until their earlier death, resignation or removal in accordance with the Limited Liability Company Agreement.

**ARTICLE IV**

**Effect of the Merger on the Capital Stock and  
Membership Interests of the Constituent Entities; Exchange of Certificates**

4.1. *Effect on Capital Stock and Membership Interests.* As of the Effective Time, by virtue of the Merger and without any action on the part of any holder thereof:

(a) *Membership Interests of Merger Sub.* Each issued and outstanding membership interest of Merger Sub shall be converted into and become an equivalent fully paid and nonassessable membership interest of the Surviving Entity.

(b) *Cancellation of Excluded Shares.* Each share of common stock, par value \$0.01 per share, of the Company ( *Company Common Stock* ) that is owned directly or indirectly by the Company as treasury stock or by Parent, Merger Sub or any other wholly owned Subsidiary (as defined in Section 5.1(a)) of Parent and in each case not held on behalf of third parties (such shares, collectively with Dissenters' Shares (as defined in Section 4.10), the *Excluded Shares* ) shall be canceled, and no consideration shall be delivered in exchange therefor.

(c) *Conversion of Company Common Stock.* Subject to the provisions of Section 4.4, each share of Company Common Stock, together with the associated Rights (as defined in Section 5.1(b)) (each share of Company Common Stock together with the associated Right, a *Share* or, collectively, *Shares* ), issued and outstanding immediately prior to the Effective Time (other than the Excluded Shares) shall be converted, at the option of the holder thereof, into the right to receive (x) 0.9024 (the *Exchange Ratio* ) fully paid, non-assessable shares of Parent Common Stock (as defined below) (the *Stock Consideration* ) or (y) upon a valid Cash Election (as defined in Section 4.1(d)), \$45.00 in cash from Parent (the *Cash Consideration* and, together with the Stock Consideration, the *Merger Consideration* ), subject to the limitations set forth in Sections 4.1(d), 4.1(e) and 4.1(g). For purposes of this Agreement, *Parent Common Stock* shall mean the common stock, \$1.00 par value per share, of Parent.

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(d) *Cash Election*. Subject to the immediately following sentence and to Sections 4.1(e) and 4.1(g), each record holder of Shares immediately prior to the Effective Time shall be entitled to elect, with respect to each Share, to receive cash (a *Cash Election* ). Notwithstanding the foregoing, subject to Section 4.1(g) below, the maximum aggregate Cash Consideration shall be the product of the Cash Consideration multiplied by the Cash Election Number. For purposes of this Agreement, the *Cash Election Number* shall be the amount equal to the product of 50% multiplied by the aggregate number of shares of Shares outstanding at 5:00 P.M. (Eastern Time) on the second Trading Day (as defined below) prior to the Effective Time. For purposes of this Agreement, *Trading Day* means a day on which the National Association of Securities Dealers, Inc. National Market ( *Nasdaq National Market* ) is open for trading. To the extent not covered by a properly given Cash Election, all Shares issued and outstanding immediately prior to the Effective Time shall, except as provided in Section 4.1(b) and Section 4.1(e), be converted solely into shares of Parent Common Stock.

(e) *Cash Election Adjustments*. If the aggregate number of Shares covered by Cash Elections (the *Cash Election Shares* ) exceeds the Cash Election Number, each Cash Election Share shall be converted into (i) the right to receive an amount in cash, without interest, equal to the product of (A) the Cash Consideration and (B) a fraction (the *Cash Fraction* ), the numerator of which shall be the Cash Election Number and the denominator of which shall be the total number of Cash Election Shares, and (ii) a number of shares of Parent Common Stock equal to the product of (A) the Exchange Ratio and (B) an amount equal to one minus the Cash Fraction. If the Cash Election Shares are less than the Cash Election Number, then the right to receive a share of Parent Common Stock included in the Stock Consideration shall be converted into (x) the right to receive an amount in cash, without interest, equal to the product of (A) the Cash Consideration and (B) a fraction (the *Stock Fraction* ) the numerator of which is the excess of (1) the number of Shares that are not Cash Election Shares (the *Stock Election Shares* ) included in the Stock Consideration over (2) the Cash Election Number, and the denominator of which is the total number of shares of Stock Election Shares, and (y) the number of shares of Parent Common Stock equal to the product of (A) the Exchange Ratio and (B) an amount equal to one minus the Stock Fraction.

(f) *Computation of Conversion Rates*. The Exchange Agent (as defined in Section 4.2(a)), in consultation with Parent and the Company, shall make all computations to give effect to this Section 4.1.

(g) *Reduction in Cash Consideration*. If, after having made the calculations under Section 4.1(e), the value of Parent Common Stock (excluding fractional shares to be paid in cash) to be issued in the Merger, valued at the average of the high and low trading prices of Parent Common Stock on the day before the date of the Closing as reported on the Nasdaq National Market (the *Parent Closing Price* ), is less than 45% of the total consideration to be paid in exchange for the Shares (including, without limitation, the amount of cash to be paid in lieu of fractional shares or for Dissenters Shares and any other payments required to be considered in determining whether the continuity of interest requirements applicable to reorganizations under Section 368 of the Code have been satisfied) (the *Total Consideration* ), then the Cash Consideration to be paid with respect to Cash Election Shares shall be reduced and the number of shares of Parent Common Stock to be issued with respect to the Cash Election Shares shall be increased such that (1) the aggregate increase in the value of Stock Consideration (as determined pursuant to this Section 4.1(g)) equals the aggregate reduction in the Cash Consideration and (2) the aggregate value of the Stock Consideration equals 45% of the Total Consideration. The additional shares of Parent Common Stock to be issued as a result of the adjustment described in the preceding sentence shall be distributed pro rata among the Cash Election Shares. For purposes of this Section 4.1(g), the cash to be paid for any Dissenters Share shall be deemed to have a value equal to the quotient of (x) the Aggregate Non-Dissenter Value (as defined below) and (y) the total number of Non-Dissenters Shares (as defined below). *Non-Dissenters Shares* means the number of Shares minus any Dissenters Shares and the *Aggregate Non-Dissenter Value* means the aggregate value of (1) the cash consideration paid for Non-Dissenter Shares plus (2) the product of the number of shares of Parent Common Stock issued in exchange for Non-Dissenter Shares and Parent Closing Price. Notwithstanding the foregoing, in the event that before the Closing Date final U.S. Treasury Regulations that are applicable to the Merger describing the continuity of interest requirements applicable to reorganizations under Section 368 of the Code provide that the percentage of the consideration in a Section 368 reorganization that consists of stock for purposes of determining whether the continuity of interest

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test has been satisfied is to be tested based on the fair market value of the acquiring corporation's stock on or about the date the merger agreement is signed (rather than on the Closing Date), then no adjustment to the cash and stock described in this Section 4.1(g) shall be made.

(h) *Adjustments to Prevent Dilution.* In the event that the Company changes the number of Shares or securities convertible or exchangeable into or exercisable for Shares, or Parent changes the number of shares of Parent Common Stock or securities convertible or exchangeable into or exercisable for shares of Parent Common Stock, issued and outstanding prior to the Effective Time as a result of a reclassification, stock split (including a reverse split), stock dividend or distribution, recapitalization, merger, subdivision, combination, issuer exchange offer or other similar transaction, appropriate and proportionate adjustments, if any, to the Stock Consideration and the Exchange Ratio will be made to reflect such reclassification, stock split (including a reverse split), stock dividend or distribution, recapitalization, merger, subdivision, combination, issuer exchange offer or similar transaction and all references to the Stock Consideration and Exchange Ratio in this Agreement shall be deemed to be the Stock Consideration and Exchange Ratio as so adjusted. Notwithstanding the foregoing, nothing contained in this Section 4.1(h) shall prohibit Parent from (i) purchasing shares of Parent Common Stock in the open market in accordance with Rule 10b-18 under the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder (the *Exchange Act*), (ii) issuing shares of Parent Common Stock pursuant to the terms of its convertible notes outstanding on the date hereof or (iii) taking shares of Parent Common Stock as payment of withholding and other taxes with respect to the exercise of options or the granting or vesting of restricted stock granted under any Parent Stock Plan (as defined in Section 5.2(e)), and none of such actions shall result in any adjustment to the Stock Consideration or the Exchange Ratio.

4.2. *Surviving Entity To Make Certificates Available.*

(a) *Exchange of Certificates.* The Company and Parent shall authorize UMB Bank, N.A. (or such other bank or trust company in the United States as shall be reasonably acceptable to the Company and Parent) to act as the exchange agent hereunder (the *Exchange Agent*). At the Effective Time, Merger Sub shall deposit with the Exchange Agent for the benefit of the holders of certificates, which immediately prior to the Effective Time represented Shares (the *Certificates*), the Cash Consideration, without interest, and certificates representing the shares of Parent Common Stock (such Cash Consideration and shares of Parent Common Stock, together with any dividends or distributions with respect thereto payable as provided in Section 4.3, being hereinafter referred to as the *Exchange Fund*) issuable pursuant to Section 4.1(c) in exchange for outstanding Shares.

(b) *Election and Exchange Procedures.*

(i) The Exchange Agent will mail not fewer than 20 business days prior to the date of the Closing, or cause to be mailed with the Joint Proxy Statement/Prospectus (as defined in Section 6.3(a)), a form of election (the *Form of Election*), which will include a Form W-9, to holders of record of Shares (as of a record date as close as practicable to the date of mailing and mutually agreed to by Parent and the Company). In addition, the Exchange Agent will use its best efforts to make the Form of Election available to any Person (as defined below) who becomes a stockholder of the Company during the period between such record date and the Election Deadline (as defined below). Any election to receive Cash Consideration contemplated by Section 4.1(d) will have been properly made only if the Exchange Agent shall have received at its designated office or offices, by 4:00 P.M. (Eastern Time), on the Trading Day that is the fourth Trading Day prior to the date of the Closing (such time being the *Election Deadline*), a Form of Election properly completed and accompanied by one or more Certificates to which such Form of Election relates, duly endorsed in blank or otherwise acceptable for transfer on the books of the Company (or an appropriate guarantee of delivery), as set forth in such Form of Election. An election may be revoked only by written notice received by the Exchange Agent prior to the Election Deadline. In addition, all elections shall automatically be revoked if the Exchange Agent is notified by Parent and the Company that the Merger has been abandoned. If an election is so revoked, the Certificate(s) (or guarantee of delivery, as appropriate) to which such election relates shall be promptly returned to the Person (as defined below) who submitted the same to the Exchange Agent. Parent shall have the power, which it may delegate in whole or in part to the Exchange Agent, to determine, in its reasonable good faith judgment, whether



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Forms of Election have been properly completed, signed and submitted or revoked pursuant to this Section 4.2, and to disregard immaterial defects in Forms of Election. For the purposes of this Agreement, the term *Person* or *person* shall mean any individual, corporation (including not-for-profit), general or limited partnership, limited liability company, joint venture, estate, trust, association, organization, Governmental Entity (as defined in Section 5.1(d)(i)) or other entity of any kind or nature.

(ii) As soon as reasonably practicable after the Effective Time, the Exchange Agent will mail to each holder of record of a Certificate whose Shares were converted into the right to receive the Merger Consideration (other than with respect to Certificates subject to a valid Form of Election), (A) a letter of transmittal (which will specify that delivery will be effected, and risk of loss and title to the Certificates will pass, only upon proper delivery of the Certificates to the Exchange Agent and will be in such form and have such other provisions as Parent and the Company may specify consistent with this Agreement) and (B) instructions for use in effecting the surrender of the Certificates in exchange for the Merger Consideration.

(iii) After the Effective Time, upon surrender in accordance with this Section 4.2(b) of a Certificate for cancellation to the Exchange Agent, together with such letter of transmittal, duly executed, and such other documents as may reasonably be required by the Exchange Agent, the holder of such Certificate will be entitled to receive in exchange therefor the Merger Consideration that such holder has the right to receive therefor pursuant to the provisions of this Article IV, certain dividends or other distributions, if any, in accordance with Section 4.3 and cash in lieu of any fractional share of Parent Common Stock in accordance with Section 4.4, and the Certificate so surrendered will forthwith be cancelled. In the event of a transfer of ownership of Shares that are not registered in the transfer records of the Company, payment may be issued to a Person other than the Person in whose name the Certificate so surrendered is registered (the *Transferee*) if such Certificate is properly endorsed or otherwise in proper form for transfer and the Transferee pays any transfer or other taxes required by reason of such payment to a person other than the registered holder of such Certificate or establishes to the satisfaction of the Exchange Agent that such tax has been paid or is not applicable. Until surrendered as contemplated by this Section 4.2(b), each Certificate will be deemed at any time after the Effective Time to represent only the right to receive, upon such surrender, the Merger Consideration that the holder thereof has the right to receive in respect of such Certificate pursuant to the provisions of this Article IV, together with certain dividends or other distributions, if any, in accordance with Section 4.3 and cash in lieu of any fractional share of Parent Common Stock in accordance with Section 4.4. No interest will be paid or will accrue on any cash payable to holders of Certificates pursuant to the provisions of this Article IV.

4.3. *Dividends; Transfer Taxes.* No dividends or other distributions that are declared on or after the Effective Time on Parent Common Stock or are payable to the holders of record thereof on or after the Effective Time shall be paid to Persons entitled by reason of the Merger to receive certificates representing Parent Common Stock until such Persons surrender their Certificates, as provided in Section 4.2, and no Cash Consideration or cash payment in lieu of fractional shares shall be paid to any such holder pursuant to Section 4.4, until such holder of such Certificate shall so surrender such Certificate. Subject to the effect of applicable Law, there shall be paid to the record holder of the certificates representing such Parent Common Stock (a) at the time of such surrender or as promptly as practicable thereafter, the amount of any dividends or other distributions theretofore paid with respect to whole shares of such Parent Common Stock and having a record date on or after the Effective Time and a payment date prior to such surrender and (b) at the appropriate payment date or as promptly as practicable thereafter, the amount of dividends or other distributions payable with respect to whole shares of Parent Common Stock and having a record date on or after the Effective Time but prior to surrender and a payment date subsequent to surrender. In no event shall the Person entitled to receive such dividends or other distributions be entitled to receive interest on such dividends or other distributions. If any cash or certificate representing shares of Parent Common Stock is to be paid to or issued in a name other than that in which the Certificate surrendered in exchange therefor is registered, it shall be a condition of such exchange that the Certificate so surrendered shall be properly endorsed and otherwise in proper form for transfer and that the Person requesting such exchange shall pay to the Exchange Agent any transfer or other taxes required by reason of the issuance of certificates for such shares of Parent Common Stock in a name other than that of the registered holder of the Certificate surrendered, or shall establish to the satisfaction of the Exchange Agent that such tax has been paid or is not applicable.

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4.4. *No Fractional Shares.* No certificates or scrip representing fractional shares of Parent Common Stock shall be issued upon the surrender for exchange of Certificates pursuant to this Article IV, and no Parent dividend or other distribution or stock split or combination shall relate to any fractional security, and such fractional interests shall not entitle the owner thereof to vote or to any rights of a security holder of Parent. In lieu of any such fractional securities, each holder of Shares who would otherwise have been entitled to receive a fraction of a share of Parent Common Stock (after taking into account all Shares then held of record by such holder) shall receive cash (without interest) in an amount equal to the product of such fractional part of a share of Parent Common Stock multiplied by the Parent Closing Price and rounded to the nearest cent. As promptly as practicable after the determination of the amount of cash, if any, to be paid to holders of fractional interests, the Exchange Agent shall so notify Parent, and Parent shall deposit or cause the Surviving Entity to deposit, such amount with the Exchange Agent and shall cause the Exchange Agent to forward payments to such holders of fractional interests subject to and in accordance with the terms hereof.

4.5. *Return of Exchange Fund.*

(a) Any portion of the Exchange Fund that remains undistributed to the former stockholders of the Company for one year after the Effective Time shall be delivered to Parent, upon demand of Parent, and any former stockholders of the Company who have not theretofore complied with this Article IV shall thereafter look only to Parent for payment of their claim for Parent Common Stock, Cash Consideration, any cash in lieu of fractional shares of Parent Common Stock and any dividends or distributions with respect to Parent Common Stock. None of the Company, Parent or the Surviving Entity shall be liable to any holder of Shares for the Cash Consideration, shares of Parent Common Stock (or dividends or distributions with respect thereto) or cash in lieu of fractional shares of Parent Common Stock delivered to a public official pursuant to any applicable abandoned property, escheat or similar Law.

(b) The Exchange Agent shall invest any cash included in the Exchange Fund as directed by Parent; *provided*, that, for the two-month period immediately following the Effective Time, such investments shall be in obligations of or guaranteed by the United States of America, in commercial paper obligations rated A-1 or P-1 or better by Moody's Investors Service, Inc. or Standard & Poor's Corporation, respectively, or in certificates of deposit, bank repurchase agreements or banker's acceptance of commercial banks with capital exceeding \$1 billion. Any interest and other income resulting from such investments will be paid to Parent. Any losses resulting from such investments shall not diminish Parent's and Merger Subs's obligation to pay the full amount of the Merger Consideration.

4.6. *Further Ownership Rights in Shares.* All shares of Parent Common Stock issued, and all Cash Consideration paid, upon the surrender for exchange of Certificates in accordance with the terms hereof (including any cash paid pursuant to Sections 4.3 or 4.4) shall be deemed to have been issued or paid, as the case may be, in full satisfaction of all rights pertaining to Shares, subject, however, to the Surviving Entity's obligation to pay any dividends or make any other distribution with a record date prior to the Effective Time which may have been declared or made by the Company on Shares in accordance with the terms of this Agreement.

4.7. *Lost Certificates.* If any Certificate shall have been lost, stolen or destroyed, upon the making of an affidavit of that fact by the person claiming such Certificate to be lost, stolen or destroyed and, if required by Parent, the posting by such person of a bond in such reasonable amount as Parent may direct as indemnity against any claim that may be made against it with respect to such Certificate, the Exchange Agent will deliver in exchange for such lost, stolen or destroyed Certificate the Cash Consideration and the number of shares of Parent Common Stock to which such person is entitled pursuant to Section 4.1 with respect to Shares formerly represented thereby, any cash in lieu of fractional shares of Parent Common Stock to which such holders are entitled pursuant to Section 4.4 and unpaid dividends and distributions on shares of Parent Common Stock to which such holders are entitled pursuant to this Agreement.

4.8. *Withholding Rights.* Each of the Surviving Entity and Parent shall be entitled to deduct and withhold from the consideration otherwise payable pursuant to this Agreement to any holder of Shares and Company





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Options (as defined in Section 4.11) such amounts as it is required to deduct and withhold with respect to the making of such payment under the Code and the rules and regulations promulgated thereunder, or any provision of state, local or foreign tax law. To the extent that amounts are so withheld by the Surviving Entity or Parent, as the case may be, such withheld amounts shall be treated for all purposes of this Agreement as having been paid to the holders of Shares and Company Options in respect of which such deduction and withholding was made by the Surviving Entity or Parent, as the case may be.

4.9. *Closing of the Company Transfer Books.* At the Effective Time, the stock transfer books of the Company shall be closed and no transfer of Shares shall thereafter be made. If, after the Effective Time, Certificates are presented to the Surviving Entity, they shall be canceled and exchanged as provided in this Article IV.

4.10. *Dissenters' Shares.* Notwithstanding any provision of this Agreement to the contrary, Shares that are issued and outstanding immediately prior to the Effective Time and held by holders of such Shares who exercise appraisal rights with respect thereto in accordance with applicable provisions of the DGCL, including, without limitation, Section 262 thereof (the *Dissenters' Shares*) will not be exchangeable for the right to receive the Merger Consideration, and holders of such Dissenters' Shares will be entitled to receive payment of the appraised value of such Dissenters' Shares in accordance with those provisions unless and until such holders fail to perfect or effectively withdraw or lose their rights to appraisal and payment under the DGCL. If, after the Effective Time, any such holder fails to perfect or effectively withdraws or loses such rights to appraisal and payment under the DGCL, such Dissenters' Shares will thereupon be treated as if they had been converted into and to have become exchangeable for, at the Effective Time, the right to receive the Merger Consideration, without any interest thereon. The Company shall give Parent prompt notice of any demands received by the Company for appraisals of Shares. The Company shall not, except with the prior written consent of Parent, make any payment with respect to any demands for appraisal or offer to settle or settle any such demands. Notwithstanding any provision of this Agreement to the contrary, if Parent or the Company abandons or is finally enjoined or prevented from carrying out the Merger and the other transactions contemplated under this Agreement, the right of each holder of Dissenters' Shares to receive payment of the appraised value of Shares as provided herein shall terminate, effective as of the time of such abandonment, injunction, prevention or rescission.

4.11. *Treatment of Stock Options, Restricted Stock and Phantom Stock Awards.*

(a) *Treatment of Stock Options.* Each option to purchase Shares granted under a Company Stock Plan (as defined in Section 5.1(b)) that is outstanding immediately prior to the Effective Time (a *Company Option*) shall become fully vested and fully exercisable at the Effective Time. At the Effective Time, subject to the provisions of Section 4.4, each unexercised Company Option with an exercise price that is less than the Deemed Per Share Merger Consideration (as defined below) shall be cancelled and the holder of such Company Option shall be entitled to receive cash from the Company in an amount equal to (x) the Deemed Per Share Merger Consideration minus the exercise price per Share under the Company Option, multiplied by (y) the number of Shares subject to the Company Option. For purposes of this Section 4.11, the *Deemed Per Share Merger Consideration* shall be equal to (x) one-half the Cash Consideration plus (y) one-half the Exchange Ratio multiplied by the Parent Closing Price. The Company shall withhold from such cash payment, and pay over to the appropriate taxing authorities, all amounts the Company is required to withhold under federal and, if applicable, state tax laws. At the Effective Time, each Company Option with an exercise price that is equal to or greater than the Deemed Per Share Merger Consideration shall be cancelled and the holder of such Company Option shall not be entitled to receive any consideration for such Company Option. As soon as practicable after the date of this Agreement, the Company Board (as defined in Section 5.1(c)(ii)) and any committee of the Company Board administering the Company Stock Plans shall use their respective reasonable best efforts to take any action necessary to accomplish the foregoing, including obtaining any required consents from any Person.

(b) *Treatment of Restricted Stock.* Each share of restricted stock granted under a Company Stock Plan that is outstanding immediately prior to the Effective Time (a *Restricted Share*) shall become fully vested and all



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restrictions relating to such Restricted Shares shall lapse at the Effective Time. The holder of each Restricted Share shall receive the Form of Election in accordance with Section 4.2(b)(i) and each Restricted Share shall otherwise be treated as all other outstanding Shares in accordance with Section 4.1(c) above. As soon as practicable after the date of this Agreement, the Company Board and any committee of the Company Board administering the Company Stock Plans shall use their respective reasonable best efforts to take any action necessary to accomplish the foregoing, including obtaining any required consents from any Person.

(c) *Treatment of Phantom Stock.* At the Effective Time, each PSU (as defined in Section 5.1(b)) granted under a Company Stock Plan or under another agreement shall become fully vested and the Company shall pay the holder of such PSU a cash amount equal to the Deemed Per Share Merger Consideration multiplied by the number of Shares credited under each PSU. Fractional shares may be deemed credited under the awards. The Company shall withhold from such cash payment, and pay over to the appropriate taxing authorities, all amounts the Company is required to withhold under federal and, if applicable, state tax laws. As soon as practicable after the date of this Agreement, the Company Board and any committee of the Company Board administering the Company Stock Plans shall use their respective reasonable best efforts to take any action necessary to accomplish the foregoing, including obtaining required consents from any Person.

**ARTICLE V**

**Representations and Warranties**

5.1. *Representations and Warranties of the Company.* Except as set forth in the disclosure letter delivered to Parent by the Company prior to entering into this Agreement (the *Company Disclosure Letter*) (with specific reference to the Section or Subsection of this Agreement to which the information stated in such disclosure relates; *provided*, that any fact or condition disclosed in any section of the Company Disclosure Letter in such a way as to make its relevance to a representation or representations made elsewhere in this Agreement or information called for by another section of the Company Disclosure Letter reasonably apparent shall be deemed to be an exception to such representation or representations or to be disclosed in such other section of the Company Disclosure Letter notwithstanding the omission of a reference or cross reference thereto) the Company hereby represents and warrants to Parent and Merger Sub that:

(a) *Organization, Good Standing and Qualification.* Each of the Company and its Subsidiaries (as defined below) is a corporation, limited liability company or partnership duly organized, validly existing and in good standing under the Laws of its respective jurisdiction of organization and has all requisite corporate or similar power and authority to own, lease and operate its properties and assets and to carry on its business as presently conducted. Each of the Company and its Subsidiaries is qualified to do business and is in good standing as a foreign corporation in each jurisdiction where the ownership or operation of its assets or properties or conduct of its business requires such qualification, except where the failure to be so qualified or in good standing, when taken together with all other such failures, is not reasonably likely to have a Company Material Adverse Effect (as defined below). The Company has made available to Parent a complete and correct copy of the Company's and its material Subsidiaries' certificates of incorporation and bylaws or the charter documents, bylaws or similar governing agreements, each as amended to the date of this Agreement and as in full force and effect on the date of this Agreement.

As used in this Agreement, the term (i) *Subsidiary* means, with respect to the Company, Parent or Merger Sub, as the case may be, any entity, whether incorporated or unincorporated, of which at least a majority of the securities or ownership interests having by their terms voting power to elect a majority of the board of directors or other persons performing similar functions is directly or indirectly owned or controlled by such party or by one or more of its respective Subsidiaries and (ii) *Company Material Adverse Effect* means a material adverse effect on the financial condition, properties, business or results of operations of the Company and its Subsidiaries taken as a whole, excluding such effects resulting from or arising in connection with:

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(A) changes that are the result of general economic, capital market, regulatory, political or business conditions or acts of war or terrorism;

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(B) changes that are the result of factors generally affecting the industries or markets in which the Company operates to the extent such changes do not disproportionately affect the Company and its Subsidiaries as compared to the typical company operating in such industry or market;

(C) changes in the Company's relationships with its employees or with any labor organization or other representative of such employees, or any adverse change, effect or circumstance resulting from or arising in connection with any union certification or decertification petition, union authorization campaign, grievance or arbitration proceeding or other labor-related proceeding or litigation, labor strike, slowdown, work stoppage or other labor controversy that is threatened to occur or occurs after the date of this Agreement;

(D) any adverse change, effect or circumstance resulting from entering into this Agreement or the announcement thereof or the pendency or consummation of the transactions contemplated hereby;

(E) changes in applicable law, rule or regulations or generally accepted accounting principles or the interpretation thereof after the date of this Agreement; and

(F) any out of pocket expenses (including filing fees and legal expenses specifically with respect to any litigation arising from the transactions contemplated by this Agreement) directly incurred in connection with the transactions contemplated by this Agreement and in accordance with its terms.

(b) *Capital Structure.* As of the date of this Agreement, the authorized capital stock of the Company consists of 80,000,000 Shares and 20,000,000 shares of preferred stock, par value \$0.01 per share (the *Preferred Shares*). At the close of business on February 24, 2005, 28,389,043 Shares and no Preferred Shares were issued and outstanding. The Company has no Shares or Preferred Shares reserved for issuance, except that, at the close of business on February 24, 2005: (i) 1,361,913 Shares were reserved for issuance by the Company pursuant to Company Options granted under the following plans:

<u>Plan</u>	<u>Shares Reserved</u>
USF 1992 Stock Option Plan	35,800
USF Stock Option Plan for Non-Employee Directors	284,513
USF Long-Term Incentive Plan	1,041,600
USF Employees' 401(k) Retirement Plan	0
USF Non-Qualified Employee Stock Purchase Plan	0
USF Director's Compensation Plan	0

(collectively, the *Company Stock Plans*), (ii) 1,830,326 Shares were reserved for issuance pursuant to Company Options not yet granted under the Company Stock Plans, (iii) 9,166 Shares were held by the Company in its treasury and (iv) Preferred Shares were reserved for issuance pursuant to the rights (the *Rights*) under the Amended and Restated Rights Agreement, dated as of January 30, 2004, between the Company and Computershare Investor Services, LLC, as Rights Agent, as amended (the *Rights Agreement*). As of February 24, 2005, the Company had 5,596 phantom stock units (each, a *PSU*) outstanding, each PSU reflecting the value of one Share. The Company has no outstanding stock appreciation rights (*SARS*). Except for the issuance of shares pursuant to Company Options outstanding on February 24, 2005, between February 24, 2005 and the date of this Agreement, the Company has not (i) issued any Shares, Company Options, PSUs or other capital stock or voting or equity securities of the Company or (ii) changed the authorized capital of the Company. Except as set forth above, no shares of capital stock or other equity or voting securities of the Company are reserved for issuance or are outstanding. The Company Common Stock is listed on the Nasdaq

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National Market. All of the outstanding Shares have been duly authorized and are, and all Shares issuable upon the exercise of Company Options or stock awards will be when issued thereunder, validly issued, fully paid and nonassessable and are not subject to any preemptive rights. Each of the outstanding shares of capital stock or other securities or ownership interests of each of the Company's Subsidiaries is duly authorized, validly issued, fully paid and nonassessable and owned of record and beneficially by the Company or by a direct or indirect wholly owned Subsidiary of the Company, free and clear of any lien, mortgage, pledge, security interest, charge, claim or other encumbrance of any kind or nature ( *Lien* ) and such shares of capital stock or other securities were not issued in violation of any

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preemptive rights or other preferential rights of subscription or purchase of any Person other than those that have been waived or otherwise cured or satisfied. Section 5.1(b) of the Company Disclosure Letter sets forth (x) each of the Company's Subsidiaries and the ownership interest of the Company in each of such Subsidiaries, as well as the ownership interest of any other Person or Persons in each of such Subsidiaries, and (y) the Company's or its Subsidiaries' capital stock, equity interest or other direct or indirect ownership interest in any other corporation, partnership, association, joint venture, limited liability company or other entity, as well as the ownership interest of any other Person or Persons in each such corporation, partnership, association, joint venture, limited liability company or other entity. Except as set forth above and pursuant to the Rights Agreement, there are no preemptive or other outstanding rights, options, warrants, conversion rights, stock appreciation rights, redemption rights, repurchase rights, agreements, arrangements, calls, commitments or rights of any kind that obligate the Company or any of its Subsidiaries to issue, deliver or sell, or cause to be issued, delivered or sold, any shares of capital stock or other securities of the Company or any of its Subsidiaries or any securities or obligations convertible or exchangeable into or exercisable for, or giving any Person a right to subscribe for or acquire, any securities of the Company or any of its Subsidiaries, and no securities or obligations evidencing such rights are authorized, issued or outstanding. The Company does not have outstanding any bonds, debentures, notes or other obligations the holders of which have the right to vote (or convertible into or exercisable for securities having the right to vote) with the stockholders of the Company on any matter ( *Voting Debt* ). The Company does not own, directly or indirectly, any voting interest in any Person that may require a filing by Parent under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the *HSR Act* ). Neither the Company nor any of its Subsidiaries is a party to any stockholder agreement, voting trust or other agreement with respect to the voting of Shares.

(c) *Corporate Authority; Approval and Fairness.* (i) The Company has all requisite corporate power and authority and has taken all corporate action necessary in order to execute, deliver and perform its obligations under this Agreement, and, subject only to approval of this Agreement by the holders of a majority of the outstanding Shares entitled to vote on such approval at the Company Stockholders Meeting (the *Company Stockholder Approval* ), to consummate the Merger and the other transactions contemplated hereby. This Agreement has been duly executed and delivered by the Company and is a valid and binding agreement of the Company enforceable against the Company in accordance with its terms, subject to (i) bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium, fraudulent conveyance or other similar laws or judicial decisions now or hereafter in effect relating to or affecting creditors' rights and to general equity principles and (ii) the remedy of specific performance and injunctive relief may be subject to equitable defenses and to the discretion of the court before which any proceeding therefor may be brought (the *Bankruptcy and Equity Exception* ).

(ii) The Board of Directors of the Company (the *Company Board* ), at a meeting duly called and held, (A) as of the date of this Agreement, has unanimously (1) approved and declared advisable this Agreement and the Merger and the other transactions contemplated hereby and (2) recommended that the Company's stockholders adopt this Agreement and (B) has received the written opinion of its financial advisor, Morgan Stanley & Co. Incorporated ( *Morgan Stanley* ), dated the date of this Agreement, to the effect that the consideration to be received by the holders of the Shares in the Merger is fair from a financial point of view, as of the date of such opinion, to such holders. It is agreed and understood that such opinion is for the benefit of the Company Board and may not be relied on by Parent or Merger Sub. Each director and executive officer of the Company who has a right to vote any Shares has represented to the Company his or her intention as of the date of this Agreement to vote such Shares in favor of the adoption of this Agreement.

(d) *Governmental Filings; No Violations; Certain Contracts, Etc.*

(i) Other than the filings and/or notices (A) pursuant to Section 1.3, (B) under the HSR Act, the Exchange Act and the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder (the *Securities Act* ), (C) required to be made with the Nasdaq National Market and (D) state securities and blue sky laws, no notices, reports or other filings are required to be made by the Company with, nor are any consents, registrations, approvals, permits or authorizations required to be obtained by the Company from, any governmental or regulatory authority, agency, commission, body or other governmental entity ( *Governmental* ).

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*Entity* ), in connection with the execution and delivery of this Agreement by the Company and the consummation by the Company of the Merger and the other transactions contemplated hereby, except those that the failure to make or obtain are not, individually or in the aggregate, reasonably likely to have a Company Material Adverse Effect or prevent or materially impair the ability of the Company to consummate the transactions contemplated by this Agreement.

(ii) The execution, delivery and performance of this Agreement by the Company do not, and the consummation by the Company of the Merger and the other transactions contemplated hereby and compliance with the provisions hereof will not, constitute or result in (A) a breach or violation of, or a default under, the certificate of incorporation or bylaws of the Company or the bylaws or the charter documents, bylaws or similar governing agreements of any of its Subsidiaries, (B) a breach or violation of, a termination (or right of termination) or a default under, the acceleration of any obligations or the creation of a Lien on the assets or properties of the Company or any of its Subsidiaries (with or without notice, lapse of time or both) pursuant to any agreement, lease, license, contract, note, bond, mortgage, indenture, arrangement or other obligation that is not otherwise terminable by the other party thereto on 60 days or less notice ( *Contracts* ) binding upon the Company or any of its Subsidiaries or any Laws or governmental or non-governmental permit or license to which the Company or any of its Subsidiaries is subject or (C) any change in the rights or obligations of any party under any of such Contracts except, in the case of clause (B) or (C) above, for any breach, violation, termination, default, acceleration or creation that, individually or in the aggregate, is not reasonably likely to have a Company Material Adverse Effect or prevent or materially impair the ability of the Company to consummate the transactions contemplated by this Agreement.

(iii) Each oral or written material contract required to be filed by the Company pursuant to Item 601(a) of SEC Regulation S-K as of the date of this Agreement has been filed with or incorporated by reference in the Company Reports (as defined in Section 5.1(e)) filed with the Securities and Exchange Commission (the *SEC* ) prior to the date of this Agreement.

(e) *Company Reports; Financial Statements.* (i) The Company has delivered to Parent each registration statement, report, proxy statement or information statement prepared by the Company since December 31, 2003, or each such document is available on the SEC's website, including (i) the Company's Annual Report on Form 10-K for the year ended December 31, 2003, and (ii) the Company's Quarterly Reports on Form 10-Q for the periods ended April 3, 2004, July 3, 2004 and October 2, 2004, each in the form (including exhibits, annexes and any amendments thereto) filed with the SEC (collectively, including any such reports filed subsequent to the date of this Agreement, the *Company Reports* ). As of their respective dates (or, if amended, as of the date of such amendment), the Company Reports did not, and any Company Reports filed with the SEC subsequent to the date of this Agreement will not, contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements made therein, in light of the circumstances in which they were made, not misleading. Each of the consolidated balance sheets included in or incorporated by reference into the Company Reports (including the related notes and schedules) fairly presents, or will fairly present, the consolidated financial position of the Company and its Subsidiaries as of its date and each of the consolidated statements of income and of changes in financial position included in or incorporated by reference into the Company Reports (including any related notes and schedules) fairly presents, or will fairly present, the results of operations, retained earnings and changes in financial position, as the case may be, of the Company and its Subsidiaries for the periods set forth therein (subject, in the case of unaudited statements, to notes and normal year-end audit adjustments that will not be material in amount or effect), in each case in accordance with U.S. generally accepted accounting principles ( *GAAP* ) consistently applied during the periods involved, except as may be noted therein. Since January 1, 2001, the Company has complied in all material respects with its reporting obligations under the Exchange Act.

(i) The Company is in compliance in all material respects with (A) the applicable provisions of the Sarbanes-Oxley Act of 2002, and the regulations promulgated thereunder (the *Sarbanes-Oxley Act* ) and (B) the applicable listing and corporate governance rules and regulations of the Nasdaq National Market. The



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Company's disclosure controls and procedures (as defined in Sections 13a-14(c) and 15d-14(c) of the Exchange Act) effectively enable the Company to comply with, and the appropriate officers of the Company to make all certifications required under, the Sarbanes-Oxley Act. To the Knowledge of the Company (as defined in Section 9.13(a)), the Company did not, as of December 31, 2004, and does not, have any material weaknesses (as defined in Statement on Auditing Standards No. 60 (codified in Codification of Statements on Auditing Standards AU § 325)) and expects to receive an unqualified opinion from its independent auditors in connection with its Annual Report on Form 10-K for the year ended December 31, 2004.

(f) *Absence of Certain Changes.* Except as disclosed in the Company Reports filed with the SEC prior to the date of this Agreement or as contemplated by this Agreement, since the Company Balance Sheet Date (as defined below) the Company and its Subsidiaries have conducted their respective businesses only in, and have not engaged in any material transaction other than according to, the ordinary course of such businesses consistent with past practice and there has not been (i) any change in the financial condition, properties, business or results of operations of the Company and its Subsidiaries or any development or combination of developments of which management of the Company has Knowledge that, individually or in the aggregate, has had or is reasonably likely to have a Company Material Adverse Effect or prevent or materially impair the ability of the Company to consummate the transactions contemplated by this Agreement; (ii) any material damage, destruction or other casualty loss with respect to any material asset or property owned, leased or otherwise used by the Company or any of its Subsidiaries, whether or not covered by insurance; (iii) any declaration, setting aside or payment of any dividend or other distribution in cash, stock or property in respect of the capital stock of the Company, except for dividends or other distributions on its capital stock publicly announced prior to the date of this Agreement and except as expressly permitted hereby; (iv) any change by the Company in accounting principles or any material accounting practices or methods; (v) except as provided for herein, any increase in the compensation payable or that could become payable by the Company or any of its Subsidiaries to officers or key employees or any amendment of any of the Company Compensation and Benefit Plans (as defined in Section 5.1(i)) other than increases or amendments in the ordinary course; or (vi) any action that, if it would have occurred immediately after the date of this Agreement, would have violated or been inconsistent with, the provisions of Section 6.1(a) (*provided*, that solely for purposes of this Section 5.1(f)(vi), Section 6.1(a)(i)(N)(II) shall only apply to employment, severance or deferred compensation agreements with (A) any officer or director of the Company or (B) any other employee of the Company or any of its Subsidiaries with an annual base salary in excess of \$150,000). For purposes of this Agreement, *Company Balance Sheet Date* means October 2, 2004.

(g) *Litigation.* There are no civil, criminal or administrative actions, suits, claims, hearings, investigations or proceedings pending or, to the Knowledge of the Company (as defined in Section 9.13(a)), threatened against the Company or any of its Subsidiaries except for those that are not, individually or in the aggregate, reasonably likely to have a Company Material Adverse Effect or prevent or materially impair the ability of the Company to consummate the transactions contemplated by this Agreement.

(h) *No Undisclosed Material Liabilities.* Neither the Company nor any of its Subsidiaries has any liabilities or obligations, whether accrued, contingent, absolute, determined, determinable or otherwise, other than:

(i) liabilities or obligations (A) disclosed or provided for in the Company's balance sheet as of the Company Balance Sheet Date or (B) disclosed in the Company Reports filed with the SEC prior to the date of this Agreement;

(ii) liabilities or obligations which, individually and in the aggregate, have not had and are not reasonably likely to have a Company Material Adverse Effect;

(iii) liabilities or obligations incurred in the ordinary course of business consistent with past practice; or

(iv) liabilities or obligations under this Agreement or incurred in connection with the transactions contemplated hereby.

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(i) *Employee Benefits.*

(i) Section 5.1(i)(i) of the Company Disclosure Letter contains a complete and correct list of all Company Compensation and Benefit Plans. The term *Company Compensation and Benefit Plans* means all material employee welfare benefit and employee pension benefit plans as defined in sections 3(1) and 3(2) of the Employee Retirement Income Security Act of 1974, as amended ( *ERISA* ) and all other material employee benefit agreements or arrangements, including, without limitation, deferred compensation plans, incentive plans, bonus plans or arrangements, stock option plans, stock purchase plans, stock award plans, golden parachute agreements, severance pay plans, dependent care plans, cafeteria plans, employee assistance programs, scholarship programs, employment contracts, retention incentive agreements, vacation policies, and other similar plans, agreements and arrangements that are maintained or contributed to by the Company, any of its Subsidiaries or any Person (whether or not incorporated) that is treated as a single employer together with the Company or any of its Subsidiaries under Section 414 of the Code ( *Company ERISA Affiliate* ) or with respect to which the Company, any of its Subsidiaries or any Company ERISA Affiliate may have any liability, contingent or otherwise. Section 5.1(i)(i) of the Company Disclosure Letter identifies which of the Company Compensation and Benefit Plans are subject to Title IV of ERISA. Section 5.1(i)(i) of the Company Disclosure Letter also identifies which of the Company Compensation and Benefit Plans are multiemployer plans within the meaning of section 3(37) of ERISA ( *Company Multiemployer Plans* ). In subsections (ii) through (x), (xii) and (xv) through (xvii) below, the term Company Compensation and Benefit Plan excludes Company Multiemployer Plans.

(ii) With respect to each Company Compensation and Benefit Plan, the Company has heretofore made available to Parent, as applicable, complete and correct copies of each of the following documents:

(A) each Company Compensation and Benefit Plan and any amendments thereto (or if the Company Compensation and Benefit Plan is not a written agreement, a description thereof);

(B) the most recent annual Form 5500 report filed with the Internal Revenue Service (the *IRS* );

(C) the most recent statement filed with the Department of Labor pursuant to 29 C.F.R. Section 2520.104-23;

(D) the most recent annual Form 990 and 1041 reports filed with the IRS;

(E) the most recent actuarial report;

(F) the most recent report prepared in accordance with Statement of Financial Accounting Standards No. 87;

(G) the most recent summary plan description and summaries of material modifications thereto;

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(H) the trust agreement, group annuity contract or other funding agreement that provides for the funding of a Company Compensation and Benefit Plan;

(I) the most recent financial statement for a Company Compensation and Benefit Plan;

(J) the most recent determination letter received from the IRS with respect to each Company Compensation and Benefit Plan that is intended to qualify under Section 401 of the Code; and

(K) any agreements directly relating to a Company Compensation and Benefit Plan pursuant to which the Company is obligated to indemnify any person.

(iii) No asset of the Company, any Subsidiary or any Company ERISA Affiliate is the subject of any Lien arising under Section 302(f) of ERISA or Section 412(n) of the Code; none of the Company, any Subsidiary or any Company ERISA Affiliate has been required to post any security under Section 307 of ERISA or Section 401(a)(29) of the Code; and, to the Knowledge of the Company, no fact or event exists that could reasonably be expected to give rise to any such Lien or requirement to post any such security.

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(iv) The Pension Benefit Guaranty Corporation (the *PBGC*) has not instituted proceedings to terminate any Company Compensation and Benefit Plan that is subject to Title IV of ERISA and no condition exists that presents a material risk that such proceedings will be instituted.

(v) No pension benefit plan as defined in Section 3(2) of ERISA that is maintained or contributed to by the Company, any Subsidiary or any Company ERISA Affiliate had an accumulated funding deficiency as defined in Section 302 of ERISA and Section 412 of the Code, whether or not waived, as of the last day of the most recent fiscal year of the plan ending on or prior to the date of this Agreement. All contributions required to be made with respect to any Company Compensation and Benefit Plan on or prior to the date of this Agreement have been timely made or are reflected in the most recent financial statements included in the Company Reports.

(vi) Except as would not, individually or in the aggregate, reasonably be likely to have a Company Material Adverse Effect, (A) neither the Company nor any other Person has engaged in a transaction that could result in the imposition upon the Company or any of its Subsidiaries of a civil penalty under Section 409 or 502(i) of ERISA or a tax under Section 4971, 4972, 4975, 4976, 4980, 4980B or 6652 of the Code with respect to any Company Compensation and Benefit Plan, and (B) to the Knowledge of the Company, no fact or event exists that could reasonably be expected to give rise to any such liability.

(vii) Except as would not, individually or in the aggregate, reasonably be likely to have a Company Material Adverse Effect, each Company Compensation and Benefit Plan has been operated and administered in all respects in accordance with its terms and applicable Laws, including but not limited to ERISA and the Code.

(viii) Each Company Compensation and Benefit Plan that is intended to qualify under Section 401(a) of the Code has received a favorable determination letter from the IRS and, to the Knowledge of the Company, no condition exists that could be reasonably expected to result in the revocation of any such letter.

(ix) No Company Compensation and Benefit Plan provides medical, surgical or hospitalization benefits (whether or not insured by a third party) for employees or former employees of the Company, any of its Subsidiaries or any Company ERISA Affiliate for periods extending beyond their retirements or other terminations of service, other than (A) coverage mandated by applicable Law, (B) death benefits under any pension benefit plan as defined in Section 3(2) of ERISA or (C) benefits the full cost of which is borne by the current or former employee (or his beneficiary) and no commitments have been made to provide such coverage.

(x) The consummation of the transactions contemplated by this Agreement, either alone or in conjunction with another event (such as a termination of employment), will not (A) result in payments of any kind that would not be deductible under Section 162(m) or Section 280G of the Code or (B) other than as contemplated by Section 4.11 of this Agreement, (I) entitle any current or former employee of the Company, any of its Subsidiaries or any Company ERISA Affiliate to severance pay or any other payment under a Company Compensation and Benefit Plan, (II) accelerate the time of payment or vesting of benefits under a Company Compensation and Benefit Plan or (III) increase the amount of compensation due any current or former employee of the Company, any of its Subsidiaries or any Company ERISA Affiliate.

(xi) Except as would not, individually or in the aggregate, reasonably be likely to have a Company Material Adverse Effect, there is no litigation, action, proceeding, audit, examination or claim pending, or to the Knowledge of the Company, threatened or contemplated relating to any Company Compensation and Benefit Plan.

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(xii) Except as would not, individually or in the aggregate, reasonably be likely to have a Company Material Adverse Effect, (A) none of the Company, any of its Subsidiaries or any Company ERISA Affiliate has incurred any liability under Title IV of ERISA that has not been satisfied (other than liability to the PBGC for the payment of premiums pursuant to Section 4007 of ERISA) and (B) no condition exists for which the PBGC is authorized to seek from the Company, any of its Subsidiaries or a Company ERISA Affiliate, a late payment charge under Section 4007(b) of ERISA. To the Knowledge of the Company, no condition exists that presents a risk that the

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Company, any of its Subsidiaries or a Company ERISA Affiliate will incur any liability under Title IV of ERISA (other than liability to the PBGC for the payment of premiums pursuant to Section 4007 of ERISA) that would, individually or in the aggregate, reasonably be likely to have a Company Material Adverse Effect.

(xiii) Except as would not, individually or in the aggregate, reasonably be likely to have a Company Material Adverse Effect, none of the Company, any of its Subsidiaries or any Company ERISA Affiliate has withdrawn from any Company Multiemployer Plan. To the Knowledge of the Company, no event has occurred or circumstance exists that presents a material risk of the occurrence of any withdrawal from, or the termination, reorganization, or insolvency of, any Company Multiemployer Plan that could result in any liability of the Company, any of its Subsidiaries or any Company ERISA Affiliate with respect to a Company Multiemployer Plan that would, individually or in the aggregate, reasonably be likely to have a Company Material Adverse Effect.

(xiv) To the Knowledge of the Company, no Company Multiemployer Plan is the subject of any proceeding brought by the PBGC and none of the Company, any of its Subsidiaries or any Company ERISA Affiliate has received notice from any Company Multiemployer Plan that (A) such Company Multiemployer Plan is in reorganization or is insolvent, (B) that increased contributions may be required to avoid a reduction in plan benefits or the imposition of an excise tax or (C) that such Company Multiemployer Plan intends to terminate or has terminated.

(xv) The most recent financial statements and actuarial reports, if any, for the Company Compensation and Benefit Plans reflect the financial condition and funding of the Company Compensation and Benefit Plans as of the dates of such financial statements and actuarial reports, and no material adverse change has occurred with respect to the financial condition or funding of the Company Compensation and Benefit Plans since the dates of such financial statements and actuarial reports.

(xvi) None of the Company, any of its Subsidiaries or any Company ERISA Affiliate has entered into, or made any premium payments with respect to, any split-dollar insurance arrangements since July 30, 2002 for any director or executive officer. None of the Company, any of its Subsidiaries or any Company ERISA Affiliate has any obligation or liability under any plan, contract, policy or any other arrangement that limits its ability to terminate any split-dollar insurance arrangements, other than a requirement to provide notice of termination.

(xvii) Except as would not, individually or in the aggregate, reasonably be likely to have a Company Material Adverse Effect, no Company Compensation and Benefit Plan that satisfies the requirements of Section 401(a) of the Code has incurred a partial termination within the meaning of Section 411(d)(3) of the Code during the six-year period ending on the date of this Agreement.

(xviii) Except as would not have a Company Material Adverse Effect, (i) none of the Company, any of its Subsidiaries or any Company ERISA Affiliate has any potential liability, contingent or otherwise, under the Coal Industry Retiree Health Benefits Act of 1992 and (ii) none of the Company, any of its Subsidiaries, or any entity that was ever a Company ERISA Affiliate was, on July 20, 1992, required to be treated as a single employer under section 414 of the Code together with an entity that was ever a party to any collective bargaining agreement or any other agreement with the United Mine Workers of America.

(xix) Except as would not, individually or in the aggregate, reasonably be likely to have a Company Material Adverse Effect, each Company Compensation and Benefit Plan maintained outside the United States primarily for the benefit of Employees working outside the United States complies in all material respects with applicable local Law.

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(xx) No Company Compensation and Benefit Plan is funded by a trust that meets the requirements of Rev. Proc. 92-64 (a rabbi trust ).

(j) *Compliance with Laws; Permits.* Since January 1, 2001, the businesses of each of the Company and its Subsidiaries have not been, and are not being, conducted in violation of any federal, state, local or foreign law,

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statute, ordinance, rule, regulation, judgment, order, injunction, decree, writ, arbitration award, agency requirement, license, permit, franchise, variance, exemption or other governmental authorization, consent or approval of any Governmental Entity (collectively, *Laws* ), except for violations or possible violations that, individually or in the aggregate, are not reasonably likely to have a Company Material Adverse Effect or prevent or materially impair the ability of the Company to consummate the transactions contemplated by this Agreement. Except with respect to regulatory matters covered by Section 6.5, no investigation or review by any Governmental Entity with respect to the Company or any of its Subsidiaries is pending or, to the Knowledge of the Company, threatened, nor has any Governmental Entity indicated an intention to conduct the same, except for those the outcome of which are not, individually or in the aggregate, reasonably likely to have a Company Material Adverse Effect or prevent or materially impair the ability of the Company to consummate the transactions contemplated by this Agreement. The Company and its Subsidiaries each has all governmental permits, franchises, variances, exemptions, orders and other governmental authorizations, consents and approvals necessary to conduct its business as presently conducted except those the absence of which are not, individually or in the aggregate, reasonably likely to have a Company Material Adverse Effect or prevent or materially impair the ability of the Company to consummate the Merger and the other transactions contemplated by this Agreement. Neither the Company nor any of its Subsidiaries has received written notice of any revocation or modification of any such governmental permits, franchises, variances, exemptions, orders and other governmental authorizations, consents and approvals, the revocation or modification of which would have a Company Material Adverse Effect.

(k) *Takeover Statutes*. No fair price, moratorium, control share acquisition or other similar anti-takeover statute or regulation (including Section 203 of the DGCL) (each a *Takeover Statute* ) or any anti-takeover provision in the Company's certificate of incorporation and bylaws is applicable to the Shares, the Merger or the other transactions contemplated by this Agreement.

(l) *Environmental Matters*. Except for such matters that, individually or in the aggregate, are not reasonably likely to have a Company Material Adverse Effect: (i) the Company and its Subsidiaries comply with all applicable Environmental Laws (as defined below); (ii) no property owned or operated by the Company or any of its Subsidiaries (including soils, groundwater, surface water, buildings or other structures) is contaminated with any Hazardous Substance (as defined below) that requires remediation pursuant to any applicable Environmental Law; (iii) neither the Company nor any of its Subsidiaries has received any claim alleging liability for any Hazardous Substance disposal or contamination on any third party property; (iv) neither the Company nor any of its Subsidiaries has received any notice, demand, letter, claim or request for information alleging that the Company or any of its Subsidiaries is in violation of any Environmental Law; (v) neither the Company nor any of its Subsidiaries is subject to any order, decree or directive from any Governmental Entity pursuant to any Environmental Law; and (vi) no portion of any of the assets currently or previously owned or operated by the Company or any of its Subsidiaries is listed on the National Priorities List or the Comprehensive Environmental Response, Compensation and Liability Information System list under CERCLA or, to the Knowledge of the Company, any similar ranking or listing under any law of any state or country in which the property is located.

As used herein, the term *Environmental Law* means any federal, state, local or foreign statute, law, regulation, order, decree, permit or authorization concerning: (A) the protection of the environment, (B) the handling, use, presence, disposal, release or threatened release of any Hazardous Substance or (C) noise, odor, indoor air, employee exposure, wetlands, pollution, contamination or any injury or threat of injury to persons or property relating to any Hazardous Substance.

As used herein, the term *Hazardous Substance* means any substance that is listed, classified or regulated pursuant to any Environmental Law.

(m) *Tax Matters*. As of the date of this Agreement, neither the Company nor any of its Affiliates has taken or agreed to take any action, nor, to the Knowledge of the Company, is there any fact or circumstance, that would prevent the Merger and the other transactions contemplated by this Agreement from qualifying as a

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reorganization within the meaning of Section 368(a) of the Code. As used in this Agreement, the term *Affiliates* shall have the same meaning as the term *affiliates* as defined by Rule 12b-2 under the Exchange Act.

(n) *Taxes*. The Company, each of its Subsidiaries and, to the Knowledge of the Company, any affiliated, combined or unitary group of which the Company or any Subsidiary is or was a member (each a *Company Tax Party*) (i) have duly and timely filed (taking into account any extension of time within which to file) all material Tax Returns (as defined below) required to be filed by any of them and all such filed Tax Returns are complete and accurate in all material respects; (ii) have paid or deposited all material Taxes (as defined below) (A) that are required to be paid with respect to the periods covered by such Tax Returns or (B) that the Company, any of its Subsidiaries or any other Company Tax Party are obligated to withhold from amounts owing to any employee, creditor or third party, except, in each case, with respect to matters contested in good faith; and (iii) have not waived any statute of limitations with respect to Taxes or agreed to any extension of time with respect to a Tax assessment or deficiency. As of the date of this Agreement, there are not pending or, to the Knowledge of the Company, threatened in writing, any audits, examinations, investigations or other proceedings in respect of Taxes or Tax matters. There are not, to the Knowledge of the Company, any unresolved questions or claims concerning the Company's, any of its Subsidiaries' or any other Company Tax Party's material Tax liability that are not disclosed or provided for in the Company Reports filed with the SEC prior to the date of this Agreement. Neither the Company nor any of its Subsidiaries has any liability with respect to income, franchise or similar Taxes that accrued on or before the date of the respective financial statements included in the Company Reports filed with the SEC prior to the date of this Agreement in excess of the amounts accrued with respect thereto that are reflected in such financial statements. The Company has not been a party to the distribution of stock of a controlled corporation as defined in Section 355(a) of the Code in a transaction intended to qualify under Section 355 of the Code within the past two years. The Company Reports reflect an adequate reserve for all material Taxes for which the Company and its Subsidiaries may be liable for all Taxable periods and portions thereof through the date thereof. There are no liens with respect to Taxes upon any assets of the Company or any of its Subsidiaries (except for liens for property or ad valorem Taxes not yet delinquent and other Taxes not yet due and payable or being contested in good faith). Neither the Company nor any of its Subsidiaries is a party to a Tax allocation agreement, Tax sharing agreement, Tax indemnity agreement or similar agreement or arrangement. Neither Company nor any of its Subsidiaries has participated in any transactions that have been identified by the IRS in published guidance as of the date of this Agreement as tax avoidance transactions.

As used in this Agreement, (i) the term *Tax* (including, with correlative meaning, the terms *Taxes*, and *Taxable*) includes all federal, state, local and foreign income, profits, franchise, gross receipts, environmental, customs duty, capital stock, severances, stamp, payroll, sales, employment, unemployment, disability, use, property, withholding, excise, production, value added, occupancy and other taxes, duties or assessments of any nature whatsoever, together with all interest, penalties and additions imposed with respect to such amounts and any interest in respect of such penalties and additions, and (ii) the term *Tax Return* includes all returns and reports (including elections, declarations, disclosures, schedules, estimates and information returns) required to be supplied to a Tax authority relating to Taxes.

(o) *Labor Matters*. As of the date of this Agreement:

(i) set forth in Section 5.1(o)(i) of the Company Disclosure Letter is a listing of each of the collective bargaining agreements or other material contracts or agreements with any labor organization or other representative of employees to which the Company or any of its Subsidiary is a party; any such agreement or contract or contract that covers more than one state is specifically identified as such in Section 5.1(o) of the Company Disclosure Letter; the Company and its Subsidiaries are in compliance with each of such the collective bargaining agreements or other material contracts or agreements with any labor organization or other representative of employees to which the Company or any of its Subsidiaries is a party except those failures to comply that are not, individually or in the aggregate, reasonably likely to have a Company Material Adverse Effect; the Company has made available to Parent a listing of the number of employees of the Company covered by each of such agreements and their classifications thereunder (including the location for classifications that are not Company-wide) organized by Subsidiary;

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(ii) there is no unfair labor practice charge filed with the National Labor Relations Board or complaint pending or, to the Knowledge of the Company, threatened, with regard to employees of the Company or any of its Subsidiaries, except those complaints that are not, individually or in the aggregate, reasonably likely to have a Company Material Adverse Effect;

(iii) there is no labor strike, material slowdown, material work stoppage or other material labor controversy in effect or, to the Knowledge of the Company, threatened against the Company or any of its Subsidiaries;

(iv) except as disclosed in the Company Reports filed with the SEC prior to the date of this Agreement, no union certification or decertification petition has been filed (with service of process having been made on the Company or any of its Subsidiaries), or, to the Knowledge of the Company, threatened (or pending without service of process having been made on the Company or any of its Subsidiaries), that relates to employees of the Company or any of its Subsidiaries and, to the Knowledge of the Company, no union authorization campaign has been conducted, within the past 12 months;

(v) Section 5.1(o)(v) of the Company Disclosure Letter sets forth all grievance proceedings pending before the National Grievance Committee and, except as set forth in Section 5.1(o)(v) of the Company Disclosure Letter, no grievance proceeding or arbitration proceeding arising out of or under any collective bargaining agreement is pending (with service of process having been made on the Company or any of its Subsidiaries), or, to the Knowledge of the Company, threatened (or pending without service of process having been made on the Company or any of its Affiliates), against the Company or any of its Subsidiaries related to any of their employees except those proceedings that are not, individually or in the aggregate, reasonably likely to have a Company Material Adverse Effect;

(vi) neither the Company nor any of its Subsidiaries is a party to, or is otherwise bound by, any consent decree with any Governmental Entity relating to employees or employment practices of the Company or any of its Subsidiaries except those consent decrees that are not, individually or in the aggregate, reasonably likely to have a Company Material Adverse Effect; and

(vii) the Company and each of its Subsidiaries is in compliance with all applicable agreements, contracts and policies relating to employment, employment practices, wages, hours and terms and conditions of employment of the employees except those failures to comply that are not, individually or in the aggregate, reasonably likely to have a Company Material Adverse Effect.

Solely for purposes of this subsection (o), clause (C) of the definition of *Company Material Adverse Effect* shall not apply.

(p) *Insurance*. The Company has made available to Parent an insurance schedule of the Company's and its Subsidiaries' directors' and officers' liability insurance and primary and excess casualty insurance policies, providing coverage for bodily injury and property damage to third parties, including products liability and completed operations coverage, and workers' compensation, in effect as of the date of this Agreement. The Company and its Subsidiaries maintain insurance coverage reasonably adequate for the operation of the business of the Company and its Subsidiaries (taking into account the cost and availability of such insurance).

(q) *Intellectual Property*.

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(i) The Company and/or each of its Subsidiaries owns, is licensed or otherwise possesses legally enforceable rights to use all (A) trademarks, service marks, brand names, trade names, d/b/as, Internet domain names, logos, trade dress, and all goodwill associated therewith and symbolized thereby, and registrations and applications therefor, including renewals; (B) inventions and discoveries, whether patentable or not, and all patents, registrations, and applications therefor, including divisions, continuations, continuations-in-part and reissues; (C) published and unpublished works of authorship, whether copyrightable or not, including computer software programs, applications, source code and object code, and databases and other compilations of information, copyrights in and to

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the foregoing, including extensions, renewals, restorations and registrations and applications therefor; (D) confidential information, trade secrets and know-how, including processes, schematics, business methods, formulae, drawings, prototypes, models, designs, customer lists and supplier lists; and (E) all other intellectual property ((A) through (E) collectively, *IP Rights* ) that are used in the business of the Company and its Subsidiaries as currently conducted, except for any such failures to own, be licensed or possess that, individually or in the aggregate, are not reasonably likely to have a Company Material Adverse Effect.

(ii) The Surviving Entity will, as of the Effective Time, have legally enforceable license rights or other valid rights to use all of the IP Rights currently used by the Company and its Subsidiaries in the operation and conduct of their businesses, except where failure to have such rights of use is not reasonably likely to have a Company Material Adverse Effect.

(iii) Except as would not, individually or in the aggregate, reasonably be likely to have a Company Material Adverse Effect, (A) the IP Rights owned by the Company and its Subsidiaries are subsisting, enforceable and valid, (B) the IP Rights licensed by the Company and its Subsidiaries from third parties are, to the Knowledge of the Company, subsisting, enforceable and valid and (C) neither the Company nor any of its Subsidiaries has received any written claims challenging such validity, subsistence or enforceability, and, to the Knowledge of the Company, no basis exists for asserting such invalidity, lapse, expiration or unenforceability of such IP Rights.

(iv) Neither the Company nor any of its Subsidiaries has been advised in writing that the conduct of the business of the Company and its Subsidiaries conflicts with any IP Rights of any third party, except for those conflicts that would not reasonably be likely to result in a material expense.

(v) To the Knowledge of the Company, no third party has in the past three years infringed, misappropriated or otherwise violated, nor is any third party currently infringing, misappropriating or otherwise violating, any of the Company's or its Subsidiaries' IP Rights.

(vi) The consummation of the transactions contemplated hereby will not conflict with, alter or impair any of the Company's or its Subsidiaries' IP Rights other than such conflicts that are not reasonably likely to have a Company Material Adverse Effect.

(r) *Owned and Leased Properties.*

(i) The Company and each of its Subsidiaries has such good and indefeasible title to all owned real property and such good and valid title to, or such valid rights by lease, license, other agreement or to otherwise to use, all other assets and properties (in each case, tangible and intangible) necessary to enable the Company and its Subsidiaries to conduct their businesses as currently conducted and as described in the Company Reports filed with the SEC prior to the date of this Agreement, except, in each case, for defects in title, easements, restrictive covenants and similar encumbrances that are not, individually or in the aggregate, reasonably likely to have a Company Material Adverse Effect or materially interfere with the Company's and its Subsidiaries' use of such assets or properties. All assets and properties, other than assets and properties in which the Company and its Subsidiaries have leasehold interests, are free and clear of all Liens, other than, (A) Liens for current Taxes not yet due and payable and (B) Liens that, individually or in the aggregate, are not reasonably likely to materially interfere with the Company's and its Subsidiaries' operations of such assets or properties.

(ii) Except for such matters that, individually or in the aggregate, are not reasonably likely to have a Company Material Adverse Effect, the Company and its Subsidiaries (A) have complied in all material respects with the terms of all leases of their material properties currently in

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existence to which they are a party and under which they are in occupancy, and all such leases are in full force and effect and (B) enjoy peaceful and undisturbed possession under all such leases.

(s) *Rights Agreement*. Parent shall not constitute an *Acquiring Person* (as defined in the Rights Agreement) and the Rights will not separate from the Shares or become exercisable solely as a result of entering into this Agreement or consummation of the Merger and/or the other transactions contemplated hereby.

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(t) *Brokers and Finders*. Neither the Company nor any of its officers, directors or employees has employed any broker or finder or incurred any liability for any brokerage fees, commissions or finders, fees in connection with the Merger or the other transactions contemplated by this Agreement, except that the Company has employed Morgan Stanley as its financial advisor, the arrangements with which have been disclosed in writing to Parent prior to the date of this Agreement.

5.2. *Representations and Warranties of Parent and Merger Sub*. Except as set forth in the disclosure letter delivered to the Company by Parent prior to entering into this Agreement (the *Parent Disclosure Letter*) (with specific reference to the Section or Subsection of this Agreement to which the information stated in such disclosure relates; *provided*, that any fact or condition disclosed in any section of the Parent Disclosure Letter in such a way as to make its relevance to a representation or representations made elsewhere in this Agreement or information called for by another section of the Parent Disclosure Letter reasonably apparent shall be deemed to be an exception to such representation or representations or to be disclosed in such other section of the Parent Disclosure Letter notwithstanding the omission of a reference or cross reference thereto), Parent and Merger Sub each hereby represent and warrant to the Company that:

(a) *Organization, Good Standing and Qualification*. Each of Parent and its Subsidiaries is a corporation, limited liability company or partnership duly organized, validly existing and in good standing under the Laws of its respective jurisdiction of organization and has all requisite corporate or similar power and authority to own, lease and operate its properties and assets and to carry on its business as presently conducted. Each of Parent and its Subsidiaries is qualified to do business and is in good standing as a foreign corporation in each jurisdiction where the ownership or operation of its assets or properties or conduct of its business requires such qualification, except where the failure to be so qualified or in good standing, when taken together with all other such failures, is not reasonably likely to have a Parent Material Adverse Effect (as defined below). Parent has made available to the Company a complete and correct copy of Parent's and its material Subsidiaries' certificates of incorporation and bylaws or the charter documents, bylaws or similar governing agreements, each as amended to the date of this Agreement and as in full force and effect on the date of this Agreement.

As used in this Agreement, the term *Parent Material Adverse Effect* means a material adverse effect on the financial condition, properties, business or results of operations of the Parent and its Subsidiaries taken as a whole, excluding such effects resulting from or arising in connection with:

(i) changes that are the result of general economic, capital market, regulatory, political or business conditions or acts of war or terrorism;

(ii) changes that are the result of factors generally affecting the industries or markets in which Parent operates to the extent such changes do not disproportionately affect Parent and its Subsidiaries as compared to the typical company operating in such industry or market;

(iii) changes in Parent's relationships with its employees or with any labor organization or other representative of such employees, or any adverse change, effect or circumstance resulting from or arising in connection with any union certification or decertification petition, union authorization campaign, grievance or arbitration proceeding or other labor-related proceeding or litigation, labor strike, slowdown, work stoppage or other labor controversy that is threatened to occur or occurs after the date of this Agreement;

(iv) any adverse change, effect or circumstance resulting from entering into this Agreement or the announcement thereof or the pendency or consummation of the transactions contemplated hereby;

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(v) changes in applicable law, rule or regulations or generally accepted accounting principles or the interpretation thereof after the date of this Agreement; and

(vi) any out of pocket expenses (including filing fees and legal expenses specifically with respect to any litigation arising from the transactions contemplated by this Agreement) directly incurred in connection with the transactions contemplated by this Agreement and in accordance with its terms.

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(b) *Capitalization of Merger Sub.* All of the issued and outstanding membership interests of Merger Sub are, and at the Effective Time will be, owned by Parent, and there are (i) no other membership interest or voting securities of Merger Sub, (ii) no securities of Merger Sub convertible into or exchangeable for membership interests or voting securities of Merger Sub and (iii) no options or other rights to acquire from Merger Sub, and no obligations of Merger Sub to issue, any membership interests, voting securities or securities convertible into or exchangeable for membership interests or voting securities of Merger Sub. Merger Sub has not conducted any business prior to the date of this Agreement and has no, and prior to the Effective Time will have no, assets, liabilities or obligations of any nature other than those incident to its formation and pursuant to this Agreement and the Merger and the other transactions contemplated by this Agreement.

(c) *Capital Structure of Parent.* As of the date of this Agreement, the authorized capital stock of Parent consists of 120,000,000 shares of Parent Common Stock and 5,000,000 shares of preferred stock, par value \$1.00 per share (the *Parent Preferred Stock* ). At the close of business on February 23, 2005, 48,869,174 shares of Parent Common Stock and no shares of Parent Preferred Stock were issued and outstanding. Parent has no shares of Parent Common Stock or Parent Preferred Stock reserved for issuance, except that, at the close of business on February 23, 2005, (A) 1,489,257 shares of Parent Common Stock were reserved for issuance by Parent pursuant to options or stock awards granted under Parent's stock plans (the *Parent Stock Plans* ), (B) 3,139,944 shares of Parent Common Stock were reserved for issuance by Parent pursuant to options or stock awards not yet granted under Parent's stock plans and (C) 2,053,223 shares of Parent Common Stock were held by Parent in its treasury. Parent has no outstanding SARS. Except for the issuance of shares pursuant to options outstanding on February 23, 2005, between February 23, 2005 and the date of this Agreement, Parent has not (i) issued any shares of Parent Common Stock, options to purchase Parent Common Stock or other capital stock or voting or equity securities of Parent or (ii) changed the authorized capital of Parent. Except as set forth above, no shares of capital stock or other equity or voting securities of Parent are reserved for issuance or are outstanding. The Parent Common Stock is listed on the Nasdaq National Market. All of the outstanding shares of Parent Common Stock have been duly authorized and are, and all shares of Parent Common Stock issuable upon the exercise of such options or stock awards will be when issued thereunder, validly issued, fully paid and nonassessable and are not subject to any preemptive rights. Each of the outstanding shares of capital stock or other securities or ownership interests of each of Parent's Subsidiaries is duly authorized, validly issued, fully paid and nonassessable and owned of record and beneficially by Parent or by a direct or indirect wholly owned Subsidiary of Parent, free and clear of any Lien and such shares of capital stock or other securities were not issued in violation of any preemptive rights or other preferential rights of subscription or purchase of any Person other than those that have been waived or otherwise cured or satisfied. Except for Parent's Subsidiaries, Parent does not own, directly or indirectly, any capital stock, equity interest or other ownership interest in any corporation, partnership, association, joint venture, limited liability company or other entity. Except as set forth above, there are no preemptive or other outstanding rights, options, warrants, conversion rights, stock appreciation rights, redemption rights, repurchase rights, agreements, arrangements, calls, commitments or rights of any kind that obligate the Company or any of its Subsidiaries to issue, deliver or sell, or cause to be issued, delivered or sold, any shares of capital stock or other securities of Parent or any of its Subsidiaries or any securities or obligations convertible or exchangeable into or exercisable for, or giving any Person a right to subscribe for or acquire, any securities of the Company or any of its Subsidiaries, and no securities or obligations evidencing such rights are authorized, issued or outstanding. Parent does not have outstanding any bonds, debentures, notes or other obligations the holders of which have the right to vote (or convertible into or exercisable for securities having the right to vote) with the stockholders of Parent on any matter ( *Parent Voting Debt* ). Neither Parent nor any of its Subsidiaries is a party to any stockholder agreement, voting trust or other agreement with respect to the voting of shares of Parent Common Stock.

(d) *Corporate Authority; Approval and Fairness.*

(i) Each of Parent and Merger Sub has all requisite corporate power and authority and has taken all corporate action necessary in order to execute, deliver and perform its obligations under this Agreement and, subject only to the approval of the issuance of Parent Common Stock pursuant to the Merger (the *Share Issuance* ) by the affirmative vote of the holders of a majority of the shares of Parent Common Stock present in

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person or by proxy at the Parent Stockholders Meeting at which the holders of at least a majority of the outstanding shares of Parent Common Stock are present in person or by proxy (the *Parent Stockholder Approval* ). This Agreement has been duly executed and delivered by Parent and Merger Sub and is a valid and binding agreement of Parent and Merger Sub, enforceable against each of Parent and Merger Sub in accordance with its terms, subject to the Bankruptcy and Equity Exception.

(ii) The Board of Directors of Parent (the *Parent Board* ), at a meeting duly called and held, (A) as of the date of this Agreement, has unanimously (i) approved this Agreement, (ii) determined to cause Parent, as the sole member of Merger Sub, to approve and adopt this Agreement and (iii) recommended that Parent's stockholders approve the Share Issuance and (B) has received the written opinion of its financial advisor, IFL Capital LLC ( *IFL* ), dated the date of this Agreement, to the effect that the consideration to be paid by Parent to holders of the Shares in the Merger is fair, from a financial point of view, as of the date of such opinion, to Parent. It is agreed and understood that such opinion is for the benefit of the Parent Board and may not be relied on by the Company. Each director and executive officer of Parent who has a right to vote any shares of Parent Common Stock has represented to Parent his or her intention as of the date of this Agreement to vote such shares of Parent Common Stock in favor of the Share Issuance.

(iii) The affirmative vote of Parent, as the sole equity holder of outstanding membership interests of Merger Sub, is the only vote of the holders of any class or series of Merger Sub equity necessary to approve the Merger. The managers of Merger Sub (by unanimous written consent) have approved and adopted this Agreement and the transactions contemplated hereby, including the Merger.

(iv) Prior to the Effective Time, Parent will have taken all necessary action to permit it to issue the number of shares of Parent Common Stock required to be issued pursuant to Article IV. The Parent Common Stock, when issued, will be validly issued, fully paid and nonassessable, and no stockholder of Parent will have any preemptive right of subscription or purchase in respect thereof. The Parent Common Stock, when issued, will be registered under the Securities Act and Exchange Act and registered or exempt from registration under any applicable state securities or blue sky laws.

(e) *Governmental Filings; No Violations; Certain Contracts; Etc.* (i) Other than the filings and/or notices (A) pursuant to Section 1.3, (B) under the HSR Act, the Securities Act and the Exchange Act, (C) required to be made with the Nasdaq National Market, and (D) state securities and blue sky laws, no notices, reports or other filings are required to be made by Parent or Merger Sub with, nor are any consents, registrations, approvals, permits or authorizations required to be obtained by Parent or Merger Sub from, any Governmental Entity, in connection with the execution and delivery of this Agreement by Parent and Merger Sub and the consummation by Parent and Merger Sub of the Merger and the other transactions contemplated hereby, except those that the failure to make or obtain are not, individually or in the aggregate, reasonably likely to have a Parent Material Adverse Effect or prevent or materially impair the ability of Parent or Merger Sub to consummate the transactions contemplated by this Agreement.

(ii) The execution, delivery and performance of this Agreement by Parent and Merger Sub do not, and the consummation by Parent and Merger Sub of the Merger and the other transactions contemplated hereby and compliance with the provisions hereof will not, constitute or result in (A) a breach or violation of, or a default under, the certificate of incorporation or bylaws of Parent, the certificate of formation or limited liability company agreement of Merger Sub or the charter documents, bylaws or similar governing agreements of any of its Subsidiaries, (B) a breach or violation of, a termination (or right of termination) or a default under, the acceleration of any obligations or the creation of a Lien on the assets or properties of Parent or any of its Subsidiaries (with or without notice, lapse of time or both) pursuant to any Contracts binding upon Parent or any of its Subsidiaries or any Laws or governmental or non-governmental permit or license to which Parent any of its Subsidiaries is subject or (C) any change in the rights or obligations of any party under any of such Contracts except, in the case of clause (B) or (C) above, for any breach, violation, termination, default, acceleration or creation that, individually or in the aggregate, is not reasonably likely to have a Parent Material Adverse Effect or prevent or materially impair the ability of Parent or Merger Sub to consummate the transactions contemplated by this Agreement.



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(iii) Each oral or written material contract required to be filed by Parent pursuant to Item 601(a) of SEC Regulation S-K as of the date of this Agreement has been filed with or incorporated by reference in the Parent Reports (as defined in Section 5.2(f)) filed with the SEC prior to the date of this Agreement.

(f) *Parent Reports; Financial Statements.* (i) Parent has delivered to the Company each registration statement, report, proxy statement or information statement prepared by the Parent since December 31, 2003, or each such document is available on the SEC's website, including (i) Parent's Annual Report on Form 10-K for the year ended December 31, 2003, and (ii) Parent's Quarterly Reports on Form 10-Q for the periods ended March 31, 2004, June 30, 2004 and September 30, 2004, each in the form (including exhibits, annexes and any amendments thereto) filed with the SEC (collectively, including any such reports filed subsequent to the date of this Agreement, the *Parent Reports*). As of their respective dates (or, if amended, as of the date of such amendment), the Parent Reports did not, and any Parent Reports filed with the SEC subsequent to the date of this Agreement will not, contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements made therein, in light of the circumstances in which they were made, not misleading. Each of the consolidated balance sheets included in or incorporated by reference into the Parent Reports (including the related notes and schedules) fairly presents, or will fairly present, the consolidated financial position of Parent and its Subsidiaries as of its date and each of the consolidated statements of income and of changes in financial position included in or incorporated by reference into the Parent Reports (including any related notes and schedules) fairly presents, or will fairly present, the results of operations, retained earnings and changes in financial position, as the case may be, of Parent and its Subsidiaries for the periods set forth therein (subject, in the case of unaudited statements, to notes and normal year-end audit adjustments that will not be material in amount or effect), in each case in accordance with GAAP consistently applied during the periods involved, except as may be noted therein. Since January 1, 2001, Parent has complied in all material respects with its reporting obligations under the Exchange Act.

(ii) Parent is in compliance in all material respects with (A) the applicable provisions of the Sarbanes-Oxley Act and (B) the applicable listing and corporate governance rules and regulations of the Nasdaq National Market. Parent's disclosure controls and procedures (as defined in Sections 13a-14(c) and 15d-14(c) of the Exchange Act) effectively enable Parent to comply with, and the appropriate officers of Parent to make all certifications required under, the Sarbanes-Oxley Act. To the knowledge of Parent, Parent did not, as of December 31, 2004, and does not, have any material weaknesses (as defined in Statement on Auditing Standards No. 60 (codified in Codification of Statements on Auditing Standards AU § 325)) and expects to receive an unqualified opinion from its independent auditors in connection with its Annual Report on Form 10-K for the year ended December 31, 2004.

(g) *Absence of Certain Changes.* Except as disclosed in the Parent Reports filed with the SEC prior to the date of this Agreement or as contemplated by this Agreement, since the Parent Balance Sheet Date (as defined below), Parent and its Subsidiaries have conducted their respective businesses only in, and have not engaged in any material transaction other than according to, the ordinary course of such businesses consistent with past practice and there has not been (i) any change in the financial condition, properties, business or results of operations of Parent and its Subsidiaries or any development or combination of developments of which management of Parent has Knowledge that, individually or in the aggregate, has had or is reasonably likely to have a Parent Material Adverse Effect or prevent or materially impair the ability of Parent to consummate the transactions contemplated by this Agreement; (ii) any material damage, destruction or other casualty loss with respect to any material asset or property owned, leased or otherwise used by Parent or any of its Subsidiaries, whether or not covered by insurance; (iii) any declaration, setting aside or payment of any dividend or other distribution in cash, stock or property in respect of the capital stock of Parent, except for dividends or other distributions on its capital stock publicly announced prior to the date of this Agreement and except as expressly permitted hereby; (iv) any change by Parent in accounting principles or any material accounting practices or methods; or (v) any action that, if it would have occurred immediately after the date of this Agreement, would have violated or been inconsistent with, the provisions of Section 6.1(b). For purposes of this Agreement, *Parent Balance Sheet Date* means September 30, 2004.

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(h) *Litigation.* There are no civil, criminal or administrative actions, suits, claims, hearings, investigations or proceedings pending or, to the Knowledge of Parent (as defined in Section 9.13(b)), threatened against Parent or any of its Subsidiaries, except for those that are not, individually or in the aggregate, reasonably likely to have a Parent Material Adverse Effect or prevent or materially impair the ability of Parent or Merger Sub to consummate the transactions contemplated by this Agreement.

(i) *No Undisclosed Material Liabilities.* None of Parent, Merger Sub nor any of Parent's Subsidiaries has any liabilities or obligations, whether accrued, contingent, absolute, determined, determinable or otherwise, other than:

(i) liabilities or obligations (A) disclosed or provided for in Parent's balance sheet as of the Parent Balance Sheet Date or (B) disclosed in the Parent Reports filed with the SEC prior to the date of this Agreement;

(ii) liabilities or obligations which, individually and in the aggregate, have not had and are not reasonably likely to have a Parent Material Adverse Effect;

(iii) liabilities or obligations incurred in the ordinary course of business consistent with past practice; or

(iv) liabilities or obligations under this Agreement or incurred in connection with the transactions contemplated hereby.

(j) *Employee Benefits.*

(i) Section 5.2(j)(i) of the Parent Disclosure Letter contains a complete and correct list of all Parent Compensation and Benefit Plans. The term *Parent Compensation and Benefit Plans* means all material employee welfare benefit and employee pension benefit plans as defined in sections 3(1) and 3(2) of ERISA and all other material employee benefit agreements or arrangements, including, without limitation, deferred compensation plans, incentive plans, bonus plans or arrangements, stock option plans, stock purchase plans, stock award plans, golden parachute agreements, severance pay plans, dependent care plans, cafeteria plans, employee assistance programs, scholarship programs, employment contracts, retention incentive agreements, vacation policies, and other similar plans, agreements and arrangements that are maintained or contributed to by Parent, any of its Subsidiaries or any Person (whether or not incorporated) that is treated as a single employer together with Parent or any of its Subsidiaries under Section 414 of the Code ( *Parent ERISA Affiliate* ) or with respect to which Parent, any of its Subsidiaries or any Parent ERISA Affiliate may have any liability, contingent or otherwise. Section 5.2(j)(i) of the Parent Disclosure Letter identifies which of the Parent Compensation and Benefit Plans are subject to Title IV of ERISA. Section 5.2(j)(i) of the Parent Disclosure Letter also identifies which of the Parent Compensation and Benefit Plans are multiemployer plans within the meaning of section 3(37) of ERISA ( *Parent Multiemployer Plans* ). In subsections (ii) through (x), (xii) and (xv) through (xvii) below, the term Parent Compensation and Benefit Plan excludes Parent Multiemployer Plans.

(ii) With respect to each Parent Compensation and Benefit Plan, Parent has heretofore made available to the Company, as applicable, complete and correct copies of each of the following documents:

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(A) each Parent Compensation and Benefit Plan and any amendments thereto (or if the Parent Compensation and Benefit Plan is not a written agreement, a description thereof);

(B) the most recent annual Form 5500 report filed with the IRS;

(C) the most recent statement filed with the Department of Labor pursuant to 29 C.F.R. Section 2520.104-23;

(D) the most recent annual Form 990 and 1041 reports filed with the IRS;

(E) the most recent actuarial report;

(F) the most recent report prepared in accordance with Statement of Financial Accounting Standards No. 87;

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(G) the most recent summary plan description and summaries of material modifications thereto;

(H) the trust agreement, group annuity contract or other funding agreement that provides for the funding of a Parent Compensation and Benefit Plan;

(I) the most recent financial statement for a Parent Compensation and Benefit Plan;

(J) the most recent determination letter received from the IRS with respect to each Parent Compensation and Benefit Plan that is intended to qualify under Section 401 of the Code; and

(K) any agreements directly relating to a Parent Compensation and Benefit Plan pursuant to which Parent is obligated to indemnify any person.

(iii) No asset of Parent, any of Parent's Subsidiaries or any Parent ERISA Affiliate is the subject of any Lien arising under Section 302(f) of ERISA or Section 412(n) of the Code; none of Parent, any Subsidiary of Parent or any Parent ERISA Affiliate has been required to post any security under Section 307 of ERISA or Section 401(a)(29) of the Code; and, to the Knowledge of Parent, no fact or event exists that could reasonably be expected to give rise to any such Lien or requirement to post any such security.

(iv) The PBGC has not instituted proceedings to terminate any Parent Compensation and Benefit Plan that is subject to Title IV of ERISA and no condition exists that presents a material risk that such proceedings will be instituted.

(v) No pension benefit plan as defined in Section 3(2) of ERISA that is maintained or contributed to by Parent, any Subsidiary of Parent or any Parent ERISA Affiliate had an accumulated funding deficiency as defined in Section 302 of ERISA and Section 412 of the Code, whether or not waived, as of the last day of the most recent fiscal year of the plan ending on or prior to the date of this Agreement. All contributions required to be made with respect to any Parent Compensation and Benefit Plan on or prior to the date of this Agreement have been timely made or are reflected in the most recent financial statements included in the Parent Reports.

(vi) Except as would not, individually or in the aggregate, reasonably be likely to have a Parent Material Adverse Effect, (A) neither Parent nor any other Person has engaged in a transaction that could result in the imposition upon Parent or any of its Subsidiaries of a civil penalty under Section 409 or 502(i) of ERISA or a tax under Section 4971, 4972, 4975, 4976, 4980, 4980B or 6652 of the Code with respect to any Parent Compensation and Benefit Plan, and (B) to the Knowledge of Parent, no fact or event exists that could reasonably be expected to give rise to any such liability.

(vii) Except as would not, individually or in the aggregate, reasonably be likely to have a Parent Material Adverse Effect, each Parent Compensation and Benefit Plan has been operated and administered in all respects in accordance with its terms and applicable Laws, including but not limited to ERISA and the Code.

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(viii) Each Parent Compensation and Benefit Plan that is intended to qualify under Section 401(a) of the Code has received a favorable determination letter from the IRS and, to the Knowledge of Parent, no condition exists that could be reasonably expected to result in the revocation of any such letter.

(ix) No Parent Compensation and Benefit Plan provides medical, surgical or hospitalization benefits (whether or not insured by a third party) for employees or former employees of Parent, any of its Subsidiaries or any Parent ERISA Affiliate for periods extending beyond their retirements or other terminations of service, other than (A) coverage mandated by applicable Law, (B) death benefits under any pension benefit plan as defined in Section 3(2) of ERISA or (C) benefits the full cost of which is borne by the current or former employee (or his beneficiary) and no commitments have been made to provide such coverage.

(x) The consummation of the transactions contemplated by this Agreement, either alone or in conjunction with another event that (such as a termination of employment), will not (A) entitle any current or former



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employee of Parent, any of its Subsidiaries or any Parent ERISA Affiliate to severance pay or any other payment under a Parent Compensation and Benefit Plan, (B) accelerate the time of payment or vesting of benefits under a Parent Compensation and Benefit Plan, (C) increase the amount of compensation due any current or former employee of Parent, any of its Subsidiaries or any Parent ERISA Affiliate or (D) result in payments of any kind that would not be deductible under Section 162(m) or Section 280G of the Code.

(xi) Except as would not, individually or in the aggregate, reasonably be likely to have a Parent Material Adverse Effect, there is no litigation, action, proceeding, audit, examination or claim pending, or to the Knowledge of Parent, threatened or contemplated relating to any Parent Compensation and Benefit Plan.

(xii) Except as would not, individually or in the aggregate, reasonably be likely to have a Parent Material Adverse Effect, (A) none of Parent, any of its Subsidiaries or any Parent ERISA Affiliate has incurred any liability under Title IV of ERISA that has not been satisfied (other than liability to the PBGC for the payment of premiums pursuant to Section 4007 of ERISA) and (B) no condition exists for which the PBGC is authorized to seek from Parent, any of its Subsidiaries or a Parent ERISA Affiliate, a late payment charge under Section 4007(b) of ERISA. To the Knowledge of Parent, no condition exists that presents a risk that Parent, any of its Subsidiaries or a Parent ERISA Affiliate will incur any liability under Title IV of ERISA (other than liability to the PBGC for the payment of premiums pursuant to Section 4007 of ERISA) that would, individually or in the aggregate, reasonably be likely to have a Parent Material Adverse Effect.

(xiii) Except as would not, individually or in the aggregate, reasonably be likely to have a Parent Material Adverse Effect, none of Parent, any of its Subsidiaries or any Parent ERISA Affiliate has withdrawn from any Parent Multiemployer Plan. To the Knowledge of Parent, no event has occurred or circumstance exists that presents a material risk of the occurrence of any withdrawal from, or the termination, reorganization, or insolvency of, any Parent Multiemployer Plan that could result in any liability of Parent, any of its Subsidiaries or any Parent ERISA Affiliate with respect to a Parent Multiemployer Plan that would, individually or in the aggregate, reasonably be likely to have a Parent Material Adverse Effect.

(xiv) To the Knowledge of Parent, no Parent Multiemployer Plan is the subject of any proceeding brought by the PBGC and none of Parent, any of its Subsidiaries or any Parent ERISA Affiliate has received notice from any Parent Multiemployer Plan that (A) such Parent Multiemployer Plan is in reorganization or is insolvent, (B) that increased contributions may be required to avoid a reduction in plan benefits or the imposition of an excise tax or (C) that such Parent Multiemployer Plan intends to terminate or has terminated.

(xv) The most recent financial statements and actuarial reports, if any, for the Parent Compensation and Benefit Plans reflect the financial condition and funding of the Parent Compensation and Benefit Plans as of the dates of such financial statements and actuarial reports, and no material adverse change has occurred with respect to the financial condition or funding of the Parent Compensation and Benefit Plans since the dates of such financial statements and actuarial reports.

(xvi) None of Parent, any of its Subsidiaries or any Parent ERISA Affiliate has entered into, or made any premium payments with respect to, any split-dollar insurance arrangements since July 30, 2002 for any director or executive officer. None of Parent, any of its Subsidiaries or any Parent ERISA Affiliate has any obligation or liability under any plan, contract, policy or any other arrangement that limits its ability to terminate any split-dollar insurance arrangements, other than a requirement to provide notice of termination.

(xvii) Except as would not, individually or in the aggregate, reasonably be likely to have a Parent Material Adverse Effect, no Parent Compensation and Benefit Plan that satisfies the requirements of Section 401(a) of the Code has incurred a partial termination within the meaning of Section 411(d)(3) of the Code during the six-year period ending on the date of this Agreement.

(xviii) Except as would not have a Parent Material Adverse Effect, (i) none of Parent, any of its Subsidiaries or any Parent ERISA Affiliate has any potential liability, contingent or otherwise, under the Coal Industry

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Retiree Health Benefits Act of 1992 and (ii) none of Parent, any of its Subsidiaries, or any entity that was ever a Parent ERISA Affiliate was, on July 20, 1992, required to be treated as a single employer under section 414 of the Code together with an entity that was ever a party to any collective bargaining agreement or any other agreement with the United Mine Workers of America.

(xix) Except as would not, individually or in the aggregate, reasonably be likely to have a Parent Material Adverse Effect, each Parent Compensation and Benefit Plan maintained outside the United States primarily for the benefit of Employees working outside the United States complies in all material respects with applicable local Law.

(k) *Compliance with Laws; Permits.* Since January 1, 2001, the businesses of each of Parent and its Subsidiaries have not been, and are not being, conducted in violation of any Laws, except for violations or possible violations that, individually or in the aggregate, are not reasonably likely to have a Parent Material Adverse Effect or prevent or materially impair the ability of Parent or Merger Sub to consummate the transactions contemplated by this Agreement. Except with respect to regulatory matters covered by Section 6.5, no investigation or review by any Governmental Entity with respect to Parent or any of its Subsidiaries is pending or, to the Knowledge of Parent, threatened, nor has any Governmental Entity indicated an intention to conduct the same, except for those the outcome of which are not, individually or in the aggregate, reasonably likely to have a Parent Material Adverse Effect or prevent or materially impair the ability of Parent or Merger Sub to consummate the transactions contemplated by this Agreement. Parent and its Subsidiaries each has all governmental permits, franchises, variances, exemptions, orders and other governmental authorizations, consents and approvals necessary to conduct its business as presently conducted except those the absence of which are not, individually or in the aggregate, reasonably likely to have a Parent Material Adverse Effect or prevent or materially impair the ability of Parent or Merger Sub to consummate the Merger and the other transactions contemplated by this Agreement. Neither Parent nor any of its Subsidiaries has received written notice of any revocation or modification of any such governmental permits, franchises, variances, exemptions, orders and other governmental authorizations, consents and approvals, the revocation or modification of which would have a Parent Material Adverse Effect.

(l) *Environmental Matters.* Except for such matters that, individually or in the aggregate, are not reasonably likely to have a Parent Material Adverse Effect: (i) Parent and its Subsidiaries comply with all applicable Environmental Laws; (ii) no property owned or operated by Parent or any of its Subsidiaries (including soils, groundwater, surface water, buildings or other structures) is contaminated with any Hazardous Substance that requires remediation pursuant to any applicable Environmental Law; (iii) neither Parent nor any of its Subsidiaries has received any claim alleging liability for any Hazardous Substance disposal or contamination on any third party property; (iv) neither Parent nor any of its Subsidiaries has received any notice, demand, letter, claim or request for information alleging that Parent or any of its Subsidiaries is in violation of any Environmental Law; (v) neither Parent nor any of its Subsidiaries is subject to any order, decree or directive from any Governmental Entity pursuant to any Environmental Law; and (vi) no portion of any of the assets currently or previously owned or operated by Parent or any of its Subsidiaries is listed on the National Priorities List or the Comprehensive Environmental Response, Compensation and Liability Information System list under CERCLA or, to the Knowledge of Parent, any similar ranking or listing under any law of any state or country in which the property is located.

(m) *Tax Matters.* As of the date of this Agreement, neither Parent nor any of its Affiliates has taken or agreed to take any action, nor, to the Knowledge of Parent, is there any fact or circumstance, that would prevent the Merger and the other transactions contemplated by this Agreement from qualifying as a reorganization within the meaning of Section 368(a) of the Code.

(n) *Taxes.* Parent, each of its Subsidiaries and, to the Knowledge of Parent, any affiliated, combined or unitary group of which Parent or any Subsidiary of Parent is or was a member (each a *Parent Tax Party* ) (i) have duly and timely filed (taking into account any extension of time within which to file) all material Tax Returns required to be filed by any of them and all such filed Tax Returns are complete and accurate in all material respects; (ii) have paid or deposited all material Taxes (A) that are required to be paid with respect to the periods covered by such Tax Returns or (B) that Parent, any of its Subsidiaries or any other Parent Tax Party are



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obligated to withhold from amounts owing to any employee, creditor or third party, except, in each case, with respect to matters contested in good faith; and (iii) have not waived any statute of limitations with respect to Taxes or agreed to any extension of time with respect to a Tax assessment or deficiency. As of the date of this Agreement, there are not pending or, to the Knowledge of Parent, threatened in writing, any audits, examinations, investigations or other proceedings in respect of Taxes or Tax matters. There are not, to the Knowledge of Parent, any unresolved questions or claims concerning Parent's, any of its Subsidiaries' or any other Parent Tax Party's material Tax liability that are not disclosed or provided for in the Parent Reports filed with the SEC prior to the date of this Agreement. Neither Parent nor any of its Subsidiaries has any liability with respect to income, franchise or similar Taxes that accrued on or before the date of the respective financial statements included in the Parent Reports filed with the SEC prior to the date of this Agreement in excess of the amounts accrued with respect thereto that are reflected in such financial statements. Parent has not been a party to the distribution of stock of a controlled corporation as defined in Section 355(a) of the Code in a transaction intended to qualify under Section 355 of the Code within the past two years. The Parent Reports reflect an adequate reserve for all material Taxes for which Parent and its Subsidiaries may be liable for all Taxable periods and portions thereof through the date thereof. There are no liens with respect to Taxes upon any assets of Parent or any of its Subsidiaries (except for liens for property or ad valorem Taxes not yet delinquent and other Taxes not yet due and payable or being contested in good faith). Neither Parent nor any of its Subsidiaries is a party to a Tax allocation agreement, Tax sharing agreement, Tax indemnity agreement or similar agreement or arrangement. Neither Parent nor any of its Subsidiaries has participated in any transactions that have been identified by the IRS in published guidance as of the date of this Agreement as tax avoidance transactions.

(o) *Labor Matters.* As of the date of this Agreement:

(i) Parent and its Subsidiaries are in compliance with each of the collective bargaining agreements or other material contracts or agreements with any labor organization or other representative of employees to which any of them is a party except those failures to comply that are not, individually or in the aggregate, reasonably likely to have a Parent Material Adverse Effect;

(ii) there is no unfair labor practice charge filed with the National Labor Relations Board or complaint pending or, to the Knowledge of Parent, threatened, with regard to employees of Parent or any of its Subsidiaries, except those complaints that are not, individually or in the aggregate, reasonably likely to have a Parent Material Adverse Effect;

(iii) there is no labor strike, material slowdown, material work stoppage or other material labor controversy in effect or, to the Knowledge of Parent, threatened against Parent or any of its Subsidiaries;

(iv) except as disclosed in the Parent Reports filed with the SEC prior to the date of this Agreement, no union certification or decertification petition has been filed (with service of process having been made on Parent or any of its Subsidiaries), or, to the Knowledge of Parent, threatened (or pending without service of process having been made on Parent or any of its Subsidiaries), that relates to employees of Parent or any of its Subsidiaries and, to the Knowledge of Parent, no union authorization campaign has been conducted, within the past 12 months;

(v) Section 5.2(o)(v) of the Parent Disclosure Letter sets forth all grievance proceedings pending before the National Grievance Committee and, except as set forth in Section 5.2(o)(v) of the Parent Disclosure Letter, no grievance proceeding or arbitration proceeding arising out of or under any collective bargaining agreement is pending (with service of process having been made on Parent or any of its Subsidiaries), or, to the Knowledge of Parent, threatened (or pending without service of process having been made on Parent or any of its Affiliates), against Parent or any of its Subsidiaries related to any of their employees except those proceedings that are not, individually or in the aggregate, reasonably likely to have a Parent Material Adverse Effect;

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(vi) neither Parent nor any of its Subsidiaries is a party to, or is otherwise bound by, any consent decree with any Governmental Entity relating to employees or employment practices of Parent or any of its Subsidiaries except those consent decrees that are not, individually or in the aggregate, reasonably likely to have a Parent Material Adverse Effect; and

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(vii) Parent and each of its Subsidiaries is in compliance with all applicable agreements, contracts and policies relating to employment, employment practices, wages, hours and terms and conditions of employment of the employees except those failures to comply that are not, individually or in the aggregate, reasonably likely to have a Parent Material Adverse Effect.

Solely for purposes of this subsection (o), clause (iii) of the definition of Parent Material Adverse Effect shall not apply.

(p) *Ownership of Shares.* Neither Parent nor any of its Subsidiaries Beneficially Owns or is the Beneficial Owner of (as such terms are defined in the Rights Agreement) any Shares.

(q) *Insurance.* Parent has made available to the Company an insurance schedule of Parent's and its Subsidiaries' directors' and officers' liability insurance and primary and excess casualty insurance policies, providing coverage for bodily injury and property damage to third parties, including products liability and completed operations coverage, and worker's compensation, in effect as of the date of this Agreement. Parent and its Subsidiaries maintain insurance coverage reasonably adequate for the operation of the business of Parent and its Subsidiaries (taking into account the cost and availability of such insurance).

(r) *Intellectual Property.*

(i) Parent and/or each of its Subsidiaries owns, is licensed or otherwise possesses legally enforceable rights to use all IP Rights that are used in the business of Parent and its Subsidiaries as currently conducted, except for any such failures to own, be licensed or possess that, individually or in the aggregate, are not reasonably likely to have a Parent Material Adverse Effect.

(ii) Except as would not, individually or in the aggregate, reasonably be likely to have a Parent Material Adverse Effect, (A) the IP Rights owned by Parent and its Subsidiaries are subsisting, enforceable and valid, (B) the IP Rights licensed by Parent and its Subsidiaries from third parties are, to the Knowledge of Parent, subsisting, enforceable and valid and (C) neither Parent nor any of its Subsidiaries has received any written claims challenging such validity, subsistence or enforceability, and, to the Knowledge of Parent, no basis exists for asserting such invalidity, lapse, expiration or unenforceability of such IP Rights.

(iii) Neither Parent nor any of its Subsidiaries has been advised in writing that the conduct of the business of Parent and its Subsidiaries conflicts with any IP Rights of any third party, except for those conflicts that would not reasonably be likely to result in a material expense.

(iv) To the Knowledge of Parent, no third party has in the past three years infringed, misappropriated or otherwise violated, nor is any third party currently infringing, misappropriating or otherwise violating, any of Parent's or its Subsidiaries' IP Rights.

(v) The consummation of the transactions contemplated hereby will not conflict with, alter or impair any of Parent's or its Subsidiaries' IP Rights other than such conflicts that are not reasonably likely to have a Parent Material Adverse Effect.

*(s) Owned and Leased Properties.*

(i) Parent and each of its Subsidiaries has such good and indefeasible title to all owned real property and such good and valid title to, or such valid rights by lease, license, other agreement or to otherwise to use, all other assets and properties (in each case, tangible and intangible) necessary to enable Parent and its Subsidiaries to conduct their businesses as currently conducted and as described in the Parent Reports filed with the SEC prior to the date of this Agreement, except, in each case, for defects in title, easements, restrictive covenants and similar encumbrances that are not, individually or in the aggregate, reasonably likely to have a Parent Material Adverse Effect or materially interfere with Parent's and its Subsidiaries' use of such assets or properties. All assets and



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properties, other than assets and properties in which Parent and its Subsidiaries have leasehold interests, are free and clear of all Liens, other than (A) Liens for current Taxes not yet due and payable and (B) Liens that, individually or in the aggregate, are not reasonably likely to materially interfere with Parent's and its Subsidiaries' operations of such assets or properties.

(ii) Except for such matters that, individually or in the aggregate, are not reasonably likely to have a Parent Material Adverse Effect, Parent and its Subsidiaries (A) have complied in all material respects with the terms of all leases of their material properties currently in existence to which they are a party and under which they are in occupancy, and all such leases are in full force and effect and (B) enjoy peaceful and undisturbed possession under all such leases.

(t) *Brokers and Finders.* Neither Parent nor any of its officers, directors or employees has employed any broker or finder or incurred any liability for any brokerage fees, commissions or finders, fees in connection with the Merger or the other transactions contemplated by this Agreement, except that Parent has employed IFL as its financial advisor, the arrangements with which have been disclosed in writing to the Company prior to the date of this Agreement.

(u) *Available Funds.* Parent has available to it sufficient funds to perform all of its obligations under this Agreement, to consummate the Merger and pay the aggregate Cash Consideration.

**ARTICLE VI**

**Covenants**

6.1. *Interim Operations.*

(a) *Interim Operations of the Company.*

(i) *Ordinary Course.* During the period from the date of this Agreement to the Effective Time (except as otherwise expressly provided or permitted by the terms of this Agreement or as set forth in Section 6.1(a) of the Company Disclosure Letter), the Company and its Subsidiaries shall carry on their businesses in the usual, regular and ordinary course in substantially the same manner as conducted at the date of this Agreement, and, to the extent consistent therewith, use their reasonable best efforts to preserve intact their current business organizations, keep available the services of their current officers and employees and preserve their relationships with customers, suppliers, licensors, licensees, distributors and others having business dealings with the Company or its Subsidiaries, in each case consistent with past practice. Without limiting the generality of the foregoing, and except as otherwise expressly provided or permitted by this Agreement or set forth in Section 6.1(a) of the Company Disclosure Letter, prior to the Effective Time, the Company and its Subsidiaries shall not, without the prior written consent of Parent and Merger Sub (which consent shall not be unreasonably withheld or conditioned (understanding that Parent may weigh the interests of Parent and its Subsidiaries, including the Company and its Subsidiaries, after the Merger against the interests of the Company and its Subsidiaries in the matter in determining whether to grant a consent), and Parent and Merger Sub shall respond to any request for consent pursuant to this Section 6.1(a) in a reasonably timely fashion):

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(A) (I) other than regularly scheduled quarterly dividends not to exceed \$0.093333 per share of Company Common Stock per fiscal quarter, declare, set aside or pay any dividends on, or make any other distributions in respect of, any of its capital stock, (II) split, combine or reclassify any of its capital stock or issue or authorize the issuance of any other securities in respect of, in lieu of or in substitution for shares of its capital stock or (III) purchase, redeem or otherwise acquire, except (x) the return of unvested or forfeited Shares to the Company pursuant to the terms of any Stock Plan or (y) the surrender or sale of shares of stock to the Company by a holder of Company Options to pay tax withholding obligations pursuant to the terms of any Stock Plan, any shares of capital stock of the Company or any other securities thereof or any rights, warrants or options to acquire any such shares or other securities;

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(B) issue, deliver, grant, sell, pledge, dispose of or otherwise encumber any of its capital stock or any securities convertible into, or any rights, warrants or options to acquire, any such capital stock, or any Company Voting Debt (other than the issuance of Shares upon the exercise of Company Options outstanding on the date of this Agreement;

(C) amend the Company's certificate of incorporation or bylaws;

(D) acquire or agree to acquire (I) by merging or consolidating with, or by purchasing a substantial portion of the stock, or other ownership interests in, or substantial portion of assets of, or by any other manner, any business or any corporation, partnership, association, joint venture, limited liability company or other entity or division thereof or (II) any assets that would be material, individually or in the aggregate, to the Company and its Subsidiaries, taken as a whole, except purchases of supplies, equipment and inventory in the ordinary course of business consistent with past practice;

(E) sell, lease, mortgage, pledge, grant a Lien on or otherwise encumber or dispose of any of its properties or assets, except (I) in the ordinary course of business consistent with past practice and (II) other transactions involving not in excess of \$1,000,000 in the aggregate;

(F) (I) incur any indebtedness for borrowed money or guarantee any such indebtedness of another Person, issue or sell any debt securities or warrants or other rights to acquire any debt securities of the Company, guarantee any debt securities of another Person, enter into any keep well or other agreement to maintain any financial statement condition of another person or enter into any arrangement having the economic effect of any of the foregoing, except for (x) working capital borrowings and letters of credit under revolving credit facilities incurred in the ordinary course of business, (y) indebtedness incurred to refund, refinance or replace indebtedness for borrowed money outstanding on the date of this Agreement and (z) indebtedness existing solely between the Company and its wholly owned Subsidiaries or between such Subsidiaries, or (II) make any loans, advances or capital contributions to, or investments in, any other Person, other than the advancement of travel and relocation expenses to employees of the Company and its Subsidiaries in the ordinary course of business consistent with past practice;

(G) except for capital expenditures in compliance with the amounts and timing included in the Company's written capital expenditure plan previously made available to Parent, make or incur any capital expenditure, except in the ordinary course of business or involving the expenditure of no more than \$1,000,000 individually or in the aggregate;

(H) make any material election relating to Taxes or settle or compromise any material Tax liability;

(I) except to the extent permitted by Section 6.2(a) of this Agreement, waive the benefits of, or agree to modify in any manner, any confidentiality, standstill or similar agreement to which the Company is a party;

(J) restructure, recapitalize, reorganize or completely or partially liquidate or adopt a plan of complete or partial liquidation or adopt resolutions providing for or authorizing any of the foregoing;

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(K) enter into any new collective bargaining agreement, including any collective bargaining agreement involving unions in more than one state; provided, however, that the Company and its Subsidiaries may (I) enter into collective bargaining agreements that replace or renew collective bargaining agreements that existed as of December 31, 2004 so long as the terms and conditions of any such replacement or renewal agreement do not materially deviate from the terms and conditions of such existing agreement and (II) enter into collective bargaining agreements for Company or Subsidiary business locations that have had union elections prior to the date of this Agreement but for which no collective bargaining agreement exists as of the date of this Agreement, provided that the Company and its Subsidiaries negotiate such agreements in good faith and the final agreements contain commercially reasonable terms;

(L) change any accounting principle used by it, except as required by applicable Laws or GAAP;

(M) (I) settle or compromise (x) any litigation, administrative proceeding, claim or charge before or with the National Labor Relations Board or any other litigation, administrative proceeding, claim or charge that reasonably could be expected to have a significant impact on the labor relations of the Company or any

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of its Subsidiaries or (y) any other claim, grievance, charge, litigation or proceeding in excess of \$2,000,000 or (II) except in the ordinary course of business or as otherwise required pursuant to contracts existing on or prior to the date of this Agreement or entered into in the ordinary course after the date of this Agreement, pay, discharge or satisfy any material claims, liabilities or obligations; *provided, however*, that the Company and its Subsidiaries may settle or compromise automobile and accident liability litigation in an individual amount not to exceed the Company's self-insurance retention amounts;

(N) (I) enter into any new, or amend any existing, retention or severance agreement or arrangement, deferred compensation arrangement or employment agreement with any officer, director or employee whose annual base salary exceeds \$150,000, (II) enter into any employment agreement, retention or severance agreement or arrangement or deferred compensation arrangement with any director, officer or employee, except for (x) agreements or arrangements with individuals hired or promoted to fill vacant positions in terms not more favorable in any material respect than those applicable to the person that previously held the vacant position, (y) severance agreements for new hires on terms providing net severance payments not greater than six months in base salary and target bonus and (z) other severance commitments that are not in excess of \$50,000 for any individual; *provided, however* that the severance payments and commitments in subsections (y) and (z) above shall not exceed \$2,000,000 in the aggregate, (III) adopt any new incentive, retirement or welfare benefit arrangements, plans or programs for the benefit of current, former or retired employees or amend any existing Company Compensation and Benefit Plan (other than amendments required by Law or to maintain the tax qualified status of such plans under the Code), (IV) grant any increases in employee compensation, other than in the ordinary course or pursuant to promotions, in each case consistent with past practice (which shall include normal individual periodic performance reviews and related compensation and benefit increases and bonus payments consistent with past practices) or (V) grant any stock options or stock awards other than as permitted by this Agreement; *provided, however*, that notwithstanding the foregoing, the Company may take any action reasonably necessary to fulfill its obligations as contemplated by Section 4.11 of this Agreement; or

(O) authorize any of, or commit or agree to take any of, the foregoing actions.

(ii) *Other Actions.* The Company shall not take any action or omit to take any action that could reasonably be expected to cause any of its representations and warranties set forth in this Agreement to become untrue in any material respect.

*(b) Interim Operations of Parent.*

(i) *Ordinary Course.* During the period from the date of this Agreement to the Effective Time (except as otherwise expressly provided or permitted by the terms of this Agreement or as set forth in Section 6.1(b) of the Parent Disclosure Letter), Parent and its Subsidiaries shall carry on their businesses in the usual, regular and ordinary course in substantially the same manner as conducted at the date of this Agreement, and, to the extent consistent therewith, use their reasonable best efforts to preserve intact their current business organizations, keep available the services of their current officers and employees and preserve their relationships with customers, suppliers, licensors, licensees, distributors and others having business dealings with Parent and its Subsidiaries, in each case consistent with past practice. Without limiting the generality of the foregoing, and except as otherwise expressly provided or permitted by this Agreement or set forth in Section 6.1(b)(i) of the Parent Disclosure Letter, prior to the Effective Time Parent and its Subsidiaries shall not, without the prior written consent of the Company (which consent shall not be unreasonably withheld or conditioned (in each case from the point of view of the operations of Parent and its Subsidiaries, taken as a whole), and the Company shall respond to any request for consent pursuant to this Section 6.1(b) in a reasonably timely fashion):

(A) (I) declare, set aside or pay any dividends on, or make any other distributions in respect of, any of its capital stock or (II) split, combine or reclassify any of its capital stock or issue or authorize the issuance of any other securities in respect of, in lieu of or in substitution for shares of its capital stock;

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(B) issue, deliver, grant, sell, pledge, dispose of or otherwise encumber any of its capital stock or any securities convertible into, or any rights, warrants or options to acquire, any such capital stock, or any Parent

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Voting Debt (other than (I) the issuance of shares of Parent Common Stock upon the exercise of options or other stock awards outstanding on the date of this Agreement, or (II) pursuant to existing Parent Stock Plans in accordance with their current terms and past practice);

(C) amend Parent's certificate of incorporation or bylaws or amend Merger Sub's certificate of formation or limited liability company agreement;

(D) directly or indirectly, (I) enter into any transaction, other than the Merger, that would require approval of the stockholders of Parent under applicable Law or stock exchange rules; (II) enter into an agreement, other than this Agreement, relating to (x) any acquisition, merger, consolidation, joint venture, tender offer, share exchange, business combination with, or purchase of more than 20% of the equity securities or consolidated total assets of any asset-based trucking company located in the United States or (y) acquisitions, mergers, consolidations, joint ventures, tender offers, share exchanges, business combinations with, or purchases of more than 20% of the equity securities or consolidated total assets of any other Person for a transaction value in excess of \$50 million individually (provided, however, that the foregoing restriction shall not apply to transactions to which the HSR Act does not apply) or \$120 million in the aggregate (determined, in each case, in accordance with Section 801.10 of the regulations adopted under the HSR Act); or (III) enter into any other transaction or take any other action that would reasonably be expected to (x) adversely affect Parent's ability to use available funds to perform all of its obligations under this Agreement and to consummate the Merger or (y) otherwise prevent, materially delay or materially impair the ability of Parent or Merger Sub to consummate the transactions contemplated by this Agreement;

(E) recapitalize, reorganize or completely or partially liquidate Parent or adopt a plan of complete or partial liquidation or Parent or adopt resolutions providing for or authorizing any of the foregoing;

(F) enter into any new collective bargaining agreement involving unions in more than one state;

(G) change any accounting principle used by it, except as required by applicable Law or GAAP; or

(H) authorize any of, or commit or agree to take any of, the foregoing actions.

(ii) *Other Actions.* Neither Parent nor Merger Sub shall take any action or omit to take any action that could reasonably be expected to cause any of the representations and warranties of Parent and Merger Sub set forth in this Agreement to become untrue in any material respect.

(c) *Interim Operations of Merger Sub.* During the period from the date of this Agreement to the Effective Time, Merger Sub shall not engage in any activities of any nature except as provided in or contemplated by this Agreement.

6.2. *Acquisition Proposals.*

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(a) *No Solicitation or Negotiation.* The Company hereby covenants that, except as expressly permitted by this Section 6.2, the Company shall not, and the Company shall instruct and use its reasonable best efforts to cause its officers, directors, employees, investment bankers, attorneys, accountants and other advisors or representatives (such officers, directors, employees, investment bankers, attorneys, accountants and other advisors or representatives, collectively, *Representatives* ) not to, directly or indirectly, and on becoming aware of, shall take reasonable action to stop its Representatives from continuing to:

(i) solicit, initiate or encourage any inquiries or the making of any proposal or offer that constitutes, or could reasonably be expected to lead to, any Acquisition Proposal (as defined in Section 6.2(e)); or

(ii) enter into, or participate in any discussions or negotiations regarding, or furnish to any Person any non-public information for the purpose of encouraging or facilitating, any Acquisition Proposal.

The Company shall, and shall direct its Representatives to, cease immediately and cause to be terminated all discussions and negotiations that commenced prior to the date of this Agreement regarding any Acquisition Proposal existing on the date of this Agreement.

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Notwithstanding anything to the contrary set forth in this Agreement the Company may, to the extent the Company Board determines in good faith, after consultation with outside counsel, that such action is likely required under applicable Law, in response to (A) a Superior Proposal (as defined in Section 6.2(e)) or (B) a bona fide, unsolicited written Acquisition Proposal that the Company Board determines in good faith after consultation with outside counsel and its financial advisor could lead to a Superior Proposal (any such Acquisition Proposal, a *Potential Superior Proposal* ), (1) furnish information with respect to the Company to the Person making such Superior Proposal or Potential Superior Proposal and its Representatives pursuant to a customary confidentiality agreement not less restrictive of the other party (except that it need not include any standstill provisions) than the Confidentiality Agreement, dated January 13, 2005, between Parent and the Company (the *Confidentiality Agreement* ) (provided, however, that, to the extent any such confidentiality agreement does not contain any standstill provisions, the Confidentiality Agreement shall be automatically amended (without any further action by the parties) such that the standstill provisions in the Confidentiality Agreement restricting activities of Parent and its Subsidiaries shall be deleted), and (2) participate in discussions or negotiations (including solicitation of such a revised Superior Proposal or Potential Superior Proposal) with such Person and its Representatives regarding any such Superior Proposal or Potential Superior Proposal.

(b) *No Change in Company Recommendation or Alternative Acquisition Agreement.* The Company Board shall not:

(i) except as expressly permitted by this Section 6.2, withdraw or modify (or publicly propose to withdraw or modify), in a manner adverse to Parent or Merger Sub, the approval or recommendation by the Company Board with respect to this Agreement and the Merger and other transactions contemplated hereby;

(ii) except as permitted by Section 8.3(a), cause or permit the Company to enter into any letter of intent, memorandum of understanding, agreement in principle, acquisition agreement, merger agreement or similar agreement (an *Alternative Acquisition Agreement* ) providing for the consummation of a transaction contemplated by any Acquisition Proposal (other than a confidentiality agreement referred to in Section 6.2(a) entered into in the circumstances referred to in Section 6.2(a)); or

(iii) except as expressly permitted by this Section 6.2, approve, recommend or propose publicly to approve or recommend any Acquisition Proposal.

Notwithstanding anything to the contrary set forth in this Agreement the Company Board may withdraw or modify its approval or recommendation with respect to this Agreement and the Merger and other transactions contemplated hereby, or approve or recommend any Superior Proposal made or received after the date of this Agreement, if the Company Board determines in good faith, after consultation with outside counsel, that such action is likely required under applicable Law (a *Change in Company Recommendation* ); provided, however, that no Change in Company Recommendation may be made in response to a Superior Proposal until after 72 hours following Parent's receipt of written notice from the Company (an *Adverse Recommendation Notice* ) (x) advising Parent that the Company Board intends to make such Change in Company Recommendation and the reason for such change, (y) specifying the material terms and conditions of such Superior Proposal (including the proposed financing for such proposal) and providing Parent with a copy of any documents conveying such proposal and (z) identifying any party making such Superior Proposal. During such 72-hour period, the Company will cooperate with Parent with respect to such Superior Proposal with the intent of enabling Parent to engage in good faith negotiations to make such adjustments to the terms and conditions of the Merger as would enable the Company to proceed with the Merger on such adjusted terms. In determining whether to make a Change in Company Recommendation in response to a Superior Proposal, the Company Board shall take into account any such changes to the terms of this Agreement proposed by Parent (in response to an Adverse Recommendation Notice or otherwise) in determining whether such third party Acquisition Proposal still constitutes a Superior Proposal. Notwithstanding the foregoing, to the extent that an Adverse Recommendation Notice is received on a Saturday, Sunday or holiday, then such 72-hour period shall expire no earlier than 12:00 noon (Eastern Time) on the second business day immediately thereafter.



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(c) *No Change in Parent Recommendation.* The Parent Board shall not withdraw or modify (or publicly propose to withdraw or modify), in a manner adverse to the Company, the approval or recommendation by the Parent Board with respect to the Share Issuance; *provided*, that the Parent Board may withdraw or modify its approval or recommendation with respect to the Share Issuance, if the Parent Board determines in good faith, after consultation with outside counsel, that such action is likely required under applicable Law (a *Change in Parent Recommendation* ), which the Company acknowledges and agrees may be the result of a Material Adverse Change. For purposes of this Section 6.2(c), *Material Adverse Change* shall mean (1) a change that is the result of general economic, capital market, regulatory, political or business conditions or acts of war or terrorism or (2) a change that is the result of factors generally affecting the industries or markets in which the Company or Parent operate to the extent such change does not disproportionately affect the Company and its Subsidiaries or Parent and its Subsidiaries as compared to the typical company operating in such industry or market, in each case which change is reasonably likely to have, a material adverse effect on the financial condition, properties, business or results of operations of (x) the Company and its Subsidiaries, taken as a whole, (y) Parent and its Subsidiaries, taken as a whole, or (z) the Company and its Subsidiaries and Parent and its Subsidiaries, taken as a whole.

(d) *Certain Permitted Disclosure.* Nothing contained in this Agreement shall be deemed to prohibit the Company from taking and disclosing to its stockholders a position with respect to a tender offer contemplated by Rule 14d-9 or Rule 14e-2 promulgated under the Exchange Act or from making any other disclosure to the Company's stockholders or the general public if the Company Board determines in good faith, after consultation with outside counsel, that such disclosure is likely required under applicable Law.

(e) *Definitions.* As used in this Agreement:

*Acquisition Proposal* means (i) any proposal or offer for a merger, consolidation, dissolution, tender offer, recapitalization, reorganization, share exchange, business combination or similar transaction involving the Company or (ii) any proposal or offer to acquire in any manner, directly or indirectly, more than 20% of the equity securities or more than 20% of the consolidated total assets (including, without limitation, equity securities of its Subsidiaries) of the Company, in each case other than the transactions contemplated by this Agreement.

*Superior Proposal* means any bona fide written Acquisition Proposal made by a third party to acquire more than 50% of the equity securities or more than 50% of the assets of the Company and its Subsidiaries, taken as a whole, pursuant to a tender or exchange offer, a merger, a recapitalization, a consolidation or a sale of its assets, which the Company Board determines in its good faith judgment (after consultation with its financial advisor) (i) to be more favorable from a financial point of view to the holders of Company Common Stock than the Merger and (ii) is reasonably capable of being completed on the terms proposed and for which financing is reasonably capable of being obtained, taking into account all financial, regulatory, legal and other aspects of such proposal.

6.3. *Information Supplied.* (a) As soon as practicable following the date of this Agreement, but in no event later than April 1, 2005, Parent and the Company shall, in consultation with each other, prepare and file with the SEC the Joint Proxy Statement/Prospectus (as defined below), and Parent shall prepare and file with the SEC the Registration Statement on Form S-4 to be filed with the SEC by Parent in connection with the Share Issuance (including the proxy statement and prospectus (the *Joint Proxy Statement/Prospectus* ) constituting a part thereof) (the *S-4 Registration Statement* ) as promptly as practicable. Each of Parent and the Company shall provide promptly to the other such information concerning its Subsidiaries, directors, officers, stockholders, business and financial statements and affairs as, in the reasonable judgment of the providing party or its counsel, may be required or appropriate for inclusion in the Joint Proxy Statement/Prospectus and the S-4 Registration Statement, or in any amendments or supplements thereto, and to cause its counsel and auditors to cooperate with the other's counsel and auditors in the preparation of the Joint Proxy Statement/Prospectus and the S-4 Registration Statement. Parent and the Company each shall use its reasonable best efforts to have the S-4

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Registration Statement declared effective under the Securities Act as promptly as practicable after such filing, and promptly thereafter mail the Joint Proxy Statement/Prospectus to the stockholders of the Company. Prior to the effective date of the S-4 Registration Statement Parent shall take any action (other than qualifying to do business in any jurisdiction in which it is not now so qualified or to file a general consent to service of process) required to be taken under any applicable state securities law or blue sky notice requirements in connection with the Stock Issuance and to consummate the other transactions contemplated by this Agreement and will pay all expenses incident thereto and the Company shall furnish all information concerning the Company and the holders of capital stock of the Company as may be reasonably requested in connection with any such action.

(b) The Company and Parent each agrees, as to itself and its Subsidiaries, that none of the information supplied or to be supplied by it or its Subsidiaries for inclusion or incorporation by reference in (i) the S-4 Registration Statement will, at the time the S-4 Registration Statement is filed with the SEC or becomes effective under the Securities Act, contain any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and (ii) the Joint Proxy Statement/Prospectus and any amendment or supplement thereto will, at the date of mailing to stockholders and at the date of the Stockholders Meetings (as defined in Section 6.4), contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading. No filing of, or amendment or supplement to, or correspondence to the SEC or its staff with respect to, the S-4 Registration Statement will be made by Parent, or with respect to the Joint Proxy Statement/Prospectus will be made by the Company, without providing the other party hereto a reasonable opportunity to review and comment thereon. Parent shall advise the Company, promptly after Parent receives notice thereof, of the time when the S-4 Registration Statement has become effective or any supplement or amendment has been filed, the issuance of any stop order, the suspension of the qualification of the Parent Common Stock issuable in connection with the Merger for offering or sale in any jurisdiction, or any request by the SEC for amendment of the S-4 Registration Statement or comments thereon and responses thereto or requests by the SEC for additional information. The Company shall advise Parent, promptly after the Company receives notice thereof, of any request by the SEC for the amendment of the Joint Proxy Statement/Prospectus or comments thereon and responses thereto or requests by the SEC for additional information. If at any time prior to the Effective Time any information relating to Parent or the Company, or any of their respective Affiliates, officers or directors, should be discovered by Parent or the Company which should be set forth in an amendment or supplement to either of the S-4 Registration Statement or the Joint Proxy Statement/Prospectus, so that any of such documents would not include any misstatement of a material fact or omit to state any material fact necessary to make the statements therein, in light of the circumstances under which they were made, not misleading, the party which discovers such information shall promptly notify the other party or parties hereto, as applicable, and an appropriate amendment or supplement to the S-4 Registration Statement and/or the Joint Proxy Statement/Prospectus describing such information shall be promptly filed with the SEC and, to the extent required by applicable Law, disseminated to the stockholders of the Company. Each of the parties hereto shall cause the Joint Proxy Statement/Prospectus to comply as to form and substance to such party in all material respects with the applicable requirements of the Exchange Act, the Securities Act and the rules of the Nasdaq National Market.

6.4. *Stockholders Meetings*. Except if the Company Board determines in good faith, after consultation with outside counsel, that taking such action would likely constitute a breach of its obligations under applicable Law, the Company will take, in accordance with applicable Law and its certificate and bylaws, all action necessary to convene a meeting of holders of Shares (the *Company Stockholders Meeting* ) as promptly as practicable after the S-4 Registration Statement is declared effective to consider and vote upon the adoption of this Agreement. Subject to Section 6.2(b), the Company Board shall recommend and not withdraw such adoption and shall take all reasonable and lawful action to solicit such adoption. Except if the Parent Board determines in good faith, after consultation with outside counsel, that taking such action would likely constitute a breach of its obligations under applicable Law, Parent will take, in accordance with applicable Law and its certificate and bylaws, all action necessary to convene a meeting of holders of Parent Common Stock (the *Parent Stockholders Meeting* and, together with the Company Stockholders Meetings, the *Stockholders Meetings* ) as promptly as practicable

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after the S-4 Registration Statement is declared effective to consider and vote upon the approval of the Share Issuance. Subject to Section 6.2(c), the Parent Board shall recommend such approval and shall take all lawful action to solicit such approval. The Company and Parent shall cooperate to schedule and convene the Stockholders Meetings on the same date as soon as practicable after the S-4 Registration Statement is declared effective under the Securities Act.

*6.5. Filings; Other Actions; Notification; Access.*

(a) The Company and Parent shall cooperate with each other and use (and shall cause their respective Subsidiaries to use) their respective reasonable best efforts to take or cause to be taken all actions, and do or cause to be done all things, necessary, proper or advisable on its part under this Agreement and applicable Laws to consummate and make effective the Merger and the other transactions contemplated by this Agreement as promptly as practicable, including preparing and filing as promptly as practicable all documentation to effect all necessary notices, reports and other filings and to obtain as promptly as practicable all consents, registrations, approvals, permits and authorizations necessary or advisable to be obtained from any third party and/or any Governmental Entity in order to consummate the Merger or any of the other transactions contemplated by this Agreement. Subject to applicable laws relating to the exchange of information, Parent and the Company shall have the right to review in advance, and to the extent practicable each will consult the other on, all the information relating to Parent or the Company, as the case may be, and any of their respective Subsidiaries, that appear in any filing made with, or written materials submitted to, any third party and/or any Governmental Entity in connection with the Merger and the other transactions contemplated by this Agreement. In exercising the foregoing right, each of the Company and Parent shall act reasonably and as promptly as practicable. Without limiting the generality of the foregoing, Parent and the Company shall each file a Pre-Merger Notification and Report Form under the HSR Act with respect to the Merger as promptly as practicable, but in no event later than April 1, 2005. Parent and the Company shall each request early termination of the waiting period with respect to the Merger under the HSR Act. Each of the parties agrees to use their respective reasonable best efforts to respond as promptly as practicable to any request for additional information pursuant to Section (e)(1) of the HSR Act.

(b) The Company and Parent each shall, upon request by the other, furnish the other with all information concerning itself, its Subsidiaries, directors, officers and stockholders and such other matters as may be reasonably necessary or advisable in connection with any other statement, filing, notice or application made by or on behalf of Parent, the Company or any of their respective Subsidiaries to any third party and/or any Governmental Entity in connection with the Merger and the transactions contemplated by this Agreement.

(c) Subject to applicable Law and the instructions of any Governmental Entity, the Company and Parent each shall keep the other apprised of the status of matters relating to completion of the transactions contemplated hereby, including promptly furnishing the other with copies of notice or other communications received by Parent or the Company, as the case may be, or any of its Subsidiaries, from any third party and/or any Governmental Entity with respect to the Merger and the other transactions contemplated by this Agreement. The Company and Parent each shall give prompt notice to the other of any change that is reasonably likely to result in a Company Material Adverse Effect or Parent Material Adverse Effect, respectively. Neither the Company nor Parent shall permit any of its officers or any other representatives or agents to participate in any meeting with any Governmental Entity in respect of any filings, investigation or other inquiry unless it consults with the other party in advance and, to the extent permitted by such Governmental Entity, gives the other party the opportunity to attend and participate therein.

(d) Without limiting the generality of the undertakings pursuant to this Section 6.5, each of the Company (in the case of clauses (i) and (iii) below) and Parent (in all cases set forth below) agree to take or cause to be taken the following actions: (i) the provision, as promptly as practicable, to each and every federal, state, local or foreign court or Governmental Entity with jurisdiction over enforcement of any applicable antitrust or competition laws ( *Government Antitrust Entity* ) of non-privileged information and documents requested by any Government Antitrust Entity or that are necessary, proper or advisable to permit consummation of the

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transactions contemplated by this Agreement; (ii) the use of its reasonable best efforts, after consultation with the Company, to avoid the entry of any permanent, preliminary or temporary injunction or other order, decree, decision, determination or judgment that would delay, restrain, prevent, enjoin or otherwise prohibit consummation of the transactions contemplated by this Agreement (including, without limitation, the defense through litigation on the merits of any claim asserted in any court, agency or other proceeding by any person or entity (including, without limitation, any Governmental Entity) seeking to delay, restrain, prevent, enjoin or otherwise prohibit consummation of such transactions; *provided*, that Parent shall not be required to sell or otherwise dispose of, or hold separate pending such disposition, or enter into any agreements with, or submit to any requests by, the relevant Government Antitrust Entity with respect to, any assets, categories of assets or businesses or other segments of the Company or Parent or any of their respective Subsidiaries if such action would, after taking into account the expected proceeds of such sale or other disposition, reasonably be expected to have a material adverse effect on the financial condition, properties, business or results of operations of Parent and its Subsidiaries (including the Company and its Subsidiaries), taken as a whole, after the Merger; and (iii) the use of its reasonable best efforts to take, in the event that any permanent, preliminary or temporary injunction, decision, order, judgment, determination or decree is entered or issued, or becomes reasonably foreseeable to be entered or issued, in any proceeding or inquiry of any kind that would make consummation of the Merger in accordance with the terms of this Agreement unlawful or that would delay, restrain, prevent, enjoin or otherwise prohibit consummation of the Merger or the other transactions contemplated by this Agreement, any and all steps (including, without limitation, the appeal thereof, the posting of a bond or the taking of the steps contemplated by clause (ii) of this paragraph, subject to the proviso contained therein) necessary to resist, vacate, modify, reverse, suspend, prevent, eliminate or remove such actual, anticipated or threatened injunction, decision, order, judgment, determination or decree so as to permit such consummation on a schedule as close as possible to that contemplated by this Agreement.

*6.6. Access to Information.*

(a) Upon reasonable notice, and except as may otherwise be required by applicable Law, each of the Company and Parent shall (and shall cause each of its Subsidiaries to) afford the Representatives of the other party reasonable access, during normal business hours throughout the period prior to the Effective Time, to its properties, books, contracts, records and personnel and, during such period, each of the Company and Parent shall (and shall cause each of its Subsidiaries to) furnish promptly to the other all information concerning its business, properties and personnel as may reasonably be requested, provided that no investigation pursuant to this Section 6.6 shall affect or be deemed to modify any representation or warranty made by any party hereto. All requests for information made pursuant to this Section 6.6 shall be directed to an executive officer of the Company or Parent, as the case may be, or such Person as may be designated by such party. All such information shall be governed by the terms of the Confidentiality Agreement.

(b) Nothing in this Agreement shall require any party hereto to permit any inspection, or to disclose any information, that in the reasonable judgment of such party would result in (i) the disclosure of any trade secrets of third parties or violate any of its obligations with respect to confidentiality if such party shall have used commercially reasonable efforts to obtain the consent of such third party to such inspection or disclosure, (ii) any violation of laws relating to the sharing of information between competitors, it being understood that the parties will provide extracts, or summaries, or aggregations or other information to the greatest extent practicable in a manner that does not result in any such violation or improper disclosure or (iii) waiver of a privilege.

*6.7. Taxation.* The parties will use their reasonable best efforts to cause the Merger to qualify as a reorganization under Section 368(a) of the Code and, subject to Section 6.2, none of the parties shall take or cause to be taken any action, whether before or after the Effective Time, that could disqualify the Merger as a reorganization within the meaning of Section 368(a) of the Code. The Company, Parent and Merger Sub shall execute and deliver to Sullivan & Cromwell LLP, special counsel to the Company, and Fulbright & Jaworski L.L.P., special counsel to Parent, customary representation letters, substantially in the forms attached hereto as Exhibit B and Exhibit C, at such time or times as reasonably requested by such law firms in connection with their delivery of the respective opinions referred to in Section 7.3(c) and Section 7.2(c). None of the Company, Parent

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or Merger Sub shall take or cause to be taken any action (or fail to take or cause to be taken any action) which reasonably would be expected to cause to be untrue any of the representations in such representation letters.

6.8. *Affiliates.* Prior to the Effective Time, the Company shall deliver to Parent a list of names and addresses of those Persons who are, in the opinion of the Company, as of the time of the Company Stockholders Meeting, affiliates of the Company within the meaning of Rule 145 under the Securities Act. The Company shall provide to Parent such information and documents as Parent shall reasonably request for purposes of reviewing such list. There shall be added to such list the names and addresses of any other Person subsequently identified by either Parent or the Company as a Person who may be deemed to be such an affiliate of the Company; *provided, however*, that no such Person identified by Parent shall be added to the list of affiliates of the Company if Parent shall receive from the Company, on or before the date of the Company Stockholders Meeting, an opinion of counsel reasonably satisfactory to Parent to the effect that such Person is not such an affiliate. The Company shall exercise reasonable best efforts to deliver or cause to be delivered to Parent, prior to the date of the Company Stockholders Meeting, from each affiliate of the Company identified in the foregoing list (as the same may be supplemented as aforesaid), a letter dated as of the Closing Date substantially in the form attached as Exhibit D.

6.9. *Stock Exchange Listing and De-listing.* Parent shall use its reasonable best efforts to cause the shares of Parent Common Stock to be issued in the Merger to be approved for listing on the Nasdaq National Market subject to official notice of issuance, prior to the Closing Date. The Surviving Entity shall use its reasonable best efforts to cause the Shares to be de-listed from the Nasdaq National Market and de-registered under the Exchange Act as soon as practicable following the Effective Time.

6.10. *Publicity.* The initial press release regarding the Merger shall be a joint press release and thereafter the Company and Parent each shall consult with each other before issuing, and provide each other the opportunity to review, comment upon and concur with and use reasonable efforts to agree on, any press releases or otherwise making public announcements with respect to the Merger and the other transactions contemplated by this Agreement and prior to making any filings with any third party and/or any Governmental Entity with respect thereto, except as may be required by Law or by obligations pursuant to any listing agreement with or rules of the Nasdaq National Market or by the request of any Government Antitrust Entity. Notwithstanding anything to the contrary contained in this Section 6.10, either party may respond to questions from stockholders or inquiries from financial analysts and media representatives in a manner that is consistent with then-existing public disclosures.

6.11. *Employee Benefits/Labor Matters.*

(a) For the period beginning at the Effective Time and ending on December 31 of the calendar year in which the Effective Time occurs, Parent shall, or shall cause the Surviving Entity or its Subsidiaries to, offer employee compensation and benefit plans to Continuing Employees (as defined below) that are no less favorable in the aggregate than those offered under the Company Compensation and Benefit Plans as of the date of this Agreement. Parent shall, or shall cause the Surviving Entity or its Subsidiaries to, take such actions as are necessary to grant those employees who are, as of the Effective Time, employed by the Company or any of its Subsidiaries and are not included in a unit of employees covered by a collective bargaining agreement ( *Continuing Employees* ) credit for Past Service (as defined below) for purposes of initial eligibility to participate, vesting and benefit accrual under, any employee benefit plans maintained by Parent, the Surviving Entity or any Subsidiary of Parent or the Surviving Entity in which they are eligible to participate. *Past Service* means a Continuing Employee's service with the Company or any Subsidiary of the Company to the same extent recognized by the Company and any of its Subsidiaries. Parent shall, or shall cause the Surviving Entity and its Subsidiaries to, take such actions as are necessary to give Continuing Employees credit for their Past Service for purposes of determining the amounts of sick pay, holiday pay and vacation pay they are eligible to receive under any sick pay, holiday pay and vacation pay policies and programs maintained by Parent, the Surviving Entity or any Subsidiary of the Surviving Entity in which they are eligible to participate. With respect to each Continuing Employee who is an active participant in a group health plan (as defined in Section 5000(b) of the Code) (a *Company Health Plan* ) immediately prior to the Effective Time, Parent shall, or shall cause the Surviving





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Entity or its Subsidiaries to, take such actions as are necessary to ensure that the group health plan (other than a flexible spending account arrangement) maintained by Parent, the Surviving Entity or one of its Subsidiaries in which such Continuing Employee is eligible to participate during the calendar year in which the Effective Time occurs (the *Current Year*) shall (i) waive any preexisting condition restrictions and waiting period requirements to the extent that such preexisting condition restrictions and waiting period requirements were waived or satisfied under the applicable Company Health Plan in which such Continuing Employee participated immediately prior to the Effective Time; and (ii) provide credit, for the Current Year, for any copayments or deductible payments made by the Continuing Employee and out of pocket expenditures incurred by the Continuing Employee under the applicable Company Health Plan for the Current Year.

(b) Parent acknowledges that by operation of Law the Surviving Entity and its Subsidiaries shall continue to be obligated to comply with the terms of any Company Compensation and Benefit Plans that are maintained by the Company and any of its Subsidiaries immediately prior to the Effective Time; *provided, however*, nothing herein shall restrict Parent's or the Surviving Entity's or its Subsidiaries' ability to amend or terminate such Company Compensation and Benefit Plans in accordance with their terms.

(c) Parent acknowledges that by operation of Law the Surviving Entity and its Subsidiaries shall continue to be obligated to comply with the terms of the agreements listed on Section 6.11(c) of the Company Disclosure Letter (the *CIC Agreements*). Parent acknowledges that the consummation of the Merger contemplated by this Agreement will constitute a Change of Control within the meaning of each of the CIC Agreements. If upon termination of employment an employee of the Company is determined to be a key employee within the meaning of Section 409A of the Code and that, as a result of such determination, any portion of severance due under the applicable CIC Agreement would be subject to additional taxation, Parent will delay paying such portion of the severance until the earliest permissible date on which payments may commence without triggering such additional taxation (with such delay not to exceed six months); provided, however, that if any such delay in payment of all or a portion of the severance is required to ensure that any additional tax is not applied under Section 409A of the Code, upon the key employee's termination of employment Parent shall immediately cause the unpaid severance amount to be set aside in a rabbi trust meeting the requirements of Rev. Proc. 92-64 with Wachovia Bank, N.A., or the then current trustee of the trust used to fund the Company's Nonqualified Deferred Compensation Plan and Supplemental Executive Retirement Plan, as trustee of such rabbi trust.

(d) Parent acknowledges that by operation of Law after the Effective Time the Subsidiaries of the Company that are parties to collective bargaining agreements shall continue to be obligated to comply with the terms of such collective bargaining agreements.

6.12. *Letter of the Company's Accountants.* The Company shall use commercially reasonable efforts to cause to be delivered to Parent and Sub two letters from Deloitte & Touche LLP, the Company's independent public accountants, one dated a date within two business days before the date on which the S-4 shall become effective and one dated two business days before the Effective Time, each addressed to Parent and Sub and customary in scope and substance for letters delivered by independent public accountants in connection with registration statements similar to the S-4.

6.13. *Letter of Parent's Accountants.* Parent shall use commercially reasonable efforts to cause to be delivered to the Company two letters from KPMG LLP, Parent's independent public accountants, one dated a date within two business days before the date on which the S-4 shall become effective and one dated two business days before the Effective Time, each addressed to the Company and customary in scope and substance for letters delivered by independent public accountants in connection with registration statements similar to the S-4.

6.14. *Appointment of Additional Director.* The Parent Board shall take action prior to the Effective Time to cause the number of directors comprising the full Parent Board immediately following the Effective Time to be increased by one person, and cause a member of the Company Board selected by Parent from among the members of the Company Board who are willing to serve to be elected to the Parent Board to hold office from the period



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commencing one business day after the Effective Time until his successor is duly elected or appointed and qualified in the manner provided in the certificate of incorporation of Parent or as otherwise provided by Law.

6.15. *Expenses.* Except as otherwise provided in Section 8.5(b) or Section 8.5(c), whether or not the Merger is consummated, all fees and expenses incurred in connection with this Agreement and the Merger and the other transactions contemplated by this Agreement shall be paid by the party incurring such expense, except that expenses incurred in connection with the printing and mailing of the Joint Proxy Statement/Prospectus shall be shared equally by Parent and the Company.

6.16. *Indemnification; Directors and Officers Insurance.*

(a) From and after the Effective Time, Parent shall indemnify and hold harmless, to the fullest extent permitted under applicable Law (and Parent shall also advance expenses as incurred to the fullest extent permitted under applicable Law provided the Person to whom expenses are advanced provides an undertaking to repay such advances if it is ultimately determined that such Person is not entitled to indemnification), each present and former director and officer of the Company and its Subsidiaries (collectively, the *Indemnified Parties* ) against any costs or expenses (including reasonable attorneys' fees and expenses), judgments, fines, losses, claims, damages or liabilities (collectively, *Costs* ) incurred in connection with any claim, action, suit, proceeding or investigation, whether civil, criminal, administrative or investigative, arising out of or pertaining to matters existing or occurring at or prior to the Effective Time (and whether asserted or claimed prior to, at or after the Effective Time) that are, in whole or in part, based on or arising out of the fact that such person is or was a director, officer, employee of the Company or any of Subsidiary of the Company, including the transactions contemplated by this Agreement or serve as a fiduciary under, or with respect to, any employee benefit plan (within the meaning of Section 3(3) of ERISA) at any time maintained by or contributed to by the Company or any of its Subsidiaries.

(b) Any Indemnified Party wishing to claim indemnification under paragraph (a) of this Section 6.16, upon learning of any such claim, action, suit, proceeding or investigation, shall promptly notify Parent thereof, but the failure to so notify shall not relieve Parent of any liability it may have to such Indemnified Party except to the extent such failure materially prejudices Parent. In the event of any such claim, action, suit, proceeding or investigation (whether arising before or after the Effective Time), (i) Parent and the Surviving Entity shall pay the reasonable fees and expenses of counsel selected by the Indemnified Parties, which counsel shall be reasonably satisfactory to Parent, promptly after statements therefor are received and otherwise advance to such Indemnified Party upon request of reimbursement of documented expenses reasonably incurred, (ii) Parent shall cooperate with the defense of such matter and (iii) any determination required to be made with respect to whether an Indemnified Party's conduct complies with the standards set forth under applicable Law and the certificate of incorporation or bylaws shall be made by independent counsel mutually acceptable to Parent and the Indemnified Party; *provided, however*, that Parent and the Surviving Entity shall not be liable for any settlement effected without its written consent (which consent shall not be unreasonably withheld, delayed or conditioned). If such indemnity is not available with respect to any Indemnified Party, then the Surviving Entity and the Indemnified Party shall contribute to the amount payable in such proportion as is appropriate to reflect relative faults and benefits.

(c) Subject to the last sentence of this Section 6.16(c), for six years after the Effective Time, Parent shall maintain in effect directors' and officers' liability insurance ( *D&O Insurance* ) covering acts or omissions occurring prior to the Effective Time with respect to those persons who are currently covered by the Company's D&O Insurance policy on terms with respect to such coverage and amount no less favorable than those of the D&O Insurance policy of the Company in effect on the date of this Agreement; *provided, however*, that in no event will Parent be required to pay aggregate annual premiums for insurance under this Section 6.16(c) in excess of three times the most recent aggregate annual premium paid by the Company for such purpose (which annual aggregate premium the Company represents and warrants to be approximately \$750,000 in the aggregate) (the *Current Premium* ); *provided, further*, that if the annual premiums of such insurance coverage exceed such amount, Parent will be obligated to obtain a D&O Insurance policy with the best coverage available, in the reasonable judgment of the Parent Board, for a cost up to but not exceeding 300% of the Current Premium. In



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addition, for six years after the Effective Time, Parent shall maintain in effect fiduciary liability insurance policies for employees who serve or have served as fiduciaries under or with respect to any employee benefit plans described in Section 6.16 of the Company Disclosure Letter with coverages and in amounts no less favorable than those of the policies of the Company in effect on the date of this Agreement. The provisions of this Section 6.16(c) shall be deemed to have been satisfied if Parent, with the cooperation of the Company, obtains prepaid policies prior to the Closing for purposes of this Section 6.16(c), which policies are provided by an insurer with a claims paying rate no lower than the rating of the provider of the Company's current D&O Insurance policy and provide such directors and officers with coverage no less advantageous to the insured for an aggregate period of six years with respect to claims arising from facts or events that occurred on or before the Effective Time (including those related to this Agreement and the transactions contemplated hereby).

(d) If Parent or the Surviving Entity or any of their respective successors or assigns (i) shall consolidate with or merge into any other corporation or entity and shall not be the continuing or surviving corporation or entity of such consolidation or merger or (ii) shall transfer all or substantially all of such party's properties and assets to any individual, corporation or other entity, then, and in each such case, proper provisions shall be made so that the successors and assigns of Parent or the Surviving Entity, as the case may be, shall assume all of the applicable obligations set forth in this Section 6.16.

(e) The provisions of this Section 6.16 are intended to be for the benefit of, and shall be enforceable by, each of the Indemnified Parties, their heirs and their representatives and are in addition to, and not in substitution for, any other rights to indemnification that any such person may have by contract or otherwise. If any Indemnified Party is required to bring any action to enforce rights or to collect moneys due under this Agreement and is successful in such action, Parent and the Surviving Entity shall reimburse such Indemnified Party for all of its expenses reasonably incurred in connection with bringing and pursuing such action including, without limitation, reasonable attorneys' fees and costs.

*6.17. Other Actions by the Company and Parent.*

(a) *Rights.* Prior to the Effective Time, the Company Board shall take all necessary action to terminate all of the outstanding Rights, effective immediately prior to the Effective Time.

(b) *Takeover Statute.* If any Takeover Statute is or may become applicable to the Merger or the other transactions contemplated by this Agreement, each of Parent and the Company and its Board of Directors shall grant such approvals and take such actions as are necessary so that such transactions may be consummated as promptly as practicable on the terms contemplated by this Agreement or by the Merger and otherwise act to eliminate or minimize the effects of such statute or regulation on such transactions.

(c) *Section 16 Matters.* The Company Board and Parent Board shall, prior to the Effective Time, take all such actions as may be reasonably necessary or appropriate pursuant to Rule 16b-3(d) and Rule 16b-3(e) under the Exchange Act to exempt (i) the conversion of Shares into Parent Common Stock and (ii) the acquisition of Parent Common Stock pursuant to the terms of this Agreement by officers and directors of the Company subject to the reporting requirements of Section 16(a) of the Exchange Act or by employees of the Company who may become an officer or director of Parent subject to the reporting requirements of Section 16(a) of the Exchange Act. In furtherance of the foregoing, prior to the Effective Time, (i) the Company Board shall adopt resolutions that specify (A) the name of each individual whose disposition of Shares (including Company Options and other derivative securities with respect to Shares) is to be exempted, (B) the number of Shares (including Company Options and other derivative securities with respect to Shares) to be disposed of by each such individual and (C) that the approval is granted for purposes of exempting the disposition from Section 16(b) of the Exchange Act under Rule 16b-3(e) of the Exchange Act and (ii) the Parent Board shall adopt resolutions that specify (A) the name of each individual whose acquisition of shares of Parent Common Stock is to be exempted, (B) the number of Shares that may be converted into Parent Common Stock acquired by each such individual in the Merger and (C) that the approval is granted for purposes of exempting the acquisition from Section 16(b) of the Exchange Act under Rule 16b-3(d) of the Exchange Act. The parties hereby agree, which shall also be set forth in the



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foregoing resolutions, that all of the securities, including any options and derivative securities, referred to above serve a compensation related function. Parent and the Company shall provide to counsel of the other party for its review copies of such resolutions to be adopted by the Company Board and the Parent Board prior to such adoption and the Company shall provide Parent with such information as shall be reasonably necessary for the Parent Board to set forth the information required in the resolutions of the Parent Board.

**ARTICLE VII**

**Conditions**

7.1. *Conditions to Each Party's Obligation to Effect the Merger.* The respective obligation of each party to effect the Merger is subject to the satisfaction or waiver at or prior to the Effective Time of each of the following conditions:

(a) *Stockholder Approvals.* The Company Stockholder Approval and Parent Stockholder Approval shall each have been obtained.

(b) *Nasdaq National Market Listing.* The shares of Parent Common Stock issuable to the Company stockholders pursuant to this Agreement shall have been authorized for listing on the Nasdaq National Market upon official notice of issuance.

(c) *Regulatory Consents.* The waiting period applicable to the consummation of the Merger under the HSR Act shall have expired or been terminated and, other than the filing provided for in Section 1.3, all notices, reports, applications and other filings required to be made prior to the Effective Time by the Company or Parent or any of their respective Subsidiaries with, and all consents, registrations, approvals, permits, clearances and authorizations required to be obtained prior to the Effective Time by the Company or Parent or any of their respective Subsidiaries from, any Governmental Entity (collectively, *Governmental Consents*) in connection with the execution and delivery of this Agreement and the consummation of the Merger and the other transactions contemplated hereby by the Company, Parent and Merger Sub shall have been made or obtained (as the case may be), except those that the failure to make or to obtain are not, individually or in the aggregate, reasonably likely to have a Company Material Adverse Effect or a Parent Material Adverse Effect.

(d) *Litigation.* No court or other Governmental Entity of competent jurisdiction shall have enacted, issued, promulgated, enforced or entered any statute, law, ordinance, rule, regulation, judgment, determination, decree, injunction or other order (whether temporary, preliminary or permanent) that is in effect and restrains, enjoins or otherwise prohibits consummation of the Merger or the other transactions contemplated by this Agreement (collectively, an *Order*).

(e) *S-4.* The S-4 Registration Statement shall have become effective under the Securities Act. No stop order suspending the effectiveness of the S-4 Registration Statement shall have been issued by the SEC and remain in effect.

7.2. *Conditions to Obligations of Parent and Merger Sub.* The obligations of Parent and Merger Sub to effect the Merger are also subject to the satisfaction or waiver by Parent at or prior to the Effective Time of the following conditions:

(a) *Representations and Warranties.* The representations and warranties of the Company contained in this Agreement shall be true and correct in all respects (without giving effect to any limitation as to materiality or Company Material Adverse Effect or any similar limitation set forth therein) as of the date of this Agreement and, except to the extent such representations and warranties speak as of an earlier date, as of the Effective Time (as though made at and as of the Effective Time), except where the failure of such representations and warranties (other than Section 5.1(b) hereof, which must be true and correct in all material respects) to be so true and correct has not had and is not reasonably likely to have, individually or in the aggregate, a Company Material Adverse



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Effect. Parent shall have received at the Closing a certificate signed on behalf of the Company by an executive officer of the Company to the effect that such executive officer has read this Section 7.2(a) and the conditions set forth in this Section 7.2(a) have been satisfied.

(b) *Performance of Obligations of the Company.* The Company shall have performed in all material respects all obligations required to be performed by it under this Agreement at or prior to the Closing Date, and Parent shall have received a certificate signed on behalf of the Company by an executive officer of the Company to such effect.

(c) *Tax Opinion.* Parent shall have received the opinion of Fulbright & Jaworski L.L.P., counsel to Parent, dated the Closing Date, to the effect that the Merger will be treated for U.S. federal income tax purposes as a reorganization within the meaning of Section 368(a) of the Code, and that each of Parent and the Company will be a party to that reorganization within the meaning of Section 368(b) of the Code.

7.3. *Conditions to Obligation of the Company.* The obligation of the Company to effect the Merger is also subject to the satisfaction or waiver by the Company at or prior to the Effective Time of the following conditions:

(a) *Representations and Warranties.* The representations and warranties of Parent and Merger Sub contained in this Agreement shall be true and correct in all respects (without giving effect to any limitation as to materiality or Parent Material Adverse Effect or any similar limitation set forth therein) as of the date of this Agreement and, except to the extent such representations and warranties speak as of an earlier date, as of the Effective Time (as though made at and as of the Effective Time), except where the failure of such representations and warranties (other than Section 5.2(c) hereof, which must be true and correct in all material respects) to be so true and correct has not had and is not reasonably likely to have, individually or in the aggregate, a Parent Material Adverse Effect. The Company shall have received at the Closing a certificate signed on behalf of Parent by an executive officer of Parent to the effect that such executive officer has read this Section 7.3(a) and the conditions set forth in this Section 7.3(a) have been satisfied.

(b) *Performance of Obligations of Parent and Merger Sub.* Each of Parent and Merger Sub shall have performed in all material respects all obligations required to be performed by it under this Agreement at or prior to the Closing Date, and the Company shall have received a certificate signed on behalf of Parent and Merger Sub by an executive officer of Parent to such effect.

(c) *Tax Opinion.* The Company shall have received the opinion of Sullivan & Cromwell LLP, counsel to the Company, dated the Closing Date, to the effect that the Merger will be treated for U.S. federal income tax purposes as a reorganization within the meaning of Section 368(a) of the Code, and that each of Parent and the Company will be a party to that reorganization within the meaning of Section 368(b) of the Code.

**ARTICLE VIII**

**Termination**

8.1. *Termination by Mutual Consent.* This Agreement may be terminated and the Merger may be abandoned at any time prior to the Effective Time, whether before or after the Company Stockholder Approval has been obtained, by mutual written consent of the Company and Parent by

action of their respective Boards of Directors.

8.2. *Termination by Either Parent or the Company.* This Agreement may be terminated and the Merger may be abandoned at any time prior to the Effective Time by action of the Board of Directors of either Parent or the Company:

(a) if the Merger shall not have been consummated by December 31, 2005 whether such date is before or after the date of approval by the stockholders of the Company (the *Termination Date* ); *provided, however*, that the right to terminate this Agreement pursuant to this Section 8.2(a) shall not be available to any party that has breached in any material respect its obligations under this Agreement in any manner that shall have proximately contributed to the failure of the Merger to be consummated by the Termination Date.

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(b) if the Company Stockholder Approval shall not have been obtained at the Company Stockholders Meeting duly convened therefor or at any reconvened meeting following an adjournment or postponement thereof.

(c) if the Parent Stockholder Approval shall not have been obtained at the Parent Stockholders Meeting duly convened therefor or at any reconvened meeting following an adjournment or postponement thereof.

(d) if any Order permanently restraining, enjoining or otherwise prohibiting consummation of the Merger shall become final and non-appealable (whether before or after the approval by the stockholders of the Company).

8.3. *Termination by the Company.* This Agreement may be terminated and the Merger may be abandoned at any time prior to the Effective Time, whether before or after the Company Stockholder Approval has been obtained, by action of the Company Board:

(a) if (i) the Company Board authorizes the Company, subject to complying with the terms of this Agreement, to enter into a binding written agreement concerning a transaction that constitutes a Superior Proposal, (ii) Parent does not make, within the time period specified in the last paragraph of Section 6.2(b), an offer that the Company Board determines, in good faith after consultation with its financial advisors, is at least as favorable, from a financial point of view, to the stockholders of the Company as the Superior Proposal and (iii) the Company prior to such termination pays to Parent in immediately available funds any fees required to be paid pursuant to Section 8.5.

(b) within 20 business days following the date on which the Parent Board shall have effected a Change in Parent Recommendation.

(c) if there has been a breach of any representation, warranty, covenant or agreement made by Parent or Merger Sub in this Agreement, or any such representation and warranty shall have become untrue after the date of this Agreement, such that Section 7.3(a) or 7.3(b) would not be satisfied and such breach or condition is not curable or, if curable, is not cured within 30 calendar days after written notice thereof is given by the Company to Parent.

8.4. *Termination by Parent.* This Agreement may be terminated and the Merger may be abandoned at any time prior to the Effective Time by action of the Parent Board:

(a) within 20 business days following the date on which the Company Board shall have effected a Change in Company Recommendation.

(b) if there has been a breach of any representation, warranty, covenant or agreement made by the Company in this Agreement, or any such representation and warranty shall have become untrue after the date of this Agreement, such that Section 7.2(a) or 7.2(b) would not be satisfied and such breach or condition is not curable or, if curable, is not cured within 30 calendar days after written notice thereof is given by Parent to the Company.

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8.5. *Effect of Termination and Abandonment.* (a) In the event of termination of this Agreement and the abandonment of the Merger pursuant to this Article VIII, this Agreement (other than as set forth in Section 9.1) shall become void and of no effect with no liability on the part of any party hereto (or of any of its directors, officers, employees, agents, legal and financial advisors or other representatives); *provided, however*, except as otherwise provided herein, no such termination shall relieve any party hereto of any liability or damages resulting from any willful or intentional breach of this Agreement.

(b) The Company agrees to pay Parent a fee in immediately available funds (in recognition of the fees and expenses incurred to date by Parent in connection with the matters contemplated hereby) of \$26,000,000 (the *Termination Fee* ) if this Agreement is terminated:

(i) (A) by Parent or the Company as permitted by Section 8.2(b), (B) after the date of this Agreement and prior to the Company Stockholders Meeting, a third party has made a bona fide written Acquisition

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Proposal that has been publicly disclosed and not publicly withdrawn prior to the Company Stockholders Meeting and (C) within nine months of such termination the Company or any of its Subsidiaries shall have entered into any acquisition agreement or consummated any Acquisition Proposal (for purposes of the foregoing clause the term Acquisition Proposal has the meaning assigned to such term in Section 6.2(d) except that the references to 20% in the definition are deemed to be references to 50% );

(ii) by the Company pursuant to Section 8.3(a); or

(iii) by Parent pursuant to Section 8.4(a).

The Termination Fee shall be paid promptly by the Company, but in no event later than: (x) two business days after the first to occur of the execution of an acquisition agreement or the consummation of the Acquisition Proposal, in the case of clause (i) above; (y) on the date of termination of this Agreement in the case of clause (ii) above; and (z) two business days after termination of this Agreement in the case of clause (iii) above. The Company's payment shall be the sole and exclusive remedy of Parent and Merger Sub against the Company and any of its Subsidiaries and their respective directors, officers, employees, agents, advisors or other representatives with respect to the breach of any covenant or agreement giving rise to such payment. The Company acknowledges that the agreements contained in this Section 8.5(b) are an integral part of the transactions contemplated by this Agreement, and that, without these agreements, Parent and Merger Sub would not enter into this Agreement.

(c) Parent agrees to pay the Company a fee in immediately available funds (in recognition of the fees and expenses incurred to date by the Company in connection with the matters contemplated hereby) in an amount equal to the Termination Fee if this Agreement is terminated by the Company or Parent pursuant to Section 8.2(c) or by the Company pursuant to Section 8.3(b). The Termination Fee shall be paid promptly by Parent, but in no event later than two business days after the date of such termination. Parent's payment shall be the sole and exclusive remedy of the Company against Parent and Merger Sub and any other of Parent's Subsidiaries and their respective directors, officers, employees, agents, advisors or other representatives with respect to the breach of any covenant or agreement giving rise to such payment. Each of Parent and Merger Sub acknowledges that the agreements contained in this Section 8.5(c) are an integral part of the transactions contemplated by this Agreement, and that, without these agreements, the Company would not enter into this Agreement.

**ARTICLE IX**

**Miscellaneous and General**

9.1. *Survival.* This Article IX and the agreements of the Company, Parent and Merger Sub contained in Article IV (Effect of the Merger on the Capital Stock and Membership Interests of the Constituent Entities; Exchange of Certificates), Sections 6.11 (Employee Benefits/Labor Matters), 6.14 (Appointment of Additional Director), 6.16 (Indemnification; Directors and Officers Insurance) and 6.17(c) (Section 16 Matters) shall survive the consummation of the Merger. This Article IX, the agreements of the Company, Parent and Merger Sub contained in Section 6.15 (Expenses), Section 8.5 (Effect of Termination and Abandonment) and the Confidentiality Agreement shall survive the termination of this Agreement. All other representations, warranties, covenants and agreements in this Agreement shall not survive the consummation of the Merger or the termination of this Agreement.

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9.2. *Modification or Amendment.* Subject to the provisions of applicable law, at any time prior to the Effective Time, this Agreement may be amended, modified or supplemented in writing by the parties hereto, by action of the Board of Directors of the respective parties.

9.3. *Waiver of Conditions.* The conditions to each of the parties' obligations to consummate the Merger are for the sole benefit of such party and may be waived by such party in whole or in part to the extent permitted by applicable Law.

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9.4. *Counterparts.* This Agreement may be executed in any number of counterparts, each such counterpart being deemed to be an original instrument, and all such counterparts shall together constitute the same agreement.

9.5. **GOVERNING LAW AND VENUE; WAIVER OF JURY TRIAL.** (a) **THIS AGREEMENT SHALL BE DEEMED TO BE MADE IN AND IN ALL RESPECTS SHALL BE INTERPRETED, CONSTRUED AND GOVERNED BY AND IN ACCORDANCE WITH THE LAW OF THE STATE OF DELAWARE WITHOUT REGARD TO THE CONFLICT OF LAW PRINCIPLES THEREOF.** The parties hereby irrevocably submit to the jurisdiction of the courts of the State of Delaware and the Federal courts of the United States of America located in the State of Delaware solely in respect of the interpretation and enforcement of the provisions of this Agreement and of the documents referred to in this Agreement, and in respect of the transactions contemplated hereby, and hereby waive, and agree not to assert, as a defense in any action, suit or proceeding for the interpretation or enforcement hereof or of any such document, that it is not subject thereto or that such action, suit or proceeding may not be brought or is not maintainable in said courts or that the venue thereof may not be appropriate or that this Agreement or any such document may not be enforced in or by such courts, and the parties hereto irrevocably agree that all claims with respect to such action or proceeding shall be heard and determined in such a Delaware State or Federal court. The parties hereby consent to and grant any such court jurisdiction over the person of such parties and, to the extent permitted by law, over the subject matter of such dispute and agree that mailing of process or other papers in connection with any such action or proceeding in the manner provided in Section 9.6 or in such other manner as may be permitted by law shall be valid and sufficient service thereof.

(b) EACH PARTY ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY WHICH MAY ARISE UNDER THIS AGREEMENT IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES, AND THEREFORE EACH SUCH PARTY HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT SUCH PARTY MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT, OR THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT. EACH PARTY CERTIFIES AND ACKNOWLEDGES THAT (i) NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER, (ii) EACH PARTY UNDERSTANDS AND HAS CONSIDERED THE IMPLICATIONS OF THIS WAIVER, (iii) EACH PARTY MAKES THIS WAIVER VOLUNTARILY, AND (iv) EACH PARTY HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION 9.5.

9.6. *Notices.* Any notice, request, instruction or other document to be given hereunder by any party to the others shall be in writing and delivered personally or sent by registered or certified mail, postage prepaid, or by facsimile:

*if to the Company:*

USF Corporation

8550 W. Bryn Mawr Avenue

Suite 700

Chicago, Illinois 60631

Attention: Richard C. Pagano, Esq.

Fax: (773) 824-2227





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*with a copy to:*

Sullivan & Cromwell LLP

125 Broad Street

New York, NY 10004

Attention: Joseph B. Frumkin, Esq.

Fax: (212) 558-3588

*if to Parent or Merger Sub:*

Yellow Roadway Corporation

10990 Roe Avenue

Overland Park, Kansas 66211

Attention: Daniel J. Churay, Esq.

Fax: (913) 696-6116

*with a copy to:*

Fulbright & Jaworski L.L.P.

1301 McKinney, Suite 1500

Houston, Texas 77010-3095

Attention: Charles L. Strauss, Esq.

Fax: (713) 651-5246

or to such other persons or addresses as may be designated in writing by the party to receive such notice as provided above.

9.7. *Entire Agreement; NO OTHER REPRESENTATIONS.* This Agreement (including any exhibits hereto), the Company Disclosure Letter, the Parent Disclosure Letter and the Confidentiality Agreement constitute the entire agreement, and supersede all other prior agreements, understandings, representations and warranties both written and oral, among the parties, with respect to the subject matter hereof. EACH PARTY HERETO AGREES THAT, EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES CONTAINED IN THIS AGREEMENT, NEITHER PARENT AND MERGER SUB NOR THE COMPANY MAKES ANY OTHER REPRESENTATIONS OR WARRANTIES, AND EACH HEREBY DISCLAIMS ANY OTHER REPRESENTATIONS OR WARRANTIES MADE BY ITSELF OR ANY OF ITS OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, FINANCIAL AND LEGAL ADVISORS OR OTHER REPRESENTATIVES, WITH RESPECT TO THE EXECUTION AND DELIVERY OF THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY, NOTWITHSTANDING THE DELIVERY OR DISCLOSURE TO THE OTHER OR THE OTHER S REPRESENTATIVES OF ANY DOCUMENTATION OR OTHER INFORMATION WITH RESPECT TO ANY ONE OR MORE OF THE FOREGOING.

9.8. *No Third Party Beneficiaries.* Except as provided in Article IV (Effect of the Merger on the Capital Stock and Membership Interests of the Constituent Entities; Exchange of Certificates), Sections 6.11 (Employee Benefits/Labor Matters) and 6.16 (Indemnification; Directors and Officers Insurance), this Agreement is not intended to, and does not, confer upon any Person other than the parties who are signatories hereto any rights or remedies hereunder. The parties hereto further agree that the rights of third party beneficiaries under Article IV, Sections 6.11 and 6.16 shall not arise unless and until the Effective Time occurs.

9.9. *Obligations of Parent and of the Company.* Whenever this Agreement requires a Subsidiary of Parent to take any action, such requirement shall be deemed to include an undertaking on the part of Parent to cause such Subsidiary to take such action. Whenever this Agreement requires a Subsidiary of the Company to take any action, such requirement shall be deemed to include an undertaking on the part of the Company to cause such Subsidiary to take such action and, after the Effective Time, on the part of the Surviving Entity to cause such Subsidiary to take such action.

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9.10. *Severability.* The provisions of this Agreement shall be deemed severable and the invalidity or unenforceability of any provision shall not affect the validity or enforceability or the other provisions hereof. If any provision of this Agreement, or the application thereof to any Person or any circumstance, is invalid or unenforceable, (a) a suitable and equitable provision shall be substituted therefor in order to carry out, so far as may be valid and enforceable, the intent and purpose of such invalid or unenforceable provision and (b) the remainder of this Agreement and the application of such provision to other Persons or circumstances shall not be affected by such invalidity or unenforceability, nor shall such invalidity or unenforceability affect the validity or enforceability of such provision, or the application thereof, in any other jurisdiction.

9.11. *Interpretation; Construction.*

(a) The table of contents and headings herein are for convenience of reference only, do not constitute part of this Agreement and shall not be deemed to limit or otherwise affect any of the provisions hereof. Where a reference in this Agreement is made to a Section or Exhibit, such reference shall be to a Section of or Exhibit to this Agreement unless otherwise indicated. Whenever the words include, includes or including are used in this Agreement, they shall be deemed to be followed by the words without limitation.

(b) The parties have participated jointly in negotiating and drafting this Agreement. In the event that an ambiguity or a question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties, 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.

(c) The parties agree that any action that may be taken by the Parent Board or the Company Board may, to the extent permitted by applicable Law and except with respect to the actions described in Sections 5.1(c)(ii) and 5.2(d)(ii) hereof, instead be taken by a duly authorized committee of the Parent Board or the Company Board, as the case may be, and any such action shall be deemed for purposes of this Agreement the action of the full Parent Board or the full Company Board, respectively.

9.12. *Assignment.* This Agreement shall not be assignable by operation of law or otherwise; *provided, however,* that Parent may designate, by written notice to the Company, another wholly owned direct or indirect Subsidiary to be a Constituent Corporation in lieu of Merger Sub, in which event all references herein to Merger Sub shall be deemed references to such other Subsidiary, except that all representations and warranties made herein with respect to Merger Sub as of the date of this Agreement shall be deemed representations and warranties made with respect to such other Subsidiary as of the date of such designation. Any purported assignment in violation of this Agreement is void.

9.13. *Knowledge.* As used in this Agreement, (a) *to the Knowledge of the Company* means to the actual knowledge of the individuals listed on Section 9.13(a) of the Company Disclosure Letter, and (b) *to the Knowledge of Parent* means to the actual knowledge of the individuals listed on Section 9.13(b) of the Parent Disclosure Letter.



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**EXHIBIT A-1**

(Managers of Surviving Entity from and after the Effective Time)

Todd Hacker

Terry Gerrond

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**EXHIBIT A-2**

(Officers of Surviving Entity from and after the Effective Time)

Thomas E. Bergmann	Interim Chief Executive Officer and Chief Financial Officer
Todd Hacker	Sr. Vice President and Treasurer
Terry Gerrond	Sr. Vice President, Tax
G. David Gerrard	Sr. Vice President, Purchasing
Richard C. Pagano	Sr. Vice President, General Counsel & Secretary
Gary Beggs	Sr. Vice President, Business Processes
David A. Kramer	Sr. Vice President, Sales
Brenda Landry	Vice President and Assistant Secretary
James T. Castro	Vice President, Controller
Chester J. Popkowski	Vice President, Finance & Internal Audit
Thomas W. Clarke	Vice President, Risk Management
Stephen G. Dill	Vice President, Taxes
Patrick M. Malone	Vice President, Sales & Marketing

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**EXHIBIT B**

(Form of Company Tax Representation Letter to be Placed on Company Letterhead)

[DATE]

Sullivan & Cromwell LLP

125 Broad Street

New York, New York 10004-2498

Fulbright & Jaworski L.L.P.

1301 McKinney, Suite 5100

Houston, Texas 77010-3095

Ladies and Gentlemen:

We have been asked to make certain representations and certifications in connection with the opinions to be delivered pursuant to the Agreement and Plan of Merger (the Agreement), dated as of February 27, 2005, by and among Yellow Roadway Corporation, a Delaware corporation (Parent), Yankee II LLC, a Delaware limited liability company and wholly-owned subsidiary of Parent (Merger Sub), and USF Corporation, a Delaware corporation (the Company). In connection with the issuance of such opinions, the undersigned, after due inquiry and investigation, hereby represents and certifies, on behalf of the Company, that the statements and representations contained herein are true, correct and complete in all material respects at the date hereof and will be true, correct and complete in all material respects as of the Effective Time, as if made at that time:<sup>1</sup>

1. The facts, representations and covenants relating to the Merger (as defined and described in the Agreement) and related transactions that are set forth in the Agreement, the S-4 Registration Statement and the other documents included or described in the S-4 Registration Statement, each as amended or supplemented through the date hereof are true, correct and complete in all material respects. The Merger will be consummated strictly in accordance with the Agreement and pursuant to Delaware law. To the extent they pertain to the Company, all representations and warranties in the Agreement are correct and all obligations contained therein will be complied with; all other such representations and warranties are, to the best knowledge of the management of the Company, after due inquiry, correct in all material respects. The Merger is being effected for bona fide business reasons and not for the purpose of tax avoidance.
2. The fair market value of the Parent Common Stock and other consideration received by each shareholder of the Company will be, at the Effective Time, approximately equal to the fair market value of the Company Common Stock surrendered in exchange therefor pursuant to the Merger, as determined on the basis of arm's-length negotiations among the parties. In connection with the Merger, no

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holder of Company Common Stock will receive in exchange for Company Common Stock, directly or indirectly, any consideration from Parent or any corporation related to Parent other than the Merger Consideration.

3. At least forty-five percent (45%) of the fair market value of the Company's shareholders' proprietary interests in the Company will be preserved as a proprietary interest in Parent received in the Merger. Proprietary interests will not be preserved to the extent that, in connection with the reorganization: (i) prior to the Merger an extraordinary distribution (*i.e.*, a distribution other than a regular, normal dividend) is made with respect to Company Common Stock; (ii) prior to the Merger a redemption or acquisition of Company Common Stock is made by the Company or a person related to the Company

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<sup>1</sup> Terms used but not defined herein have the meaning ascribed to them in the Agreement.



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as defined in Regulation § 1.368-1(e)(3)<sup>2</sup> (a Company Related Person ); (iii) Parent or a person related to Parent as defined in Regulation § 1.368-1(e)(3) (a Parent Related Person ) acquires Company Common Stock for consideration other than Parent Common Stock; or (iv) following the Merger, Parent redeems its stock issued in the Merger or a Parent Related Person acquires, for consideration other than Parent Common Stock, Parent Common Stock issued in the Merger. For purposes of this representation: (i) any reference to Parent or the Company includes a reference to any successor or predecessor of such corporation, except that the Company is not treated as a predecessor of Parent and Parent is not treated as a successor of the Company; (ii) each partner of a partnership will be treated as owning or acquiring any stock owned or acquired, as the case may be, by the partnership (and as having paid any consideration paid by the partnership to acquire such stock) in accordance with that partner's interest in the partnership; and (iii) an acquisition of Parent Common Stock or Company Common Stock by a person acting as an intermediary for Parent, the Company, a Parent Related Person or Company Related Person will be treated as made by Parent, the Company, Parent Related Person or Company Related Person, respectively.

4. Neither the Company nor any Company Related Person has acquired (or has any plan or intention to acquire prior to the Merger) any Company Common Stock (other than in connection with a stock repurchase program described in Revenue Ruling 99-58). During the three (3) year period prior to the Merger, the Company has not made, and does not have any plan or intention to make prior to the Merger, any distributions (other than dividends made in the ordinary course of business) in contemplation of or otherwise in connection with the Merger.
5. At the Effective Time, the Company will be conducting the Company's historic business or using a significant portion of the Company's historic business assets in a business, and, to the best knowledge of the Company, following the Merger, Parent or Merger Sub will continue the Company's historic business or will use a significant portion of the Company's historic business assets in a business, as such terms are used in Regulation § 1.368-1(d).
6. The liabilities of the Company assumed by Merger Sub and the liabilities to which the transferred assets of the Company are subject were incurred by the Company in the ordinary course of its business.
7. Parent, the Company, and the shareholders of the Company will pay their respective expenses, if any, incurred in connection with the Merger, except as otherwise provided in Section 6.12 of the Merger Agreement.
8. There is no intercorporate indebtedness existing between Parent (or any of its subsidiaries) and the Company (or any of its subsidiaries) that was issued, acquired or will be settled at a discount.
9. The Company is not an investment company with the meaning of Sections 368(a)(2)(F)(iii) and (iv).
10. The Company is not under the jurisdiction of a court in a Title 11 or similar case within the meaning of Section 368(a)(3)(A).
11. At the Effective Time, the fair market value of the assets of the Company transferred to Merger Sub will equal or exceed the sum of the liabilities assumed by Merger Sub, plus the amount of liabilities, if any, to which the assets are subject.
12. The payment of cash in lieu of fractional shares of Parent Common Stock is solely for the purpose of avoiding the expense and inconvenience to Parent of issuing fractional shares and does not represent separately bargained-for consideration. The total cash consideration that will be paid in the transaction to the Company shareholders instead of issuing fractional shares of Parent Common Stock will not exceed one percent (1%) of the total consideration that will be issued in the transaction to the Company

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<sup>2</sup> Except as otherwise indicated, all Section and Regulation references contained herein refer, respectively, to sections of the Internal Revenue Code of 1986, as amended, and to the Treasury Regulations promulgated thereunder.



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shareholders in exchange for their shares of Company Common Stock. The fractional share interests of each Company shareholder will be aggregated, and (with the possible exception of Company Common Stock held in multiple accounts) no Company shareholder will receive cash in an amount greater to or greater than the value of one full share of Parent Common Stock.

13. Neither the Company nor any of its current or former subsidiaries has been a distributing corporation or a controlled corporation in a distribution of stock intended to qualify for tax-free treatment under Section 355(a): (i) at any time during the two-year period prior to the date of the Agreement, (ii) at any time during the period commencing on the date of the Agreement and ending at the Effective Time, or (iii) which could otherwise constitute part of a plan or series of related transactions (within the meaning of Section 355(e)) in conjunction with and including the Merger.
14. None of the compensation received by any shareholder-employee of the Company will be separate consideration for, or allocable to, any of their shares of Company Common Stock; none of the shares of Parent Common Stock received by any shareholder-employee will be separate consideration for, or allocable to, any employment, consulting or similar agreement; and the compensation paid to any shareholder-employee will be for services actually rendered and will be commensurate with amounts paid to third parties bargaining at arm's-length for similar services.
15. The Agreement, the documents described in the Agreement and the S-4 Registration Statement represent the entire understanding between or among (i) Parent and its subsidiaries and (ii) the Company and its subsidiaries and, to the best knowledge of the management of the Company, between or among such entities and the affiliates and stockholders of Parent and the Company with respect to the Merger, and there are no other written or oral agreements regarding the Merger other than those expressly referred to in the Agreement, the documents described in the Agreement and the S-4 Registration Statement.
16. After the Merger, the shareholders of the Company will not be in control of Parent within the meaning of Section 368(a)(2)(H).
17. To the best knowledge of the management of the Company, none of the representations contained in the representation letters provided by Parent to Sullivan & Cromwell LLP and Fulbright & Jaworski L.L.P. on the date hereof are untrue, incorrect or incomplete as of the date hereof or will be untrue, incorrect or incomplete at the Effective Time.
18. By operation of law, the following events will occur simultaneously at the Effective Time: (i) all of the assets and liabilities of the Company will become assets and liabilities of Merger Sub and (ii) the Company will cease its legal existence for all purposes.
19. The Company is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware.
20. The Company will not take any position on any federal, state, or local income or franchise tax return, or take any other tax reporting position that is inconsistent with the treatment of the Merger as a reorganization within the meaning of Section 368(a) or with any of the foregoing representations, unless otherwise required by a final judgment, decree or other order which addresses the Merger by a court of competent jurisdiction, or by applicable state or local income or franchise tax law (and then only to the extent required by such applicable law). The Company is not aware of any facts that would cause the Merger to fail to qualify as a reorganization within the meaning of Section 368(a).
21. The undersigned is authorized to make all the representations set forth herein on behalf of the Company.

The Company understands that Sullivan & Cromwell LLP and Fulbright & Jaworski L.L.P. have not undertaken to independently verify the facts providing the basis of this letter nor have they been asked to do so. The Company understands that Sullivan & Cromwell LLP and Fulbright & Jaworski L.L.P. will rely on the statements and representations set forth herein in rendering their respective opinions pursuant to the Agreement



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concerning certain of the United States federal income tax consequences of the Merger and hereby commit to inform them and Parent if, for any reason, any of the facts described herein or in the S-4 Registration Statement, or any of the foregoing representations or statements, ceases to be true prior to the Effective time.

IN WITNESS WHEREOF, I have caused this representation letter to be executed on this      th day of [                      ], 2005.

USF CORPORATION

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

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**EXHIBIT C**

(Form of Parent Tax Representation Letter to be Placed on Parent Letterhead)

[DATE]

Fulbright & Jaworski L.L.P.

1301 McKinney, Suite 5100

Houston, Texas 77010-3095

Sullivan & Cromwell LLP

125 Broad Street

New York, New York 10004-2498

Ladies and Gentlemen:

We have been asked to make certain representations and certifications in connection with the opinions to be delivered pursuant to the Agreement and Plan of Merger (the Agreement), dated as of February 27, 2005, by and among Yellow Roadway Corporation, a Delaware corporation (Parent), Yankee II LLC, a Delaware limited liability company and wholly-owned subsidiary of Parent (Merger Sub), and USF Corporation, a Delaware corporation (the Company). In connection with the issuance of such opinions, each of the undersigned, after due inquiry and investigation, hereby represents and certifies, on behalf of Parent and Merger Sub respectively, that the statements and representations contained herein are true, correct and complete in all material respects at the date hereof and will be true, correct and complete in all material respects as of the Effective Time, as if made at that time. To the extent applicable, representations made with respect to Parent shall be deemed made with respect to Merger Sub:<sup>3</sup>

1. The facts, representations and covenants relating to the Merger (as defined and described in the Agreement) and related transactions that are set forth in the Agreement, the S-4 Registration Statement and the other documents included or described in the S-4 Registration Statement, each as amended or supplemented through the date hereof are true, correct and complete in all material respects. The Merger will be consummated strictly in accordance with the Agreement and pursuant to Delaware law. To the extent they pertain to Parent or Merger Sub, all representations and warranties in the Merger Agreement are correct and all obligations contained therein will be complied with; all other such representations and warranties are, to the best knowledge of the management of Parent, after due inquiry, correct in all material respects. The Merger is being effected for bona fide business reasons and not for the purpose of tax avoidance.
2. The fair market value of the Parent Common Stock and other consideration received by each shareholder of the Company will be, at the Effective Time, approximately equal to the fair market value of the Company Common Stock surrendered in exchange therefor

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pursuant to the Merger, as determined on the basis of arm's-length negotiations among the parties. In connection with the Merger, no holder of Company Common Stock will receive in exchange for Company Common Stock, directly or indirectly, any consideration from Parent or any corporation related to Parent other than the Merger Consideration.

3. At least forty-five percent (45%) of the fair market value of the Company's shareholders' proprietary interests in the Company will be preserved as a proprietary interest in Parent received in the Merger. Proprietary interests will not be preserved to the extent that, in connection with the reorganization: (i) prior to the Merger an extraordinary distribution (*i.e.*, a distribution other than a regular, normal dividend) is made with respect to Company Common Stock; (ii) prior to the Merger a redemption or

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<sup>3</sup> Terms used but not defined herein have the meaning ascribed to them in the Agreement.

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acquisition of Company Common Stock is made by the Company or a person related to the Company as defined in Regulation § 1.368-1(e)(3)<sup>4</sup> (a Company Related Person ); (iii) Parent or a person related to Parent as defined in Regulation § 1.368-1(e)(3) (a Parent Related Person ) acquires Company Common Stock for consideration other than Parent Common Stock; or (iv) following the Merger, Parent redeems its stock issued in the Merger or a Parent Related Person acquires, for consideration other than Parent Common Stock, Parent Common Stock issued in the Merger. For purposes of this representation: (i) any reference to Parent or the Company includes a reference to any successor or predecessor of such corporation, except that the Company is not treated as a predecessor of Parent and Parent is not treated as a successor of the Company; (ii) each partner of a partnership will be treated as owning or acquiring any stock owned or acquired, as the case may be, by the partnership (and as having paid any consideration paid by the partnership to acquire such stock) in accordance with that partner's interest in the partnership; and (iii) an acquisition of Parent Common Stock or Company Common Stock by a person acting as an intermediary for Parent, the Company or a Parent Related Person or Company Related Person will be treated as made by Parent, the Company, Parent Related Person or Company Related Person, respectively.

4. There is no plan or intention on the part of Parent or any Parent Related Person to purchase, exchange, redeem, or otherwise acquire, directly or indirectly, any Parent Common Stock issued in the Merger (excluding any fractional shares of Parent Common stock exchanged for cash in the Merger). For purposes of this representation, a person is considered to own or acquire stock owned or acquired (as the case may be) by a partnership in which such person is a partner in proportion to such person's interest in the partnership.
5. Parent has no plan or intent to, following the Merger, sell, distribute, or otherwise dispose of any of the assets of the Company acquired in the Merger, except for dispositions made in the ordinary course of business, transfers of assets to one or more corporations controlled (within the meaning of Section 368(c)) in each case by the transferor corporation in accordance with Section 368(a)(2)(C).
6. Following the Merger, Parent, Merger Sub or another member of Parent's qualified group will continue the Company's historic business or use a significant portion of the Company's historic business assets in a business. For purposes of this representation letter, Parent's qualified group means one or more chains of corporations connected through stock ownership with Parent, but only if Parent owns directly stock meeting the requirements of Section 368(c) in at least one other corporation, and stock meeting the requirements of Section 368(c) in each of the corporations (except Parent) is owned directly by one of the other corporations. In addition, Parent will be treated as owning its proportionate share of the Company's business assets used in a business or any partnership in which members of Parent's qualified group either own a significant interest or have active and substantial management functions as a partner with respect to that partnership business.
7. At all times prior to and after the Effective Time, Merger Sub has been and will be a disregarded entity for United States federal income tax purposes pursuant to Regulation § 301.7701-3(b) (a Disregarded Entity ), no election to be treated as a corporation has been or will be made under Regulation § 301.7701-3(b) with respect to Merger Sub, and neither Parent nor Merger Sub has any plan or intention to take any action or fail to take any action that would result in Merger Sub becoming an entity that is not a Disregarded Entity.
8. Parent does not have any plan or intention to sell or otherwise dispose of its membership interests in Merger Sub to any person that is not a member of Parent's qualified group.

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<sup>4</sup> Except as otherwise indicated, all Section and Regulation references contained herein refer, respectively, to sections of the Internal Revenue Code of 1986, as amended, and to the Treasury Regulations promulgated thereunder.



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9. To the best knowledge of Parent, the liabilities of the Company assumed by Merger Sub and the liabilities to which the transferred assets of the Company are subject were incurred by the Company in the ordinary course of its business.
10. Parent, the Company and the shareholders of the Company will pay their respective expenses, if any, incurred in connection with the Merger, except as otherwise provided in Section 6.12 of the Merger Agreement.
11. There is no intercorporate indebtedness existing between Parent (or any of its subsidiaries) and the Company (or any of its subsidiaries) that was issued, acquired or will be settled at a discount.
12. Parent is not an investment company with the meaning of Sections 368(a)(2)(F)(iii) and (iv).
13. To the best knowledge of Parent, the Company is not under the jurisdiction of a court in a Title 11 or similar case within the meaning of Section 368(a)(3)(A).
14. At the Effective Time, the fair market value of the assets of the Company transferred to Merger Sub will equal or exceed the sum of the liabilities assumed by Merger Sub, plus the amount of liabilities, if any, to which the assets are subject.
15. The payment of cash in lieu of fractional shares of Parent Common Stock is solely for the purpose of avoiding the expense and inconvenience to Parent of issuing fractional shares and does not represent separately bargained-for consideration. The total cash consideration that will be paid in the transaction to the Company shareholders instead of issuing fractional shares of Parent Common Stock will not exceed one percent (1%) of the total consideration that will be issued in the transaction to the Company shareholders in exchange for their shares of Company Common Stock. The fractional share interests of each Company shareholder will be aggregated, and (with the possible exception of Company Common Stock held in multiple accounts) no Company shareholder will receive cash in an amount greater to or greater than the value of one full share of Parent Common Stock.
16. Neither Parent nor any of its current or former subsidiaries has been a distributing corporation or a controlled corporation in a distribution of stock intended to qualify for tax-free treatment under Section 355(a): (i) at any time during the two-year period prior to the date of the Agreement, (ii) at any time during the period commencing on the date of the Agreement and ending at the Effective Time, or (iii) which could otherwise constitute part of a plan or series of related transactions (within the meaning of Section 355(e)) in conjunction with and including the Merger.
17. None of the compensation received by any shareholder-employee of the Company will be separate consideration for, or allocable to, any of their shares of Company Common Stock; none of the shares of Parent Common Stock received by any shareholder-employee will be separate consideration for, or allocable to, any employment, consulting or similar agreement; and the compensation paid to any shareholder-employee will be for services actually rendered and will be commensurate with amounts paid to third parties bargaining at arm's-length for similar services.
18. The Agreement, the documents described in the Agreement and the S-4 Registration Statement represent the entire understanding between or among (i) Parent and its subsidiaries, and (ii) the Company and its subsidiaries and, to the best knowledge of the management of Parent, between or among such entities and the affiliates and stockholders of Parent and the Company with respect to the Merger, and there are no other written or oral agreements regarding the Merger other than those expressly referred to in the Agreement, the documents described in the Agreement and the S-4 Registration Statement.
19. To the best knowledge of the management of Parent and Merger Sub, none of the representations contained in the representation letters provided by the Company to Fulbright & Jaworski L.L.P. and Sullivan & Cromwell LLP on the date hereof are untrue, incorrect or incomplete as of the date hereof or will be untrue, incorrect or incomplete at the Effective Time.



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20. Neither Parent nor Merger Sub will take any position on any federal, state, or local income or franchise tax return, or take any other tax reporting position that is inconsistent with the treatment of the Merger as a reorganization within the meaning of Section 368(a) or with any of the foregoing representations, unless otherwise required by a final judgment, decree or other order which addresses the Merger by a court of competent jurisdiction, or by applicable state or local income or franchise tax law (and then only to the extent required by such applicable law). Neither Parent nor Merger Sub is aware of any facts that would cause the Merger to fail to qualify as a reorganization within the meaning of Section 368(a).
21. After the Merger, the shareholders of the Company will not be in control of Parent within the meaning of Section 368(a)(2)(H).
22. Neither Parent nor any corporation related to Parent now owns, directly or indirectly, nor has owned during the past five (5) years, directly or indirectly, any stock of the Company.
23. Merger Sub was formed solely for the purpose of effecting the Merger and has conducted and will conduct no business or other activities and has or will have no assets other than assets necessary to its formation and to the consummation of the Merger.
24. By operation of law, the following events will occur simultaneously at the Effective Time: (i) all of the assets and liabilities of the Company will become assets and liabilities of Merger Sub, and (ii) the Company will cease its legal existence for all purposes.
25. Parent is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. Merger Sub is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware. Parent directly holds one hundred percent (100%) of the limited liability company membership interests of Merger Sub.
26. The undersigned are authorized to make all the representations set forth herein on behalf of Parent and Merger Sub.

Parent and Merger Sub understand that Fulbright & Jaworski L.L.P. and Sullivan & Cromwell LLP have not undertaken to independently verify the facts providing the basis of this letter nor have they been asked to do so. Parent and Merger Sub understand that Fulbright & Jaworski L.L.P. and Sullivan & Cromwell LLP will rely on the statements and representations set forth herein in rendering their respective opinions pursuant to the Agreement concerning certain of the United States federal income tax consequences of the Merger and hereby commit to inform them and the Company if, for any reason, any of the facts described herein or in the S-4 Registration Statement, or any of the foregoing representations or statements ceases to be true prior to the Effective Time.

IN WITNESS WHEREOF, I have caused this representation letter to be executed on this      th day of [                      ], 2005.

YELLOW ROADWAY CORPORATION

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

YANKEE II LLC

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



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**EXHIBIT D**

(Affiliates Letter)

[•], 2005

Ladies and Gentlemen:

I have been advised that I may be deemed to [be][have been] an affiliate of USF Corporation, a Delaware corporation (the *Company*), as of the time of the special meeting of stockholders of the Company in connection with the Merger (as defined below), as the term affiliate is defined for purposes of paragraphs (c) and (d) of Rule 145 of the rules and regulations of the Securities and Exchange Commission (the *Commission*) under the Securities Act of 1933, as amended (together with the rules and regulations promulgated thereunder, the *Securities Act*). Pursuant to the terms of the Agreement and Plan of Merger, dated as of February 27, 2005 (the *Merger Agreement*), by and among the Company, Yellow Roadway Corporation, a Delaware corporation (*Parent*), and Yankee II LLC, a Delaware limited liability company and a wholly owned subsidiary of Parent (*Merger Sub*), the Company will be merged with and into Merger Sub, in consideration of cash and shares of common stock, par value \$1.00 per share, of Parent (*Parent Common Stock*), with Merger Sub as the surviving entity (the *Merger*).

I hereby represent, warrant, and covenant to Parent and Merger Sub that in the event I receive any shares of Parent Common Stock as a result of the Merger (such shares, *Affiliate Shares*):

A. I shall not make any sale, transfer or other disposition of any Affiliate Shares in violation of the Securities Act.

B. I have carefully read this letter and the Merger Agreement and discussed their requirements and other applicable limitations upon my ability to sell, transfer, or otherwise dispose of Affiliate Shares, to the extent I felt necessary, with my counsel or counsel for Parent and Merger Sub.

C. I have been advised that the issuance of Parent Common Stock to me pursuant to the Merger has been or will be registered with the Commission under the Securities Act on a Registration Statement on Form S-4. However, I have also been advised that, because at the time the Merger will be submitted for a vote of the stockholders of the Company, I may be deemed to be an affiliate of the Company, and the distribution by me of any Affiliate Shares will not be registered under the Securities Act, and that I may not sell, transfer, or otherwise dispose of any Affiliate Shares, unless (i) such sale, transfer or other disposition has been registered under the Securities Act, (ii) such sale, transfer or other disposition is made in conformity with the volume and other limitations of Rule 145 promulgated by the Commission under the Securities Act, (iii) in the opinion of counsel reasonably acceptable to Parent, such sale, transfer or other disposition is otherwise exempt from registration under the Securities Act or (iv) pursuant to a no action letter or interpretive letter obtained by the undersigned from the staff of the Commission, such sale, transfer or other disposition is otherwise exempt from registration under the Securities Act.

D. I understand that Parent is under no obligation to register under the Securities Act the sale, transfer, or other disposition by me or on my behalf of any Affiliate Shares or to take any other action necessary in order to make an exemption from such registration available; *provided*,

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*however*, that Parent agrees that it shall meet the requirements of Rule 144(c) under the Securities Act.

E. I understand that stop transfer instructions will be given to Parent's transfer agent with respect to my Affiliate Shares and that there will be placed on the certificates for any Affiliate Shares, or any substitutions therefore, a legend stating in substance:

The shares represented by this certificate were issued in a transaction to which Rule 145 promulgated under the Securities Act of 1933, as amended, applies. The shares represented by this certificate may only be transferred in accordance with the terms of an agreement dated as of [ ], 2005, between the registered holder hereof and the issuer of this certificate, a copy of which agreement will be mailed to the holder hereof without charge within five days after receipt of written request therefore.

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F. I also understand that unless the transfer by me of my Affiliate Shares has been registered under the Securities Act or is a sale made in conformity with the provisions of Rule 145, Parent reserves the right to put the following legend on the certificates issued to my transferee:

The shares represented by this certificate have not been registered under the Securities Act of 1933, as amended, and were acquired from a person who received such shares in a transaction to which Rule 145 promulgated under the Securities Act of 1933, as amended, applies. The shares may not be sold, pledged, or otherwise transferred except (i) pursuant to an effective registration statement or (ii) in accordance with an exemption from the registration requirements of the Securities Act of 1933, as amended.

G. Execution of this letter should not be considered an admission on my part that I am an affiliate of the Company as described in the first paragraph of this letter, nor as a waiver of any rights I may have to object to any claim that I am such an affiliate on or after the date of this letter; provided, however, that notwithstanding this paragraph G, I agree that I am bound by the terms of this letter and that this paragraph G shall not prohibit the Company from enforcing the terms of this letter against me.

It is understood and agreed that the legends set forth in paragraph E and F above shall be removed by the delivery of substitute certificates without such legend if, with respect to any Affiliate Shares, (1) I shall have delivered to Parent a copy of a letter from the staff of the Commission, or an opinion of counsel in form and substance reasonably satisfactory to Parent, to the effect that such legend is not required for purposes of the Securities Act, (2) one year shall have elapsed from the date I received such Affiliate Shares and the provisions of Rule 145(d)(2) are then available to me or (iii) two years shall have elapsed from the date I received such Affiliate Shares and the provisions of Rule 145(d)(3) are then available to me.

Parent agrees that it will (a) supply me with any information necessary to enable me to make routine sales of any Affiliate Shares as may be permitted, by and in accordance with, the provisions of Rule 144 under the Securities Act or any similar rule or regulation of the Commission hereafter applicable, and (b) promptly furnish to me, upon my written request, a written statement representing that, as of the date of such written statement, it has complied with the reporting requirements enumerated in Rule 144(c) under the Securities Act.

This letter constitutes the complete understanding between Parent and me concerning the subject matter hereof. This letter shall be governed by and construed in accordance with the laws of the State of Delaware.

Very truly yours,

By: \_\_\_\_\_

Name: \_\_\_\_\_

Agreed and accepted this [•] day of

[•], 2005

YELLOW ROADWAY CORPORATION

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

YANKEE II LLC

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

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**ANNEX B**

February 27, 2005

The Board of Directors

Yellow Roadway Corporation

10990 Roe Avenue

Overland Park, Kansas 66211

Ladies and Gentlemen:

You have requested our opinion as to the fairness, from a financial point of view, to Yellow Roadway Corporation ( Parent ) of the consideration proposed to be paid by Parent in the proposed merger (the Merger ) of a wholly owned subsidiary of Parent (the Merger Subsidiary ) with USF Corporation (the Company ). Pursuant to the Agreement and Plan of Merger dated as of February 27, 2005 (the Agreement ) by and among Parent, the Merger Subsidiary and the Company, the Company will become a wholly owned subsidiary of Parent, and each outstanding share of common stock, par value \$0.01 per share, of the Company (the Company Common Stock ), other than shares held in treasury, held by Parent or a subsidiary of Parent or as to which appraisal rights have been exercised, will be converted into the right to receive 0.9024 shares (the Stock Consideration ) of common stock, par value \$1.00 per share, of Parent (the Parent Common Stock ) or, upon the election of the holder of such share of the Company Common Stock, \$45.00 in cash from Parent (the Cash Consideration and, together with the Stock Consideration, the Merger Consideration ), subject to the limitations set forth in the Agreement. The terms and conditions of the Merger are more fully set forth in the Agreement.

In arriving at our opinion, we have:

(i) reviewed the Agreement and certain related documents;

(ii) reviewed certain publicly available business and financial information concerning Parent and the Company and the industries in which they operate;

(iii) compared the proposed financial terms of the Merger with the publicly available financial terms of certain transactions involving companies we deemed relevant and the consideration paid for such companies;

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(iv) compared the financial and operating performance of Parent and the Company with publicly available information concerning certain other companies we deemed relevant;

(v) reviewed the current and historical market prices of the Parent Common Stock and the Company Common Stock and certain publicly traded securities of other companies we deemed relevant;

(vi) reviewed certain internal financial analyses and forecasts prepared by the managements of Parent and the Company relating to their respective businesses, as well as the estimated amount and timing of the cost savings, revenue generation and related expenses expected to result from the Merger (the Synergies );

(vii) analyzed the pro forma impact of the Merger, before and after giving effect to the Synergies, on, among other things, Parent's earnings per share, consolidated capitalization and financial ratios; and

(viii) performed such other financial studies and analyses, and considered such other information, as we deemed appropriate for the purposes of this opinion.

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In addition, we have held discussions and participated in negotiations with certain members of the managements of Parent and the Company and their financial, tax and legal advisors with respect to certain aspects of the Merger, and the past and current business operations of Parent and the Company, the financial condition and operations and future prospects of Parent and the Company, the effects of the Merger on the financial condition and future prospects of Parent and certain other matters we believed necessary or appropriate to our inquiry.

In giving our opinion, we have relied upon and assumed, without independent verification, the accuracy and completeness of all information that was publicly available or was furnished to us by Parent or the Company or otherwise reviewed by us, and we have not assumed any responsibility or liability therefor. We have not conducted any valuations or appraisals of any assets or liabilities, nor have any such valuations or appraisals been provided to us. In relying on financial analyses and forecasts provided to us, including the Synergies, we have assumed that they have been reasonably prepared based on assumptions reflecting the best currently available estimates and judgments by the managements of Parent and the Company as to the expected future results of operations and financial condition of Parent and the Company to which such analyses or forecasts relate. We express no view as to such forecasts, including the Synergies, or the assumptions on which they were based. We have also assumed that the Merger will qualify as a reorganization for United States federal income tax purposes.

For purposes of rendering our opinion, we have assumed, in all respects material to our analysis, that the Merger and the other transactions contemplated by the Agreement will be consummated as described in the Agreement, that all the representations and warranties of each party contained in the Agreement are true and correct, that each party to the Agreement will perform all of the covenants and agreements required to be performed by it thereunder without any consents or waivers of the other parties thereto and that all conditions to the consummation of the Merger will be satisfied without waiver thereof. We note that we are not legal, tax or regulatory experts and have relied upon, without assuming any responsibility for independent verification or liability therefor, the assessment of Parent's legal, tax and regulatory advisors with respect to the legal, tax and regulatory matters relating to the Merger. We have further assumed that all material governmental, regulatory or other consents and approvals necessary for the consummation of the Merger will be obtained without any adverse effect on Parent or the Company or on the contemplated benefits of the Merger, in any respect material to our analysis.

Our opinion is necessarily based on economic, market and other conditions as in effect on, and the information made available to us as of, the date hereof. It should be understood that subsequent developments may affect this opinion and that we do not have any obligation to update, revise or reaffirm this opinion. Our opinion is limited to the fairness, from a financial point of view, to Parent of the Merger Consideration to be paid by Parent in the Merger, and we express no opinion as to the underlying business decision by Parent to engage in the Merger. We are expressing no opinion herein as to the price at which the Parent Common Stock or the Company Common Stock will trade at any future time.

We note that we were not authorized to and did not solicit any expressions of interest from any other parties with respect to any alternative transaction, and no opinion is expressed as to whether any alternative transaction might be more favorable to Parent than the Merger.

We have acted as financial advisor to Parent in connection with the Merger and will receive a fee for our services, a portion of which is contingent upon public announcement of the Merger, a portion of which is contingent upon receipt of all required material government consents or approvals, and a portion of which is contingent upon consummation of the Merger. Parent has also agreed to indemnify us against certain liabilities in



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connection with our services. We or our affiliates have, from time to time, provided financial advisory services to Parent and its affiliates for which we have received customary compensation. We or our affiliates may also provide other financial advisory and financing services to Parent, the Company and/or their respective affiliates in the future.

This letter is provided to the Board of Directors of Parent in connection with and for the purposes of its evaluation of the Merger. This opinion does not constitute a recommendation to any stockholder of Parent as to how such stockholder should vote in any vote relating to the Merger or any other matter. This opinion may not be disclosed, referred to or communicated (in whole or in part) to any third party for any purpose whatsoever without our prior written approval, except that this opinion may be reproduced in full in any filing made with the Securities and Exchange Commission by Parent in connection with the Merger.

On the basis of and subject to the foregoing, it is our opinion as of the date hereof that the Merger Consideration to be paid by Parent in the Merger is fair, from a financial point of view, to Parent.

Very truly yours,

**IFL CAPITAL LLC**

By: \_\_\_\_\_  
**Name:** James L. Hamilton  
**Title:** Managing Director

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**ANNEX C**

1585 Broadway  
New York, NY 10036

February 27, 2005

Board of Directors

USF Corporation

8550 West Bryn Mawr Avenue

Suite 700

Chicago, Illinois 60631

Members of the Board:

We understand that USF Corporation (the Company), Yellow Roadway Corporation (Parent) and Yankee II LLC, a wholly owned subsidiary of Parent (Merger Sub), propose to enter into an Agreement and Plan of Merger, substantially in the form of the draft dated February 26, 2005 (the Merger Agreement), which provides, among other things, for the merger (the Merger) of the Company with and into Merger Sub, with Merger Sub as the surviving entity. Pursuant to the Merger, each outstanding share of common stock, par value \$0.01 per share (the Common Stock), of the Company, other than shares held in treasury or by Parent or any subsidiary of Parent or as to which dissenters' rights have been perfected, will be converted into, (i) upon a valid Cash Election (as defined in the Merger Agreement), \$45.00 in cash (the Cash Consideration) or (ii) 0.9024 shares (the Exchange Ratio) of common stock, par value \$1.00 per share (the Parent Common Stock), of Parent (the Stock Consideration and, together with the Cash Consideration, the Merger Consideration), subject to adjustment and pro-rata pursuant to the formulas set forth in the Merger Agreement. The terms and conditions of the Merger are more fully set forth in the Merger Agreement.

You have asked for our opinion as to whether the Merger Consideration to be received by the holders of shares of Common Stock pursuant to the Merger Agreement is fair from a financial point of view to such holders.

For purposes of the opinion set forth herein, we have:

i) reviewed certain publicly available financial statements and other information of the Company and Parent;

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ii) reviewed certain internal financial statements and other financial and operating data concerning the Company and Parent prepared by the management of each of the Company and Parent;

iii) reviewed certain financial projections prepared by the management of each of the Company and Parent;

iv) discussed the past and current operations and financial condition and the prospects of each of the Company and Parent, including information relating to certain strategic, financial and operational benefits anticipated from the Merger, with senior executives of the Company and Parent, respectively;

v) reviewed the pro forma impact of the Merger on Parent's earnings per share and other financial ratios;

vi) reviewed the reported prices and trading activity for each of the Common Stock and the Parent Common Stock;

vii) compared the financial performance of each of the Company and Parent and the prices and trading activity of the Common Stock and the Parent Common Stock with that of certain other comparable publicly-traded companies and their securities;

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- viii) reviewed the financial terms, to the extent publicly available, of certain comparable acquisition transactions;
  
- ix) participated in discussions and negotiations among representatives of the Company, Parent and their respective financial and legal advisors;
  
- x) reviewed the draft Merger Agreement and certain related documents;
  
- xi) reviewed certain documents and correspondence related to certain audit related matters involving both the Company and Parent and discussed such information with management of the Company and Parent and their advisors; and
  
- xii) performed such other analyses and considered such other factors as we have deemed appropriate.

We have assumed and relied upon without independent verification the accuracy and completeness of the information reviewed by us for the purposes of this opinion. With respect to the financial projections of the Company and Parent, including information relating to certain strategic, financial and operational benefits anticipated from the Merger, we have assumed that they have been reasonably prepared on bases reflecting the best currently available estimates and judgments of the future financial performance of each of the Company and Parent. In addition, we have assumed that the Merger will be consummated in accordance with the terms set forth in the Merger Agreement, without any waiver, amendment or delay of any terms and conditions, including, among other things, that the Merger will be treated as a tax-free reorganization, pursuant to the Internal Revenue Code of 1986, as amended. We have not made any independent valuation or appraisal of the assets or liabilities of the Company, nor have we been furnished with any such appraisals. We are financial advisors only and have relied upon, without independent verification, the assessment of Parent and the Company and their legal, tax, regulatory or accounting advisors with respect to such matters. Our opinion is necessarily based on financial, economic, market and other conditions as in effect on, and the information made available to us as of, the date hereof. Events occurring after the date hereof may affect this opinion and the assumptions used in preparing it, and we do not assume any obligation to update, revise or reaffirm this opinion.

In arriving at our opinion, we were not authorized to solicit, and did not solicit, interest with respect to a business combination involving the Company, nor did we negotiate with any party other than Parent with respect to a business combination involving the Company.

We have acted as financial advisor to the Board of Directors of the Company in connection with this transaction and will receive a fee for our services, a substantial portion of which is contingent upon the consummation of the Merger. In the past, Morgan Stanley & Co. Incorporated and its affiliates ( Morgan Stanley ) have provided financial advisory and financing services for the Company and have received fees for the rendering of these services.

In the ordinary course of our trading, brokerage, investment management and financing activities, Morgan Stanley or its affiliates may at any time hold long or short positions, and may trade or otherwise effect transactions, for our own account or the accounts of customers, in debt or equity securities or senior loans of Parent, the Company or any other company or any currency or commodity that may be involved in this transaction.



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It is understood that this letter is for the information of the Board of Directors of the Company and may not be used for any other purpose without our prior written consent, except that a copy of this opinion may be included in its entirety in any filing Parent or the Company is required to make with the Securities and Exchange Commission in connection with this transaction if such inclusion is required by applicable law. In addition, this opinion does not in any manner address the prices at which the Parent Common Stock will trade following consummation of the Merger and Morgan Stanley expresses no opinion or recommendation as to how the shareholders of the Company should vote at the shareholders meeting to be held in connection with the Merger or as to which election to make with respect to the Merger Consideration.

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Based on and subject to the foregoing, we are of the opinion on the date hereof that the Merger Consideration to be received by the holders of shares of Common Stock pursuant to the Merger Agreement is fair from a financial point of view to such holders.

Very truly yours,

MORGAN STANLEY & CO. INCORPORATED

By: /s/ William H. Strong

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William H. Strong

Managing Director

Vice Chairman

Investment Banking

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**ANNEX D**

**SECTION 262 OF THE DELAWARE GENERAL CORPORATION LAW**

**§262 APPRAISAL RIGHTS.**

(a) Any stockholder of a corporation of this State who holds shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares, who continuously holds such shares through the effective date of the merger or consolidation, who has otherwise complied with subsection (d) of this section and who has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to §228 of this title shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock under the circumstances described in subsections (b) and (c) of this section. As used in this section, the word "stockholder" means a holder of record of stock in a stock corporation and also a member of record of a nonstock corporation; the words "stock" and "share" mean and include what is ordinarily meant by those words and also membership or membership interest of a member of a nonstock corporation; and the words "depository receipt" mean a receipt or other instrument issued by a depository representing an interest in one or more shares, or fractions thereof, solely of stock of a corporation, which stock is deposited with the depository.

(b) Appraisal rights shall be available for the shares of any class or series of stock of a constituent corporation in a merger or consolidation to be effected pursuant to §251 (other than a merger effected pursuant to §251(g) of this title), §252, §254, §257, §258, §263 or §264 of this title:

(1) Provided, however, that no appraisal rights under this section shall be available for the shares of any class or series of stock, which stock, or depository receipts in respect thereof, at the record date fixed to determine the stockholders entitled to receive notice of and to vote at the meeting of stockholders to act upon the agreement of merger or consolidation, were either (i) listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc. or (ii) held of record by more than 2,000 holders; and further provided that no appraisal rights shall be available for any shares of stock of the constituent corporation surviving a merger if the merger did not require for its approval the vote of the stockholders of the surviving corporation as provided in subsection (f) of §251 of this title.

(2) Notwithstanding paragraph (1) of this subsection, appraisal rights under this section shall be available for the shares of any class or series of stock of a constituent corporation if the holders thereof are required by the terms of an agreement of merger or consolidation pursuant to §§251, 252, 254, 257, 258, 263 and 264 of this title to accept for such stock anything except:

a. Shares of stock of the corporation surviving or resulting from such merger or consolidation, or depository receipts in respect thereof;

b. Shares of stock of any other corporation, or depository receipts in respect thereof, which shares of stock (or depository receipts in respect thereof) or depository receipts at the effective date of the merger or consolidation will be either listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc. or held of record by more than 2,000 holders;

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c. Cash in lieu of fractional shares or fractional depository receipts described in the foregoing subparagraphs a. and b. of this paragraph; or

d. Any combination of the shares of stock, depository receipts and cash in lieu of fractional shares or fractional depository receipts described in the foregoing subparagraphs a., b. and c. of this paragraph.

(3) In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under §253 of this title is not owned by the parent corporation immediately prior to the merger, appraisal rights shall be available for the shares of the subsidiary Delaware corporation.

(c) Any corporation may provide in its certificate of incorporation that appraisal rights under this section shall be available for the shares of any class or series of its stock as a result of an amendment to its certificate of

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incorporation, any merger or consolidation in which the corporation is a constituent corporation or the sale of all or substantially all of the assets of the corporation. If the certificate of incorporation contains such a provision, the procedures of this section, including those set forth in subsections (d) and (e) of this section, shall apply as nearly as is practicable.

(d) Appraisal rights shall be perfected as follows:

(1) If a proposed merger or consolidation for which appraisal rights are provided under this section is to be submitted for approval at a meeting of stockholders, the corporation, not less than 20 days prior to the meeting, shall notify each of its stockholders who was such on the record date for such meeting with respect to shares for which appraisal rights are available pursuant to subsection (b) or (c) hereof that appraisal rights are available for any or all of the shares of the constituent corporations, and shall include in such notice a copy of this section. Each stockholder electing to demand the appraisal of such stockholder's shares shall deliver to the corporation, before the taking of the vote on the merger or consolidation, a written demand for appraisal of such stockholder's shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of such stockholder's shares. A proxy or vote against the merger or consolidation shall not constitute such a demand. A stockholder electing to take such action must do so by a separate written demand as herein provided. Within 10 days after the effective date of such merger or consolidation, the surviving or resulting corporation shall notify each stockholder of each constituent corporation who has complied with this subsection and has not voted in favor of or consented to the merger or consolidation of the date that the merger or consolidation has become effective; or

(2) If the merger or consolidation was approved pursuant to §228 or §253 of this title, then, either a constituent corporation before the effective date of the merger or consolidation, or the surviving or resulting corporation within ten days thereafter, shall notify each of the holders of any class or series of stock of such constituent corporation who are entitled to appraisal rights of the approval of the merger or consolidation and that appraisal rights are available for any or all shares of such class or series of stock of such constituent corporation, and shall include in such notice a copy of this section. Such notice may, and, if given on or after the effective date of the merger or consolidation, shall, also notify such stockholders of the effective date of the merger or consolidation. Any stockholder entitled to appraisal rights may, within 20 days after the date of mailing of such notice, demand in writing from the surviving or resulting corporation the appraisal of such holder's shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of such holder's shares. If such notice did not notify stockholders of the effective date of the merger or consolidation, either (i) each such constituent corporation shall send a second notice before the effective date of the merger or consolidation notifying each of the holders of any class or series of stock of such constituent corporation that are entitled to appraisal rights of the effective date of the merger or consolidation or (ii) the surviving or resulting corporation shall send such a second notice to all such holders on or within 10 days after such effective date; provided, however, that if such second notice is sent more than 20 days following the sending of the first notice, such second notice need only be sent to each stockholder who is entitled to appraisal rights and who has demanded appraisal of such holder's shares in accordance with this subsection. An affidavit of the secretary or assistant secretary or of the transfer agent of the corporation that is required to give either notice that such notice has been given shall, in the absence of fraud, be prima facie evidence of the facts stated therein. For purposes of determining the stockholders entitled to receive either notice, each constituent corporation may fix, in advance, a record date that shall be not more than 10 days prior to the date the notice is given, provided, that if the notice is given on or after the effective date of the merger or consolidation, the record date shall be such effective date. If no record date is fixed and the notice is given prior to the effective date, the record date shall be the close of business on the day next preceding the day on which the notice is given.

(e) Within 120 days after the effective date of the merger or consolidation, the surviving or resulting corporation or any stockholder who has complied with subsections (a) and (d) hereof and who is otherwise entitled to appraisal rights, may file a petition in the Court of Chancery demanding a determination of the value

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of the stock of all such stockholders. Notwithstanding the foregoing, at any time within 60 days after the effective date of the merger or consolidation, any stockholder shall have the right to withdraw such stockholder's demand for appraisal and to accept the terms offered upon the merger or consolidation. Within 120 days after the effective date of the merger or consolidation, any stockholder who has complied with the requirements of subsections (a) and (d) hereof, upon written request, shall be entitled to receive from the corporation surviving the merger or resulting from the consolidation a statement setting forth the aggregate number of shares not voted in favor of the merger or consolidation and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares. Such written statement shall be mailed to the stockholder within 10 days after such stockholder's written request for such a statement is received by the surviving or resulting corporation or within 10 days after expiration of the period for delivery of demands for appraisal under subsection (d) hereof, whichever is later.

(f) Upon the filing of any such petition by a stockholder, service of a copy thereof shall be made upon the surviving or resulting corporation, which shall within 20 days after such service file in the office of the Register in Chancery in which the petition was filed a duly verified list containing the names and addresses of all stockholders who have demanded payment for their shares and with whom agreements as to the value of their shares have not been reached by the surviving or resulting corporation. If the petition shall be filed by the surviving or resulting corporation, the petition shall be accompanied by such a duly verified list. The Register in Chancery, if so ordered by the Court, shall give notice of the time and place fixed for the hearing of such petition by registered or certified mail to the surviving or resulting corporation and to the stockholders shown on the list at the addresses therein stated. Such notice shall also be given by 1 or more publications at least 1 week before the day of the hearing, in a newspaper of general circulation published in the City of Wilmington, Delaware or such publication as the Court deems advisable. The forms of the notices by mail and by publication shall be approved by the Court, and the costs thereof shall be borne by the surviving or resulting corporation.

(g) At the hearing on such petition, the Court shall determine the stockholders who have complied with this section and who have become entitled to appraisal rights. The Court may require the stockholders who have demanded an appraisal for their shares and who hold stock represented by certificates to submit their certificates of stock to the Register in Chancery for notation thereon of the pendency of the appraisal proceedings; and if any stockholder fails to comply with such direction, the Court may dismiss the proceedings as to such stockholder.

(h) After determining the stockholders entitled to an appraisal, the Court shall appraise the shares, determining their fair value exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with a fair rate of interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors. In determining the fair rate of interest, the Court may consider all relevant factors, including the rate of interest which the surviving or resulting corporation would have had to pay to borrow money during the pendency of the proceeding. Upon application by the surviving or resulting corporation or by any stockholder entitled to participate in the appraisal proceeding, the Court may, in its discretion, permit discovery or other pretrial proceedings and may proceed to trial upon the appraisal prior to the final determination of the stockholder entitled to an appraisal. Any stockholder whose name appears on the list filed by the surviving or resulting corporation pursuant to subsection (f) of this section and who has submitted such stockholder's certificates of stock to the Register in Chancery, if such is required, may participate fully in all proceedings until it is finally determined that such stockholder is not entitled to appraisal rights under this section.

(i) The Court shall direct the payment of the fair value of the shares, together with interest, if any, by the surviving or resulting corporation to the stockholders entitled thereto. Interest may be simple or compound, as the Court may direct. Payment shall be so made to each such stockholder, in the case of holders of uncertificated stock forthwith, and the case of holders of shares represented by certificates upon the surrender to the corporation of the certificates representing such stock. The Court's decree may be enforced as other decrees in the Court of Chancery may be enforced, whether such surviving or resulting corporation be a corporation of this State or of any state.

(j) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances. Upon application of a stockholder, the Court may order all or a portion of



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the expenses incurred by any stockholder in connection with the appraisal proceeding, including, without limitation, reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares entitled to an appraisal.

(k) From and after the effective date of the merger or consolidation, no stockholder who has demanded appraisal rights as provided in subsection (d) of this section shall be entitled to vote such stock for any purpose or to receive payment of dividends or other distributions on the stock (except dividends or other distributions payable to stockholders of record at a date which is prior to the effective date of the merger or consolidation); provided, however, that if no petition for an appraisal shall be filed within the time provided in subsection (e) of this section, or if such stockholder shall deliver to the surviving or resulting corporation a written withdrawal of such stockholder's demand for an appraisal and an acceptance of the merger or consolidation, either within 60 days after the effective date of the merger or consolidation as provided in subsection (e) of this section or thereafter with the written approval of the corporation, then the right of such stockholder to an appraisal shall cease. Notwithstanding the foregoing, no appraisal proceeding in the Court of Chancery shall be dismissed as to any stockholder without the approval of the Court, and such approval may be conditioned upon such terms as the Court deems just.

(l) The shares of the surviving or resulting corporation to which the shares of such objecting stockholders would have been converted had they assented to the merger or consolidation shall have the status of authorized and unissued shares of the surviving or resulting corporation.



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**PART II**

**INFORMATION NOT REQUIRED IN PROSPECTUS**

Capitalized terms used but not defined in Part II have the meanings ascribed to them in the proxy statement/prospectus contained in this Registration Statement.

**ITEM 20. *Indemnification of Directors and Officers***

The Certificate of Incorporation and Bylaws of Yellow Roadway Corporation together provide that Yellow Roadway's directors shall not be personally liable to Yellow Roadway or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability for (i) any breach of the director's duty of loyalty to Yellow Roadway or its stockholders, (ii) acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the Delaware General Corporation Law (the "DGCL"), or (iv) any transaction from which the director derived an improper personal benefit. The Certificate of Incorporation and Bylaws of Yellow Roadway also provide that if the DGCL is amended to permit further elimination of limitation of the personal liability of the directors, then the liability of Yellow Roadway's directors shall be eliminated or limited to the fullest extent permitted by the DGCL, as so amended.

Yellow Roadway maintains directors' and officers' liability insurance against any actual or alleged error, misstatement, misleading statement, act, omission, neglect or breach of duty by any director or officer, excluding certain matters including fraudulent, dishonest or criminal acts or self-dealing.

DGCL Section 102(b)(7) provides that Yellow Roadway may indemnify a present or former director if such director conducted himself or herself in good faith and reasonably believed, in the case of conduct in his or her official capacity, that his or her conduct was in Yellow Roadway's best interests.

DGCL Section 145 provides that Yellow Roadway may indemnify its directors and officers, as well as other employees and individuals (each an "Indemnified Party", and collectively, "Indemnified Parties"), against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement in connection with specified actions, suits or proceedings, whether civil, criminal, administrative or investigative, other than in connection with actions by or in the right of Yellow Roadway (a "derivative action"), if an Indemnified Party acted in good faith and in a manner such Indemnified Party reasonably believed to be in or not opposed to Yellow's best interests and, with respect to any criminal action or proceeding, had no reasonable cause to believe that his or her conduct was unlawful. A similar standard is applicable in the case of derivative actions, except that Yellow Roadway may only indemnify an Indemnified Party for expenses (including attorneys' fees) incurred in connection with the defense or settlement of such derivative action. Additionally, in the context of a derivative action, DGCL Section 145 requires a court approval before there can be any indemnification where an Indemnified Party has been found liable to Yellow Roadway. The statute provides that it is not exclusive of other indemnification arrangements that may be granted pursuant to a corporation's charter, bylaws, disinterested director vote, stockholder vote, agreement or otherwise.

In the Agreement and Plan of Merger among Yellow Corporation, Yankee LLC, a wholly owned subsidiary of Yellow ("Sub"), and Roadway Corporation ("Roadway"), dated as of July 8, 2003, pursuant to which Roadway was merged with and into Sub, with Sub as the surviving company (the "Roadway Merger"), Yellow Roadway agreed to indemnify the former officers and directors of Roadway from liabilities arising out

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of actions or omissions in their capacity as such prior to the effective time of the Roadway Merger, and advance reasonable litigation expenses incurred in connection with such actions or omissions, to the full extent permitted under Roadway's certificate of incorporation and bylaws. Further, for a period of six years after the effective time of the Roadway Merger, Yellow Roadway will provide Roadway's officers and directors with an insurance and indemnification policy that provides coverage for acts or omissions through the effective time of the Roadway Merger; provided that the maximum aggregate amount of premiums that Yellow Roadway will be required to pay to provide and maintain this coverage does not exceed \$3,944,400 per year.

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In the Agreement and Plan of Merger among Yellow Roadway Corporation, Yankee II LLC, a wholly owned subsidiary of Yellow Roadway ( Sub ), and USF Corporation ( USF ), dated as of February 27, 2005, pursuant to which USF will be merged with and into Sub, with Sub as the surviving company (the USF Merger ), Yellow Roadway has agreed to indemnify the former officers and directors of USF from liabilities arising out of actions or omissions in their capacity as such prior to the effective time of the USF Merger, and advance reasonable litigation expenses incurred in connection with such actions or omissions, to the full extent permitted under USF 's certificate of incorporation and bylaws. Further, for a period of six years after the effective time of the USF Merger, Yellow Roadway will provide USF 's officers and directors with an insurance and indemnification policy that provides coverage for acts or omissions through the effective time of the USF Merger; provided that the maximum aggregate amount of premiums that Yellow Roadway will be required to pay to provide and maintain this coverage does not exceed \$2,250,000 per year.

**ITEM 21. Exhibits and Financial Statement Schedules.**

<b>Exhibit No.</b>	<b>Description</b>
2.1	Agreement and Plan of Merger, dated as of February 27, 2005, by and among Yellow Roadway Corporation, Yankee II LLC and USF Corporation (incorporated by reference to Exhibit 2.1 to the Registrant 's Current Report on Form 8-K filed on February 27, 2005, Reg. No. 000-12255). Pursuant to Item 601(b)(2) of Regulation S-K, certain schedules, exhibits and similar attachments to this Agreement have not been filed with this exhibit. The schedules contain various items relating to the assets of the business being acquired and the representations and warranties made by the parties to the Agreement. The Registrant agrees to furnish supplementally any omitted schedule, exhibit or similar attachment to the SEC upon request.
4.1	Certificate of Incorporation of Yellow Roadway Corporation, formerly known as Yellow Corporation (incorporated herein by reference to Exhibit 3.1 to Yellow Corporation 's Annual Report on Form 10-K for the year ended December 31, 2002, filed March 6, 2003, Reg. No. 000-12255
4.2	Certificate of Amendment to the Certificate of Incorporation of Yellow Roadway Corporation, formerly known as Yellow Corporation (incorporated herein by reference to Exhibit 4.2 to Yellow Roadway Corporation 's Registration Statement on Form S-8, filed December 23, 2003, Reg. No. 333-111499).
4.3	Bylaws of Yellow Roadway Corporation, as amended (incorporated herein by reference to Exhibit 3.1 to Yellow Roadway 's Quarterly Report on Form 10-Q for the quarter ended June 30, 2004, filed August 9, 2004, Reg. No. 000-12255).
4.4	Indenture (including form of note) dated August 8, 2003 among Yellow Corporation, certain subsidiary guarantors and Deutsche Bank Trust Company Americas, as trustee, relating to Yellow Roadway Corporation 's 5.0% Contingent Convertible Senior Notes due 2023 (incorporated herein by reference to Exhibit 4.5 to Yellow Corporation 's Registration Statement on Form S-4, filed August 19, 2003, Reg. No. 333-108081).
4.5	Registration Rights Agreement dated August 8, 2003 among Yellow Corporation, certain subsidiary guarantors and Deutsche Bank Securities Inc., as representative of the initial purchasers (incorporated herein by reference to Exhibit 4.6 to Yellow Corporation 's Registration Statement on Form S-4, filed August 18, 2003, Reg. No. 333-108081).
4.6	Indenture (including form of note) dated November 25, 2003 among Yellow Corporation, certain subsidiary guarantors and Deutsche Bank Trust Company Americas, as trustee, relating to Yellow Roadway Corporation 's 3.375% Contingent Convertible Senior Notes due 2023 (incorporated herein by reference to Exhibit 4.7 to Yellow Roadway Corporation 's Registration Statement on Form S-8, filed December 23, 2003, Reg. No. 333-11499).

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<b>Exhibit No.</b>	<b>Description</b>
4.7	Registration Rights Agreement dated November 25, 2003 among Yellow Corporation, certain subsidiary guarantors and Deutsche Bank Securities Inc., as representative of the initial purchasers (incorporated herein by reference to Exhibit 4.8 to Yellow Roadway Corporation's Registration Statement on Form S-8, filed December 23, 2003, Reg. No. 333-11499).
4.8	Indenture (including form of note) dated November 30, 2001 among Roadway Corporation (predecessor in interest to Roadway LLC), certain subsidiary guarantors and SunTrust Bank, as trustee, relating to Roadway's 8/4% Senior Notes due December 1, 2008 (incorporated herein by reference to Exhibit 4.9 to Yellow Roadway Corporation's Registration Statement on Form S-8, filed December 23, 2003, Reg. No. 333-11499).
4.9	Form of Indenture (including form of note) among Yellow Roadway Corporation, certain subsidiary guarantors and Deutsche Bank Trust Company Americas, as trustee, relating to the 5.0% Net Share Settled Contingent Convertible Senior Notes due 2023 (incorporated by reference to Exhibit 4.7 to Amendment No. 1 to Registration Statement on Form S-4/A, filed on November 30, 2004, Reg. No. 333-119990).
4.10	Form of Indenture (including form of note) among Yellow Roadway Corporation, certain subsidiary guarantors and Deutsche Bank Trust Company Americas, as trustee, relating to the 3.375% Net Share Settled Contingent Convertible Senior Notes due 2023 (incorporated by reference to Exhibit 4.8 to Amendment No. 1 to Registration Statement on Form S-4/A, filed on November 30, 2004, Reg. No. 333-119990).
5.1	Opinion of Fulbright & Jaworski L.L.P. regarding the legality of the securities to be offered hereby.
8.1	Opinion of Fulbright & Jaworski L.L.P. regarding tax matters.
8.2	Opinion of Sullivan & Cromwell LLP regarding tax matters.
23.1	Consent of KPMG LLP, independent accountants for the Registrant.
23.2	Consent of Deloitte & Touche LLP independent accountants for USF Corporation.
23.3	Consent of Ernst & Young LLP independent accountants for Roadway Corporation (successor in interest to Roadway LLC, a wholly owned subsidiary of the Registrant).
23.4	Consent of Fulbright & Jaworski L.L.P. (included in Exhibit 5.1 and Exhibit 8.1).
23.5	Consent of Sullivan & Cromwell LLP.
24.1	Powers of Attorney (included on the signature pages).
99.1	Form of Proxy of the Registrant (to be filed by amendment).
99.2	Form of Proxy of USF Corporation (to be filed by amendment).
99.3	Consent of IFL Capital LLC.
99.4	Consent of Morgan Stanley & Co. Incorporated.

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**ITEM 22. *Undertakings.***

(a) The undersigned registrant hereby undertakes that, for purposes of determining any liability under the Securities Act of 1933, each filing of the registrant's annual report pursuant to section 13(a) or section 15(d) of the Securities Exchange Act of 1934 (and, where applicable, each filing of an employee benefit plan's annual report pursuant to section 15(d) of the Securities Exchange Act of 1934) that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(b) The undersigned registrant hereby undertakes as follows: that prior to any public reoffering of the securities registered hereunder through use of a prospectus which is a part of this registration statement, by any person or party who is deemed to be an underwriter within the meaning of Rule 145(c), the issuer undertakes that such reoffering prospectus will contain the information called for by the applicable registration form with respect to reofferings by persons who may be deemed underwriters, in addition to the information called for by the other Items of the applicable form.

(c) The undersigned registrant undertakes that every prospectus (i) that is filed pursuant to the paragraph immediately preceding, or (ii) that purports to meet the requirements of section 10(a)(3) of the Securities Act of 1933 and is used in connection with an offering of securities subject to Rule 415, will be filed as a part of an amendment to the registration statement and will not be used until such amendment is effective, and that for purposes of determining any liability under the Securities Act of 1933, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

The undersigned registrant hereby undertakes to respond to requests for information that is incorporated by reference into the prospectus pursuant to Items 4, 10(b), 11 or 13 of this Form, within one business day of receipt of such request, and to send the incorporated documents by first class mail or other equally prompt means. This includes information contained in documents filed subsequent to the effective date of the registration statement through the date of responding to the request.

The undersigned registrant hereby undertakes to supply by means of a post-effective amendment all information concerning a transaction, and the company being acquired involved therein, that was not the subject of and included in the registration statement when it became effective.

Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers or controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been informed that in the opinion of the Securities and Exchange Commission, such indemnification is against public policy as expressed in the Securities Act of 1933 and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Securities Act of 1933 and will be governed by the final adjudication of such issue.

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**SIGNATURES**

Pursuant to the requirements of the Securities Act of 1933, the registrant has duly caused this registration statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Overland Park, State of Kansas, on the 1st day of April, 2005.

**YELLOW ROADWAY CORPORATION**

By:           /s/ DONALD G. BARGER, Jr.

**Donald G. Barger, Jr.**

**Senior Vice President and Chief Financial Officer**

KNOW ALL MEN BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints Donald G. Barger, Daniel J. Churay and Bhadresh Sutaria, or any of them, severally, as his/her attorney-in-fact and agent, with full power of substitution and resubstitution, for him/her and in his/her name, place, and stead, in any and all capacities, to sign any and all amendments, including post-effective amendments, to this registration statement, and to file the same with all exhibits hereto, and all other documents in connection herewith, with the Commission, granting unto said attorney-in-fact and agent, and either of them, full power and authority to do and perform each and every act and thing requisite or necessary to be done in and about the premises, as fully to all intents and purposes as he/she might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents, or either of them, or their or his substitutes, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed by the following persons in the capacities indicated on the 1<sup>st</sup> day of April, 2005.

<u>Signature</u>	<u>Title</u>
<u>          /s/ WILLIAM D. ZOLLARS</u>	Chairman of the Board of Directors, President and Chief Executive Officer (principal executive officer)
<b>William D. Zollars</b>	
<u>          /s/ DONALD G. BARGER, JR.</u>	Senior Vice President and Chief Financial Officer (principal financial officer)
<b>Donald G. Barger, Jr.</b>	
<u>          /s/ BHADRESH A. SUTARIA</u>	Vice President Corporate Controller and Chief Accounting Officer (principal accounting officer)
<b>Bhadresh Sutaria</b>	
<u>          /s/ CASSANDRA C. CARR</u>	Director
<b>Cassandra C. Carr</b>	
<u>          /s/ HOWARD M. DEAN</u>	Director

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**Howard M. Dean**

/s/ FRANK P. DOYLE

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Director

**Frank P. Doyle**

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Director

**John F. Fiedler**

/s/ DENNIS E. FOSTER

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Director

**Dennis E. Foster**

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<u>Signature</u>	<u>Title</u>
/s/ JOHN C. MCKELVEY	Director
<hr/>	
<b>John C. McKelvey</b>	
/s/ PHILLIP J. MEEK	Director
<hr/>	
<b>Phillip J. Meek</b>	
/s/ WILLIAM L. TRUBECK	Director
<hr/>	
<b>William L. Trubeck</b>	
/s/ CARL W. VOGT	Director
<hr/>	
<b>Carl W. Vogt</b>	



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