

PHOENIX FOOTWEAR GROUP INC

Form 8-K/A

March 26, 2004

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**SECURITIES AND EXCHANGE COMMISSION**

**WASHINGTON, DC 20549**

**FORM 8-K/A**

CURRENT REPORT PURSUANT  
TO SECTION 13 OR 15(d) OF THE  
SECURITIES EXCHANGE ACT OF 1934

Date of report (Date of earliest event reported) February 12, 2004

**PHOENIX FOOTWEAR GROUP, INC.**

(Exact Name of Registrant as Specified in Its Charter)

Delaware

(State or Other Jurisdiction of Incorporation)

001-31309

15-0327010

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(Commission File Number)

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(IRS Employer Identification No.)

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5759 Fleet Street, Suite 220, Carlsbad,  
California

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92008

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(Address of Principal Executive Offices)

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(Zip Code)

(760) 602-9688

(Registrant's Telephone Number, Including Area Code)

(Former Name or Former Address, if Changed Since Last Report)

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**INFORMATION TO BE INCLUDED IN THE REPORT**

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**INFORMATION TO BE INCLUDED IN THE REPORT**

On February 13, 2004, the Registrant filed a Form 8-K attaching its press release as Exhibit 99.1, announcing its fourth quarter and full year 2003 results. This amendment corrects the Form 8-K, which inadvertently filed the press release pursuant to Item 5, to furnish the press release under Item 12 and amends and restates the prior filing in its entirety.

Item 7. Financial Statements and Exhibits

(c) EXHIBITS

<b>EXHIBIT NO.</b>	<b>DESCRIPTION</b>
99.1	Press Release issued by Phoenix Footwear Group, Inc. dated February 12, 2004.

Item 12. Results of Operations and Financial Condition.

On February 12, 2004, the Registrant issued a press announcing its fourth quarter and full year 2003 results. A copy of the press release is attached as Exhibit 99.1 to this current report.

**SIGNATURES**

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

PHOENIX FOOTWEAR GROUP, INC.

Date: March 26, 2004

By: /s/ James R. Riedman  
James R. Riedman  
Chairman and CEO

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EXHIBIT INDEX

<b><u>EXHIBIT NO.</u></b>	<b><u>DESCRIPTION</u></b>
99.1	Press Release issued by Phoenix Footwear Group, Inc. dated February 12, 2004.

**NASDAQ Listing**

NetScout common stock is currently listed on NASDAQ under the symbol NTCT. In the Merger Agreement, NetScout agreed to cause to be filed with the SEC a registration statement on Form S-4 in connection with the issuance of NetScout common stock pursuant to the First Merger. After the Mergers, shares of NetScout common stock will continue to trade on NASDAQ under the same symbol NTCT.

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### **THE MERGER AGREEMENT**

*The following is a summary of the material provisions of the Merger Agreement, which summary is qualified in its entirety by the Merger Agreement, a copy of which is attached as Annex A to this document. You are urged to read the Merger Agreement in its entirety. This summary of the Merger Agreement has been included to provide NetScout stockholders with information regarding its terms. The rights and obligations of the parties are governed by the express terms and conditions of the Merger Agreement and not by this summary or any other information included in this document. This summary of the Merger Agreement is not intended to provide any other factual information about NetScout, Merger Sub, Merger Sub II, Danaher or Newco following the consummation of the Mergers. Information about NetScout, Merger Sub, Merger Sub II, Danaher or Newco can be found elsewhere in this document and in the documents incorporated by reference into this document. See also *Where You Can Find More Information: Incorporation by Reference*.*

#### **The Mergers**

Under the Merger Agreement and in accordance with the DGCL and the DLLCA, at the effective time of the First Merger, Merger Sub will merge with and into Newco. As a result of the First Merger, the separate corporate existence of Merger Sub will cease and Newco will continue as the surviving company and as a wholly-owned subsidiary of NetScout and will succeed to and assume all the rights, powers and privileges and be subject to all of the obligations of Merger Sub in accordance with the DGCL and the DLLCA. The certificate of formation and limited liability company operating agreement of Newco in effect immediately prior to the First Merger will be amended and restated in their entirety following the consummation of the Merger. Immediately following the First Merger, Newco (as the surviving entity of the First Merger) will merge with and into Merger Sub II. As a result of the Second Merger, the separate corporate existence of Newco will cease and Merger Sub II will continue as the surviving company and as a wholly-owned subsidiary of NetScout and will succeed to and assume all the rights, powers and privileges and be subject to all of the obligations of Newco in accordance with the DLLCA.

#### **Closing; Effective Time**

Under the terms of the Merger Agreement, the closing of the Mergers will take place at 10:00 a.m., Eastern Time, no later than the second business day after the date on which the conditions precedent to the Mergers are satisfied or waived (other than those to be satisfied at the closing of the Mergers), unless otherwise agreed upon by NetScout and Danaher.

Under the terms of the Distribution Agreement, the date of the Distribution will be selected by Danaher's board of directors or its designees. The closing of the Separation will occur at 12:01 a.m. Eastern Time on the date of the Distribution. See also *Description of the Separation and Distribution Agreement*.

At the closing of the First Merger, NetScout and Danaher will cause to be filed a certificate of merger with the Secretary of State of the State of Delaware to effect the First Merger. The First Merger will become effective at the time of filing of such certificate of merger or at such later time as NetScout and Danaher may agree and provide in the certificate of merger. Immediately after the effective time of the First Merger, NetScout will cause to be filed a certificate of merger with the Secretary of State of the State of Delaware to effect the Second Merger. The Second Merger will become effective at the time of filing of such certificate of merger or at such later time as NetScout and Danaher may agree and provide in the certificate of merger.

#### **Merger Consideration**

The Merger Agreement provides that, at the effective time of the First Merger, each issued and outstanding Newco common unit (except Newco common units held by Danaher, NetScout or any of their respective subsidiaries or by Newco in its treasury) will be automatically converted into a number of shares of NetScout

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common stock equal to (x) 62.5 million shares of NetScout common stock plus the product of (A) 1.46 multiplied by (B) the number of shares of NetScout common stock issued in any acquisition by NetScout prior to the effective time of the First Merger divided by (y) the aggregate number of Newco common units issued and outstanding immediately prior to the effective time of the First Merger. The calculation of the merger consideration as set forth in the Merger Agreement is expected to result, prior to the elimination of fractional shares, in Newco's members immediately prior to the First Merger and Newco Employees collectively holding approximately 59.5% of the outstanding equity interests of NetScout on a fully-diluted basis upon completion of the Transactions and NetScout equityholders immediately prior to the First Merger collectively holding approximately 40.5% of such equity interests on a fully-diluted basis.

No fractional shares of NetScout common stock will be issued pursuant to the First Merger. Any holder of Newco common units who would otherwise be entitled to receive a fraction of a share of NetScout common stock (after aggregating all fractional shares issuable to such holder) shall, in lieu of such fraction of a share, be paid in cash the dollar amount (rounded to the nearest whole cent), after deducting any required withholding taxes, on a pro rata basis, without interest, determined by multiplying such fraction by the closing price of a share of NetScout common stock on NASDAQ on the last business day prior to the closing of the First Merger.

### **Exchange of Newco Common Units**

Prior to the effective time of the First Merger, NetScout will issue and cause to be deposited with the exchange agent non-certificated shares of NetScout common stock represented by book entry authorizations for the benefit of the Danaher stockholders who received Newco common units in the Distribution and for distribution in the First Merger upon conversion of the Newco common units.

At the effective time of the First Merger, all issued and outstanding Newco common units will be converted into the right to receive shares of NetScout common stock as described above under Merger Consideration. Upon receipt of a duly executed letter of transmittal and other customary documents, the exchange agent will distribute the shares of NetScout common stock to each person who was entitled to receive Newco common units in the Distribution. Each person entitled to receive Newco common units in the Distribution will be entitled to receive in respect of such Newco common units a certificate or book-entry authorization representing the number of whole shares of NetScout common stock that such holder has the right to receive pursuant to the First Merger (and cash in lieu of fractional shares of NetScout common stock as described above under Merger Consideration ) (and any dividends or other distributions and other amounts as described below under Distributions With Respect to Shares of NetScout Common Stock After the Effective Time of the First Merger ).

### **Distribution With Respect to Shares of NetScout Common Stock After the Effective Time of the First Merger**

No dividend or other distributions declared or made after the effective time of the First Merger with respect to NetScout common stock with a record date after the effective time of the First Merger will be paid with respect to any shares of NetScout common stock unless the holder has exchanged its Newco common units in accordance with the Merger Agreement. NetScout is required under the Merger Agreement to deposit all such amounts with the exchange agent.

### **Termination of the Distribution Fund**

Any portion of the amounts deposited with the exchange agent under the Merger Agreement that remains undistributed to the former members of Newco on the one-year anniversary of the effective time of the First Merger will be delivered to NetScout upon demand, and any former members of Newco who have not received shares of NetScout common stock as described above may thereafter look only to NetScout for payment of their claim for

NetScout common stock and any dividends, distributions or cash in lieu of fractional shares with respect to NetScout common stock (subject to any applicable abandoned property, escheat or similar law).

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### **Conversion of Shares in the Second Merger**

Immediately after the effective time of the First Merger, both Newco (as the surviving entity in the First Merger) and Merger Sub II will be wholly-owned subsidiaries of NetScout. At the effective time of the Second Merger, each limited liability company interest of Newco outstanding immediately prior to the effective time of the Second Merger shall be cancelled and shall cease to exist and no consideration shall be delivered in exchange therefor and each limited liability company interest in Merger Sub II outstanding immediately prior to the effective time of the Second Merger shall remain unchanged and continue to remain outstanding as a limited liability company interest in Merger Sub II. At the effective time of the Second Merger, NetScout will continue as the sole member of Merger Sub II (the surviving entity of the Second Merger) and Merger Sub II shall continue without dissolution.

### **Adjustment Amount**

Under the Merger Agreement, promptly following the delivery of the Audited Financial Statements, Danaher was required to deliver to NetScout a statement setting forth a calculation of the Operating Profit derived from the audited financial statements of the Communications Business for the year ended December 31, 2013 included in the Audited Financial Statements. In the event that the Operating Profit was less than the amount set forth on the schedules to the Merger Agreement, then Danaher would have been obligated to pay to NetScout an amount in cash equal to the product of (x) such shortfall multiplied by (y) 13.1; provided, however, that in no event would such payment exceed \$150 million. Because the Operating Profit reflected in the Audited Financial Statements exceeded the amount specified in the Merger Agreement, there was no payment required.

### **Post-Closing NetScout Board of Directors and Officers**

The Merger Agreement provides that the NetScout board of directors will take all actions necessary such that, effective as of the effective time of the First Merger, one person selected by Danaher and approved by NetScout will be elected to the NetScout board of directors. In accordance with the Merger Agreement, this individual will also, subject to the fiduciary duties of NetScout's board of directors, be nominated for re-election to the board of directors of NetScout at NetScout's 2015 annual meeting of stockholders.

Additionally, the executive officers of NetScout immediately prior to the consummation of the First Merger are expected to be the executive officers of NetScout immediately following the consummation of the Mergers.

### **Stockholders Meeting**

Under the terms of the Merger Agreement, NetScout is required to call a meeting of its stockholders for the purpose of voting upon the issuance of shares of NetScout's common stock in the Mergers and related matters as promptly as practicable following the date on which the SEC has cleared the NetScout proxy statement and, if required by the SEC as a condition to the mailing of the NetScout proxy statement, the registration statement of NetScout has been declared effective. NetScout will ask its stockholders to vote on this matter at the special meeting of NetScout stockholders by delivering the NetScout proxy statement to its stockholders in accordance with applicable law and its organizational documents. NetScout is required to call such a stockholders' meeting for the purpose of voting upon the issuance of shares of NetScout common stock in the Mergers and related matters unless the Merger Agreement is terminated, regardless of whether the board of directors of NetScout has made a Change in Recommendation (as defined below). The special meeting will be held at 10:00 a.m. on June 25, 2015.

### **Representations and Warranties**

In the Merger Agreement, each of NetScout and the Merger Subs has made representations and warranties to Danaher and Newco, and each of Danaher and Newco has made representations and warranties to NetScout and Merger Subs. These representations and warranties relate to, among other things:

due organization, good standing and qualification;

corporate governance documents;

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capital structure;

financial statements and absence of undisclosed liabilities;

absence of certain changes or events;

title to and sufficiency of assets;

interests in real property;

intellectual property and privacy matters;

material contracts;

compliance with applicable laws and regulatory matters, including compliance with anticorruption, export control and sanctions laws;

governmental authorizations

tax matters;

labor and employee benefit matters and compliance with the Employee Retirement Income Security Act of 1974;

environmental matters;

insurance matters;

absence of investigations or litigation;

authority to enter into the Merger Agreement (and the other Transaction Documents);

no conflicts with or violations of governance documents, other obligations or laws;

formation of the Merger Subs solely for the purpose of engaging in the Mergers, the Distribution and other Transactions;

payment of fees to brokers or finders in connection with the Merger Agreement and the other Transaction Documents; and

the absence of any other representations.

NetScout and Merger Subs have also made representations and warranties to Danaher and Newco relating to NetScout's SEC filings, NetScout and its affiliates not constituting interested stockholders with respect to Danaher for purposes of the anti-takeover restrictions of Section 203 of the DGCL, the vote required by NetScout's stockholders to consummate the transactions contemplated by the Merger Agreement and the other Transaction Documents, that the shares of NetScout common stock to be issued pursuant to the First Merger have been duly authorized and will be validly issued and not subject to any restriction on resale, other than those imposed by Rules 144 and 145 under the Securities Act.

Danaher and Newco also made representations and warranties to NetScout and the Merger Subs relating to Danaher and its affiliates not constituting interested stockholders with respect to NetScout for purposes of the anti-takeover restrictions of Section 203 of the DGCL, and that the only stockholder vote required in connection with consummation of the transactions contemplated by the Merger Agreement and the other Transaction Documents is by Danaher, in its capacity as sole member of Newco prior to the Distribution. Danaher's and Newco's representations and warranties are generally limited to Newco and its subsidiaries and the Communications Business.

Many of the representations and warranties contained in the Merger Agreement are subject to a Material Adverse Effect standard, materiality qualifications, knowledge qualifications, or a combination of the foregoing,

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and, except as set forth in Article IV of the Distribution Agreement, none of the representations and warranties survive the closing of the Mergers. The Merger Agreement does not contain any post-closing indemnification obligations with respect to these matters; provided, however pursuant to the Distribution Agreement, certain of Danaher's and Newco's representations in the Merger Agreement related to title to and sufficiency of the Newco Assets and the Newco IP survive for a period of 12 months after the effective time of the First Merger.

Under the Merger Agreement, a Material Adverse Effect means, with respect to Newco or NetScout, as applicable, any effect, change, claim, event or circumstance that, considered with all other effects, changes, claims, events or circumstances either (a) would prevent or materially impair such party from complying with its obligations under the Merger Agreement or from consummating the transactions contemplated by the Merger Agreement and the other Transaction Documents or (b) is or would reasonably be expected to be or to become materially adverse to, or has or would reasonably be expected to have or result in a material adverse effect on the business, financial condition or results of operations of such party and its subsidiaries taken as a whole. However, with respect to clause (b), any change, development, event, occurrence, effect or state of facts arising out of or resulting from any of the following will not be deemed either to constitute, or be taken into account in determining whether there is, a material adverse effect:

conditions generally affecting the industry in which NetScout or Newco, as the case may be, competes or the U.S. or global economy as a whole, to the extent that such conditions do not have a disproportionate impact on NetScout and its subsidiaries (the NetScout Companies) or Newco and its subsidiaries after giving effect to the transactions and transfer of assets and liabilities as set forth in the Distribution Agreement (the Newco Companies), as the case may be, taken as a whole, relative to other companies in the industry in which such companies operate;

general conditions in the financial markets, and any changes therein (including any changes arising out of acts of terrorism, war, weather conditions or other force majeure events), to the extent that such conditions do not have a disproportionate impact on NetScout Companies or the Newco Companies, as the case may be, taken as a whole, relative to other companies in the industry in which the NetScout Companies or the Newco Companies, as the case may be, operate;

changes in the trading price or trading volume of NetScout common stock or Danaher common stock, as the case may be (it being understood, however, that, generally any effect, change, claim, event or circumstance giving rise to or contributing to such changes in the trading price or trading volume of NetScout common stock or Danaher common stock, as the case may be, may give rise to a Material Adverse Effect and may be taken into account in determining whether a Material Adverse Effect has occurred);

changes in GAAP (or any interpretations of GAAP) or laws applicable to NetScout Companies or Newco Companies, as the case may be, to the extent that such conditions do not have a disproportionate impact on NetScout Companies or Newco Companies, as the case may be, taken as a whole, relative to other companies in the industry in which the NetScout Companies or the Newco Companies, as the case may be, operate;

the failure to meet public estimates or forecasts of revenues, earnings of other financial metrics, in and of itself, or the failure to meet internal projections, forecasts or budgets of revenues, earnings or other financial metrics, in and of itself (it being understood, however, that, generally, any effect, change, claim, event or circumstance giving rise to or contributing to any such failure may give rise to a Material Adverse Effect and may be taken into account in determining whether a Material Adverse Effect has occurred);

any stockholder or derivative litigation arising from or relating to the Merger Agreement or the transactions contemplated by the Merger Agreement or the other Transaction Documents;

effects, changes, claims, events or circumstances resulting directly from the announcement or pendency of the Merger Agreement or the transactions contemplated by the Merger Agreement or the

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other Transaction Documents, including loss of employees, suppliers or customers (including changes in customer bidding procedures or testing or award or scope of survey and/or loss of customer orders or contracts) and any related decrease in sales volume of NetScout Products or Newco Products, as the case may be; or

any items disclosed by such party in their respective disclosure letter delivered pursuant to the Merger Agreement.

## **Conduct of Business Pending Closing**

Each of the parties has undertaken to perform customary covenants in the Merger Agreement that place restrictions on it and its subsidiaries until the effective time of the Merger. In general, each of NetScout and Danaher (generally, to the extent of the Communications Business only) agrees that prior to the effective time of the First Merger, except to the extent required by law, consented to by the other party (which consent may not be unreasonably withheld, conditioned or delayed), disclosed in their respective disclosure letters, or otherwise expressly permitted or contemplated by the Merger Agreement and the other Transaction Documents, it will use its commercially reasonable efforts to ensure that the conduct its business and operations in the ordinary course in all material respects; and will use its commercially reasonable efforts to preserve intact the material components of its current business organization, and maintain its relations and goodwill in all material respects with all material suppliers, material customers, material licensors, and governmental bodies.

In addition, NetScout has agreed that prior to the effective time of the First Merger, except to the extent required by law, disclosed in its disclosure letter, consented to by Danaher (which consent may not be unreasonably withheld, conditioned or delayed) or otherwise expressly permitted or contemplated by the Merger Agreement and the other Transaction Documents, it will not take the following actions:

declare, accrue, set aside or pay any dividend or make any other distribution in respect of any shares of capital stock or other securities, or repurchase, redeem or otherwise reacquire any shares of capital stock or other securities, other than: (A) dividends or distributions between or among any of the NetScout Companies to the extent consistent with past practices; (B) pursuant to NetScout's right to purchase restricted shares of NetScout common stock held by an employee of, or other service provider to, NetScout upon termination of such individual's employment or service or upon the cashless or net exercise of outstanding NetScout stock options or to satisfy withholding obligations upon vesting or exercise of equity awards or (C) pursuant to NetScout's stock repurchase programs to the extent consistent with past practices;

sell, issue, grant, authorize the sale, issuance or grant of, or publicly announce its intention to sell, issue, or grant: (A) any capital stock or other security; (B) any option, call, warrant or right to acquire any capital stock or other security; or (C) any instrument convertible into or exchangeable for any capital stock or other security (except that NetScout may: (1) issue shares of NetScout common stock pursuant to acquisitions, as described below; (2) issue shares of NetScout common stock: (a) upon the valid exercise of NetScout stock options or upon the vesting of any NetScout restricted stock units, in each case outstanding as of October 12, 2014; and (b) pursuant to NetScout's employee stock purchase plan); and (3) in the ordinary course of business and consistent with past practices, grant equity awards under the NetScout's equity incentive plans; provided that such equity awards may not exceed 1,000,000 shares of NetScout common stock in the aggregate under such equity plans);

amend or permit the adoption of any amendment to its certificate of incorporation or bylaws or other charter or organizational documents in any event to the extent reasonably likely to adversely affect the transactions contemplated by the Merger Agreement or the other Transaction Documents;

make any capital expenditure outside the ordinary course of business (except that the NetScout Companies may make any capital expenditure that: (A) is provided for in NetScout's capital expense budget delivered to Danaher prior to October 12, 2014; or (B) when added to all other capital

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expenditures made on behalf of all of the NetScout Companies since October 12, 2014 but not provided for in NetScout's capital expense budget delivered to Danaher prior October 12, 2014, does not exceed \$5,000,000 in the aggregate);

acquire any equity interest or other interest in any other entity or acquire, lease or license any right or other asset from any other person or sell or otherwise dispose of, or lease or license, any right or other asset to any other person (except in each case for: (A) assets acquired, leased, licensed or disposed of by NetScout in the ordinary course of business; (B) assets that are immaterial to the business of the NetScout Companies; (C) sales of inventory or other assets in the ordinary course of business; or (D) acquisitions (1) for consideration that does not exceed \$50,000,000 in the aggregate or (2) for equity consideration that do not exceed 450,000 shares of NetScout common stock in the aggregate (provided, however, that the fair value of any such equity consideration shall also be counted for purposes of measuring whether the amounts in clause (1) have been exceeded);

establish, adopt, enter into or amend any employee plan or employee agreement, pay any bonus or make any profit-sharing or similar payment to, pay any severance, retention or change-of-control or similar benefits, or increase the compensation payable to, any employees (except that NetScout (A) may take any such actions to the extent required by applicable law or the terms of any employee plan or employee agreement as in effect as of October 12, 2014; (B) may make grants of NetScout equity awards as set forth above; (C) may increase the compensation of employees in the ordinary course of business consistent with past practice; (D) may make bonus payments and profit sharing payments to employees in the ordinary course of business consistent with past practice; (E) may enter into compensation arrangements with any prospective employees in the ordinary course of business consistent with past practice; and (F) may increase the amount of compensation payable in connection with the promotion of any employee in the ordinary course of business consistent with past practice);

make any pledge of any of its material assets or permit any of its material assets to become subject to any encumbrances, in each case other than in the ordinary course of business, other than pursuant to the Debt Financing;

lend money to any person (other than routine travel and business expense advances made to directors or employees in the ordinary course of business), or, except in the ordinary course of business and consistent with past practices, incur or guarantee any indebtedness in excess of \$5,000,000 in the aggregate (other than the Debt Financing);

other than in the ordinary course of business and consistent with past practices or as required by concurrent changes in GAAP or SEC rules and regulations, change any of its methods of accounting or accounting practices in any respect;

except as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect with respect to NetScout, settle any legal proceeding or other material claim;

take any action that would reasonably be expected to cause the Mergers to fail to qualify as a reorganization under Section 368(a) of the Code; or

agree or commit to take any of the foregoing actions.

In addition, Danaher (to the extent of the Communications Business) has agreed that prior to the effective time of the First Merger, except to the extent required by law, disclosed in its disclosure letter, consented to by NetScout (which consent may not be unreasonably withheld, conditioned or delayed) or otherwise expressly permitted or contemplated by the Merger Agreement or the other Transaction Documents, it will not take the following actions:

sell, issue, grant, authorize the sale, issuance or grant of, or publicly announce its intention to sell, issue, or grant: (A) any capital stock or other security to any Newco Employee; (B) any option, call, warrant or right to acquire any capital stock or other security to any Newco Employee; or (C) any

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instrument convertible into or exchangeable for any capital stock or other security to any Newco Employee, in each case, which would constitute Danaher Equity Awards (except that: (1) Danaher may issue shares of Danaher common stock upon the valid exercise of options exercisable for Danaher common stock or upon the vesting of any Danaher restricted stock units, in each case outstanding as of October 12, 2014 or granted in accordance with clause (2); and (2) Danaher may (x) make grants of Danaher Equity Awards to Newco Employees in November 2014 as previously disclosed to NetScout, (y) make grants of Danaher Equity Awards of up to 100,000 additional shares of Danaher common stock to Newco Employees and (z) make grants to Newco Employees in respect of a number of shares of Danaher common stock underlying Danaher Equity Awards that, on or after October 12, 2014, are either forfeited without a delivery of Danaher common stock, tendered as payment for the exercise of an option exercisable for Danaher common stock or withheld from delivery to satisfy applicable taxes in respect of the Danaher Equity Award; provided that if the closing of the Mergers has not occurred by August 4, 2015, Danaher may continue to make ordinary course grants of Danaher Equity Awards to Newco Employees irrespective of the limitations set forth herein;

with respect to any Danaher Equity Awards, except as otherwise required by the terms of any employee plan or employee agreement or as otherwise permitted above, (A) amend or waive any of its rights under, or accelerate the vesting under, any provision of any of the Danaher Stock Plans, (B) amend any provision of any agreement evidencing any outstanding stock option, restricted stock grant, or any restricted stock unit purchase agreement, or (C) otherwise modify any of the terms of any outstanding option, restricted stock agreement, restricted stock unit, warrant or other security or any related contract

amend or permit the adoption of any amendment to the certificate of incorporation, bylaws, certificate of formation, limited liability company operating agreement, or other charter or organizational documents of Newco or any of its subsidiaries;

with respect to the Communications Business, make or commit to make any capital expenditure outside the ordinary course of business (except that Newco and its subsidiaries may make any capital expenditure that: (A) is provided for in such entity's capital expense budget delivered to NetScout prior to October 12, 2014; or (B) when added to all other capital expenditures made on behalf of Newco and its subsidiaries since October 12, 2014 but not provided for in the capital expense budgets of such entities delivered to NetScout prior to October 12, 2014, does not exceed \$5,000,000 in the aggregate per calendar quarter);

other than in the ordinary course of business, amend, terminate, or waive any material right or remedy under, any material contract or any other contract that is material to Newco and its subsidiaries (taken as a whole), other than termination thereof upon the expiration of any such contract in accordance with its terms or upon a material breach thereof by the counterparty thereto

establish, adopt, enter into or amend any employee plan or employee agreement of which any Newco Employee is a beneficiary or a party, pay any bonus or make any profit-sharing or similar payment to, pay any severance, retention or change-of-control or similar benefits, or increase the compensation payable to,

any Newco Employees (except that Danaher (A) may take any such actions to the extent either contemplated by the Employee Matters Agreement or as required by applicable law or the terms of any employee plan or employee agreement as in effect as of October 12, 2014; (B) may make grants of Danaher Equity Awards as set forth above; (C) may amend applicable employee plans in a manner that either applies to all employees of Danaher in the applicable jurisdiction generally or would not reasonably be expected to result in material liability to NetScout; (D) may make bonus payments and profit sharing payments to Newco Employees in the ordinary course of business consistent with past practice; (E) may enter into compensation arrangements with any prospective Newco Employee in the ordinary course of business consistent with past practice; and (F) may increase the amount of compensation payable in connection with the promotion of any Newco Employee in the ordinary course of business consistent with past practice);

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with respect to the Communications Business, acquire any equity interest or other interest in any other entity or acquire, lease or license any right or other asset from any other person or sell or otherwise dispose of, or lease or license, any right or other asset to any other person (except in each case for: (A) assets acquired, leased, licensed or disposed of by Newco and its subsidiaries in the ordinary course of business; (B) assets that are immaterial to the business of Newco and its subsidiaries; (C) sales of inventory or other assets in the ordinary course of business; or (D) acquisitions for cash consideration that do not exceed \$50,000,000 in the aggregate);

make any pledge of any of the Newco Assets or permit any of the Newco Assets to become subject to any encumbrances, other than permitted encumbrances;

with respect to Newco and its subsidiaries, lend money to any person (other than (i) routine travel and business expense advances made to directors or employees in the ordinary course of business, or (ii) loans to Danaher or any of its subsidiaries), or incur or guarantee any indebtedness in excess of \$5,000,000 in the aggregate;

with respect to Newco and its subsidiaries or the Communications Business, other than (A) in the ordinary course of business and consistent with past practices, (B) changes made by Danaher with respect to both the Communications Business and one or more of its other businesses or (C) as required by concurrent changes in GAAP or SEC rules and regulations, change any of its methods of accounting or accounting practices in any respect;

with respect to Newco and its subsidiaries or the Communications Business, except as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect with respect to the Newco Companies, settle any legal proceeding or other material claim;

take any action that would reasonably be expected to cause the Mergers to fail to qualify as a reorganization under Section 368(a) of the Code; or

agree or commit to do any of the foregoing actions.

**SEC Filings**

The parties agreed to prepare appropriate documents, including this document, a registration statement on Form S-4 of NetScout, and a registration statement on Form S-4 and S-1 (or such other appropriate registration form or forms to be designated by Danaher) of Newco and to file them with the SEC, and NetScout and Newco, as the case may be, have agreed to use their reasonable best efforts to have these documents cleared by the SEC and have their respective registration statements declared effective by the SEC as promptly as reasonably practicable after such filings or at such other time as Danaher, Newco and NetScout may agree.

NetScout is required under the terms of the Merger Agreement to mail this document to its stockholders as promptly as practicable after the SEC clears this document and, if required by the SEC, the registration statements described above are declared effective.

If Danaher elects to complete the Distribution by way of an exchange offer, NetScout, Danaher and Newco are required under the terms of the Merger Agreement to prepare, and Danaher is obligated to file with the SEC, a Schedule TO as promptly as practicable after the date on which the registration statement with respect to the Separation and the Distribution is declared effective and to the extent such filing is required by applicable law.

### **Regulatory Matters**

The Merger Agreement provides that each party to the Merger Agreement will use reasonable best efforts to take or cause to be taken all actions necessary or advisable to consummate the Mergers as soon as practicable, including to prepare and file all filings (if any) and give all notices (if any) required to be made and given by such party in connection with the Mergers and the other transactions contemplated by the Merger Agreement and

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the other Transaction Documents; (ii) obtain each third party consent (if any) required to be obtained (pursuant to any applicable law or contract, or otherwise) by such party in connection with the Mergers or any of the other transactions contemplated by the Merger Agreement and the other Transaction Documents (including NetScout providing a guarantee of Newco's obligations reasonably necessary to obtain such consents); and (iii) lift any restraint, injunction or other legal bar to the Mergers. Each party to the Merger Agreement has also agreed to file all notices, reports and other documents required to be filed by such party with any governmental body with respect to the Mergers and to submit promptly any additional information requested by any such governmental body. NetScout and Danaher have agreed to prepare and file (x) the notifications required under the HSR Act and (y) any applicable mandatory foreign competition act filings in connection with the Mergers. NetScout and Danaher each shall use its reasonable best efforts to cause the expiration or early termination of any waiting period under the HSR Act, and NetScout and Danaher shall each (i) cooperate with the other party in connection with any filing or submission and in connection with any investigation or other inquiry, including any proceeding initiated by a private party, (ii) promptly supply the other party with any information which may be required in order to effectuate notices, reports, documents or other filings with any governmental body required to be made pursuant to the HSR Act and any applicable mandatory foreign competition act filings (the Antitrust Filings); and (iii) promptly supply any additional information which reasonably may be required by any governmental body in connection with Antitrust Filings or which the parties may reasonably deem appropriate.

Notwithstanding the foregoing, neither NetScout, Danaher, Merger Subs nor Newco shall have any obligation under the Merger Agreement (except as specifically set forth in the Merger Agreement or any other Transaction Document) to divest or agree to divest (or cause any of its subsidiaries to divest or agree to divest) any of its respective material businesses, material product lines or material assets, or to take or agree to take (or cause any of its subsidiaries to take or agree to take) any other material action or agree (or cause any of its subsidiaries to agree) to any material limitation or material restriction on any of its respective material businesses, material product lines or material assets, except as would not, or as would not reasonably be expected to, involve the divestiture of assets that generated in the aggregate more than 10% of the combined gross revenues of Newco and its subsidiaries (after giving effect to the Separation) and the NetScout Companies for the 12 months ending June 27, 2014 (it being understood that no such action shall be considered for purposes of determining whether a Material Adverse Effect has occurred or is reasonably likely to occur and the parties shall not be required to take any of the foregoing actions in this paragraph unless the effectiveness of such action is conditioned on the closing of the Mergers). Notwithstanding the foregoing, no such divestiture of assets may occur if such divestiture would constitute a Disqualifying Action (as defined in the Tax Matters Agreement).

On April 22, 2015, the Antitrust Division of the U.S. Department of Justice gave Danaher and NetScout written notice that it had closed its investigation into the Transactions, which effectively terminated the waiting period under the HSR Act.

## **No Solicitation**

The Merger Agreement contains detailed provisions restricting NetScout's or Danaher's ability to seek an alternative transaction. With respect to Danaher, this restriction is only with respect to Newco and its subsidiaries, the Communications Business and the Newco Assets. Under these provisions, NetScout and Danaher have each agreed that it and its subsidiaries will not, and it will use reasonable best efforts to cause its and its subsidiaries' officers, directors, employees, agents and representatives not to:

solicit, initiate, knowingly encourage or knowingly facilitate the making, submission or announcement of any acquisition proposal or acquisition inquiry;

furnish any information regarding any of the NetScout Companies, on the one hand, or the Communications Business, Newco Assets or the Newco Companies, on the other hand, as applicable, to any person in connection with or in response to an acquisition proposal or acquisition inquiry;

except in limited circumstances, approve, endorse or recommend, or propose publicly to approve, endorse or recommend, an acquisition proposal;

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engage in discussions or negotiations with any person relating to any acquisition proposal or acquisition inquiry;

approve, endorse or recommend any acquisition proposal or acquisition inquiry; or

enter into any letter of intent or similar document or any contract contemplating or otherwise relating to any acquisition transaction or acquisition inquiry.

The Merger Agreement provides that the term "acquisition proposal" means any offer or proposal relating to:

any merger, exchange, consolidation, business combination, issuance of securities, acquisition of securities, reorganization, recapitalization, takeover offer, tender offer, exchange offer or other similar transaction: (i) in which such entity or any of its subsidiaries is a constituent corporation and which would result in a third party, or the stockholders of that third party, beneficially owning 15% or more of any class of equity or voting securities of such entity or any of its subsidiaries, or the entity resulting from such transaction or the parent of such entity; (ii) in which a person or group of persons directly or indirectly acquires beneficial or record ownership of securities representing more than 15% of the outstanding securities of any class of voting securities of such entity or any of its subsidiaries; or (iii) in which such entity or any of its subsidiaries issues securities representing more than 15% of the outstanding securities of any class of voting securities of such entity or any of its subsidiaries;

any sale, lease, exchange, transfer, exclusive license, acquisition or disposition of any business or businesses or assets of such entity or its subsidiaries that constitute or account for 15% or more of the consolidated net revenues, or consolidated net income for the 12 full months immediately prior to the receipt of the related acquisition proposal or 15% or more of the fair market value of the consolidated assets of such entity or any of its subsidiaries; or

any liquidation or dissolution of such entity or any of its subsidiaries.

Notwithstanding the foregoing:

nothing in the Merger Agreement shall preclude Danaher from entering into any agreement providing for, or in connection with, any acquisition proposal with respect to Danaher, its subsidiaries, assets or businesses (other than the Communications Business, the Newco Assets, Newco or any of its subsidiaries) so long as such agreement provides for the acquisition by a third party, directly or indirectly, of outstanding shares of Danaher common stock or assets of one or more other businesses of Danaher, does not contemplate the termination of the Merger Agreement and would not prevent or materially impair Danaher from complying with its obligations under the Merger Agreement or from consummating the transactions contemplated by the Merger Agreement and the other Transaction Documents; and

prior to the vote of NetScout stockholders to approve the issuance of shares of NetScout common stock in the First Merger, NetScout may furnish information regarding NetScout and its subsidiaries or engage in discussions and negotiations with any person in response to a bona fide acquisition proposal (i) that did not result from a breach of the restrictions described in this section entitled No Solicitation, (ii) if the NetScout board of directors concludes in good faith, after consultation with its financial advisor and outside legal counsel that such acquisition proposal is or is reasonably expected to result in a superior proposal, (iii) the NetScout board of directors concludes in good faith, after consultation with outside legal counsel that failure to take such action would reasonably constitute a breach of fiduciary duties of the NetScout board of directors, (iv) NetScout receives an executed confidentiality agreement from such third party that contains provisions that are at least as favorable to NetScout as the provisions of the confidentiality agreement between NetScout and Danaher, (v) NetScout provides Danaher written notice of the identity of the person making the acquisition proposal and (vi) NetScout makes such information available to Danaher prior to or substantially at the same time it is provided to such person.

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The Merger Agreement provides that the term superior proposal means an unsolicited bona fide written offer by a third party to purchase at least a majority of the outstanding shares of NetScout common stock or at least a majority of the assets of NetScout (whether through a tender offer, merger or otherwise), that is determined by the NetScout board of directors, in its good faith judgment, after consulting with its financial advisor and outside legal counsel, and after taking into account the terms and conditions of the offer, including the likelihood and anticipated timing of consummation, (i) to be more favorable, from a financial point of view, to NetScout's stockholders than transactions contemplated by the Merger Agreement, (ii) is reasonably likely to be completed, taking into account any financing and approval requirements that the NetScout board of directors determines to be relevant and all other financial, legal, regulatory and other aspects of such proposal that the NetScout board of directors determines to be relevant, and (iii) for which financing, if a cash transaction (in whole or part), is then fully committed.

The Merger Agreement provides that NetScout and Danaher will each promptly, and in any event within 24 hours after receipt, notify the other party of the receipt of an acquisition proposal and provide to the other party copies of any written materials evidencing such proposal, and shall keep the other party reasonably informed of the status and material terms and conditions of any such acquisition proposal.

## **Board Recommendation**

NetScout has agreed in the Merger Agreement that it and its board of directors will:

recommend that NetScout's stockholders vote in favor of the issuance of shares of NetScout common stock pursuant to the First Merger at the NetScout stockholder meeting;

include a statement in the proxy statement to the effect that the NetScout board of directors recommends that NetScout's stockholders vote to approve the issuance of shares of NetScout common stock pursuant to the First Merger (the Board Recommendation); and

except as specifically described below, not directly or indirectly withdraw or modify (or propose to by withdrawn or modified) the Board Recommendation in a manner adverse to Danaher (a Change in Recommendation).

Notwithstanding the foregoing, the NetScout board of directors, at any time prior to obtaining stockholder approval of the issuance of shares of NetScout common stock in the First Merger, may effect a Change in Recommendation under the following circumstances:

if: (A) NetScout has not materially breached its obligations described above under the heading No Solicitation; (B) after October 12, 2014, an unsolicited acquisition proposal is made to NetScout and is not withdrawn; (C) the NetScout board of directors determines in its good faith judgment, after consulting with its financial advisor and outside legal counsel, that such acquisition proposal constitutes a NetScout Superior Offer; (D) the NetScout board of directors does not effect, or cause NetScout to effect, a Change in Recommendation at any time within 4 business days (together with any subsequent shorter period as contemplated by clause (E) below, the Notice Period) after Danaher receives (x) written notice from NetScout that the NetScout board of directors has determined that such acquisition proposal is a NetScout

Superior Offer and (y) a summary of the material terms and conditions of such acquisition proposal and other information required to be provided pursuant to the Merger Agreement (provided, a new notice shall be required with respect to each material modification to such offer (it being understood that any change in the purchase price or form of consideration in such offer shall be deemed a material modification) and a new Notice Period (of 3 business days) shall begin); (E) during the applicable Notice Period, if requested by Danaher, NetScout engages in good faith negotiations, and directs its financial advisors and outside legal advisors to, engage in good faith negotiations, with Danaher to amend the Merger Agreement in such a manner that the competing acquisition proposal does not constitute a NetScout Superior Offer; (F) at the end of the applicable Notice Period, such acquisition proposal has not been withdrawn and constitutes a NetScout Superior Offer (taking into account any changes to the terms of this Agreement proposed by Danaher as a result

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of the negotiations required by clause (E) or otherwise); and (G) the NetScout board of directors determines in good faith, after having consulted with its outside legal counsel, that, in light of such Superior Offer, a failure to make a Change in Recommendation would be reasonably likely to constitute a breach of the fiduciary duties of the NetScout board of directors to NetScout stockholders under applicable law; or

if other than in connection with or as a result of the making of an acquisition proposal or an acquisition inquiry with respect to NetScout, a material development or change in circumstances that was not known or reasonably foreseeable to the NetScout board of directors on October 12, 2014 occurs or arises after October 12, 2014, which material development or change in circumstances becomes known to the NetScout board of directors prior to the approval of the issuance of shares of NetScout common stock pursuant to the First Merger by the NetScout stockholders (such material development or change in circumstances being referred to as an Intervening Event (it being understood that that in no event shall (i) any action taken by NetScout or Danaher pursuant to and in compliance with its obligations under the Merger Agreement related to the Antitrust Filings, and the consequences of any such action or (ii) the receipt, existence of or terms of an acquisition proposal with respect to NetScout or the consequences thereof constitute an Intervening Event); (A) the NetScout board of directors determines in its good faith judgment, after consulting with its financial advisor and outside legal counsel that an Intervening Event has occurred; (B) the NetScout board of directors does not effect, or cause NetScout to effect, a Change in Recommendation at any time within 4 business days after Danaher receives written notice from NetScout that the NetScout board of directors has determined that an Intervening Event requires the NetScout board of directors to effect, or cause NetScout to effect, a Change in Recommendation (provided, a new notice shall be required with respect to any change in circumstances and a new notice period of 3 business days shall begin); (C) during such applicable period, if requested by Danaher, NetScout engages in good faith negotiations, and directs its financial advisors and outside legal advisors to, engage in good faith negotiations, with Danaher to amend this Agreement in such a manner that obviates the need for the NetScout board of directors to effect, or cause NetScout to effect, a Change in Recommendation as a result of such Intervening Event; and (D) the NetScout board of directors determines in good faith, after having consulted with its outside legal counsel, that, in light of such Intervening Event, a failure to make a Change in Recommendation would be reasonably likely to constitute a breach of the fiduciary duties of the NetScout board of directors to NetScout's stockholders under applicable law.

The Merger Agreement provides that NetScout is not prohibited from taking and disclosing to its stockholders a position required by Rule 14e-2(a) or Rule 14d-9 promulgated under the Exchange Act and no disclosure that the NetScout board of directors may determine in good faith (after consultation with outside counsel) that it or NetScout is required to make under applicable law will constitute a violation of the Merger Agreement. A stop, look and listen or similar communication of the type contemplated by Rule 14d-9(f) of the Exchange Act shall not be deemed a Change in Recommendation if the NetScout board of directors expressly reaffirms the Board Recommendation within 5 business days of the public announcement of any applicable acquisition proposal.

## **Covenant Not to Compete**

Danaher has agreed that, for two years after the date of the effective time of the First Merger, it and its subsidiaries will not engage in any of the businesses in which the Communications Business is engaged in as of the effective date of the First Merger (the Restricted Business) anywhere throughout the world without the prior written consent of NetScout. Notwithstanding the foregoing:

Danaher and its subsidiaries will not be prohibited from engaging in the business conducted by Danaher or its subsidiaries (excluding the Communications Business) on the effective date of the First Merger;

Danaher and its subsidiaries will not be prohibited from owning a non-controlling interest in a joint venture or non-consolidated entity that engages in the Restricted Business;

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Danaher may acquire interests in or securities of any person engaged in the restricted business where the revenues of such person that are derived from the Restricted Business are either (i) 35% or less of such person's total revenues or (ii) less than \$50 million annually;

if Danaher completes a business combination with another entity that is engaged in the Restricted Business, which results in the Danaher stockholders immediately prior to such transaction owning less than 50% of the stock of the surviving entity, the surviving entity or any of its subsidiaries or affiliates (but not Danaher or any of its subsidiaries) may engage in the Restricted Business;

Danaher and its subsidiaries are not prohibited from owning 10% or less of the capital stock of any publicly traded entity engaged in the Restricted Business;

Danaher may acquire interests in or securities of any entity as an investment by its pension funds or funds of any other benefit plan of Danaher, whether or not such entity is engaged in the Restricted Business; and

Danaher may perform its obligations under the Merger Agreement and the other Transaction Documents.

### **Non-Solicitation of Employees**

Danaher and NetScout each agree that, except as specifically set forth below, for a period of 3 years from and after the closing of the Mergers (the Non-Solicit Period), they will not, and they will cause their respective subsidiaries not to, directly or indirectly, solicit to hire, or solicit to enter into a consulting agreement with, (a) for the first year of the Non-Solicit Period, any employee or category of employee and (b) for the second and third year of the Non-Solicit Period, any executive officer or senior manager, in each case, of the other party or the other party's subsidiaries. The foregoing restrictions shall not apply to (i) general solicitations (such as advertisements) for employment placed by a party or any party's subsidiary and not specifically targeted at the other party's employees, (ii) responding to or hiring any employee of the other party who contacts a party without any prior solicitation or (iii) the solicitation or hiring of (or entering into a consulting agreement with) any employee of the other party who is contacted by a recruitment agency (provided that such party and its representatives did not identify any employees of the other party to such recruitment agency or otherwise instruct such agency to target any employees of the other party).

### **Certain Other Covenants and Agreements**

The Merger Agreement contains certain other covenants and agreements, including covenants (with certain exceptions specified in the Merger Agreement) relating to:

audited financial statements for the Communications Business that Danaher is required to provide to NetScout as soon as reasonably practicable after October 12, 2014 and prior to November 15, 2014, unaudited financial statements for interim periods not covered by such audited financial statements and financial statements that Danaher is required to provide after the end of the applicable fiscal period;

any press release or public announcement relating to the transactions contemplated by the Merger Agreement and the other Transaction Documents;

the participation in and defense of any litigation that may arise with respect to the transactions contemplated by the Merger Agreement and the other Transaction Documents, in connection with which neither Danaher or NetScout will enter into any settlement without the other party's prior written consent (which consent shall not be unreasonably withheld, conditioned or delayed);

the obligation of Danaher to use reasonable best efforts to cause the delivery of the Tax Opinion from its outside counsel and NetScout's obligation to cause Merger Sub II to be treated as a disregarded entity for U.S. federal tax purposes;

access to each other's officers, employees, accountants, properties and records;

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NetScout's obligation to use best efforts to cause the shares of NetScout common stock to be issued pursuant to the First Merger to be approved for listing on NASDAQ at or prior to the effective time of the First Merger;

Danaher's and Newco's obligation to use commercially reasonable efforts to cooperate with NetScout (at NetScout's sole expense) in connection with the arrangement of any debt financing prior to the effective time of the First Merger;

steps required to be taken to cause any disposition of Newco common units or acquisitions of NetScout common stock resulting from the transactions contemplated by the Merger Agreement or the other Transaction Documents by each individual who is subject to the reporting requirements of Section 16 of the Exchange Act with respect to NetScout or Newco to be exempt under Rule 16b-3 promulgated under the Exchange Act; and

NetScout's obligation to take any actions necessary (except to the extent reasonably expected to result in material liability to NetScout) to ensure that the transactions contemplated by the Merger Agreement will not (1) constitute a change in control or other triggering event under any NetScout benefit plan or arrangement or otherwise result in any payment, acceleration, vesting, increase in benefits, etc. with respect to any current or former officer or other employee, or any individual who is a current or former independent contractor, consultant or director or (2) result in any payment or benefit to such person that would reasonably be expected to be a parachute payment within the meaning of Section 280G(b)(2) of the Code.

**Conditions to the Merger**

The obligations of NetScout, Danaher, the Merger Subs and Newco to consummate the First Merger are subject to the satisfaction of the following conditions:

the effectiveness of the registration statement of NetScout and the registration statement of Newco and the absence of any stop order or proceedings seeking a stop order with respect thereto;

the approval by NetScout stockholders of the issuance of shares of NetScout's common stock in the First Merger;

the consummation of the Separation and the Distribution in accordance with the Distribution Agreement, and the execution and delivery of the Transaction Documents by all parties;

the expiration or termination of any applicable waiting period under the HSR Act;

the approval for listing on NASDAQ of the shares of NetScout common stock to be issued pursuant to the First Merger; and

the absence of court orders or orders of other governmental authorities, absence governmental legal proceedings and the absence of any applicable law preventing the consummation of the Mergers. The conditions listed above are referred to herein as the Joint Conditions to the Merger.

Danaher's and Newco's obligation to effect the First Merger is subject to the satisfaction or waiver of the following conditions:

certain representations and warranties of NetScout and Merger Sub relating to capitalization, power and enforceability of the Merger Agreement, the vote required and financial advisors must be accurate in all material respects, as of October 12, 2014 and as of the closing date of the First Merger (or on an earlier specified date);

other representations and warranties of NetScout and Merger Sub must be accurate as of October 12, 2014 and as of the closing date of the First Merger (or on an earlier specified date), subject to a qualification for inaccuracies that individually or in the aggregate do not constitute and would not reasonably be expected to have or result in a Material Adverse Effect with respect to NetScout;

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the performance or compliance in all material respects by NetScout and the Merger Subs of all obligations and covenants required to be performed or complied with at or prior to the effective time of the First Merger;

since October 12, 2014, with respect to NetScout and its subsidiaries, no Material Adverse Effect shall have occurred and no event shall have occurred or circumstance exist that would reasonably be expected to have or result in a Material Adverse Effect;

the receipt by Danaher of a certificate, dated as of the effective time of the First Merger, of the chief executive officer of NetScout certifying the satisfaction by NetScout of the conditions described in the preceding three bullet points plus the satisfaction of the Joint Conditions to the Merger regarding approval by NetScout stockholders of the issuance of NetScout common stock pursuant to the First Merger;

the receipt by Danaher and Newco of the Tax Opinion from Danaher's tax counsel;

the receipt by Danaher of the IRS ruling, which IRS ruling is still in effect; provided, that this condition shall be deemed satisfied or waived on June 30, 2015; and

appointment of Danaher's designee to the NetScout board of directors.

The conditions listed above are referred to herein as the Additional Conditions to the Merger for Danaher's Benefit.

NetScout's and Merger Subs obligation to effect the First Merger is subject to the satisfaction or waiver of the following conditions:

certain representations and warranties of Danaher and Newco relating to capitalization, power and enforceability of the Merger Agreement, the vote required and financial advisors must be accurate in all material respects, as of October 12, 2014 and as of the closing date of the First Merger (or on an earlier specified date);

other representations and warranties of Danaher and Newco must be accurate as of October 12, 2014 and as of the closing date of the First Merger (or on an earlier specified date), subject to a qualification for inaccuracies that individually or in the aggregate do not constitute and would not reasonably be expected to have or result in a Material Adverse Effect with respect to the Newco Companies;

the performance or compliance in all material respects by Danaher and Newco of all obligations and covenants required to be performed or complied with at or prior to the effective time of the First Merger;

since October 12, 2014, with respect to Newco and its subsidiaries, no Material Adverse Effect shall have occurred and no event shall have occurred or circumstance exist that would reasonably be expected to have

or result in a Material Adverse Effect;

the receipt by NetScout of a certificate, dated as of the effective time of the First Merger, of the chief executive officer of Danaher certifying the satisfaction by Danaher of the conditions described in the preceding three bullet points plus the satisfaction of the Joint Conditions to the Merger regarding the consummation of the Separation and the Distribution in accordance with the Distribution Agreement, and the execution and delivery of the Transaction Documents by all parties; and

delivery by Danaher of a statement described in Section 1.1445-2(c)(3)(i) of the U.S. Treasury Regulations certifying that the interests of Newco are not U.S. real property interests.

The conditions listed above are referred to herein as the Additional Conditions to the Merger for NetScout's Benefit.

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**Termination**

The Merger Agreement may be terminated at any time prior to the consummation of the First Merger by the mutual written consent of Danaher and NetScout. Also, subject to specified qualifications and exceptions, either Danaher or NetScout may terminate the Merger Agreement at any time prior to the consummation of the First Merger if:

the First Merger has not been consummated by October 12, 2015;

any governmental entity has issued a final, nonappealable order, or shall have taken any other action, having the effect of permanently prohibiting the Mergers; or

NetScout's stockholders failed to approve the issuance of shares of NetScout's common stock in the First Merger at the NetScout special meeting (including any adjournment or postponement of the NetScout special meeting).

In addition, subject to specified qualifications and exceptions, Danaher may terminate the Merger Agreement if:

NetScout has breached or failed to perform in any material respect any of its representations, warranties, covenants or other agreements contained in the Merger Agreement, which breach or failure to perform (1) would result in a failure of an Additional Condition to the Merger for Danaher's Benefit and (2) cannot be cured by October 12, 2015; or

(a) the NetScout board of directors shall have failed to recommend that NetScout's stockholders vote to approve the issuance of shares of NetScout Common Stock pursuant to the First Merger, or shall have withdrawn or modified in a manner adverse to Danaher the Board Recommendation, (b) NetScout shall have failed to include in the NetScout proxy statement the Board Recommendation, (c) NetScout shall have failed to publicly recommend against any publicly announced acquisition proposal, and reaffirm the Board Recommendation in connection therewith, within ten (10) business days of the request of Danaher, (d) the NetScout board of directors shall have approved, endorsed or recommended any acquisition proposal, (e) NetScout shall have entered into any letter of intent or similar document or any contract relating to any acquisition proposal; or (f) NetScout shall have breached in any material respect the provisions described above under the heading "No Solicitation" (in each case, a Triggering Event); provided that such termination must occur within the first 20 business days after NetScout has confirmed to Danaher that a Triggering Event has occurred.

In addition, subject to specified qualifications and exceptions, NetScout may terminate the Merger Agreement if:

either Danaher or Newco has breached or failed to perform in any material respect any of its representations, warranties, covenants or other agreements contained in the Merger Agreement, which breach or failure to perform (1) would result in a failure of an Additional Condition to the Merger for NetScout's Benefit and (2) cannot be cured by October 12, 2015; or

on or after June 30, 2015, all of the conditions described in Conditions to the Merger above have been satisfied or waived or are capable of being satisfied at the closing of the Mergers) other than (a) the Joint Conditions to the Merger regarding the consummation of the Separation and the Distribution in accordance with the Distribution Agreement, and the execution and delivery of the Transaction Documents by all parties (solely because the Tax Opinion has not yet been received) and (b) receipt of the Tax Opinion by Danaher; provided that NetScout must provide 14 calendar days prior written notice of its intent to terminate the Merger Agreement for this reason, during which period, Danaher may satisfy or waive the receipt of the Tax Opinion as an Additional Condition to the Merger for Danaher's Benefit.

If the Merger Agreement is terminated, the Merger Agreement will be of no further force or effect, except as described below in the section of this document entitled Termination Fee Payable in Certain Circumstances, and

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the termination of the Merger Agreement will not relieve any party from any liability for any willful and material breach of any representation, warranty, covenant, obligation or other provision contained in the Merger Agreement.

### **Termination Fee Payable in Certain Circumstances**

The Merger Agreement provides that, upon termination of the Merger Agreement under specified circumstances, a termination fee of \$55 million may be payable by NetScout to Danaher. The circumstances under which such termination fee may be payable include:

if the Merger Agreement is terminated by Danaher within 20 business days after notification by NetScout of a Triggering Event;

if the Merger Agreement is terminated by (x) either Danaher or NetScout because the First Merger has not been consummated by October 12, 2015 or (y) by Danaher because NetScout has breached or failed to perform in any material respect any of its representations, warranties, covenants or other agreements contained in the Merger Agreement and (A) after October 12, 2014 but before such termination, an acquisition proposal shall have been made to NetScout and (B) within 9 months after such termination NetScout reaches a definitive agreement to consummate or consummates such acquisition proposal; or

if the Merger Agreement is terminated by NetScout or Danaher because NetScout's stockholders failed to approve the issuance of shares of NetScout's common stock in the First Merger at the NetScout special meeting (including any adjournment or postponement of the NetScout special meeting) and (A) after October 12, 2014 but before such termination, an acquisition proposal shall have been made to NetScout and (B) within 9 months after such termination NetScout reaches a definitive agreement to consummate or consummates such acquisition proposal.

### **Expenses**

The Merger Agreement provides that, except as described immediately above, each party will pay its own fees and expenses in connection with the Merger Agreement, the Mergers and the other transactions contemplated by the Merger Agreement and the other Transaction Documents, except Danaher and NetScout shall share equally all printing costs and all filing fees paid pursuant to the HSR Act and appropriate filings, if required, with foreign regulatory authorities.

In addition, any fees and expenses incurred in connection with seeking third-party consents will be paid as set forth in the Distribution Agreement. NetScout will be responsible for all out-of-pocket costs, third party fees and expenses related to any debt financing it enters into prior to the effective time of the First Merger. All liabilities incurred by Newco and its subsidiaries in connection with the Mergers and the other transactions contemplated by the Transaction Documents are deemed to be liabilities of Danaher.

### **Specific Performance**

The parties agree that irreparable damage would occur and that the parties would not have any adequate remedy at law in the event that any of the provisions of the Merger Agreement were not performed in accordance with their specific terms or were otherwise breached. As a result, the parties have agreed that each of them will be entitled to specific

performance and injunctive or other equitable relief to prevent breaches of the Merger Agreement and to enforce specifically the terms and provisions of the Merger Agreement, in addition to any other remedy to which they are entitled at law or in equity.

### **Amendments**

The Merger Agreement may be amended by the parties at any time before or after the stockholders of NetScout approve the issuance of the shares of NetScout common stock in the First Merger, but after such approval, no amendment which by law or under the rules of NASDAQ requires further stockholder approval may be made to the Merger Agreement without obtaining such further approval. All amendments to the Merger Agreement must be in writing and signed by each party.

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**THE DISTRIBUTION AGREEMENT**

*The following is a summary of the material provisions of the Distribution Agreement. This summary is qualified in its entirety by the Distribution Agreement, a copy of which is attached as Annex B to this document. The rights and obligations of the parties are governed by the express terms and conditions of the Distribution Agreement and not by this summary or any other information included in this document. You are urged to read the Distribution Agreement carefully and in its entirety. Such information can be found elsewhere in this document. See also *Where You Can Find More Information; Incorporation By Reference*.*

**The Separation**

***Transfer of Assets***

Subject to the terms and conditions of the Distribution Agreement, Danaher will assign, transfer, convey and deliver to Newco or one or more subsidiaries of Newco, all of Danaher's and any applicable subsidiary of Danaher's, right, title and interest in the assets of the Communications Business, which are referred to herein as the Communications Assets, including with certain exceptions:

leases to certain premises and all rights and interests of Danaher or any subsidiary of Danaher under such leases;

the issued and outstanding capital stock of, or other equity interests in, the subsidiaries of Danaher that will be owned (directly or indirectly) by Newco immediately prior to the Separation Time, which are referred to herein as the Newco Subs;

the office equipment (including personal computers and mobile devices), furnishings and other tangible assets and all the machinery, equipment, tools and vehicles, in each case, as used, or held for use, primarily in the operation of the Communications Business;

the permits granted to Danaher or any subsidiary of Danaher that are used, or held for use, primarily in the Communications Business (including any pending applications for such permits);

rights to causes of action, lawsuits, judgments, claims, counterclaims and demands of Danaher, its affiliates, Newco or any Newco Sub that relate primarily to the Communications Business, a Communications Asset or a Communications Liability (as defined below);

inventories of materials, parts, raw materials, packaging materials, supplies, works-in-process, goods in transit, finished goods and products that are used, or held for use, primarily in the Communications Business;

Newco and Newco Subs intellectual property rights, including (x) the right to recover damages for any infringement of such intellectual property and to register, prosecute, maintain or record such intellectual property rights after the Separation Date and (y) all goodwill associated with the Communications Business;

rights with respect to third-party warranties that relate to the Communications Assets;

the rights and interests that relate to the Communications Business under any contract that is primarily related to the Communications Business, including under any contract that also relates to any other business or business function of Danaher or any subsidiary of Danaher;

all business records primarily related to the Communications Assets or Communications Liabilities, including with respect to employees who are to remain or become employees of Newco or the Newco Subs in connection with the Separation and subject to any applicable law or collective bargaining obligations, employment and personnel records of these employees, including performance reviews in respect of the period while employed by Newco or any Newco Sub, Forms I-9 and W-4, service credit records, vacation and other leave accrual/balance records, and employee benefit election records in effect as of the closing;

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the right to enforce the confidentiality provisions of any confidentiality, non-disclosure or other similar contracts that relate to the Communications Business and rights to enforce the assignment provisions of any contract;

all accounts receivable or unbilled receivables of the Communications Business, including all accounts receivable of Newco or any Newco Sub;

all assets reflected as an asset on the audited combined balance sheets of the Communications Business as of December 31, 2013, and any assets acquired by or for Newco or any Newco Sub after the date of such balance sheet which would have been reflected on such balance sheet had such assets been acquired on or before the date of such balance sheet;

all the rights of Newco or any Newco Sub under the Distribution Agreement, the Merger Agreement or any Ancillary Agreement; and

any and all other assets owned or held immediately prior to the Separation Time by Danaher or any subsidiary of Danaher that are not described in the list above and that are used, or held for use, primarily in the Communications Business and are not Excluded Assets (as defined below).

The Distribution Agreement also identifies specific assets that are not Communications Assets and thus will not be transferred to Newco or any Newco Sub as part of the Separation, referred to as Excluded Assets, including:

all cash and cash equivalents of Newco or any Newco Sub and bank or other deposit accounts of Danaher and its affiliates (other than Newco and any Newco Sub);

certain intellectual property rights owned by Danaher or any subsidiary of Danaher, other than Newco intellectual property;

employment and personnel records of (i) employees who do not become employees of Newco or the Newco Subs and (ii) employees who become employees of Newco or the Newco Subs, but the transfer of which is prohibited by law or any body representing such employees;

all rights to insurance policies or practices of Danaher and its affiliates, any refunds paid or payable in connection with the cancellation or discontinuance of any such policies or practices, and any claims made under such policies;

all rights to causes of action, lawsuits, judgments, claims, counterclaims or demands against a party other than NetScout or its affiliates that do not relate to the Communications Assets or Communications Business;

certain financial and tax records and working papers of Danaher's auditors;

other than rights to enforce certain confidentiality provisions that relate to confidential information of the Communications Business, records relating to the negotiation and consummation of the potential separation of the Communications Business;

rights and interests that do not relate to the Communications Business under any contract, including under any contract that is not primarily related to the Communications Business;

all permits of Danaher or its affiliates other than those permits used, or held for use, primarily in the Communications Business;

all the issued and outstanding capital stock of, or other equity interests in, the subsidiaries of Danaher (other than Newco or any Newco Sub);

any and all assets that are expressly contemplated by any Ancillary Agreement as assets to be retained by or conveyed to Danaher or any subsidiary of Danaher (other than Newco or any Newco Sub);

assets listed on certain schedules to the Distribution Agreement; and

other than any Communications Asset, assets used, held for use in, or related to, businesses of Danaher other than the Communications Business.

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***Assumption of Liabilities***

At the same time as the transfer of the Communications Assets to Newco or one or more Newco Subs (with certain exceptions), Newco or one or more Newco Subs will assume, perform and fulfill when due and, to the extent applicable, comply with certain liabilities of the Communications Business described below and certain other liabilities described in the schedules to the Distribution Agreement. The Communications Business liabilities, which are referred to herein as the Communications Liabilities (which Newco will assume), specifically exclude the Excluded Liabilities (as defined below), but include, with certain exceptions:

liabilities that are expressly contemplated by the Distribution Agreement, including certain liabilities specified on the schedules to the Distribution Agreement, or any Ancillary Agreement as liabilities to be retained, assumed or retired by Newco or any Newco Sub, and all agreements, obligations and liabilities of any person at Newco or any Newco Sub under the Distribution Agreement, the Merger Agreement or any Ancillary Agreement;

liabilities that relate to (i) the conduct and operation of the Communications Business, (ii) the conduct and operation of any other business conducted by Newco or any subsidiary of Newco after the Separation Time, (iii) the ownership, operation or use of any Communications Assets and (iv) any warranty or similar obligation of the Communications Business;

with respect to the Communications Business and the Communications Assets, subject to certain exceptions, liabilities that relate to (x) any violation or alleged violation of environmental laws, (y) any loss of life or injury due to asbestos exposure and (z) the off-site disposal, storage, transport, discharge or release of hazardous materials;

liabilities under the Newco contracts and the allocated portion of any Newco Shared Contract or any other contract that is assigned to Newco or any Newco Sub;

liabilities that relate to leases for the Communications Assets;

customer deposits held by Danaher or any subsidiary of Danaher that are related to the provision of service by the Communications Business;

accounts payable that relate to the construction or investment in the Communications Assets as of the effective time of the First Merger;

tax liabilities that are allocated to Newco or the Newco Subs pursuant to the Tax Matters Agreement (See Other Agreements Tax Matters Agreement ); and

other than Excluded Liabilities, liabilities of Danaher or any subsidiary of Danaher (including Newco and the Newco Subs) that relate to the ownership or use of the Communications Assets or the operation or the conduct of the Communications Business.

The Distribution Agreement also identifies specific liabilities that will not be assumed by Newco or any Newco Sub as part of the Separation, which are referred to herein as the Excluded Liabilities, including the following liabilities:

liabilities that relate to (A) any loss of life or injury due to asbestos exposure and (B) the off-site disposal, storage, transport, discharge or release of hazardous materials that relates to (x) the ownership or use of the Excluded Assets or (y) activities of Danaher or any subsidiary of Danaher (other than Newco or any Newco Sub) at or affecting the Communications Assets, other than as included in the Communications Liabilities above;

liabilities for indebtedness other than indebtedness solely between or among Newco and any Newco Sub;

liabilities, costs or expenses incurred by or on behalf of Newco or any Newco Sub at or prior to the effective time of the First Merger in connection with the Transactions contemplated by the Distribution Agreement, the Merger Agreement or any Ancillary Agreement;

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tax liabilities that are allocated to Danaher or the Danaher group pursuant to the Tax Matters Agreement (See Other Agreements Tax Matters Agreement );

liabilities that relate to certain contingent or deferred obligations and employee benefit payments; and

liabilities that are expressly contemplated by the Distribution Agreement or any Ancillary Agreement as liabilities to be retained or assumed by Danaher or any subsidiary of Danaher (other than Newco or any Newco Sub), and all liabilities of Danaher or any subsidiary of Danaher (other than Newco or any Newco Sub) under the Distribution Agreement or any Ancillary Agreement.

***Cash Transfers***

If any cash or cash equivalents remain in Newco or any Newco Sub immediately following the Separation Time, Newco shall promptly transfer, or cause to be transferred, such amount of cash and cash equivalents (including any interest earned thereon) to Danaher or its designee.

***Third Party Consents***

As promptly as practicable after the signing of the Distribution Agreement and for a period of eighteen (18) months following the closing of the Mergers, the parties to the Distribution Agreement will cooperate and each use reasonable best efforts to transfer or reissue to Newco or a Newco Sub all the permits used, or held for use, primarily in the Communications Business and to obtain all consents and governmental approvals required to consummate the transfer of the Communications Assets and Communications Liabilities. No party is required to make any material payments, incur a material liability or grant any material accommodation to any third party to obtain such consents or approvals, although Danaher and NetScout have each agreed to bear half the costs associated with obtaining such consents.

***Deferred Assets; Subsequent Transfers***

If the transfer of any Communications Assets or Excluded Assets requires any consents or approvals which have not been obtained at the Separation Time, the transfer of such asset will automatically be deferred (but will still be considered a Communications Asset or Excluded Asset, as applicable). The party retaining the deferred asset will hold the asset in trust for the benefit of the party entitled to the asset until the asset is transferred. During such time, the parties will use reasonable best efforts to make arrangements to place the party entitled to such asset in the same position as if the asset had been transferred as originally contemplated. As soon as the legal impediment to the transfer of the asset in question is removed, or the necessary consents and/or governmental approvals are obtained, the transfer will be effected pursuant to the terms of the Distribution Agreement and/or applicable Ancillary Agreement. The obligations related to the transfer of deferred assets will survive for the duration of the term of the contract, if any, giving rise to the consent requirement.

***Shared Contracts***

Danaher will use reasonable best efforts to separate and cause the applicable member of the Newco group to enter into new agreements with the applicable counterparties to the Danaher Shared Contracts prior to the Separation Time. Upon such separation of a Danaher Shared Contract, the separated contract that is related to the Communications Business will be a Newco contract and the other separated contract will be an Excluded Asset. To the extent that Danaher is unable or the applicable counterparties are unwilling to enter into agreements with respect to any Danaher Shared Contract, Danaher (or the applicable subsidiary of Danaher) will partially assign the Communications Business

functions to Newco in the manner agreed to by the parties. In the event that such partial assignment is not permitted by the terms of the applicable Danaher Shared Contract or consented to by the applicable counterparty, Danaher will use reasonable best efforts to provide for an alternative arrangement so that the applicable member of the Newco group will have the benefits of such Danaher Shared Contract as though it had been partially assigned. Danaher (or the applicable subsidiary of Danaher) is not required to make any

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supplemental payments to any third party when providing such an alternative arrangement. Newco will cooperate with Danaher when entering into any new agreement or partial assignment. The obligations related to Danaher's use of reasonable best efforts to separate and assign Danaher Shared Contracts will terminate on the eighteen (18) month anniversary of the closing of the Mergers, and the obligations related to Danaher's use of reasonable best efforts to provide for alternative arrangements will survive for the duration of the term of the applicable contract.

Newco will use reasonable best efforts to separate and cause the applicable member of the Danaher group to enter into new agreements with the applicable counterparties to the Newco Shared Contracts prior to the Separation Time. Upon such separation of a Newco Shared Contract, the separated contract that is related to the Communications Business will be a Newco contract and the other separated contract will be an Excluded Asset. To the extent that Newco is unable or the applicable counterparties are unwilling to enter into agreements with respect to any Newco Shared Contract, Newco (or the applicable subsidiary of Newco) will partially assign the non-Communications Business functions to Danaher in the manner agreed to by the parties. In the event that such partial assignment is not permitted by the terms of the applicable Newco Shared Contract or consented to by the applicable counterparty, Newco will use reasonable best efforts to provide for an alternative arrangement so that the applicable member of the Danaher group will have the benefits of such Newco Shared Contract as though it had been partially assigned. Newco (or the applicable subsidiary of Newco) is not required to make any supplemental payments to any third party when providing such an alternative arrangement. Danaher will cooperate with Newco when entering into any new agreement or partial assignment. The obligations related to Newco's use of reasonable best efforts to separate and assign Newco Shared Contracts will terminate on the eighteen (18) month anniversary of the closing of the Mergers, and the obligations related to Newco's use of reasonable best efforts to provide for alternative arrangements will survive for the duration of the term of the applicable contract.

### ***Novations of Newco Contracts***

Upon Danaher's request, the parties will use reasonable best efforts to obtain the novation of any Newco contract specified by Danaher. Danaher (or the applicable subsidiary of Danaher) is not required to make any payments to any third party when obtaining such novations. The obligations related to the novation of Newco contracts will terminate on the eighteen (18) month anniversary of the closing of the Mergers.

### ***Termination of Intercompany Agreements***

Effective as of the Distribution Date, Danaher and Newco will terminate all contracts (including any guarantee obligations) between Danaher and any subsidiary of Danaher (excluding Newco and any Newco Sub), on the one hand, and Newco and any subsidiary of Newco, on the other hand, except (i) the Merger Agreement, the Distribution Agreement, and the Ancillary Agreements, (ii) any contracts or intercompany accounts solely between members of the Newco group, (iii) any contract to which any person other than the parties to the Distribution Agreement (or their affiliates) are a party, (iv) any contracts between a subsidiary of Danaher that is in the business of selling or buying products or services to or from third parties and a member of the Newco group (and that is primarily related to the provision of such products or services and was or is entered into in the ordinary course of business) and (v) any contract that the Distribution Agreement, the Merger Agreement, or the Ancillary Agreements expressly contemplate will survive the Distribution Date. All loans between Danaher or any subsidiary of Danaher, on the one hand, and Newco or any subsidiary of Newco, on the other hand, likewise will be terminated before the Distribution Date.

### ***Guarantees***

Following the closing, if the parties were unable to novate, assign or replace any Danaher guarantees prior to the closing, Newco will (i) continue to use its reasonable best efforts to novate, assign or replace such Danaher guarantees

with NetScout as guarantor and (ii) indemnify, defend and hold harmless Danaher and its affiliates

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against, and reimburse Danaher and its affiliates for, any losses Danaher and its affiliates incurred because any such Danaher guarantee is called upon and Danaher or its affiliate is required to make any material payment under any such Danaher guarantee. The obligations related to Newco's use of reasonable best efforts do not require Newco to take any action that would be reasonably expected to expose it or any subsidiary of Newco to any material incremental expenses or losses of benefits.

### ***Resignations***

At or prior to the Distribution Date, Danaher will use its reasonable best efforts to cause each employee and director of Danaher or any subsidiary of Danaher who will not be employed by Newco or a Newco Sub to resign, effective no later than the Distribution Date, from all boards of directors or similar governing bodies of Newco or any Newco Sub, and from all positions as officers of Newco or any Newco Sub.

### **Conditions to the Separation**

The obligations of Danaher to effect the Separation pursuant to the Distribution Agreement are subject to fulfillment (on or before the effective time of the First Merger) or waiver (which waiver will require the written consent of NetScout unless the Merger Agreement has been terminated), at or prior to the Separation Date, of each condition to each party's respective obligations to effect the Mergers as described in the Merger Agreement.

### **The Distribution**

The Distribution Agreement provides that Danaher may elect, in its sole discretion, to effect the Distribution in the form of either (i) a dividend of Newco common units to Danaher stockholders on a *pro rata* basis, referred to as a spin-off, (ii) an offer by Danaher to exchange Newco common units for currently outstanding shares of Danaher's common stock, referred to as a split-off exchange offer or (iii) a combination of a spin-off and a split-off exchange offer. Danaher must advise NetScout of the form of the Distribution at least thirty (30) business days before the anticipated date of the closing of the Mergers.

### **Conditions to the Distribution**

The obligations of Danaher to effect the Distribution pursuant to the Distribution Agreement are subject to fulfillment (on or before the effective time of the First Merger) or waiver (which waiver will require the written consent of NetScout unless the Merger Agreement has been terminated) of each of the following conditions:

the Communications Business, Communications Assets and Communications Liabilities have been transferred to Newco and the Excluded Assets and Excluded Liabilities have been transferred to or remain with a member of the Danaher group (other than Newco or a Newco Sub);

with respect to any spin-off, Danaher has established the record date, for purposes of the Distribution, and has provided a notice to FINRA no later than ten (10) days prior to the record date;

Danaher and Newco have prepared and mailed to the holders of record of Danaher common stock information concerning Newco, its business, operations and management, the Distribution and such other

matters as Danaher will determine in its sole and absolute discretion (after consultation with NetScout) and as otherwise required by applicable law;

each material governmental approval required in connection with the Internal Restructuring or any transaction contemplated by the Plan of Reorganization has been obtained and is in full force and effect; and

each of the conditions to Danaher's obligations to effect the Mergers has been satisfied or waived, other than those conditions that by their nature are to be satisfied at the Distribution Date.

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### **NetScout Guarantee**

Following the effective time of the First Merger, NetScout guarantees the obligations of Newco and the Newco Subs to Danaher under the Distribution Agreement and the Ancillary Agreements.

### **Additional Covenants**

Each of Danaher and Newco have undertaken specified covenants in the Distribution Agreement restricting the conduct of their respective businesses and committing them to take specified actions. You are urged to read carefully the sections of the Distribution Agreement entitled Access to Information and Additional Agreements. The more significant of these covenants discuss:

confidentiality and access by each party to confidential information (including making witnesses available) in the possession or control of the other party;

treatment by each party of privileged information; and

the removal of tangible Communications Assets located at any facilities of Danaher or any subsidiaries of Danaher (other than Newco or any subsidiary of Newco).

### **Insurance**

Prior to the effective time of the First Merger, Newco, the Communications Assets and the Communications Business will continue to be covered under insurance policies of Danaher or the subsidiaries of Danaher. Following the effective time of the First Merger, Newco, the Communications Assets and the Communications Business will no longer be covered under the insurance policies of Danaher or the subsidiaries of Danaher. Newco or any subsidiary of Newco will have the right to access occurrence-based coverage (to the extent such coverage exists) for claims asserted after the effective time of the First Merger but arising out of an occurrence prior to the effective time of the First Merger.

Following the Distribution Date, members of the Newco group will have no rights or claims with respect to any captive insurance company of Danaher or any of its affiliates or any fronted insurance program maintained by Danaher or any of its affiliates that is not a risk transfer insurance program.

Danaher will maintain directors and officers liability and fiduciary liability insurance coverage for no less than six years following the effective time of the First Merger.

### **Mutual Releases; Indemnification**

#### ***Release of Pre-Distribution Date Claims***

Subject to specified exceptions, Newco, on the one hand, and Danaher, on the other hand, agreed to release the other party and its respective subsidiaries, stockholders, directors, partners, managers, managing members, officers, agents or employees from any and all liabilities, whether arising under any contract or by operation of law or otherwise, including in connection with the Transactions and all other activities to implement the Separation:

existing or arising from any acts or events occurring or failing to occur or alleged to have occurred or to have failed to occur on or before the effective time of the Mergers; or

arising from any conditions existing or alleged to have existed on or before the effective time of the Mergers. The mutual release is subject to specified exceptions set forth in the Distribution Agreement, including with respect to any indemnification to which a director, officer, manager, employee or agent of Danaher, Newco or any of their subsidiaries is entitled, if such individual was entitled to a right of indemnification under the organizational documents of Newco or any subsidiary of Newco or pursuant to a contract.

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***Indemnification***

Except as otherwise provided in the Merger Agreement or any Ancillary Agreement, Newco and each member of the Newco group, on a joint and several basis, agreed to indemnify Danaher from and against all losses, liabilities, damages, penalties, judgments, assessments, costs and expenses that relate to any of the following, whether arising before or after the effective time of the First Merger:

the Communications Liabilities assumed by Newco;

any breach by Newco or any Newco Sub of any obligations under the Distribution Agreement or the Ancillary Agreements after the effective time of the Mergers; and

any breach by NetScout or any of its affiliates of any covenant of NetScout under the Merger Agreement, which by its terms is to be performed after the effective time of the Mergers.

Except as otherwise provided in the Merger Agreement or any Ancillary Agreement, Danaher has agreed to indemnify Newco from and against all losses, liabilities, damages, penalties, judgments, assessments, costs and expenses that relate to any of the following, whether arising before or after the effective time of the Mergers:

the Excluded Liabilities;

any breach by Danaher or any subsidiary of Danaher (other than Newco or any subsidiary of Newco) of any obligations under the Distribution Agreement or the Ancillary Agreements on or after the Separation Time;

any breach by Danaher or any of its affiliates of any covenant of Danaher under the Merger Agreement, which by its terms is to be performed after the effective time of the Mergers; and

any breach of the representations and warranties set forth in certain sections of the Merger Agreement with respect to title to, and sufficiency of, the Communications Assets.

***Survival***

The ability to make a claim for indemnification related to the breach of any representation and warranty made by Danaher will terminate after the end of the applicable survival period under the terms of the Merger Agreement as described in The Merger Agreement Survival of Representations, Warranties and Agreements. In the event that notice of any claim for indemnification related to the breach of any representation and warranty made by Danaher is given within the applicable survival period, the representations and warranties that are the subject of such indemnification claim will survive until such time as such claim is finally resolved.

***Baskets and Caps***

Danaher's obligation to indemnify the Newco indemnitees for losses related to a breach of specified representations and warranties made by Danaher in the Merger Agreement with respect to title to, and sufficiency of, the Communications Assets is subject to certain limitations. With respect to such losses, no indemnification will be made by Danaher with respect to any claim until the aggregate amount of all such losses exceeds \$5,000,000, at which point the Newco Indemnitees are entitled to indemnification only for such losses in excess of \$5,000,000. Only individual claims or series of related claims involving such losses in excess of \$100,000 will be included in the calculation to determine whether the \$5,000,000 deductible amount has been met. In no event will the obligation of Danaher to indemnify Newco indemnitees for losses related to breaches of specified representations and warranties made by Danaher in the Merger Agreement with respect to title to, and sufficiency of, the Communications Assets exceed \$250,000,000 in the aggregate.

***Indemnification Obligations Net of Proceeds from Third Parties***

Any liability that is subject to indemnification or contribution pursuant to the Distribution Agreement will be net of any proceeds received by the indemnitee from any third party for indemnification for such liability

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(referred to as third-party proceeds). An indemnitee must use commercially reasonable efforts to seek to collect or recover any third-party proceeds in connection with any liability for which the indemnitee seeks indemnification or contribution.

**Amendment and Waiver**

The Distribution Agreement may be amended and any provision may be waived only by writing signed by both parties, in the case of an amendment, or the party waiving the provision, in the case of a waiver. In addition, unless the Merger Agreement shall have been terminated in accordance with its terms, any such amendment or waiver shall be subject to the written consent of NetScout.

**Termination**

Prior to the closing of the Mergers, the Distribution Agreement will terminate without any further action upon termination of the Merger Agreement. In the event of such termination, no party will have any further liability to the other party, except as provided in the Merger Agreement.

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**OTHER AGREEMENTS**

*The following is a summary of the material provisions of the Employee Matters Agreement, the Tax Matters Agreement, the Transition Services Agreement, the Trademark License Agreement, the IP License Agreement, the DBS License Agreement, the Lease Agreement and the Voting Agreement. This summary is qualified in its entirety by reference to the complete text of the Employee Matters Agreement and the Tax Matters Agreement, copies of which are attached hereto as annexes D and E, respectively. The rights and obligations of the parties are governed by the express terms and conditions of these agreements and not by this summary or any other information included in this document. You are urged to read the agreements carefully and in their entirety.*

**Employee Matters Agreement**

In connection with the proposed Transactions, Danaher, NetScout and Newco have negotiated an employee matters agreement, that, among other things, allocates between the parties the pre-and post-closing liabilities in respect of the employees and independent contractors of the Communications Business transferring to Newco (including liabilities in respect of Danaher's employee benefit plans) and establishes certain required treatment of the transferring employees by NetScout after the closing.

***Identification of Newco Employees and Newco Independent Contractors***

Transferring employees and independent contractors of the Communications Business, respectively referred to as Newco Employees and Newco Independent Contractors, will generally consist of:

each employee or independent contractor of Danaher's Tektronix Communications and Arbor Networks businesses;

each employee or independent contractor of Danaher's Fluke Network's business who transfers by operation of law, or is determined to be either:

primarily dedicated to the Communications Business in the ordinary course; or

required for the ongoing operation of the Communications Business.

Danaher employees meeting the criteria above who are not actively at work at the time of the closing of the Mergers as a result of a disability or an approved leave of absence will become Newco Employees only if and when they return to active employment within six months after the closing of the Mergers (or such longer period as may be required by law).

The parties will establish an integration team to identify which employees and independent contractors of Danaher's Fluke Networks Enterprise business should be treated as Newco Employees and Newco Independent Contractors, with the goal of providing Newco with sufficient operational and management employees to operate and manage the Communications Business. If the integration team is unable to agree prior to the closing of the Mergers whether an employee or independent contractor of Danaher's Fluke Networks Enterprise business should be a Newco Employee or Newco Independent Contractor, the Senior Vice President-Human Resources of Danaher will make the final

determination.

***General Allocation of Liabilities***

Newco will generally assume all liabilities in respect of Newco Employees and Newco Independent Contractors, whether arising before or after the closing of the Mergers, as well as all liabilities arising before the closing of the Mergers in respect of individuals who are not Newco Employees or Newco Independent Contractors but where the liability arose while the individual was employed by or providing substantial services to the Communications Business. Danaher will retain all other liabilities, including all liabilities in respect individuals who are not Newco Employees or Newco Independent Contractors (except as described in the

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preceding sentence) and all liabilities arising from the transfer of Newco Employees and Newco Independent Contractors in connection with the proposed Transactions (other than transfer-related liabilities that arise out of Newco's or NetScout's failure to comply with any of their respective obligations under the terms of the Employee Matters Agreement).

Newco will continue to maintain or assume all obligations under Danaher's collective bargaining agreements to the extent they apply to Newco Employees and as required by law. If the terms of a collective bargaining agreement require that any assets or liabilities be retained by Danaher or transferred to Newco in a manner other than as set forth in the Employee Matters Agreement, the terms of the applicable collective bargaining agreement will govern.

### ***Post-Closing Compensation and Benefits***

For 12 months after the closing of the Mergers, NetScout will generally provide each Newco Employee with a base salary or hourly wage that is at least equal to the base salary or hourly wage provided to the employee immediately before the closing of the Mergers and a target annual cash bonus opportunity that is no less favorable than the target annual cash bonus opportunity in effect for the employee immediately before the closing of the Mergers.

NetScout will also generally provide severance benefits to any Newco Employee not covered by a collective bargaining agreement who is terminated within 12 months after the closing of the Mergers that are no less favorable than the severance benefits the Newco Employee would have received upon a termination of his or her employment immediately before the closing of the Mergers.

In addition, from a period beginning within a reasonable period of time following the closing of the Mergers through the end of the calendar year in which the closing occurs, NetScout will use its reasonable best efforts to provide each Newco Employee with health, welfare and retirement benefits that are no less favorable than the health, welfare and retirement benefits provided by NetScout to its similarly situated employees in the applicable jurisdiction.

### ***Service Crediting***

Subject to certain exceptions, Newco Employees generally will be credited by NetScout for all of their pre-closing service with Danaher for purposes of eligibility, vesting and determination of level of benefits under any NetScout benefit arrangement in which Newco Employees participate after the closing of the Mergers.

### ***Treatment of Defined Benefit Pension Plans***

Newco Employees will generally cease participating in and accruing benefits under Danaher's defined benefit pension plans as of the closing of the Mergers. NetScout will not be required to establish or maintain a U.S. defined benefit pension plan following the closing of the Mergers for any Newco Employee, and Danaher will retain all assets and liabilities for Newco Employees relating to Danaher's U.S. defined benefit pension plan. If required by law in the applicable non-U.S. jurisdiction, NetScout will use its reasonable efforts to establish or maintain a non-U.S. defined benefit pension plan for Newco Employees who participated in a Danaher non-U.S. defined benefit pension plan immediately before the closing of the Mergers with terms substantially similar to the terms of the applicable Danaher non-U.S. defined benefit pension plan as in effect immediately before the closing of the Mergers, and Danaher will transfer assets and liabilities related to Newco Employees under the applicable Danaher non-U.S. defined benefit pension plan to the applicable NetScout non-U.S. defined benefit pension plan. If the non-U.S. pension liabilities transferred by Danaher exceed the assets transferred by Danaher, Danaher is obligated to transfer an amount of cash to NetScout equal to the difference between the non-U.S. pension liabilities transferred and the assets transferred.



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***Treatment of Defined Contribution Retirement Plans***

Newco Employees will cease participating in the Danaher 401(k) plan in which the employees participate as of the closing of the Mergers, and each Newco Employee will become fully vested in his or her account balance under the plan as of the closing of the Mergers. Each Newco Employee will be permitted to make rollover contributions from the Danaher 401(k) plan in which the employee participates to NetScout's 401(k) plan.

Newco Employees will generally cease participating in and accruing benefits under Danaher's non-U.S. defined contribution retirement plans as of the closing of the Mergers. If required by law in the applicable non-U.S. jurisdiction, NetScout will establish or maintain a non-U.S. defined contribution retirement plan for Newco Employees who participated in a Danaher non-U.S. defined contribution retirement plan immediately before the closing of the Mergers with terms no less favorable than the terms of the applicable Danaher non-U.S. defined contribution retirement plan as in effect immediately before the closing of the Mergers, and Danaher will transfer assets and liabilities related to Newco Employees under the applicable Danaher non-U.S. defined contribution retirement plan to the applicable NetScout non-U.S. defined contribution retirement plan.

***Treatment of Welfare Benefit Plans***

Newco Employees will generally cease participating in and accruing any benefits under Danaher's welfare benefit plans as of the closing of the Mergers. NetScout will use its reasonable best efforts to establish or maintain health and welfare benefits plans providing medical, dental, vision, disability and life insurance coverage for Newco Employees with terms and conditions that are fully equivalent to the health and welfare benefits provided by NetScout to its similarly situated employees as of the closing of the Mergers. Danaher generally will retain liabilities for welfare and fringe benefit claims incurred before the closing of the Mergers, and NetScout generally will assume liabilities for welfare and fringe benefit claims incurred on and after the closing of the Mergers.

NetScout will credit each Newco Employee with the amount of accrued but unused vacation time and other paid time off benefits attributable to pre-closing service at Danaher. However, NetScout may require that any carry-over amounts in excess of what could have been carried over under the applicable NetScout paid time off plan be used by December 31 of the year following the year in which the closing of the Mergers occurs.

***Treatment of Nonqualified Deferred Compensation Plan***

Newco Employees will cease active participation in Danaher's nonqualified deferred compensation plan as of the closing of the Mergers. NetScout will have no obligation to establish a nonqualified deferred compensation plan for Newco Employees, and Danaher will retain all assets and liabilities with respect to Danaher's nonqualified deferred compensation plan, including any liabilities with respect to Newco Employees.

***Treatment of Danaher Equity Incentive Awards***

Each option to purchase shares of Danaher common stock that is held by a Newco Employee and is vested and exercisable immediately before the closing of the Mergers or is scheduled to vest on or before August 4, 2015 will generally remain outstanding for 90 days following the later of the closing date of the Mergers or the date the option becomes vested and exercisable. Each restricted stock unit relating to shares of Danaher common stock that is held by a Newco Employee and is unvested immediately before the closing of the Mergers, but is scheduled to vest on or before August 4, 2015, will continue to vest and be settled in accordance with its terms. Each of these Danaher stock options and Danaher restricted stock units may be equitably adjusted by Danaher if determined by the Danaher board of directors to be necessary to reflect the impact of the proposed Transactions on the value of shares of Danaher

common stock. Danaher does not believe that any adjustments will be made in the event that the exchange offer, if applicable, is fully subscribed.

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All stock options and restricted stock units relating to shares of Danaher common stock that are held by a Newco Employee and that are not vested immediately before the closing of the Mergers or scheduled to vest on or before August 4, 2015, will generally be cancelled by Danaher immediately before the closing of the Mergers and replaced by NetScout with a cash retention award and restricted stock units relating to shares of NetScout common stock in respect of the value (determined in accordance with the methods described below) of the cancelled Danaher stock options and Danaher restricted stock units held by the employee before the closing of the Mergers. The value of each cancelled Danaher stock option, referred to herein as the Cancelled Danaher Option Value, will be equal to the spread value of the cancelled Danaher stock option, or, if greater, the value obtained by dividing the total number of shares of Danaher common stock subject to the cancelled Danaher stock option by 2.5 and multiplying the resulting number of shares by the per share closing price of Danaher common stock trading on the regular way basis on the New York Stock Exchange on the day immediately prior to the closing date of the Mergers. The value of each cancelled Danaher restricted stock unit, referred to herein as the Cancelled Danaher Restricted Stock Unit Value, is equal to the total number of shares of Danaher common stock subject to the Danaher restricted stock unit multiplied by the per share closing price of Danaher common stock trading on the regular way basis on the New York Stock Exchange on the day immediately prior to the closing date of the Mergers. Together, the Cancelled Danaher Option Value and the Cancelled Danaher Restricted Stock Unit Value are referred to herein as the Newco Employee's Cancelled Danaher Equity Award Value.

The cash retention award each Newco Employee will receive in respect of the value of the employee's cancelled Danaher equity awards will be equal to one half of the employee's Cancelled Danaher Equity Award Value and will become payable on the later of the first anniversary of the closing date of the Mergers or August 4, 2016, subject to the employee's continued employment with NetScout through the applicable vesting date. Danaher will reimburse NetScout for the amount of the cash retention payments (net of any applicable employment taxes and deductions).

The number of restricted stock units relating to shares of NetScout common stock each Newco Employee will receive in respect of the value of the employee's cancelled Danaher equity awards will be equal to the number obtained by dividing one half of the employee's Cancelled Danaher Equity Award Value by the per share closing price of NetScout common stock trading on the regular way basis on NASDAQ on the closing date of the Mergers, provided that the maximum aggregate value of all restricted stock units relating to shares of NetScout common stock that will be granted to Newco Employees in respect of their cancelled Danaher equity awards will not exceed \$15 million. If the value of the restricted stock units to be granted to Newco Employees in respect of their cancelled Danaher equity awards would otherwise exceed \$15 million, the applicable reduction in the number of restricted stock units to be so granted will be applied to each applicable Newco Employee on a pro rata basis. These restricted stock units relating to shares of NetScout common stock will be subject to the terms and conditions of the applicable NetScout stock plan and the applicable award agreement provided by NetScout.

However, in the event the abovementioned treatment of the cancelled Danaher equity awards results in adverse tax consequences or compliance issues to the parties or any Newco employees, different treatment may apply as agreed between Danaher and NetScout.

***Treatment of Annual Bonus Programs***

Danaher will pay or reimburse NetScout for the bonus amounts that Newco Employees could have received for the fiscal year in which the closing of the Mergers occurs based on projected actual performance for the full year as determined by Danaher in good faith as of the closing date of the Mergers, but pro-rated for the portion of the year ending on the closing date of the Mergers. Danaher will also pay or reimburse NetScout for any accrued but unpaid bonus amounts that NetScout pays to Newco Employees in respect of the fiscal year ending immediately prior to the closing of the Mergers.



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### ***Danaher Retention Plan***

Danaher may, in its sole discretion, adopt a cash retention plan for the benefit of certain Newco Employees based on the achievement of specified continued employment requirements or other vesting conditions identified by Danaher.

### ***Employee Stock Purchase Plan***

Each Newco Employee located in the United States will be eligible to participate in NetScout's employee stock purchase plan on the same basis as similarly situated employees of NetScout as of the first offering date under such plan following the closing date of the Mergers.

### ***Miscellaneous***

The indemnification and dispute resolution procedures in the Employee Matters Agreement are generally consistent with those under the Distribution Agreement. As noted above, however, there are special dispute resolution procedures for the identification of Newco Employees and Newco Independent Contractors.

The Employee Matters Agreement is governed by Delaware law.

## **Tax Matters Agreement**

### ***Allocation of Taxes***

Newco intends to enter into the Tax Matters Agreement with Danaher and NetScout immediately prior to the Distribution that will govern the parties' respective rights, responsibilities and obligations with respect to tax liabilities and benefits, tax attributes, the preparation and filing of tax returns, the control of audits and other tax proceedings and other matters regarding taxes. In general, under the agreement:

Danaher will be responsible for (i) any U.S. federal income taxes imposed on Danaher's U.S. federal consolidated group for any period, (ii) any U.S. federal, state, local or foreign taxes (and any related interest, penalties or audit adjustments) imposed on Newco and/or any of its subsidiaries for any periods or portions thereof ending on or prior to the effective date of the Distribution, and (iii) any transfer taxes arising from the Separation or the Distribution; and

Newco (and, following the effective time of the First Merger, NetScout) will be responsible for any U.S. federal, state, local or foreign taxes (and any related interest, penalties or audit adjustments) imposed on Newco and/or any of its subsidiaries for any periods or portions thereof beginning after the effective date of the Distribution.

Neither party's obligations under the agreement will be limited in amount or subject to any cap. The agreement will also assign responsibilities for administrative matters, such as the filing of returns, payment of taxes due, retention of records and conduct of audits, examinations or similar proceedings. In addition, the agreement provides for cooperation and information sharing with respect to tax matters.

Danaher will generally be responsible for preparing and filing any tax return that includes Danaher or any of its subsidiaries (as determined immediately after the Distribution), including those that also include Newco and/or any of

its subsidiaries. Newco will generally be responsible for preparing and filing any tax returns that include only Newco and/or any of its subsidiaries.

The party responsible for preparing and filing a given tax return will generally have primary authority to control tax contests related to any such tax return. Newco will generally have exclusive authority to control tax contests with respect to tax returns that include only Newco and/or any of its subsidiaries.

***Preservation of the Tax-Free Status of Certain Aspects of the Separation***

Newco and Danaher intend for the Distribution and certain related transactions to qualify as a reorganization pursuant to which no gain or loss is recognized by Danaher or its stockholders for U.S. federal income tax

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purposes under Sections 355, 368(a)(1)(D) and related provisions of the Code. In addition, Newco and Danaher intend for certain other aspects of the Separation to qualify for tax-free treatment under U.S. federal, state and local tax law and/or foreign tax law.

Danaher is seeking a ruling from the IRS regarding certain issues relevant to the qualification of the Distribution and certain other aspects of the Separation for tax-free treatment for U.S. federal income tax purposes. The request for the IRS ruling was filed on November 17, 2014. In addition, Danaher expects to receive opinions from its outside tax advisors regarding the tax-free status of the Distribution and certain other aspects of the Separation. In connection with the ruling and the opinions, Newco and Danaher have made and will make certain representations regarding the past and future conduct of their respective businesses and certain other matters.

Newco will also agree to certain covenants that contain restrictions intended to preserve the tax-free status of the Distribution and certain other aspects of the Separation. Newco may take certain actions prohibited by these covenants only if Danaher receives a private letter ruling from the IRS or Newco obtains and provides to Danaher an opinion from a U.S. tax counsel or accountant of recognized national standing to the effect that such action would not jeopardize the tax-free status of these transactions. Newco will be barred from taking any action, or failing to take any action, where such action or failure to act adversely affects the tax-free status of these transactions, for all relevant time periods. In addition, during the time period ending two years after the effective date of the Distribution these covenants will include specific restrictions on Newco, including the following:

certain restrictions on issuing or selling stock or other securities (including securities convertible into Newco stock but excluding certain compensatory arrangements);

redeeming or repurchasing its stock or stock rights, except to the extent consistent with guidance issued by the IRS;

certain restrictions on selling assets outside the ordinary course of business;

discontinuing the active conduct of the Communications Business; and

entering into any other corporate transaction (apart from the Mergers) which, when combined with the Mergers, would cause Newco to undergo a 50% or greater change in its stock ownership.

As of the effective time of the First Merger, NetScout will be subject to the same obligations and restrictions imposed on Newco under the Tax Matters Agreement, including, without limitation, the tax-related covenants discussed above, and for the avoidance of doubt any restrictions applicable to Newco shall also apply to NetScout mutatis mutandis.

Newco and NetScout will generally agree to indemnify Danaher and its affiliates against any and all tax-related liabilities incurred by them relating to the Distribution and certain other aspects of the Separation to the extent caused by an acquisition of Newco's stock or assets or by any other action undertaken by Newco or NetScout. This indemnification provision will apply even if Danaher has permitted Newco or NetScout to take an action that would otherwise have been prohibited under the tax-related covenants described above.

### **Transition Services Agreement**

In connection with the Transactions, Danaher and Newco will enter into a transition services agreement, referred to herein as the Transition Services Agreement, effective as of the closing of the First Merger. In order to facilitate the transition of the Communications Business to Newco (which, after the First Merger, will be a wholly-owned subsidiary of NetScout), under the transition services agreement Danaher and its affiliates will provide Newco, with specified support services and other assistance for a limited time following the closing of the Mergers.

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The Transition Services Agreement also addresses certain matters with respect to the provision of such services, including the management of the relationship between the parties, the use of and access to each other's records, confidentiality and proprietary rights.

The initial term of the Transition Services Agreement is currently contemplated to be for a period commencing at the Effective Time and ending at 11:59 p.m. Eastern Time on March 31, 2016, unless earlier terminated as provided in the Transition Services Agreement, although the individual terms of certain services may expire prior to the end of the term of the Transition Services Agreement itself. Newco will not have the option of extending the services provided under the Transition Services Agreement.

Newco will generally be able to terminate any services provided by giving 30 days written notice to Danaher. Once Newco has terminated any of the services, Newco shall not be permitted to request such services be resumed pursuant to the Transition Services Agreement.

Each party to the Transition Services Agreement generally agrees to indemnify the other party and other party's related parties from claims related to the indemnifying party's breach of its obligations under the Transition Services Agreement.

## **Trademark License Agreement**

As of the Separation Date, pursuant to the Trademark License Agreement, Danaher will grant Newco a non-exclusive transitional license to use certain retained trademarks for applicable products bearing such marks as of the closing of the Separation and the Mergers and being transferred pursuant to the Distribution Agreement and Merger Agreement (including any modifications or updates thereto in the ordinary course of business), together with applicable materials related thereto. Each such license extends for 12 months following the closing of the Separation and the Mergers (or an additional 1-year extension period if requested by Newco and agreed by Danaher). The Trademark License Agreement will provide for applicable requirements regarding use and sublicensing of the licensed marks and will require the licensee to replace such marks with a new source indicator that is not similar thereto prior to the applicable termination date.

## **IP License Agreement**

As of the Separation Date, pursuant to the Intellectual Property Cross-License Agreement ( IP License Agreement ), Danaher will grant Newco a perpetual and irrevocable, non-exclusive license to certain retained patents, copyrights and trade secrets owned by Danaher and used by Newco as of the closing of the Separation and the Mergers, or embodied by the technology delivered to Newco as of the closing, and Newco will grant Danaher a perpetual and irrevocable, non-exclusive license to certain patents, copyrights and trade secrets owned by Newco and used by Danaher as of the closing of the Separation and the Mergers. The IP License Agreement will provide for applicable requirements and restrictions regarding use and sublicensing of the licensed intellectual property.

## **DBS License Agreement**

As of the Separation Date, pursuant to the DBS License Agreement, Danaher will grant a non-exclusive six-month license to Newco to use the Danaher Business System solely for internal business purposes relating solely to the Communications Business. Newco may sublicense such license solely to direct and indirect, wholly-owned subsidiaries (but only as long as such entities remain direct and indirect, wholly-owned subsidiaries).

## **Lease Agreement**

In connection with the Distribution Agreement, Danaher or one of its subsidiaries ( Landlord ) and Newco or one of its subsidiaries ( Tenant ) will enter into the Commercial Lease Agreement (the Lease ), to be executed at closing. Pursuant to the Lease, Landlord will lease to Tenant the land and improvements located at 3033 W President George Bush Highway, in Collin County, Plano, Texas (the Premises ).

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The Lease is a triple net lease, such that Tenant is responsible for all taxes, insurance, utilities and costs and expenses relating to the repair, maintenance and operation of the Premises during the term of the Lease. The term of the Lease is approximately three years, subject to Tenant's right to renew the term for one additional term of three years. In addition to paying all costs and expenses relating to the Premises as described above, Tenant is obligated to pay base rent during the first two lease years of \$984,000 per annum and during the third lease year, of \$3,000,000 per annum. The base rent during the renewal term lease years is based upon the increase in CPI over the prior period.

Tenant is permitted to use the Premises for general, executive and administrative office use and uses reasonably ancillary thereto. The Lease includes customary default provisions and remedies for Landlord in the case of such a default.

Tenant has the right to make alterations to the Premises, subject to Landlord's consent (provided, however, no consent shall be required for non-structural cosmetic alterations if the price does not exceed agreed upon thresholds), not to be unreasonably withheld, conditioned or delayed, compliance with applicable legal requirements and providing security for the performance of the alteration if the cost thereof exceeds agreed upon thresholds.

Except for customary rights to terminate in the event of a casualty that is not repaired within agreed upon time periods or taking by eminent domain, Tenant does not have the right to an early termination of the Lease.

Landlord and Tenant generally have agreed to indemnify each other and each other's related parties from claims related to the Premises and the use and occupancy thereof.

Subject to the terms of the Lease, Tenant has the right to purchase the Premises at or near the end of the term of the Lease (but not sooner than six months prior to the expiration of the term). Any such purchase is subject to customary escrow conditions but is not contingent upon Tenant obtaining financing or any other matter.

## **Voting Agreement**

In connection with the Transactions, on October 12, 2014, Danaher and Anil Singhal (the Stockholder) entered into a voting agreement. Pursuant to the Voting Agreement, the Stockholder has agreed, subject to the termination of the Voting Agreement, at any meeting of the stockholders of NetScout, however called, or at any adjournment or postponement thereof, or on any written consent of the stockholders of NetScout, to vote or consent (or cause to be voted or consented) all of his 2,248,226 shares (Subject Shares) of NetScout common stock, which represented approximately 5.5% of the total outstanding shares of NetScout common stock based on 41,181,526 shares of common stock reported outstanding as of October 10, 2014 (as represented by NetScout in the Merger Agreement): (a) in favor of the approval of the issuance of shares of NetScout common stock in the First Merger and any related proposals in furtherance thereof; and (b) against the following actions (other than the Mergers and the transactions contemplated by the Merger Agreement): (i) any acquisition proposal; (ii) any merger, tender offer, recapitalization, reorganization, consolidation, share exchange, business combination, liquidation, dissolution or similar transaction or series of transactions of NetScout or any of its subsidiaries; (iii) any amendment of NetScout's certificate of incorporation; or (iv) any other action, proposal, transaction or agreement involving NetScout that would reasonably be expected to prevent or materially impede, interfere with, delay, postpone or adversely affect the transactions contemplated by the Merger Agreement, including the Mergers. In addition, the Stockholder granted certain officers of Danaher a limited proxy to vote the Subject Shares in accordance with the foregoing voting commitment.

The Stockholder has also agreed, among other things, subject to certain exceptions (including transfers to any person that agrees in writing to be bound by the terms of the Voting Agreement): not to (i) directly or indirectly, sell, transfer (except as may be specifically required by court order), pledge, encumber, hypothecate,



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assign or otherwise dispose of, by tendering into any tender or exchange offer, by operation of law or otherwise, either voluntarily or involuntarily, or enter into any contract, option or other arrangement or understanding with respect to the voting of or sale, transfer, pledge, encumbrance, hypothecation assignment or similar disposition of, the Subject Shares; (ii) grant any proxies or powers of attorney, or any other authorization or consent with respect to any or all of the Subject Shares that could reasonably be expected to prevent, nullify, impede, interfere with, frustrate, delay, postpone, discourage or otherwise materially adversely affect the Mergers, the Merger Agreement, any of the transactions contemplated by the Merger Agreement or the Voting Agreement; or (iii) deposit any of the Subject Shares into a voting trust or enter into a voting agreement with respect to any of the Subject Shares.

The Voting Agreement also provides that nothing in the Voting Agreement limits the discretion of the Stockholder to take or not take any action in his fiduciary capacity as director of NetScout. Also, the obligations of the Stockholder shall not be affected by any Change in Recommendation.

Each of the parties to the Voting Agreement has made customary representations and warranties, including with respect to authority to enter into and carry out its obligation under, and enforceability of, the Voting Agreement.

The Stockholder is also subject to the non-solicitation covenants applicable to NetScout and its representatives in the Merger Agreement.

The Voting Agreement and the limited proxy granted thereunder will automatically terminate upon the earliest of (i) the effective time of the First Merger and (ii) the termination of the Merger Agreement.

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**DESCRIPTION OF CAPITAL STOCK OF NETSCOUT AND THE COMBINED COMPANY**

The rights of NetScout stockholders are governed by Delaware law, the NetScout Charter and the NetScout Bylaws, which are included as exhibits to NetScout's filings with the SEC.

The following description of NetScout's capital stock does not purport to be complete and is subject to, and qualified in its entirety by reference to, the complete text of the NetScout Charter and the NetScout Bylaws.

**Common Stock**

The NetScout Charter authorizes the issuance of up to 150 million shares of common stock, par value \$0.001 per share. As of May 1, 2015, there were 40,807,787 shares of NetScout common stock issued and outstanding.

There is one class of authorized NetScout common stock which is entitled to one vote per share of common stock held of record on the applicable record date on all matters submitted to a vote of stockholders. There are no cumulative voting rights. Except as otherwise required by law or the NetScout Charter, each holder of NetScout common stock shall have one vote in respect of each share of NetScout common stock held of record by such holder. The holders of NetScout common stock are entitled to receive, from funds legally available for the payment thereof, dividends when and as declared by resolution of the NetScout board of directors, subject to any preferential dividend rights granted to the holders of any then outstanding preferred stock. In the event of liquidation, each share of NetScout common stock is entitled to share pro rata in any distribution of NetScout's assets after payment or providing for the payment of liabilities and the liquidation preference of any then outstanding preferred stock. Holders of NetScout common stock have no preemptive rights to purchase, subscribe for or otherwise acquire any unissued or treasury shares or other securities.

**Preferred Stock**

The NetScout Charter authorizes the NetScout board of directors, without stockholder approval, to create one or more classes or series within a class of preferred stock, to issue shares of preferred stock in such class or series up to the maximum number of shares of the relevant class or series of preferred stock authorized, and to determine the preferences, rights, privileges, qualifications, limitations, and restrictions of any such class or series, including the dividend rights, dividend rates, voting rights, the rights and terms of redemption, redemption prices, the rights and terms of conversion, liquidation preferences, sinking fund terms, the number of shares constituting any such class or series, and the designation of such class or series. Currently, the NetScout board of directors can designate up to 5 million shares of preferred stock.

The NetScout board of directors shall determine the rights, preferences, privileges and restrictions of the 5 million undesignated shares of preferred stock, including dividend rights, conversion rights, voting rights, terms of redemption, liquidation preferences, sinking fund terms and the number of shares constituting any series or the designation of any series.

If NetScout decides to sell shares of preferred stock, the NetScout board of directors will fix the rights, preferences, privileges and restrictions of the preferred stock of each series in the certificate of designation relating to that series.

**Certain Anti-Takeover Effects of Provisions of the NetScout Charter and the NetScout Bylaws**

NetScout is subject to Section 203 of the DGCL. Subject to certain exceptions, Section 203 prevents a publicly held Delaware corporation from engaging in a business combination with any interested stockholder for three years

following the date that the person became an interested stockholder, unless the interested

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stockholder attained such status with the approval of the NetScout board of directors or unless the business combination is approved in a prescribed manner. A business combination includes, among other things, a merger or consolidation involving NetScout and an interested stockholder and the sale of more than 10% of NetScout's assets. In general, an interested stockholder is any entity or person beneficially owning 15% or more of NetScout's outstanding voting stock and any entity or person affiliated with or controlling or controlled by such entity or person.

The NetScout Charter provides that the directors elected may be removed with cause only by the holders of at least a majority of the shares then entitled to vote at an election of directors or without cause only by the holders of at least a 75% of the shares then entitled to vote at an election of directors. Under the NetScout Bylaws, unless and until filled by the stockholders, any vacancy or newly created directorships on the NetScout board of directors may be filled by vote of a majority of the directors then in office, although less than a quorum, or by a sole remaining director.

The NetScout Charter and the NetScout Bylaws provide that any action required or permitted to be taken by NetScout stockholders at an annual meeting or special meeting of stockholders may only be taken if it is properly brought before such meeting. The NetScout Bylaws also provide that, except as otherwise required by law, special meetings of the stockholders can only be called by NetScout's Chairman, president or by a majority vote of the NetScout board of directors. In addition, the NetScout Bylaws establish an advance notice procedure for stockholder proposals to be brought before an annual meeting of stockholders, including proposed nominations of candidates for election to the NetScout board of directors. Stockholders at an annual meeting may only consider proposals or nominations specified in the notice of meeting or brought before the meeting by or at the direction of the NetScout board of directors or by a stockholder of record on the record date for the meeting, who is entitled to vote at the meeting and who has delivered timely written notice in proper form to the NetScout secretary of the stockholder's intention to bring such business before the meeting. These provisions could have the effect of delaying stockholder actions that are favored by the holders of a majority of NetScout's outstanding voting securities until the next stockholder meeting.

The DGCL provides generally that the affirmative vote of a majority of the shares entitled to vote on any matter is required to amend a corporation's certificate of incorporation or bylaws, unless a corporation's certificate of incorporation or bylaws, as the case may be, requires a greater percentage. Portions of the NetScout Charter may be amended by the affirmative vote of the holders of at least 75% of the votes which all the NetScout stockholders would be entitled to vote. The NetScout Bylaws may be amended or repealed by a majority vote of the NetScout board of directors or by the affirmative vote of the holders of at least 75% of the votes which all NetScout stockholders would be entitled to cast in any annual election of directors.

## **Listing**

NetScout common stock trades on NASDAQ under the symbol NTCT.

## **Transfer Agent**

The transfer agent and registrar for the NetScout common stock is Computershare.

**Table of Contents****SECURITY OWNERSHIP OF NETSCOUT COMMON STOCK**

The following table and footnotes set forth as of May 1, 2015, the beneficial ownership, as defined by regulations of the SEC, of NetScout common stock held by:

each person or group of persons known to NetScout to own beneficially more than 5% of the outstanding shares of NetScout common stock;

each director and named executive officer of NetScout; and

all current directors and executive officers of NetScout as a group.

Name and Address of the beneficial owner

	<b>Number of Shares Beneficially Owned(1)</b>	<b>Percentage of Class Beneficially Owned(2)</b>
Anil K. Singhal(3)	2,248,226	5.5%
Michael Szabados	48,216	*
John W. Downing	90,000	*
Victor A. DeMarines	28,379	*
Robert E. Donahue	4,206	*
John R. Egan	65,093	*
Joseph G. Hadzima, Jr.	106,068	*
Vincent J. Mullarkey	60,379	*
Jean Bua	22,208	*
Christopher Perretta		*
Brown Capital Management, LLC(4) 1201 N. Calvert Street Baltimore, Maryland 21202	5,556,329	13.6%
Aristeia Capital, L.L.C.(5) 136 Madison Avenue, 3rd Floor New York, New York 10016	4,000,000	9.8%
Danaher Corporation(6) 2200 Pennsylvania Ave., NW Suite 800W Washington, DC 20037	3,423,045	8.4%
BlackRock, Inc.(7) 40 East 52nd Street New York, New York 10022	3,267,336	8.0%
Neuberger Berman Group LLC(8) 605 3rd Avenue	2,518,034	6.2%

New York, New York 10016		
The Vanguard Group(9)		
100 Vanguard Blvd.		
Malvern, Pennsylvania 19355	2,415,518	5.9%
All executive officers and directors as a group (10 persons)	2,672,775	6.5%

\* Represents less than one percent of class.

- (1) Under applicable SEC rules and regulations, a person is considered to beneficially own NetScout's common stock if such person either has the sole or shared power with any other person to either vote or dispose of such common stock. As a result, more than one person may be reported as the beneficial owner of any particular share of NetScout's common stock. Beneficial ownership is determined in accordance with the rules of the SEC. Shares of common stock issuable by NetScout to a person or entity named below pursuant to options which may be exercised within 60 days of May 1, 2015 or restricted stock units which may vest within 60 days of May 1, 2015 are deemed to be beneficially owned and outstanding for purposes of calculating the number of shares and the percentage beneficially owned by that person or entity.

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However, these shares are not deemed to be beneficially owned and outstanding for purposes of computing the percentage beneficially owned by any other person or entity. Unless otherwise noted, the address of each person listed on the table is c/o NetScout Systems, Inc., 310 Littleton Road, Westford, MA 01886, and each person has either sole or shared voting or dispositive power over the shares shown below as beneficially owned by such person.

- (2) Based on 40,807,787 shares of NetScout's common stock outstanding as of May 1, 2015.
- (3) As of May 1, 2015, Mr. Singhal's spouse did not beneficially own at least five percent of NetScout's outstanding common stock, and therefore the 1,081,201 shares held by trusts of which Mr. Singhal's spouse is deemed the beneficial owner are reported herein by Mr. Singhal. This amount does not include an aggregate of 1,078,822 shares held in trusts for the benefit of Mr. Singhal's children for which neither Mr. Singhal nor his spouse is a trustee, and 58,961 shares held in a trust for the benefit of Mr. Singhal's nieces and nephews for which neither Mr. Singhal nor his spouse is a trustee.
- (4) Based solely on a Schedule 13G/A filed with the SEC on February 5, 2015. Brown Capital Management, LLC has the sole power to vote 3,225,387 shares and sole dispositive power of 5,556,329 shares. Includes 2,779,100 shares beneficially owned by The Brown Capital Management Small Company Fund, a registered investment company, which is managed by Brown Capital Management, LLC.
- (5) Based solely on a Schedule 13G filed with the SEC on February 17, 2015. Aristeia Capital, L.L.C. has the sole power to vote 4,000,000 shares and sole dispositive power of 4,000,000 shares.
- (6) Based solely on a Schedule 13D filed with the SEC on October 22, 2014. Includes 1,174,819 shares which the reporting person has the sole power to vote or dispose. Also includes 2,248,226 shares which the reporting person has the shared power to vote or dispose pursuant to a Voting Agreement, dated as of October 12, 2014, by and between the reporting person and Anil Singhal entered into in connection with the Merger Agreement. The reporting person may be deemed to have beneficial ownership of such 2,248,226 shares as a result of provision 1.1(b) in the Voting Agreement. Under Section 1.1(b) of the Voting Agreement, Frank T. McFaden and Robert S. Lutz are appointed as Proxy and Attorney-in-Fact for Anil Singhal and, in such capacities, may be deemed to have voting or dispositive power over the 2,248,226 shares subject to the Voting Agreement.
- (7) Based solely on a Schedule 13G/A filed with the SEC on January 23, 2015. BlackRock Inc. and its affiliates have the sole power to vote 3,185,425 shares and sole dispositive power of 3,267,336 shares.
- (8) Based solely on a Schedule 13G filed with the SEC on February 12, 2015 (the "Neuberger 13G"). Neuberger Berman Group LLC may be deemed to be the beneficial owner for purposes of Rule 13d-3 with respect to the shared power to vote or direct the vote of 2,511,634 shares of common stock because certain affiliated persons have shared power to retain, dispose of and vote the securities. In addition to the holdings of individual advisory clients, each of Neuberger Berman LLC and Neuberger Berman Management LLC serve as a sub-adviser and investment manager, respectively, of Neuberger Berman Group LLC's various registered mutual funds which hold such shares. The holdings belonging to clients of Neuberger Berman Trust Co N.A., Neuberger Berman Trust Co of Delaware N.A., NB Alternatives Advisers LLC, Neuberger Berman Fixed Income LLC and NB Alternative Investment Management LLC, affiliates of Neuberger Berman LLC, are also aggregated to comprise the holdings referenced in the Neuberger 13G. This amount also includes 6,400 additional shares from individual client accounts over which Neuberger Berman LLC has shared power to dispose but does not have voting power. The holdings of Neuberger Berman Trust Co N.A., Neuberger Berman Trust Co of Delaware N.A., NB Alternatives Advisers LLC, Neuberger Berman Fixed Income LLC and NB Alternative Investment Management LLC, affiliates of Neuberger Berman LLC, are also aggregated to comprise the holdings referenced in the Neuberger 13G.
- (9) Based solely on a Schedule 13G/A filed with the SEC on February 10, 2015. Includes 48,792 shares for which such reporting person has the sole power to vote and 2,369,626 shares of which such reporting person has sole dispositive power. Vanguard Fiduciary Trust Company, a wholly-owned subsidiary of The Vanguard Group, Inc. is the beneficial owner of 45,892 shares as a result of its serving as an investment manager of collective trust accounts. Vanguard Investments Australia, Ltd., a wholly-owned subsidiary of The Vanguard Group, Inc. is the

beneficial owner of 2,900 shares as a result of its serving as an investment manager of Australian investment offerings.

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**PROPOSAL NO. 1**

**PROPOSAL TO APPROVE THE ISSUANCE OF SHARES OF NETSCOUT COMMON STOCK**

**IN THE FIRST MERGER**

For a summary and detailed information regarding this proposal, see the information about the proposed Mergers, and the issuance of shares of NetScout common stock in the First Merger, contained throughout this document, including the information set forth in the sections of this document entitled **The Transactions**, **The Merger Agreement** and **The Distribution Agreement**.

Copies of the Merger Agreement and the Distribution Agreement are attached to this document as **Annex A** and **Annex B**, respectively.

**If the proposal to approve the issuance of shares of NetScout common stock in the First Merger is not approved, the Mergers cannot be completed, and each of Danaher and NetScout will have the right to terminate the Merger Agreement, as described in the section entitled **The Merger Agreement Termination**.**

**Required Vote**

This proposal regarding the issuance of shares of NetScout common stock in the First Merger must be approved by the affirmative vote of a majority of the shares of NetScout common stock represented and voting on this proposal at the special meeting, either in person or by proxy (assuming a quorum is present). Abstentions would have no effect on the outcome of the vote on this proposal.

**NetScout's board of directors recommends that stockholders vote **FOR** the proposal to issue shares of NetScout common stock in the First Merger.**

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**PROPOSAL NO. 2**

**PROPOSAL TO APPROVE THE ADJOURNMENT OR POSTPONEMENT OF THE  
SPECIAL MEETING, IF NECESSARY OR APPROPRIATE**

If, at the special meeting of stockholders, the board of directors of NetScout determines it is necessary or appropriate to adjourn or postpone the special meeting in order to solicit additional proxies if there are not sufficient votes at the time of the special meeting to approve the proposal to issue shares of NetScout common stock in the First Merger, NetScout intends to move to adjourn or postpone the special meeting. If the board of directors of NetScout determines that adjournment or postponement of the special meeting is necessary or appropriate, NetScout will ask its stockholders to vote only upon the adjournment or postponement proposal, and not on the proposal to approve the issuance of shares of NetScout common stock in the Merger.

In this proposal, NetScout is asking NetScout stockholders to vote in favor of approval of the adjournment or postponement of the special meeting to a later date or time, if necessary or appropriate, to solicit additional proxies if there are not sufficient votes at the time of the special meeting to approve the issuance of shares of NetScout common stock in the First Merger. If the stockholders approve this proposal, NetScout could adjourn or postpone the special meeting and use the additional time to solicit additional proxies, including the solicitation of proxies from stockholders that have previously voted. Among other things, approval of this proposal could mean that, even if NetScout had received proxies representing a sufficient number of votes against the issuance of NetScout common stock in the First Merger to defeat that proposal, NetScout could adjourn or postpone the special meeting without a vote and seek to convince the holders of those shares to change their votes to vote in favor of approval of the issuance of shares of NetScout common stock in the First Merger.

**Required Vote**

This proposal to approve the adjournment or postponement of the special meeting, if necessary or appropriate, to solicit additional proxies if there are not sufficient votes at the time of the special meeting to approve the issuance of shares of NetScout common stock in the First Merger must be approved by the affirmative vote of a majority of the shares of NetScout common stock represented and voting on this proposal at the special meeting, either in person or by proxy. Abstentions would have no effect on the outcome of the vote on this proposal if it is submitted for approval when no quorum is present at the special meeting.

**NetScout's board of directors recommends that stockholders vote FOR the proposal to approve the adjournment or postponement of the special meeting, if necessary or appropriate, to solicit additional proxies if there are not sufficient votes at the time of the special meeting to approve the issuance of shares of NetScout common stock in the First Merger.**

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**STOCKHOLDER PROPOSALS FOR 2015 ANNUAL MEETING**

To be considered for inclusion in the proxy materials for the 2015 Annual Meeting, proposals must be submitted in writing to NetScout's principal executive offices at 310 Littleton Road, Westford, Massachusetts 01886, attention: Secretary, and must have been received by NetScout no later than March 26, 2015. Proposals must satisfy the procedures set forth in Rule 14a-8 under the Exchange Act. If NetScout stockholders wish to submit a proposal for the 2015 Annual Meeting but not have it included in the proxy materials for such meeting or wish to nominate a director, they must submit such proposal or nomination in writing to our principal executive offices at the address noted above, which must be received by NetScout no earlier than the close of business of May 12, 2015 and no later than the close of business of June 11, 2015 and must satisfy the requirements described above and in the NetScout Bylaws. In order to curtail controversy as to the date on which a proposal was received, NetScout suggests that NetScout stockholders submit their proposals by registered mail, return receipt requested.

**Table of Contents****WHERE YOU CAN FIND MORE INFORMATION; INCORPORATION BY REFERENCE**

NetScout files annual, quarterly and current reports, proxy statements and other information with the SEC. You may read and copy materials that NetScout has filed with the SEC at the following SEC public reference room: 100 F Street, N.E., Washington, D.C. 20549. Please call the SEC at 1-800-SEC-0330 for further information on the operation of the public reference room.

NetScout's SEC filings are also available to the public on the SEC's internet website at [www.sec.gov](http://www.sec.gov), which contains reports, proxy and information statements and other information regarding companies that file electronically with the SEC. In addition, NetScout's SEC filings are also available to the public on NetScout's website, [www.netscout.com](http://www.netscout.com). Information contained on NetScout's website is not incorporated by reference into this document, and you should not consider information contained on that website as part of this document.

Statements contained in this document, or in any document incorporated by reference in this proxy statement, regarding the contents of any contract or other document are not necessarily complete and each such statement is qualified in its entirety by reference to that contract or other document filed as an exhibit with the SEC. The SEC allows NetScout to incorporate by reference into this proxy statement documents NetScout files with it. This means that NetScout can disclose important information to you by referring you to those documents. The information incorporated by reference is considered to be a part of this proxy statement, and later information that NetScout files with the SEC will update and supersede that information. NetScout incorporates by reference into this document the documents listed below and any future filings NetScout makes with the SEC under Sections 13(a), 13(c), 14 or 15(d) of the Securities Exchange Act, including any filings after the date of this document until the date of the special meeting. The information incorporated by reference is an important part of this document. Any statement in a document incorporated by reference into this document will be deemed to be modified or superseded for purposes of this document to the extent a statement contained in this or any other subsequently filed document that is incorporated by reference into this document modifies or supersedes such statement. Any statement so modified or superseded will be not deemed, except as so modified or superseded, to constitute a part of this document.

**NetScout SEC Filings (SEC File Number 0000-26251)**

Annual Report on Form 10-K

Quarterly Reports on Form 10-Q

Definitive Proxy Statement on Schedule 14A

Current Reports on Form 8-K or 8-K/A

Registration Statement on Form 8-A (description of NetScout common stock)

You can obtain a copy of any document incorporated by reference into this document except for the exhibits to those documents from NetScout. You may also obtain these documents from the SEC or through the SEC's website described above. Documents incorporated by reference are available from NetScout without charge, excluding all exhibits unless specifically incorporated by reference as an exhibit into this document.

**Period or Date Filed**

Fiscal year ended March 31, 2014

Quarterly periods ended June 30, 2014,

September 30, 2014, and December 31, 2014

July 24, 2014

April 24, 2014 (item 8.01 only), July 17, 2014, August 15, 2014, September 11, 2014, October 14, 2014,

October 16, 2014, December 24, 2014, April 23, 2015

June 3, 1999 (and declared effective by the SEC on September 30, 1999) (SEC File Number 333-76843)



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You may obtain documents incorporated by reference into this document by requesting them in writing or by telephone from NetScout or Innisfree M&A Incorporated at the following addresses and telephone numbers:

NetScout Systems, Inc.,

310 Littleton Road, Westford, Massachusetts 01886,

Attention: Investor Relations,

Telephone: (978) 614-4000.

Innisfree M&A Incorporated

501 Madison Avenue, 20<sup>th</sup> floor

New York, New York 10022

Shareholders may call toll free: (888) 750-5834

Banks and Brokers may call collect: (212) 750-5833

If you request any of these documents from NetScout, we will mail them to you by first-class mail or similar within one business day of the receipt of such request.

**You should rely only on the information contained or incorporated by reference into this document in voting your shares at the special meeting. NetScout has not authorized anyone to provide you with information that is different from what is contained in this document. This document is dated May 8, 2015. You should not assume that the information contained in this document is accurate as of any other date, and neither the provision of this document to NetScout's stockholders nor the issuance of NetScout common stock in the First Merger will create any implication to the contrary.**

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**Report of Independent Registered Public Accounting Firm**

To the Board of Directors and Stockholders of Danaher Corporation

We have audited the accompanying combined balance sheets of the Communications Business of Danaher Corporation (the Company), a wholly-owned business of Danaher Corporation, as of December 31, 2014 and 2013, and the related combined statements of earnings, comprehensive income, changes in parent's equity and cash flows for each of the three years in the period ended December 31, 2014. Our audits also included the financial statement schedule listed at Item 21(b). These financial statements and schedule are the responsibility of the Company's management. Our responsibility is to express an opinion on these financial statements and schedule based on our audits.

We conducted our audits in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. We were not engaged to perform an audit of the Company's internal control over financial reporting. Our audits included consideration of internal control over financial reporting as a basis for designing audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the Company's internal control over financial reporting. Accordingly, we express no such opinion. An audit also includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements, assessing the accounting principles used and significant estimates made by management, and evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the combined financial statements referred to above present fairly, in all material respects, the combined financial position of the Communications Business of Danaher Corporation at December 31, 2014 and 2013, and the combined results of its operations and its cash flows for each of the three years in the period ended December 31, 2014 in conformity with U.S. generally accepted accounting principles. Also, in our opinion, the related financial statement schedule, when considered in relation to the basic financial statements taken as a whole, presents fairly in all material respects the information set forth therein.

/s/ Ernst & Young LLP

McLean, Virginia

February 27, 2015

**Table of Contents****COMMUNICATIONS BUSINESS OF DANAHER CORPORATION****COMBINED BALANCE SHEETS**

(\$ in thousands)

	<b>As of December 31</b>	
	<b>2014</b>	<b>2013</b>
<b>ASSETS</b>		
Current Assets:		
Trade accounts receivable, less allowance for doubtful accounts of \$2,323 and \$3,250, respectively	\$ 188,058	\$ 159,295
Inventories	54,530	53,755
Prepaid expenses and other current assets	33,492	25,599
Total current assets	276,080	238,649
Property, plant and equipment, net	46,323	43,019
Other assets	7,245	5,678
Goodwill	704,890	716,208
Other intangible assets, net	204,291	232,349
Total assets	\$ 1,238,829	\$ 1,235,903
<b>LIABILITIES AND PARENT'S EQUITY</b>		
Current Liabilities:		
Trade accounts payable	\$ 48,759	\$ 38,469
Accrued expenses and other liabilities	91,591	74,986
Deferred revenue	194,104	162,436
Total current liabilities	334,454	275,891
Long-term deferred revenue	35,026	26,542
Other long-term liabilities	78,933	102,242
Parent's Equity:		
Net parent investment	810,518	835,629
Accumulated other comprehensive loss	(20,102)	(4,401)
Total parent's equity	790,416	831,228
Total liabilities and parent's equity	\$ 1,238,829	\$ 1,235,903

See the accompanying Notes to the Combined Financial Statements.

**Table of Contents****COMMUNICATIONS BUSINESS OF DANAHER CORPORATION****COMBINED STATEMENTS OF EARNINGS**

(\$ in thousands)

	<b>Year Ended December 31</b>		
	<b>2014</b>	<b>2013</b>	<b>2012</b>
<b>Sales:</b>			
Products	\$ 535,281	\$ 623,632	\$ 594,770
Services	224,942	211,259	190,968
<b>Total sales</b>	<b>760,223</b>	<b>834,891</b>	<b>785,738</b>
<b>Cost of sales:</b>			
Products	(180,233)	(195,077)	(189,711)
Services	(52,750)	(48,043)	(44,544)
<b>Total cost of sales</b>	<b>(232,983)</b>	<b>(243,120)</b>	<b>(234,255)</b>
<b>Gross profit</b>	<b>527,240</b>	<b>591,771</b>	<b>551,483</b>
<b>Operating costs and other:</b>			
Selling, general and administrative expenses	(289,193)	(276,896)	(245,403)
Research and development expenses	(159,554)	(147,553)	(130,872)
Amortization of intangible assets	(16,158)	(19,661)	(17,327)
Impairment of intangible assets		(31,063)	
<b>Earnings before income taxes</b>	<b>62,335</b>	<b>116,598</b>	<b>157,881</b>
Income taxes	(19,783)	(32,792)	(54,083)
<b>Net earnings</b>	<b>\$ 42,552</b>	<b>\$ 83,806</b>	<b>\$ 103,798</b>

See the accompanying Notes to the Combined Financial Statements.

**Table of Contents****COMMUNICATIONS BUSINESS OF DANAHER CORPORATION****COMBINED STATEMENTS OF COMPREHENSIVE INCOME**

(\$ in thousands)

	<b>Year Ended December 31</b>		
	<b>2014</b>	<b>2013</b>	<b>2012</b>
Net earnings	\$ 42,552	\$ 83,806	\$ 103,798
Other comprehensive income (loss), net of income taxes:			
Foreign currency translation adjustments	(14,359)	4,306	2,311
Pension plan benefit adjustments	(1,342)	(324)	(689)
Total other comprehensive income (loss), net of income taxes	(15,701)	3,982	1,622
Comprehensive income	\$ 26,851	\$ 87,788	\$ 105,420

See the accompanying Notes to the Combined Financial Statements.

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**COMMUNICATIONS BUSINESS OF DANAHER CORPORATION**  
**COMBINED STATEMENTS OF CHANGES IN PARENT'S EQUITY**

(\$ in thousands)

	<b>Accumulated Other Comprehensive Income (Loss)</b>	<b>Net Parent Investment</b>
<b>Balance, December 31, 2011</b>	\$ (10,005)	\$ 619,064
Net earnings for the year		103,798
Net transfers from (to) parent		29,493
Stock-based award expense		6,167
Other comprehensive income/(loss)	1,622	
<b>Balance, December 31, 2012</b>	(8,383)	758,522
Net earnings for the year		83,806
Net transfers from (to) parent		(14,805)
Stock-based award expense		8,106
Other comprehensive income/(loss)	3,982	
<b>Balance, December 31, 2013</b>	(4,401)	835,629
Net earnings for the year		42,552
Net transfers from (to) parent		(73,244)
Stock-based award expense		5,581
Other comprehensive income/(loss)	(15,701)	
<b>Balance, December 31, 2014</b>	\$ (20,102)	\$ 810,518

See the accompanying Notes to the Combined Financial Statements.

**Table of Contents****COMMUNICATIONS BUSINESS OF DANAHER CORPORATION****COMBINED STATEMENTS OF CASH FLOWS**

(\$ in thousands)

	<b>Year Ended December 31</b>		
	<b>2014</b>	<b>2013</b>	<b>2012</b>
<b>Cash flows from operating activities:</b>			
Net earnings	\$ 42,552	\$ 83,806	\$ 103,798
<b>Non-cash items:</b>			
Depreciation	13,416	12,094	10,143
Amortization	26,509	29,005	25,612
Stock-based compensation expense	5,581	8,106	6,167
Impairment of intangible assets		31,063	
Change in deferred income taxes	(16,766)	(20,393)	(3,930)
Change in trade accounts receivable, net	(30,993)	(13,855)	(2,639)
Change in inventories	(1,974)	21,337	8,278
Change in trade accounts payable	11,042	7,411	(6,725)
Change in deferred revenue	40,152	(58,778)	19,156
Change in prepaid expenses and other assets	(2,771)	(3,501)	5,416
Change in accrued expenses and other liabilities	5,873	6,667	6,856
<b>Net cash provided by (used in) operating activities</b>	<b>92,621</b>	<b>102,962</b>	<b>172,132</b>
<b>Cash flows from investing activities:</b>			
Cash paid for acquisitions		(74,719)	(189,138)
Payments for additions to property, plant and equipment	(16,877)	(13,438)	(12,487)
<b>Net cash provided by (used in) investing activities</b>	<b>(16,877)</b>	<b>(88,157)</b>	<b>(201,625)</b>
<b>Cash flows from financing activities:</b>			
Net transfers from (to) Parent	(73,244)	(14,805)	29,493
Payments relating to earn-out liability	(2,500)		
<b>Net cash provided by (used in) financing activities</b>	<b>(75,744)</b>	<b>(14,805)</b>	<b>29,493</b>
<b>Net change in cash and equivalents</b>			
<b>Beginning balance of cash and equivalents</b>			
<b>Ending balance of cash and equivalents</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>

See the accompanying Notes to the Combined Financial Statements.



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**COMMUNICATIONS BUSINESS OF DANAHER CORPORATION**

**NOTES TO COMBINED FINANCIAL STATEMENTS**

**(1) BUSINESS OVERVIEW AND BASIS OF PRESENTATION**

The accompanying combined financial statements present the historical financial position, results of operations, changes in Parent's equity and cash flows of the Communications Business of Danaher Corporation (the Business) in accordance with accounting principles generally accepted in the United States of America (GAAP) for the preparation of carved-out combined financial statements. Reclassifications of certain prior year amounts have been made to conform to the current year presentation.

The Business consists of certain operating units of Danaher Corporation (Danaher) and is a premier global provider of network management tools and security solutions for telecommunications carriers and network enterprise customers. The Business' products enable organizations to gain unique and encompassing real-time analytical insights to better design, deploy, monitor and secure the traditional, virtualized, mobile and cloud-based networks operated by communication service providers, hosters, enterprises and government agencies worldwide. The Business' products simplify the complexity of understanding and effectively managing the underlying network technologies, communication services and subscriber interactions.

On October 13, 2014, Danaher announced a definitive agreement with NetScout Systems, Inc. (NetScout) to combine the Business with NetScout (the Transaction). The Transaction will be structured as a distribution of the Business to Danaher shareholders in either a split-off transaction, a split-off transaction, or a combination split-off and spin-off, followed by a merger with a subsidiary of NetScout for consideration of 62.5 million NetScout shares, subject to adjustment. Both the distribution and merger are expected to qualify as tax-free transactions to Danaher and its shareholders, except to the extent that cash is paid to Danaher stockholders in lieu of fractional shares. If Danaher elects a spin-off, all Danaher shareholders will participate pro-rata. If Danaher elects a split-off, Danaher will conduct an exchange offer pursuant to which its shareholders will elect whether to exchange Danaher shares for common units of the Business. If the split-off exchange offer is not fully subscribed, the additional Business common units held by Danaher will be distributed in a spin-off on a pro rata basis to Danaher shareholders. Danaher will determine which approach it will take prior to closing the transaction and no decision has been made at this time. The transaction remains subject to approval by NetScout's shareholders and the satisfaction of customary closing conditions, including regulatory approvals and the absence of a material adverse change with respect to each of the Business and NetScout. At closing, depending on the number of shares of NetScout common stock outstanding, Danaher shareholders will receive approximately 59.5% of the shares of NetScout stock outstanding following the combination. The Transaction is expected to be completed in 2015.

The Business has historically operated as part of Danaher and not as a stand-alone company and has no separate legal status or existence. The financial statements have been derived from Danaher's historical accounting records and are presented on a carve-out basis. All revenues and costs as well as assets and liabilities directly associated with the business activity of the Business are included as a component of the financial statements. The financial statements also include allocations of certain general, administrative, sales and marketing expenses and cost of sales from Danaher's corporate office and from other Danaher businesses to the Business and allocations of related assets, liabilities, and Parent's investment, as applicable. The allocations have been determined on a reasonable basis; however, the amounts are not necessarily representative of the amounts that would have been reflected in the financial statements had the Business been an entity that operated independently of Danaher. Related party allocations are discussed further in Note 16.

As part of Danaher, the Business is dependent upon Danaher for all of its working capital and financing requirements as Danaher uses a centralized approach to cash management and financing of its operations. Financial transactions relating to the Business are accounted for through the Parent investment account of the Business. Accordingly, none of Danaher's cash, cash equivalents or debt at the corporate level has been assigned to the Business in the financial statements.

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Net parent investment, which includes retained earnings, represents Danaher's interest in the recorded net assets of the Business. All significant transactions between the Business and Danaher have been included in the accompanying combined financial statements. Transactions with Danaher are reflected in the accompanying Combined Statements of Changes in Parent's Equity as Net transfers from (to) parent and in the accompanying Combined Balance Sheets within Net parent investment.

All significant intercompany accounts and transactions between the operations comprising the Business have been eliminated in the accompanying financial statements.

## **(2) SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES**

**Use of Estimates** The preparation of financial statements in conformity with accounting principles generally accepted in the United States requires management to make estimates and judgments that affect the reported amounts of assets, liabilities, revenues and expenses, and related disclosure of contingent assets and liabilities. The Business bases these estimates on historical experience, the current economic environment and on various other assumptions that are believed to be reasonable under the circumstances. However, uncertainties associated with these estimates exist and actual results may differ from these estimates.

**Accounts Receivable and Allowances for Doubtful Accounts** The Business records accounts receivable at their face amount less an allowance for doubtful accounts. An allowance for doubtful accounts is maintained at an amount estimated to be sufficient to cover the risk of collecting less than full payment on receivables. On a regular basis, the Business re-evaluates customer receivables and reassesses the sufficiency of the allowance for doubtful accounts based on specific customer collection issues.

All accounts receivable are reported on the accompanying Combined Balance Sheets adjusted for any write-offs and net of allowances for doubtful accounts. The allowances for doubtful accounts represent management's best estimate of the credit losses expected from the Business' trade accounts. Determination of the allowances requires management to exercise judgment about the timing, frequency and severity of credit losses that could materially affect the allowance for doubtful accounts and, therefore, net earnings. The Business regularly performs detailed reviews of its portfolios to determine if an impairment has occurred and evaluates the collectability of receivables based on a combination of financial and qualitative factors that may affect customers' ability to pay, including customers' financial condition, past payment experience and credit bureau information. In circumstances where the Business is aware of a specific customer's inability to meet its financial obligations, a specific reserve is recorded against amounts due to reduce the recognized receivable to the amount reasonably expected to be collected. Additions to the allowances for doubtful accounts are charged to current period earnings, amounts determined to be uncollectible are charged directly against the allowances, while amounts recovered on previously written-off accounts increase the allowances. If the financial condition of the Business' customers were to deteriorate, resulting in an impairment of their ability to make payments, additional reserves would be required. The Business recorded a benefit of \$81,000 for the year ended December 31, 2014 associated with doubtful accounts and a provision of \$710,000, and \$467,000 associated with doubtful accounts for the years ended December 31, 2013, and 2012 respectively.

Sales to the Business' largest two customers were 30% of total sales in 2014, 36% in 2013, and 33% in 2012. No other individual customer accounted for more than 10% of combined sales in 2014, 2013, or 2012. Accounts receivable from these customers accounted for 19% and 11% of total customer receivables as of December 31, 2014 and December 31, 2013, respectively.

**Inventory Valuation** Inventories include the costs of material, labor and overhead. Inventories are stated at the lower of cost or market using the first-in, first-out ( FIFO ) method to value inventory.



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**Property, Plant and Equipment** Property, plant and equipment are carried at cost. The provision for depreciation has been computed principally by the straight-line method based on the estimated useful lives of the depreciable assets as follows:

Category	Useful Life
Buildings	30 years
Leased assets and leasehold improvements	Amortized over the lesser of the economic life of the asset or the term of the lease
Machinery and equipment	3 – 10 years
Estimated useful lives are periodically reviewed and, when appropriate, changes to estimates are made prospectively.	

**Other Assets** Other assets principally include non-current deferred tax assets.

**Goodwill and Other Intangible Assets** Goodwill and other intangible assets result from the Business' acquisition of existing businesses. In accordance with accounting standards related to business combinations, goodwill is not amortized, however, certain definite-lived identifiable intangible assets, primarily customer relationships and acquired technology, are amortized over their estimated useful lives. Intangible assets with indefinite lives are not amortized. In-process research and development ( IPR&D ) is initially capitalized at fair value and when the IPR&D project is complete, the asset is considered a finite-lived intangible asset and amortized over its estimated useful life. If an IPR&D project is abandoned, an impairment loss equal to the value of the intangible asset is recorded in the period of abandonment. The Business reviews identified intangible assets for impairment whenever events or changes in circumstances indicate that the related carrying amounts may not be recoverable. The Business also tests intangible assets with indefinite lives at least annually for impairment. Refer to Note 6 for additional information about the Business' goodwill and other intangible assets.

**Revenue Recognition** The Business derives revenues primarily from the sale of network management tools and security solutions for carrier and enterprise customers, which include hardware, software and service offerings. The majority of the Business' product sales consist of a hardware product with embedded software that is essential to providing the customer the intended functionality of the solution. In addition, the Business sells stand-alone software and software-as-a-service solutions to provide customers with enhanced functionality. The Business' service offerings include installation, integration, extended warranty and maintenance services, post-contract customer support ( PCS ), and other professional services.

For revenue related to a product or service to qualify for recognition, there must be persuasive evidence of an arrangement, delivery must have occurred or the services must have been rendered, the price to the customer must be fixed and determinable and collectability of the balance must be reasonably assured, or probable in the case of stand-alone software sales. The Business evaluates delivery for product sales based on shipping terms and when title and risk of loss have passed to the customer, and in the case of software products, when the customer has the rights and ability to access the software. The Business generally considers services to be delivered as performed or upon completion to the extent there are significant customer acceptance obligations. If any significant obligations to the customer remain to be fulfilled following delivery, typically involving obligations relating to installation and acceptance by the customer, revenue recognition is deferred until such obligations have been fulfilled.

Management is required to exercise judgment and use estimates in connection with evaluating these criteria and determining the amounts of product and service revenues to be recognized.

Certain of the Business contractual arrangements consist of multiple elements (i.e., deliverables) which may include hardware, software, PCS and other services. Revenues for contractual arrangements consisting of

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multiple elements are recognized for the separate elements when the product or services that are part of the multiple-element arrangement have value on a stand-alone basis, fair value of the separate elements exists and, in arrangements that include a general right of refund relative to the delivered element, performance of the undelivered element is considered probable and substantially in the Business control. Allocation of the consideration is determined at the arrangement's inception.

When a multiple-element arrangement includes software and non-software elements, the arrangement fee is first allocated between the software and non-software elements based on the relative selling prices of all deliverables and then allocated to the individual deliverables in the arrangement. Software elements in a multiple element arrangement are recognized based on their relative vendor-specific objective evidence ( VSOE ) of fair value. If VSOE does not exist for all software elements, revenue is deferred until either: i) VSOE does exist for all elements, ii) all elements have been delivered, or iii) VSOE for all undelivered elements is known and the residual method is used to recognize revenue of delivered elements. Non-software elements in a multiple-element arrangement are recognized based on their relative selling prices determined by the selling price hierarchy. The selling price for a non-software deliverable is based on VSOE, if available, third party evidence ( TPE ) if VSOE is not available, or estimated selling price ( ESP ) if neither VSOE or TPE is available. The Business considers relevant internal and external market factors in cases where the Business is required to estimate selling prices.

Product returns consist of estimated returns for products sold and are recorded as a reduction in reported revenues at the time of sale. Customer allowances and rebates, consisting primarily of volume discounts and other short-term incentive programs, are recorded as a reduction in reported revenues at the time of sale because these allowances reflect a reduction in the purchase price. Product returns, customer allowances and rebates are estimated based on historical experience and known trends.

**Deferred Revenue** Deferred revenue includes amounts which have been billed in accordance with contractual terms but have not yet been recognized as revenue because the criteria for revenue recognition have not been met.

**Shipping and Handling** Shipping and handling costs are included as a component of cost of sales. Shipping and handling costs billed to customers are included in sales.

**Research and Development** The Business conducts research and development activities for the purpose of developing new products, enhancing the functionality, effectiveness, ease of use and reliability of the Business existing products and expanding the applications for which uses of the Business products are appropriate. Research and development costs are expensed as incurred.

**Income Taxes** The Business domestic and foreign operating results are included in the income tax returns of Danaher. The Business accounts for income taxes under the separate return method. Under this approach, the Business determines its deferred tax assets and liabilities and related tax expense as if it were filing a separate tax return. The accompanying Combined Balance Sheet does not contain a current taxes payable liability as it is deemed settled with Danaher when due and therefore included in Parent's Equity. Deferred tax liabilities and assets are determined based on the difference between the financial statement and tax basis of assets and liabilities using enacted rates expected to be in effect during the year in which the differences reverse. Deferred tax assets generally represent items that could be used as tax deductions or credits in the future for which the tax benefit has already been reflected on the Business Combined Statements of Earnings. The Business establishes valuation allowances for its deferred tax assets if it is more likely than not that some or all of the deferred tax assets would not be realized on a separate return basis. Deferred tax liabilities generally represent items that would have already been taken as deductions on the Business separate tax return but have not yet been recognized as an expense in the Business Combined Statements of Earnings. The effect on deferred tax assets and liabilities due to a change in tax rates is recognized as income tax expense in the

period that includes the enactment date. A tax benefit or expense is recognized for the net change in the deferred tax asset or liability

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during the year and the current tax liability for the year. The Business accounts for uncertain tax positions by recognizing the financial statement effects of a tax position only when, based upon the technical merits, it is more-likely-than-not that the position will be sustained upon examination. Judgment is required in evaluating tax positions and determining income tax provisions. The Business re-evaluates the technical merits of its tax positions and may recognize an uncertain tax benefit in certain circumstances, including when: (i) a tax audit is completed; (ii) applicable tax laws change, including a tax case ruling or legislative guidance; or (iii) the applicable statute of limitations expires. The Business recognizes accrued interest and penalties associated with unrecognized tax positions within income tax expense. Refer to Note 12 for additional information.

**Restructuring** The Business periodically initiates restructuring activities to appropriately position the Business cost base relative to prevailing economic conditions and associated customer demand. Costs associated with restructuring actions can include one-time termination benefits and related charges in addition to facility closure, contract termination and other related activities. The Business records the cost of the restructuring activities when the associated liability is incurred. Refer to Note 14 for additional information.

**Foreign Currency Translation** Exchange rate adjustments resulting from foreign currency transactions are recognized in net earnings, whereas adjustments resulting from the translation of financial statements are reflected as a component of accumulated other comprehensive income (loss) within parent's equity. Net foreign currency transaction gains or losses were not material in any of the years presented.

**Accounting for Stock Options** Certain employees of the Business participate in Danaher's share-based compensation plans which include stock options and restricted stock units (RSUs). The Business accounts for stock-based compensation incurred by Danaher by measuring the fair value of the award as of the grant date. Equity-based compensation expense is recognized net of an estimated forfeiture rate on a straight-line basis over the requisite service period of the award, except that in the case of RSUs, compensation expense is recognized using an accelerated attribution method.

**Pension Plans** The Business measures its pension assets and its obligations that determine the respective plan's funded status as of the end of the Business fiscal year, and recognizes an asset for a plan's overfunded status or a liability for a plan's underfunded status in its balance sheet. Changes in the funded status of the plans are recognized in the year in which the changes occur and reported in comprehensive income (loss).

**Recently Issued Accounting Pronouncements** In May 2014, the Financial Accounting Standards Board (FASB) issued Accounting Standards Update (ASU) No. 2014-09, Revenue from Contracts with Customers (Topic 606), which impacts virtually all aspects of an entity's revenue recognition. The core principle of the new standard is that revenue should be recognized to depict the transfer of promised goods or services to customers in an amount that reflects the consideration to which the entity expects to be entitled in exchange for those goods or services. The standard is effective for annual reporting periods beginning after December 15, 2016. Management has not yet completed its assessment of the impact of the new standard, including possible transition alternatives, on the Business financial statements.

**Accumulated Other Comprehensive Income (Loss)** Effective January 1, 2013, the Business adopted accounting guidance that requires the Business to separately disclose, on a prospective basis, the change in each component of other comprehensive income (loss) relating to reclassification adjustments and current period other comprehensive income (loss). As the guidance relates to presentation only, the adoption did not have a material impact on the Business results of operations, financial position or cash flows.

Foreign currency translation adjustments are generally not adjusted for income taxes as they relate to the Business indefinite investments in non-U.S. subsidiaries.

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The changes in accumulated other comprehensive income (loss) by component for the years ended December 31, 2012, 2013 and 2014, are summarized below (\$ in thousands).

	<b>Foreign Currency Translation Adjustments</b>	<b>Pension Adjustments</b>	<b>Total</b>
<b>Balance, December 31, 2011</b>	\$ (9,703)	\$ (302)	\$ (10,005)
Net current period other comprehensive income (loss):			
Increase (decrease)	2,311	(982)	1,329
Income tax (expense) benefit		293	293
Net current period other comprehensive income (loss), net of income taxes	2,311	(689)	1,622
<b>Balance, December 31, 2012</b>	(7,392)	(991)	(8,383)
Other comprehensive income (loss) before reclassifications:			
Increase (decrease)	4,306	(461)	3,845
Income tax (expense) benefit		137	137
Other comprehensive income (loss) before reclassifications, net of income taxes	4,306	(324)	3,982
Amounts reclassified from accumulated other comprehensive income (loss), net of income taxes (1)			
Net current period other comprehensive income (loss), net of income taxes	4,306	(324)	3,982
<b>Balance, December 31, 2013</b>	(3,086)	(1,315)	(4,401)
Other comprehensive income (loss) before reclassifications:			
Increase (decrease)	(14,359)	(2,023)	(16,382)
Income tax (expense) benefit		681	681
Other comprehensive income (loss) before reclassifications, net of income taxes	(14,359)	(1,342)	(15,701)
Amounts reclassified from accumulated other comprehensive income (loss), net of income taxes (1)			
Net current period other comprehensive income (loss), net of income taxes	(14,359)	(1,342)	(15,701)

<b>Balance, December 31, 2014</b>	\$	(17,445)	\$	(2,657)	\$ (20,102)
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(1) There were no items reclassified from accumulated other comprehensive income (loss) in 2013 or 2014.

Subsequent Events The Business has evaluated subsequent events for recording or disclosure in these financial statements. There were no such events.

### **(3) ACQUISITIONS**

As part of Danaher, the Business continually evaluates potential acquisitions that either strategically fit with the Business existing portfolio or expand the Business portfolio into a new and attractive business area. The Business has completed several acquisitions that have been accounted for as purchases and have resulted in the recognition of goodwill in the Business financial statements. This goodwill arises because the purchase prices for these businesses reflect a number of factors including the future earnings and cash flow potential of these businesses, the multiple to earnings, cash flow and other factors at which similar businesses have been purchased by other acquirers, the competitive nature of the processes by which the Business acquired the businesses and the complementary strategic fit and resulting synergies these businesses bring to existing operations.

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The Business makes an initial allocation of the purchase price at the date of acquisition based upon its understanding of the fair value of the acquired assets and assumed liabilities. The Business obtains this information during due diligence and through other sources. In the months after closing, as the Business obtains additional information about these assets and liabilities, including through tangible and intangible asset appraisals, and learns more about the newly acquired business, it is able to refine the estimates of fair value and more accurately allocate the purchase price. Only items identified as of the acquisition date are considered for subsequent adjustment. The Business evaluates whether any adjustments to the purchase accounting are material and assesses if any retrospective adjustments to prior period financial statements are required. The accompanying financial statements reflect the impact of all adjustments to the initial purchase accounting as of the original acquisition dates.

In connection with acquisitions, the Business may enter into post-closing financial arrangements such as purchase price adjustments, earn-out obligations and indemnification obligations. These obligations are recorded at their fair value at the time of acquisition and require management to make judgments and estimates about the ultimate settlement amount. While the Business believes it has made reasonable estimates and assumptions to calculate the fair value of these obligations, if actual results are not consistent with management's estimates and assumptions, these obligations may be understated and a charge would need to be taken against net earnings. As of December 31, 2014, the Business had recorded an estimated earn-out liability for arrangements in connection with acquisitions of \$18,291,000. The maximum exposure for these earn-out obligations as of December 31, 2014 is estimated at \$31,530,000 and these earn-out obligations are expected to be resolved in 2015.

During 2014, the Business did not make any acquisitions.

During 2013, the Business acquired two businesses for total consideration of \$74,719,000 in cash, net of cash acquired. These acquisitions enhanced the technology platforms and research and development capabilities of the Business. The aggregate annual sales of these two businesses at the time of their respective acquisitions, in each case based on the business's revenues for its last completed fiscal year prior to the acquisition, were approximately \$13,100,000. Due to the timing of these acquisitions during 2013, they did not materially impact the Business's sales or operating profit during 2013. The Business recorded an aggregate of \$62,621,000 of goodwill related to these acquisitions.

During 2012, the Business acquired VSS Monitoring, Inc ( VSS ) for total consideration of \$189,138,000 in cash, net of cash acquired. The aggregate annual sales of this business at the time of its acquisition, based on VSS's revenues for its last completed fiscal year prior to the acquisition, were \$31,346,000. In addition in 2012, VSS contributed \$30,163,000 to sales and reported a loss before income taxes of \$8,552,000 from the date of acquisition. The Business recorded an aggregate of \$135,927,000 of goodwill related to this acquisition.

The following table summarizes the estimated fair values of the assets acquired and liabilities assumed at the date of acquisition for all acquisitions consummated during 2013 and 2012 (\$ in thousands):

	<b>2013</b>	<b>2012</b>
Trade accounts receivable	\$ 5,353	\$ 4,971
Inventories		5,249
Property, plant and equipment	719	1,718
Goodwill	62,621	135,927
In-process research and development		568
Other intangible assets, primarily customer relationships, trade names and patents	34,070	65,932

Trade accounts payable	(77)	(1,864)
Other assets and liabilities, net	(27,967)	(23,363)
Net cash consideration	\$ 74,719	\$ 189,138

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Transaction related costs were not material to 2014, 2013 or 2012 earnings. The Business earnings for the years ended December 31, 2014 and 2012 reflect the impact of additional pre-tax charges totaling \$2,824,000 and \$3,026,000, respectively, associated with fair value adjustments to inventory and deferred revenue related to acquired businesses. These amounts were not material for the year ended December 31, 2013.

*Pro Forma Financial Information (Unaudited)*

The unaudited pro forma information set forth below gives effect to the 2013 acquisitions as if they had occurred as of January 1, 2013. There were no acquisitions in 2014. The pro forma information is presented for informational purposes only and is not necessarily indicative of the results of operations that actually would have been achieved had the acquisitions been consummated as of that time (\$ in thousands):

	<b>2013</b>
Sales	\$ 847,445
Net earnings	80,281
<b>(4) INVENTORIES</b>	

The classes of inventory as of December 31 are summarized as follows (\$ in thousands):

	<b>2014</b>	<b>2013</b>
Finished goods	\$ 29,619	\$ 28,852
Work in process	1,258	4,083
Raw materials	23,653	20,820
Total	\$ 54,530	\$ 53,755

**(5) PROPERTY, PLANT AND EQUIPMENT**

The classes of property, plant and equipment as of December 31 are summarized as follows (\$ in thousands):

	<b>2014</b>	<b>2013</b>
Land and improvements	\$ 1,983	\$ 1,983
Buildings	21,235	20,810
Machinery and equipment	82,972	68,928
Gross property, plant and equipment	106,190	91,721
Less accumulated depreciation	(59,867)	(48,702)
Property, plant and equipment, net	\$ 46,323	\$ 43,019

Total depreciation expense for the years ended December 31, 2014, 2013 and 2012 were \$13,416,000, \$12,094,000 and \$10,143,000, respectively.

Capital expenditures totaled \$16,877,000, \$13,438,000 and \$12,487,000 for the years ended December 31, 2014, 2013 and 2012, respectively. There was no capitalized interest related to capital expenditures in any period.

**(6) GOODWILL & OTHER INTANGIBLE ASSETS**

As discussed in Note 2 and 3, goodwill arises from the purchase price for acquired businesses exceeding the fair value of tangible and intangible assets acquired less assumed liabilities and non-controlling interests. The Business assesses goodwill for impairment at least annually in the fourth quarter of each year, or more frequently as triggering events occur that indicate that it is more likely than not that an impairment exists. In performing its goodwill impairment test, the business first assesses qualitative factors to determine whether it is more likely

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than not that the fair value of a reporting unit is less than its carrying amount, including goodwill. Qualitative factors that the Business considers include macroeconomic conditions, industry and market considerations, cost factors, and overall financial performance. If qualitative factors indicate that an impairment may have occurred, the Business performs a quantitative impairment test. The Business may opt to bypass the qualitative test in any given period.

As of December 31, 2014, the Business had four reporting units for goodwill impairment testing. The carrying value of the goodwill included in each individual reporting unit ranged from \$59,330,000 to \$411,157,000. In 2012, the qualitative impairment test indicated that an impairment of goodwill was not more likely than not. In 2013 and 2014, the Business opted to skip the qualitative test and performed the quantitative impairment test for all reporting units. In performing its quantitative assessment of goodwill impairment, management relied on a number of factors including operating results, business plans, economic projections, anticipated future cash flows, and transactions and marketplace data. These factors are inherently subject to uncertainty and require management to make estimates and exercise judgment. While the Business believes it has made reasonable estimates and assumptions to calculate the fair value of its reporting units, if actual results are not consistent with management's estimates and assumptions, goodwill and other intangible assets may be overstated and a charge would need to be taken against net earnings. No goodwill impairment charges were recorded for the years ended December 31, 2014, 2013 and 2012 and no triggering events have occurred subsequent to the performance of the latest annual impairment test.

The following table is a rollforward of goodwill reflected in the financial statements (\$ in thousands):

	<b>Total</b>
<b>Balance, December 31, 2012</b>	\$ 649,765
Attributable to 2013 acquisitions	62,621
Foreign currency translation	3,822
<b>Balance, December 31, 2013</b>	716,208
Foreign currency translation	(11,318)
<b>Balance, December 31, 2014</b>	\$ 704,890

Finite-lived intangible assets are amortized over their legal or estimated useful life. The following summarizes the gross carrying value and accumulated amortization for each major category of intangible asset (\$ in thousands):

	<b>December 31, 2014</b>		<b>December 31, 2013</b>	
	<b>Gross Carrying Amount</b>	<b>Accumulated Amortization</b>	<b>Gross Carrying Amount</b>	<b>Accumulated Amortization</b>
<b>Finite-lived intangibles:</b>				
Patents and technology	\$ 83,426	\$ (39,215)	\$ 85,331	\$ (30,435)
Customer relationships and other intangibles	180,073	(92,823)	182,791	(78,168)
<b>Total finite-lived intangibles</b>	<b>\$ 263,499</b>	<b>\$ (132,038)</b>	<b>\$ 268,122</b>	<b>\$ (108,603)</b>
<b>Indefinite-lived intangibles:</b>				
Trademarks and trade names	\$ 72,830	\$	\$ 72,830	\$

Total intangibles	\$ 336,329	\$ (132,038)	\$ 340,952	\$ (108,603)
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Total intangible amortization expense in 2014, 2013 and 2012 was \$26,509,000, \$29,005,000 and \$25,612,000, respectively, of which \$10,351,000, \$9,344,000 and \$8,285,000 is included in costs of sales for the years ended December 31, 2014, 2013 and 2012, respectively. Based on the finite-lived intangible assets recorded as of December 31, 2014, amortization expense is estimated to be \$25,501,000 during 2015, \$23,021,000 during 2016, \$18,439,000 during 2017, \$18,439,000 during 2018 and \$17,179,000 during 2019.

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The Business reviews identified intangible assets for impairment whenever events or changes in circumstances indicate that the related carrying amounts may not be recoverable. The Business also tests intangible assets with indefinite lives at least annually for impairment. Determining whether an impairment loss occurred requires a comparison of the carrying amount to the sum of undiscounted cash flows expected to be generated by the asset. These analyses require management to make judgments and estimates about future revenues, expenses, market conditions and discount rates related to these assets.

As a result of these analyses, the Business recorded no impairment charges in either 2014 or 2012. In 2013, the Business recorded an impairment charge of \$31,063,000 to reduce the value of certain customer relationship assets to their estimated fair value. These customer relationship assets were deemed to be impaired because as of December 31, 2013, orders and financial results of the acquired business to which these assets relate had not materialized according to the original expectations of the Business as of the date of acquisition.

**(7) FAIR VALUE MEASUREMENTS**

Accounting standards define fair value based on an exit price model, establish a framework for measuring fair value where the Business assets and liabilities are required to be carried at fair value and provide for certain disclosures related to the valuation methods used within a valuation hierarchy as established within the accounting standards. This hierarchy prioritizes the inputs into three broad levels as follows. Level 1 inputs are quoted prices (unadjusted) in active markets for identical assets or liabilities. Level 2 inputs are quoted prices for similar assets and liabilities in active markets, quoted prices for identical or similar assets in markets that are not active, or other observable characteristics for the asset or liability, including interest rates, yield curves and credit risks, or inputs that are derived principally from, or corroborated by, observable market data through correlation. Level 3 inputs are unobservable inputs based on the Business assumptions. A financial asset or liability's classification within the hierarchy is determined based on the lowest level input that is significant to the fair value measurement in its entirety.

A summary of financial assets and liabilities that are measured at fair value on a recurring basis as of December 31, 2014 and 2013 were as follows (\$ in thousands):

	Quoted Prices in Active Market (Level 1)	Significant Other Observable Inputs (Level 2)	Significant Unobservable Inputs (Level 3)	Total
<b>December 31, 2014</b>				
Liabilities:				
Deferred compensation plan		\$ 1,859		\$ 1,859
Earn-out obligations			\$ 18,291	18,291
<b>December 31, 2013</b>				
Liabilities:				
Deferred compensation plan		\$ 1,498		\$ 1,498
Earn-out obligations			\$ 24,896	24,896

For more information on the deferred compensation plan, see Note 16.

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The table below sets forth a summary of changes in the fair value of the Business Level 3 financial assets and liabilities that are measured at fair value on a recurring basis for the years ended December 31, 2014 and 2013 (\$ in thousands):

	<b>Total</b>
<b>Balance, December 31, 2012</b>	
Additions	24,686
Fair value adjustments	210
<b>Balance, December 31, 2013</b>	24,896
Fair value adjustments	(4,105)
Payments	(2,500)
<b>Balance, December 31, 2014</b>	<b>\$ 18,291</b>

There have been no transfers of assets or liabilities between the fair value measurement levels. The earn-out obligations recorded in 2013 are related to acquisitions made in that year and represent the Business estimate of the fair value of the liability based on the expected results of operations and achievement of other significant operational milestones of the acquired businesses during the earn-out period. Fair value adjustments are included within selling, general, and administrative expenses in the accompanying Combined Statements of Earnings.

**(8) ACCRUED EXPENSES**

Accrued expenses and other liabilities as of December 31 include the following (\$ in thousands):

	<b>2014</b>	<b>2013</b>
Compensation and benefits	\$ 16,580	\$ 23,948
Incentive compensation	11,222	23,404
Restructuring related accruals	22,333	5,611
Earn-out obligations, current	18,291	5,954
Other	23,165	16,069
Total	\$ 91,591	\$ 74,986

**Table of Contents****(9) PENSION BENEFIT PLANS**

Certain of the Business' non-U.S. employees participate in certain of Danaher's noncontributory defined benefit pension plans. None of the Business' employees in the U.S. participate in any Danaher noncontributory defined benefit pension plans. In general, these plans are funded based on considerations relating to legal requirements, underlying asset returns, the plans' funded status, the anticipated deductibility of the contribution, local practices, market conditions, interest rates and other factors. The following sets forth the funded status of the plans as of the most recent actuarial valuations using measurement dates of December 31, 2014 and 2013 (\$ in thousands):

	<b>2014</b>	<b>2013</b>
<b>Change in pension benefit obligation:</b>		
Benefit obligation at beginning of year	\$ 7,155	\$ 5,484
Service cost	438	342
Interest cost	292	232
Employee contributions	46	8
Net transfers in from other Danaher plans <sup>(1)</sup>		310
Actuarial (gain) loss	2,788	560
Foreign exchange rate impact	(1,058)	219
<b>Benefit obligation at end of year</b>	<b>9,661</b>	<b>7,155</b>
<b>Change in plan assets:</b>		
Fair value of plan assets at beginning of year	1,800	1,306
Actual return on plan assets	489	185
Employer contributions	116	37
Employee contributions	46	8
Net transfers in from other Danaher plans <sup>(1)</sup>		228
Foreign exchange rate impact	(202)	36
<b>Fair value of plan assets at end of year</b>	<b>2,249</b>	<b>1,800</b>
<b>Funded status</b>	<b>\$ (7,412)</b>	<b>\$ (5,355)</b>

<sup>(1)</sup> In 2013, certain plans, which were previously accounted for as defined contribution plans, were modified in accordance with local laws to provide guarantees to the participants. This change recharacterized these plans as defined benefit plans.

**Weighted average assumptions used to determine benefit obligations at date of measurement:**

	<b>2014</b>	<b>2013</b>
Discount rate	2.54%	4.04%
Rate of compensation increase	2.70%	2.72%

**Components of net periodic pension cost (\$ in thousands):**

	<b>2014</b>	<b>2013</b>
Service cost	\$ 438	\$ 342
Interest cost	292	232
Expected return on plan assets	(89)	(68)
Net periodic pension cost	\$ 641	\$ 506

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**Table of Contents****Weighted average assumptions used to determine net periodic pension cost at date of measurement:**

	<b>2014</b>	<b>2013</b>
Discount rate	4.04%	4.19%
Expected long-term return on plan assets	5.04%	5.31%
Rate of compensation increase	2.72%	2.68%

The discount rate used to determine the benefit obligation for each plan reflects the market rate on December 31 for high-quality fixed-income investments with maturities corresponding to the Business benefit obligations and is subject to change each year. The rate appropriate for each plan is determined based on investment grade instruments with maturities approximately equal to the average expected benefit payout under the plan.

As of December 31, 2014, unrecognized actuarial losses of \$3,896,000 (\$2,657,000, net of tax) which have not yet been recognized in net periodic pension cost are included in accumulated other comprehensive income. The unrecognized actuarial losses are calculated as the difference between the actuarially determined projected benefit obligation and the value of the plan assets less accrued pension costs as of December 31, 2014. None of this amount is expected to be recognized in net periodic pension costs during the year ending December 31, 2015. No plan assets are expected to be returned to the Business during the year ending December 31, 2015.

**Selection of Expected Rate of Return on Assets**

Long-term rate of return on asset assumptions were determined on a plan-by-plan basis based on the composition of assets and ranged from 3% to 6% in 2014 and from 4% to 6% in 2013, with a weighted average rate of return assumption of 5% in each of 2014 and 2013.

**Plan Assets**

Plan assets are invested in various insurance contracts, equity and debt securities as determined by the administrator of each plan. The value of the plan assets directly affects the funded status of the Business pension plans recorded in the financial statements. Plan assets are held in collective contracts and trusts for the overall Danaher plans. They have been allocated to the Business based on the Business proportion of the overall obligation in each year. The fair values of the Business pension plan assets as of December 31, 2014, by asset category were as follows (\$ in thousands):

	<b>Quoted Prices in Active Market (Level 1)</b>	<b>Significant Other Observable Inputs (Level 2)</b>	<b>Significant Unobservable Inputs (Level 3)</b>	<b>Total</b>
Cash and equivalents	\$ 85	\$	\$	\$ 85
Equity securities:				
Common stock	152	58		210
Fixed income securities:				
Corporate bonds		233		233
Mutual funds		1,192		1,192
Venture capital, partnerships, other private investments and			278	278

real estate								
Insurance contracts			251		251			
Total	\$	237	\$	1,734	\$	278	\$	2,249

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The fair values of the Business pension plan assets as of December 31, 2013, by asset category were as follows (\$ in thousands):

	<b>Quoted Prices in Active Market (Level 1)</b>	<b>Significant Other Observable Inputs (Level 2)</b>	<b>Significant Unobservable Inputs (Level 3)</b>	<b>Total</b>
Cash and equivalents	\$ 49	\$	\$	\$ 49
Equity securities:				
Common stock	38	54		92
Preferred stock	34			34
Fixed income securities:				
Corporate bonds		106		106
Government issued		4		4
Mutual funds		1,104		1,104
Venture capital, partnerships, other private investments and real estate			176	176
Insurance contracts		235		235
<b>Total</b>	<b>\$ 121</b>	<b>\$ 1,503</b>	<b>\$ 176</b>	<b>\$ 1,800</b>

Preferred stock and certain common stock and mutual funds are valued at the quoted closing price reported on the active market on which the individual securities are traded. Common stock, corporate bonds, U.S. government securities and mutual funds that are not traded on an active market are valued at quoted prices reported by investment brokers and dealers based on the underlying terms of the security and comparison to similar securities traded on an active market.

Venture capital, partnerships and other private investments are valued based on the information provided by the asset fund managers, which reflects the plan's share of the fair value of the net assets of the investment. The investments are valued using a combination of either discounted cash flows, earnings and market multiples, third party appraisals or through reference to the quoted market prices of the underlying investments held by the venture, partnership or private entity where available. Valuation adjustments reflect changes in operating results, financial condition, or prospects of the applicable portfolio company.

The methods described above may produce a fair value estimate that may not be indicative of net realizable value or reflective of future fair values. Furthermore, while the Business believes the valuation methods are appropriate and consistent with the methods used by other market participants, the use of different methodologies or assumptions to determine the fair value of certain financial instruments could result in a different fair value measurement at the reporting date.

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The table below sets forth a summary of changes in the fair value of the Business Level 3 venture capital, partnerships, other private investments and real estate for the years ended December 31, 2014 and 2013 (\$ in thousands):

	<b>Total</b>
<b>Balance, December 31, 2012</b>	<b>\$ 113</b>
Actual return on plan assets:	
Relating to assets sold during the period	
Relating to assets still held as of December 31, 2013	2
Purchases	69
Sales	(8)
<b>Balance, December 31, 2013</b>	<b>\$ 176</b>
Actual return on plan assets:	
Relating to assets sold during the period	
Relating to assets still held as of December 31, 2014	9
Purchases	118
Sales	(25)
<b>Balance, December 31, 2014</b>	<b>\$ 278</b>

**Expected Contributions**

During 2014, the Business contributed \$116,000 to its defined benefit pension plans. During 2015, the Business cash contribution requirements for its defined benefit pension plans are expected to be approximately \$122,000.

As the participants within the Business plans are all active employees, the benefit payments are not expected to be material in the foreseeable future.

**Other Matters**

Substantially all employees not covered by defined benefit plans are covered by defined contribution plans, which generally provide for Business funding based on a percentage of compensation. Expense for all defined benefit and defined contribution pension plans amounted to \$9,064,000, \$8,418,000, and \$7,163,000 for the years ended December 31, 2014, 2013 and 2012, respectively.

**(10) LEASES AND COMMITMENTS**

The Business operating leases extend for varying periods of time up to six years. Future minimum rental payments for all operating leases having initial or remaining non-cancelable lease terms in excess of one year are \$6,327,000 in 2015, \$6,093,000 in 2016, \$4,964,000 in 2017, \$2,492,000 in 2018, \$1,535,000 in 2019 and \$768,000 thereafter. Rent expense related to operating leases was \$6,648,000, \$6,025,000, and \$5,204,000 for the years ended December 31, 2014, 2013 and 2012, respectively.

The Business generally accrues estimated warranty costs at the time of sale. In general, manufactured products are warranted against defects in material and workmanship when properly used for their intended purpose, installed

correctly, and appropriately maintained. Warranty periods depend on the nature of the product and range from one to five years. The amount of the accrued warranty liability is determined based on historical information such as past experience, product failure rates or number of units repaired, estimated cost of material and labor, and in certain instances estimated property damage. The accrued warranty liability is reviewed on a quarterly basis and may be adjusted as additional information regarding expected warranty costs becomes known.

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The following is a rollforward of the Business accrued warranty liability for the years ended December 31, 2014 and 2013 (\$ in thousands):

	<b>Total</b>
<b>Balance, December 31, 2012</b>	<b>\$ 865</b>
Accruals for warranties issued during the period	1,009
Settlements made	(742)
<b>Balance, December 31, 2013</b>	<b>1,132</b>
Accruals for warranties issued during the period	915
Settlements made	(531)
<b>Balance, December 31, 2014</b>	<b>\$ 1,516</b>

**(11) LITIGATION AND CONTINGENCIES**

The Business is, from time to time, subject to a variety of litigation and other proceedings incidental to its business, including lawsuits involving claims for damages arising out of the use of the Business products, software and services, claims relating to intellectual property matters, employment matters, commercial disputes, and personal injury as well as regulatory investigations or enforcement. The Business may also become subject to lawsuits as a result of past or future acquisitions or as a result of liabilities retained from, or representations, warranties or indemnities provided in connection with divested businesses. Some of these lawsuits may include claims for punitive and consequential as well as compensatory damages. Based upon the Business experience, current information and applicable law, it does not believe that these proceedings and claims will have a material adverse effect on its financial position, results of operations or cash flows.

While Danaher maintains workers compensation, property, cargo, automobile, crime, fiduciary, product, general liability, and directors and officers liability insurance on behalf of the Business that cover a portion of these claims, this insurance may be insufficient or unavailable to cover such losses. In addition, while the Business believes it is entitled to indemnification from third parties for some of these claims, these rights may also be insufficient or unavailable to cover such losses. Danaher maintains third party insurance policies on behalf of the Business up to certain limits to cover certain liability costs in excess of predetermined retained amounts. For general liability risk (which includes product liability) and most other insured risks, Danaher purchases outside insurance coverage only for severe losses (stop loss insurance) and reserves must be established and maintained with respect to amounts within the self-insured retention.

In accordance with accounting guidance, the Business records a liability in the combined financial statements for loss contingencies when a loss is known or considered probable and the amount can be reasonably estimated. If the reasonable estimate of a known or probable loss is a range, and no amount within the range is a better estimate than any other, the minimum amount of the range is accrued. If a loss does not meet the known or probable level but is reasonably possible and a loss or range of loss can be reasonably estimated, the estimated loss or range of loss is disclosed. These reserves consist of specific reserves for individual claims and additional amounts for anticipated developments of these claims as well as for incurred but not yet reported claims. The specific reserves for individual known claims are quantified with the assistance of legal counsel and outside risk insurance professionals where appropriate. In addition, outside risk insurance professionals assist in the determination of reserves for incurred but not yet reported claims through evaluation of the Business specific loss history, actual claims reported, and industry

trends among statistical and other factors. Reserve estimates are adjusted as additional information regarding a claim becomes known. While the Business actively pursues financial recoveries from insurance providers, it does not recognize any recoveries until realized or until such time as a sustained pattern of collections is established related to historical matters of a similar nature and magnitude. If the risk insurance reserves established with respect to the Business are inadequate, the Business would be required to incur an expense equal to the amount of the loss incurred in excess of the reserves, which would adversely affect the Business net earnings.

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In addition, the Business operations are subject to environmental laws and regulations in the jurisdictions in which they operate, which impose limitations on the discharge of pollutants into the ground, air and water and establish standards for the use, generation, treatment, storage and disposal of hazardous and non-hazardous wastes. Certain of the Business operations involve the handling, manufacturing, use or sale of substances that are or could be classified as hazardous materials within the meaning of applicable laws. The Business must also comply with various health and safety regulations in both the United States and abroad in connection with its operations. Compliance with these laws and regulations has not had and, based on current information and the applicable laws and regulations currently in effect, is not expected to have a material adverse effect on the Business capital expenditures, earnings or competitive position, and the Business does not anticipate material capital expenditures for environmental control facilities.

**(12) INCOME TAXES**

The operating results of the Business are included in the income tax returns of Danaher. The Business accounts for income taxes under the separate return method. Under this approach, the Business determines its current tax liability, deferred tax assets and liabilities and related tax expense as if it were filing separate tax returns in each tax jurisdiction.

Earnings before income taxes for the years ended December 31 consist of the following (\$ in thousands):

	<b>2014</b>	<b>2013</b>	<b>2012</b>
United States	\$ 63,546	\$ 112,048	\$ 149,865
International	(1,211)	4,550	8,016
<b>Total</b>	<b>\$ 62,335</b>	<b>\$ 116,598</b>	<b>\$ 157,881</b>

The provision for income taxes for the years ended December 31 consist of the following (\$ in thousands):

	<b>2014</b>	<b>2013</b>	<b>2012</b>
<b>Current:</b>			
Federal U.S.	\$ 29,860	\$ 44,919	\$ 48,512
Non-U.S.	2,172	1,149	3,177
State and local	4,517	7,117	6,324
<b>Deferred:</b>			
Federal U.S.	(13,755)	(17,677)	(3,082)
Non-U.S.	(1,241)	(442)	(451)
State and local	(1,770)	(2,274)	(397)
<b>Income tax provision</b>	<b>\$ 19,783</b>	<b>\$ 32,792</b>	<b>\$ 54,083</b>

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Net current deferred income tax assets are reflected in prepaid expenses and other current assets, net long-term deferred income tax assets are reflected in other assets and net long-term deferred income tax liabilities are included in other long-term liabilities in the accompanying Combined Balance Sheets. Net deferred income tax liabilities at December 31 consist of the following (\$ in thousands):

	<b>2014</b>	<b>2013</b>
<b>Deferred tax assets:</b>		
Allowance for doubtful accounts	\$ 706	\$ 1,270
Inventories	5,154	4,094
Pension and post-retirement benefits	378	28
Insurance	914	788
Other accruals and prepayments	6,373	6,787
Tax credit and loss carryforwards	22,810	23,075
Deferred revenue and other	12,667	6,202
Valuation allowances		(84)
<b>Total deferred tax assets</b>	<b>49,002</b>	<b>42,160</b>
<b>Deferred tax liabilities:</b>		
Property, plant and equipment	(3,071)	(3,372)
Goodwill and other intangibles	(72,873)	(83,654)
<b>Total deferred tax liabilities</b>	<b>(75,944)</b>	<b>(87,026)</b>
<b>Net deferred tax liabilities</b>	<b>\$ (26,942)</b>	<b>\$ (44,866)</b>

Included in deferred income taxes as of December 31, 2014 are tax benefits for U.S. and non-U.S. net operating loss carry forwards totaling \$22,810,000. Certain of the losses from 2014 may be carried forward indefinitely and others may be carried forward to various dates from 2020 through 2028.

The effective income tax rate for the years ended December 31 varies from the U.S. statutory federal income tax rate as follows:

	<b>Percentage of Pre-Tax Earnings</b>		
	<b>2014</b>	<b>2013</b>	<b>2012</b>
Statutory federal income tax rate	35.0%	35.0%	35.0%
Increase (decrease) in tax rate resulting from:			
State income taxes (net of federal income tax benefit)	2.9	2.7	2.6
Foreign income taxed at different rates than the U.S. statutory rate	2.5	1.2	(0.3)
Research and experimentation credits	(5.0)	(5.2)	
Domestic production activities deduction	(4.2)	(4.3)	(2.7)
Resolution and adjustment of uncertain tax positions/statute expirations	(0.1)	(1.7)	(0.6)
Other	0.6	0.4	0.3

Effective income tax rate	31.7%	28.1%	34.3%
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The Business' effective tax rate for each of 2014, 2013 and 2012 is lower than the U.S. federal statutory rate of 35% due principally to tax benefits of the Domestic Production Activities Deduction and the lapse of certain statutes of limitation, partially offset by state income taxes. For the years ended December 31, 2014 and December 31, 2013, the effective tax rate is also lower due to the reinstatement of the research and experimentation credit resulting from the enactments of the Tax Increase Prevention Act of 2014 and America Tax Relief Act of 2012, partially offset by foreign income taxed at different rates than the U.S. federal statutory rate.

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As of December 31, 2014, gross unrecognized tax benefits totaled approximately \$6,671,000 (\$7,163,000, including \$492,000 associated with potential interest and penalties). As of December 31, 2013, gross unrecognized tax benefits totaled approximately \$5,952,000 (\$6,314,000, including \$362,000 associated with potential interest and penalties). The Business recognized approximately \$140,000, \$145,000, and \$120,000 of interest and penalties associated with uncertain tax positions for the years ended December 31, 2014, 2013 and 2012, respectively. To the extent unrecognized tax benefits including interest and penalties are not assessed with respect to uncertain tax positions, substantially all amounts accrued will be reduced and reflected as a reduction of the overall income tax provision.

A reconciliation of the beginning and ending amount of unrecognized tax benefits, excluding amounts accrued for potential interest and penalties, is as follows (\$ in thousands):

	<b>2014</b>	<b>2013</b>	<b>2012</b>
Unrecognized tax benefits, beginning of year	\$ 5,952	\$ 5,677	\$ 4,615
Additions based on tax positions related to the current year	1,087	2,240	862
Additions for tax positions of prior years	43		
Reductions for tax positions of prior years	(63)		
Acquisitions and other			933
Lapse of statute of limitations	(286)	(1,878)	(788)
Settlements		(138)	
Effect of foreign currency translation	(62)	51	55
Unrecognized tax benefits, end of year	\$ 6,671	\$ 5,952	\$ 5,677

By virtue of previously filed separate company and consolidated tax returns of Danaher that cover the Business, the Business is routinely under audit by federal, state, local and foreign income tax authorities, including with respect to the timing and amount of deductions and the allocation of income among various tax jurisdictions. Income taxes payable include amounts considered sufficient to pay assessments that may result from examination of prior year returns; however, the amount paid upon resolution of issues raised may differ from the amount provided.

The Internal Revenue Service is currently examining the Danaher consolidated tax returns for the years ended December 31, 2010 and 2011, which includes the operations of the Business. In addition, various Danaher consolidated tax returns, which include the Business, are currently under examination for years 2005 and subsequent. The significant jurisdictions under examination are Germany, California and Illinois and these examinations are expected to be completed no later than 2016.

Management estimates that it is reasonably possible that the amount of unrecognized tax benefits may be reduced by approximately \$40,000 within twelve months as a result of resolution of worldwide tax matters, tax audit settlements and/or statute expirations.

The Business provides income taxes for unremitted earnings of foreign subsidiaries that the Business does not consider indefinitely reinvested overseas. As of December 31, 2014, the approximate amount of earnings from foreign subsidiaries that the Business considers indefinitely reinvested and for which deferred taxes have not been provided was approximately \$43,185,000. United States income taxes have not been provided on earnings that are planned to be reinvested indefinitely outside the United States and the amount of such taxes that may be applicable is not readily determinable given the various tax planning alternatives the Business could employ should it decide to repatriate these earnings.

**(13) STOCK-BASED COMPENSATION**

The Business has no stock-based compensation plans; however, certain employees of the Business are eligible to participate in Danaher's stock-based compensation plans, which include stock options and restricted stock units

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( RSUs ). The expense associated with the Business employees who participate in the Plans is allocated to the Business in the accompanying Combined Statements of Earnings. All current grants of stock options and RSUs are made under Danaher's 2007 Stock Incentive Plan (the 2007 Plan ). The 2007 Plan provides for the grant of stock options, stock appreciation rights, RSUs, restricted stock or any other stock based award. Stock options and RSUs have also been issued to employees of the Business under Danaher's 1998 Stock Option Plan (together with the 2007 Plan, the Plans ), which operates in a similar manner to the 2007 Plan, but no further equity awards will be issued under the 1998 Stock Option Plan. No more than 19 million of the 62 million authorized shares under the 2007 Plan may be granted in any form other than stock options or stock appreciation rights. As of December 31, 2014, approximately 25 million shares of Danaher's common stock were reserved for issuance under the 2007 Plan.

Stock options granted under the Plans generally vest pro-rata over a five-year period and terminate ten years from the grant date, though the specific terms of each grant are determined by the Compensation Committee of Danaher's Board of Directors ( Compensation Committee ). Certain employees of the Business have been awarded options with different vesting criteria. Option exercise prices for options under these plans are equal to the closing price of Danaher's common stock on the NYSE on the date of grant.

RSUs issued under the Plans provide for the issuance of a share of Danaher's common stock at no cost to the holder and generally vest pro-rata over a five-year period, though the specific terms of each grant are determined by the Compensation Committee. Certain employees of the Business have been awarded RSUs with different vesting criteria.

The options and RSUs generally vest only if the employee is employed by Danaher on the vesting date or in other limited circumstances and unvested options and RSUs are forfeited upon retirement before age 65 unless the Compensation Committee determines otherwise. In connection with the Transaction, Danaher has agreed to (i) allow stock options held by Business employees that are scheduled to vest between the closing date and August 4, 2015 to vest in accordance with their terms and remain exercisable for up to 90 days following such vesting date, and (ii) allow RSUs held by Business employees that are scheduled to vest between the closing date and August 4, 2015 to vest in accordance with their terms.

The Business accounts for stock-based compensation by measuring the cost of employee services received in exchange for all equity awards granted, including stock options and RSUs, based on the fair value of the award as of the grant date. The Business recognizes the compensation expense over the requisite service period (which is generally the vesting period but may be shorter than the vesting period if the employee becomes retirement eligible before the end of the vesting period). The fair value for RSU awards was calculated using the closing price of Danaher's common stock on the date of grant, adjusted for the fact that RSUs do not accrue dividends. The fair value of the options granted was calculated using a Black-Scholes Merton option pricing model ( Black-Scholes ).

The following summarizes the assumptions used in the Black-Scholes model to value options granted during the years ended December 31, 2014, 2013 and 2012:

	2014		2013		2012	
Risk-free interest rate	1.7	1.8%	1.0	1.7%	0.7	1.1%
Weighted average volatility	22.4%		23.5%		29.4%	
Dividend yield	0.5%		0.2%		0.2%	
Expected years until exercise	5.5		6.0		6.0	

The Black-Scholes model incorporates assumptions to value stock-based awards. The risk-free rate of interest for periods within the contractual life of the option is based on a zero-coupon U.S. government instrument whose maturity

period equals or approximates the option's expected term. Expected volatility is based on implied volatility from traded options on Danaher's stock and historical volatility of Danaher's stock. The dividend yield

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is calculated by dividing Danaher's annual dividend, based on the most recent quarterly dividend rate, by the closing stock price on the grant date. To estimate the option exercise timing used in the valuation model, in addition to considering the vesting period and contractual term of the option, the Business analyzes and considers actual historical exercise experience for previously granted options.

The amount of stock-based compensation expense recognized during a period is also based on the portion of the awards that are ultimately expected to vest. The Company estimates pre-vesting forfeitures at the time of grant by analyzing historical data and revises those estimates in subsequent periods if actual forfeitures differ from those estimates. Ultimately, the total expense recognized over the vesting period will equal the fair value of awards that actually vest.

Option activity under the Company's stock plans as of December 31, 2014 and changes during the two years ended December 31, 2014 were as follows (in thousands; except exercise price and number of years):

	Options	Weighted Average Exercise Price	Weighted Average Remaining Contractual Term (in Years)	Aggregate Intrinsic Value
<b>Outstanding at December 31, 2012</b>	765	\$ 44.33		
Granted	192	65.65		
Exercised	(60)	41.78		
Cancelled/forfeited	(4)	(60.00)		
<b>Outstanding at December 31, 2013</b>	893	49.00		
Granted	206	78.21		
Exercised	(218)	40.58		
Cancelled/forfeited	(135)	58.38		
<b>Outstanding at December 31, 2014</b>	746	\$ 56.87	7.1	\$ 21,521
<b>Vested and Expected to Vest as of December 31, 2014<sup>(1)</sup></b>	702	\$ 56.27	7.0	\$ 20,667
<b>Vested as of December 31, 2014</b>	249	\$ 44.42	5.3	\$ 10,288

<sup>(1)</sup> The Expected to Vest options are the net unvested options that remain after applying the pre-vesting forfeiture rate assumption to total unvested options.

The following table summarizes information on unvested RSUs activity during the two years ended December 31, 2014 (in thousands; except grant date fair value):

	Number of RSUs	Weighted Average Grant-Date Fair Value
<b>Unvested at December 31, 2012</b>	214	\$ 45.01
Granted	83	65.39
Vested	(60)	40.80
<b>Unvested at December 31, 2013</b>	237	53.15
Granted	106	77.46
Vested	(74)	47.26
Forfeited	(60)	57.98
<b>Unvested at December 31, 2014</b>	209	62.48

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The Business recognized approximately \$5,581,000, \$8,106,000 and \$6,167,000 during the years ended December 31, 2014, 2013 and 2012, respectively, of non-cash pre-tax compensation expense associated with share-based compensation programs. This expense was allocated to the Business based on the cost directly attributable to the Business employees that participate in the share-based compensation program and has been recognized as a component of selling, general and administrative expenses in the accompanying Combined Statements of Earnings. As of December 31, 2014, \$8,475,000 and \$7,770,000 of total unrecognized compensation cost related to RSUs and stock options, respectively, are expected to be recognized over a weighted average period of approximately three years. These amounts will be adjusted for any future changes in estimated forfeitures.

**(14) RESTRUCTURING AND OTHER RELATED CHARGES**

During 2014, 2013 and 2012, the Business recorded restructuring and other related charges of \$23,910,000, \$5,529,000 and \$2,340,000, respectively, of which approximately 88%, 91% and 55%, in each respective year was included in selling, general and administrative expenses in the accompanying Combined Statements of Earnings, with the remaining amount charged to cost of sales.

The Business restructuring and related activities were focused on improvements in operational efficiency through targeted workforce reductions. The increase in year-over-year costs associated with restructuring actions taken in 2014 resulted from the Business continual efforts to align its organization with the current market opportunities. These costs were incurred to position the Business to provide superior products and services to its customers in a cost efficient manner, and taking into consideration broad economic uncertainties.

Substantially all restructuring activities initiated in 2014 were completed by December 31, 2014. As of December 31, 2014 and 2013, the Business had accrued restructuring charges of \$22,333,000 and \$5,611,000, respectively, included in accrued expenses and other liabilities in the accompanying Combined Balance Sheets.

The table below shows the rollforward of the accrual balance, associated with the 2014 and 2013 actions (\$ in thousands):

	<b>Total</b>
<b>Balance, December 31, 2012</b>	\$ 2,591
Costs incurred	5,529
Paid/Settled	(2,509)
<b>Balance, December 31, 2013</b>	5,611
Costs incurred	23,910
Paid/Settled	(7,188)
<b>Balance, December 31, 2014</b>	\$ 22,333

**(15) SEGMENT INFORMATION**

The Business is comprised of certain operating units of Danaher and is a premier global provider of network management tools and security solutions for telecommunications carriers and network enterprise customers. Given the interrelationships between products, technologies and customers, and resulting similar long-term economic characteristics, the Business meets the criteria for aggregating its three operating segments into a single reportable

segment.

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**Table of Contents****Operations in Geographical Areas**

(\$ in thousands)	Year Ended December 31		
	2014	2013	2012
<b>Sales:</b>			
United States	\$ 422,264	\$ 495,668	\$ 456,080
United Kingdom	41,873	34,374	43,966
All other (each country individually less than 5% of total sales)	296,086	304,849	285,692
<b>Total</b>	<b>760,223</b>	<b>834,891</b>	<b>785,738</b>
<b>Long-lived assets:</b>			
United States	895,575	916,874	874,840
Ireland	63,986	75,795	75,208
All other (each country individually less than 5% of total long-lived assets)	3,188	4,585	4,757
<b>Total</b>	<b>\$ 962,749</b>	<b>\$ 997,254</b>	<b>\$ 954,805</b>

**Sales by Major Product Group**

(\$ in thousands)	Year Ended December 31		
	2014	2013	2012
Telecommunications network monitoring	\$ 351,863	\$ 443,488	\$ 412,000
Service provider and enterprise network security and certification	219,298	202,596	190,760
Portable enterprise network analysis tools	69,995	74,054	77,722
Network packet brokering	48,282	39,251	30,163
Enterprise network performance management	37,091	36,825	32,620
Other	33,694	38,677	42,473
<b>Total</b>	<b>\$ 760,223</b>	<b>\$ 834,891</b>	<b>\$ 785,738</b>

**(16) RELATED-PARTY TRANSACTIONS**

The Business has historically operated as part of Danaher and not as a stand-alone company. Accordingly, certain shared costs have been allocated to the Business and are reflected as expenses in these financial statements. Management considers the allocation methodologies used to be reasonable and appropriate reflections of the related expenses attributable to the Business for purposes of the carve-out financial statements; however, the expenses reflected in these financial statements may not be indicative of the actual expenses that would have been incurred during the periods presented if the Business had operated as a separate stand-alone entity. In addition, the expenses reflected in the financial statements may not be indicative of expenses that will be incurred in the future by the Business.

**Corporate Expenses**

Certain corporate overhead and other shared expenses incurred by Danaher and its subsidiaries have been allocated to the Business and are reflected in the Combined Statements of Earnings. These amounts include, but are not limited to, items such as general management and executive oversight, costs to support Danaher information technology infrastructure, facilities, compliance, human resources, marketing and legal functions and financial management and transaction processing including public company reporting, consolidated tax filings and tax planning, Danaher benefit plan administration, risk management and consolidated treasury services, certain employee benefits and incentives, and stock based compensation administration. These costs are allocated using methodologies that management believes are reasonable for the item being allocated. Allocation methodologies include the Business relative share of revenues, headcount, or functional spend as a percentage of the total.

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**Table of Contents****Insurance Programs Administered by Danaher**

In addition to the corporate allocations noted above, the Business was allocated expenses related to certain insurance programs Danaher administers on behalf of the Business, including automobile liability, workers' compensation, general liability, product liability, directors and officers liability, cargo, and property insurance. These amounts are allocated using various methodologies, as described below.

Included within the insurance cost allocation are allocations related to programs for which Danaher is self-insured up to a certain amount. For the self-insured component, costs are allocated to the Business based on incurred claims of the Business. Danaher has premium based policies which cover amounts in excess of the self-insured retentions. The Business is allocated a portion of the total insurance cost incurred by Danaher based on its pro-rata portion of Danaher's total underlying exposure base. An estimated liability relating to the Business' known and incurred but not reported claims has been allocated to the Business and reflected on the accompanying Combined Balance Sheets.

**Medical Insurance Programs Administered by Danaher**

In addition to the corporate allocations noted above, the Business was allocated expenses related to the medical insurance programs Danaher administers on behalf of the Business. These amounts were allocated using actual medical claims incurred during the period for the associated employees attributable to the Business.

**Deferred Compensation Program Administered by Danaher**

Certain employees of the Business participate in Danaher's nonqualified deferred compensation programs that permit officers, directors and certain management employees to defer a portion of their compensation, on a pre-tax basis, until their termination of employment. Participants may choose among alternative earning rates for the amounts they defer, which are primarily based on investment options within the Danaher's 401(k) program (except that the earnings rates for amounts contributed unilaterally by the Business are entirely based on changes in the value of Danaher's common stock). All amounts deferred under this plan are unfunded, unsecured obligations of the Business.

The amounts of related party expenses allocated to the Business from Danaher and its subsidiaries for the years ended December 31, 2014, 2013 and 2012, were as follows (\$ in thousands):

	2014	2013	2012
<b>Allocated Corporate Expenses:</b>			
Cost of sales	\$ 4,173	\$ 4,153	\$ 4,171
Selling, general, and administrative expenses	23,757	24,015	24,187
Research and development expenses	275	234	233
<b>Total allocated corporate expenses</b>	<b>28,205</b>	<b>28,402</b>	<b>28,591</b>
<b>Directly Related Charges:</b>			
Insurance programs expenses	1,362	973	854
Medical insurance programs expenses	18,619	14,601	13,265
Deferred compensation program expenses	361	326	175
<b>Total related-party expenses</b>	<b>\$ 48,547</b>	<b>\$ 44,302</b>	<b>\$ 42,885</b>

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**Report of Independent Registered Public Accounting Firm**

To the Board of Directors and Stockholders of Danaher Corporation

We have audited the accompanying balance sheet of Potomac Holding LLC (the Company), a wholly-owned business of Danaher Corporation, as of December 31, 2014. This balance sheet is the responsibility of the Company's management. Our responsibility is to express an opinion on this balance sheet based on our audit.

We conducted our audit in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statement is free of material misstatement. We were not engaged to perform an audit of the Company's internal control over financial reporting. Our audit included consideration of internal control over financial reporting as a basis for designing audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the Company's internal control over financial reporting. Accordingly, we express no such opinion. An audit also includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements, assessing the accounting principles used and significant estimates made by management, and evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for our opinion.

In our opinion, the balance sheet referred to above presents fairly, in all material respects, the financial position of Potomac Holding LLC at December 31, 2014 in conformity with U.S. generally accepted accounting principles.

/s/ Ernst & Young LLP

McLean, Virginia

April 6, 2015

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**POTOMAC HOLDING LLC**

**BALANCE SHEET**

**(\$ in thousands)**

	<b>December 31, 2014</b>
<b>ASSETS</b>	
Total assets	\$
<b>LIABILITIES AND MEMBER S EQUITY</b>	
Total liabilities	
Total member s equity	
Total liabilities and member s equity	\$

See the accompanying Note to the Balance Sheet

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**POTOMAC HOLDING LLC**

**NOTE TO THE BALANCE SHEET**

**(1) BUSINESS OVERVIEW AND BASIS OF PRESENTATION**

Potomac Holding LLC ( Newco ) is a Delaware limited liability company and a wholly owned subsidiary of Danaher Corporation ( Danaher ). On September 29, 2014, Danaher caused Newco to be formed in order to facilitate the separation of the Communications Business of Danaher Corporation (the Communications Business or the Business ) from Danaher. Newco has engaged in no business operations to date and at December 31, 2014 it had no assets or liabilities.

The accompanying balance sheet presents the historical financial position of Newco in accordance with accounting principles generally accepted in the United States of America ( GAAP ).

On October 13, 2014, Danaher announced a definitive agreement with NetScout Systems, Inc. ( NetScout ) to combine the Business with NetScout (the Transaction ). Prior to the closing of the Transaction the Business will be transferred to Newco. The Transaction will be structured as a distribution of Newco to Danaher shareholders in either a spin-off transaction, a split-off transaction, or a combination split-off and spin-off, followed by a merger with a subsidiary of NetScout for consideration of 62.5 million NetScout shares, subject to adjustment. Both the distribution and merger are expected to qualify as tax-free transactions to Danaher and its shareholders, except to the extent that cash is paid to Danaher stockholders in lieu of fractional shares. If Danaher elects a split-off, Danaher will conduct an exchange offer pursuant to which its shareholders will elect whether to exchange Danaher shares for common units of Newco. If the split-off exchange offer is not fully subscribed, the additional Newco common units held by Danaher will be distributed in a spin-off on a pro rata basis to Danaher shareholders. Danaher will determine which approach it will take prior to closing the transaction and no decision has been made at this time. The transaction remains subject to approval by NetScout s shareholders and the satisfaction of customary closing conditions, including regulatory approvals and the absence of a material adverse change with respect to each of the Business and NetScout. At closing, depending on the number of shares of NetScout common stock outstanding, Danaher shareholders will receive approximately 59.5% of the shares of NetScout stock outstanding following the combination. The Transaction is expected to be completed in 2015.

**AGREEMENT AND PLAN OF MERGER AND REORGANIZATION**

among:

**NETSCOUT SYSTEMS, INC.,**

a Delaware corporation;

**RS MERGER SUB I, INC.,**

a Delaware corporation;

**RS MERGER SUB II, LLC,**

a Delaware limited liability company

**DANAHER CORPORATION,**

a Delaware corporation; and

**POTOMAC HOLDING LLC,**

a Delaware limited liability company

Dated as of October 12, 2014

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**AGREEMENT AND PLAN OF MERGER AND REORGANIZATION**

This **AGREEMENT AND PLAN OF MERGER AND REORGANIZATION** ( **Agreement** ) is made and entered into as of October 12, 2014, by and among: (i) Danaher Corporation, a Delaware corporation ( **Danaher** ); (ii) Potomac Holding LLC, a Delaware limited liability company and a wholly-owned subsidiary of Danaher ( **Newco** ); (iii) NetScout Systems, Inc., a Delaware corporation ( **NetScout** ); (iv) RS Merger Sub I, Inc., a Delaware corporation and a wholly-owned subsidiary of NetScout ( **Merger Sub** ); and (v) RS Merger Sub II, LLC, a Delaware limited liability company and a wholly-owned subsidiary of NetScout ( **Merger Sub II** and, together with Merger Sub, the **Merger Subs** ). Certain capitalized terms used in this Agreement are defined in Exhibit A.

**RECITALS**

**A.** Danaher, directly and indirectly through its wholly owned Subsidiaries, is engaged in the Communications Business.

**B.** Danaher has determined that it would be desirable to separate the Communications Business from Danaher.

**C.** Prior to the Effective Time on the Closing Date (or as otherwise contemplated by Article III of the Distribution Agreement), Danaher and Newco will (i) pursuant to the Distribution Agreement, effect the Newco Transfer and (ii) pursuant to the Distribution Agreement and after the Newco Transfer, effect the Distribution.

**D.** The respective boards of directors, boards of managers or members, of Danaher, Newco, NetScout and the Merger Subs, as applicable, have each approved and declared advisable this Agreement and the transactions contemplated hereby, including the merger of Merger Sub with and into Newco immediately following the Distribution, on the terms and subject to the conditions set forth in this Agreement and in accordance with the DGCL and the DLLCA (the **First Merger** ), and the merger of the First Merger Surviving Entity (as defined below) with and into Merger Sub II immediately after the First Merger, on the terms and subject to the conditions set forth in this Agreement and in accordance with the DLLCA (the **Second Merger** and, together with the First Merger, the **Mergers** ).

**E.** For federal income tax purposes, (i) it is intended that the Distribution should be tax-free to Danaher and to the Danaher stockholders pursuant to Section 361 and Section 355 of the Code, respectively, and the Mergers will be treated as integrated steps in a single transaction contemplated by this Agreement and will together qualify as a tax-free reorganization within the meaning of Section 368 of the Code, and (ii) this Agreement will be, and is, adopted as a plan of reorganization within the meaning of Section 368 of the Code.

**F.** As a condition and inducement to Danaher and Newco entering into this Agreement, Danaher and the Chairman, President, and Chief Executive Officer of NetScout have entered into a Voting Agreement, a copy of which is attached hereto as Exhibit B hereto (the **Voting Agreement** ), pursuant to which such stockholder has agreed to vote all shares of NetScout Common Stock directly or indirectly held by such stockholder in favor of the approval of the issuance of shares of NetScout Common Stock pursuant to the First Merger.

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**AGREEMENT**

The parties to this Agreement, intending to be legally bound, agree as follows:

**1. DESCRIPTION OF TRANSACTION**

**1.1 The Mergers.**

**(a) First Merger.** Upon the terms and subject to the conditions set forth in this Agreement, at the Effective Time, Merger Sub shall be merged with and into Newco. By virtue of the First Merger, at the Effective Time, the separate existence of Merger Sub shall cease and Newco shall continue as the surviving limited liability company in the First Merger (the **First Merger Surviving Entity** ) and shall succeed to and assume all the property, rights, privileges, powers and franchises and be subject to all of the restrictions, debt and duties of Merger Sub in accordance with the DGCL and the DLLCA.

**(b) Second Merger.** Upon the terms and subject to the conditions set forth in this Agreement, at the Second Merger Effective Time, the First Merger Surviving Entity shall be merged with and into Merger Sub II, whereupon the separate existence of the First Merger Surviving Entity shall cease and Merger Sub II shall continue as the surviving limited liability company in the Second Merger (the **Second Merger Surviving Entity** ) and shall succeed to and assume all the property, rights, privileges and powers and be subject to all of the restrictions, debt and duties of the First Merger Surviving Entity in accordance with the DLLCA.

**1.2 Effects of the Mergers.** The Mergers shall have the effects set forth in this Agreement and in the applicable provisions of the DGCL and the DLLCA.

**1.3 Closing; Effective Time.** Unless the transactions contemplated hereby shall have been abandoned and this Agreement terminated pursuant to Section 8.1, the closing of the Mergers and the other transactions contemplated hereby (the **Closing** ) shall take place at 10:00 a.m., Eastern time, at the offices of Cooley LLP, 500 Boylston Street, 14<sup>th</sup> Floor, Boston, Massachusetts, on a date and time to be designated jointly by Danaher and NetScout, which shall be no later than the second business day after the satisfaction or waiver of the last to be satisfied or waived of the conditions set forth in Sections 6 and 7 (other than the conditions, which by their nature are to be satisfied at the Closing, but subject to the satisfaction or waiver of each of such conditions), or at such other date, time or place as NetScout and Danaher may mutually agree. The date on which the Closing actually takes place is referred to as the **Closing Date**. Subject to the provisions of this Agreement, a certificate of merger satisfying the applicable requirements of the DGCL and the DLLCA shall be duly executed by Newco and concurrently with or as soon as practicable following the Closing shall be filed with the Secretary of State of the State of Delaware. The First Merger shall become effective at the time of the filing of such certificate of merger with the Secretary of State of the State of Delaware or at such later time as may be designated jointly by Danaher and NetScout and specified in such certificate of merger (the time as of which the First Merger becomes effective being referred to as the **Effective Time** ). Subject to the provisions of this Agreement, a second certificate of merger satisfying the applicable requirements of the DLLCA shall be duly executed by Merger Sub II and as soon as practicable following the Effective Time shall be filed with the Secretary of State of the State of Delaware. The Second Merger shall become effective at the time of filing of such certificate of merger with the Secretary of State of the State of Delaware or at such later time as may be designated by Danaher and NetScout and specified in such certificate of merger (the time as of which the Second Merger becomes effective being referred to as the **Second Merger Effective Time** ).

**1.4 Certificate of Incorporation and Bylaws; Directors and Officers.**

**(a) First Merger.**

(i) The certificate of formation of Newco shall, by virtue of the First Merger, be amended and restated in its entirety to read as set forth on Exhibit C hereto, and as so amended shall be the certificate of formation of the First Merger Surviving Entity until thereafter amended as provided therein or by applicable Legal Requirement;

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(ii) The limited liability company agreement of the First Merger Surviving Entity shall be amended and restated to read as set forth on Exhibit D hereto, and as so amended shall be the limited liability company agreement of the First Merger Surviving Entity until thereafter amended as provided therein or by applicable Legal Requirement; and

(iii) The directors and officers of the First Merger Surviving Entity immediately after the Effective Time shall be the same individuals who are the directors and officers of Merger Sub as in effect immediately prior to the Effective Time.

### **(b) Second Merger.**

(i) The certificate of formation of the Second Merger Surviving Entity shall, by virtue of the Second Merger, be the certificate of formation of Merger Sub II as in effect immediately prior to the Second Merger Effective Time until thereafter amended as provided by applicable Legal Requirement;

(ii) The limited liability company agreement of the Second Merger Surviving Entity shall be the limited liability company agreement of Merger Sub II as in effect immediately prior to the Second Merger Effective Time until thereafter amended as provided therein and by applicable Legal Requirement; and

(iii) The directors and officers of the Second Merger Surviving Entity immediately after the Second Merger Effective Time shall be the same individuals who are the directors and officers of Merger Sub II as in effect immediately prior to the Second Merger Effective Time.

### **1.5 Conversion of Membership Interests in the First Merger.**

(a) Subject to the terms and conditions of this Agreement, at the Effective Time, by virtue of the First Merger and without any further action on the part of Danaher, Newco, NetScout, Merger Sub or any stockholder of Danaher or NetScout:

(i) any Newco Membership Interest owned by Danaher or any Subsidiary of Newco immediately prior to the Effective Time (or held in Newco's treasury) shall be canceled and shall cease to exist, and no consideration shall be delivered in exchange therefor;

(ii) any Newco Membership Interest owned by NetScout, Merger Sub or any other Subsidiary of NetScout immediately prior to the Effective Time shall be canceled and shall cease to exist, and no consideration shall be delivered in exchange therefor;

(iii) except as provided in clauses (i) and (ii) above and subject to Sections 1.5(c) and 1.5(d), each Newco Membership Interest outstanding immediately prior to the Effective Time shall be converted into the right to receive an aggregate number of duly authorized, validly issued, fully paid and nonassessable shares of NetScout Common Stock equal to (x) 62.5 million shares of NetScout Common Stock plus the product of (A) 1.46 multiplied by (B) the number of shares of NetScout Common stock issued in any acquisition contemplated by Section 4.3(b)(v), divided by (y) the aggregate number of Newco Membership Interests issued and outstanding as of immediately prior to the Effective Time (other than shares canceled in accordance with Sections 1.5(a)(i) and 1.5(a)(ii)) (the **Per Share Merger Consideration**); and

(iv) each share of the common stock, \$0.001 par value per share, of Merger Sub outstanding immediately prior to the Effective Time shall be converted into one limited liability company interest of the First Merger Surviving Entity. Pursuant to Section 18-301(b)(3) of the DLLCA, NetScout shall be admitted to the First Merger Surviving Entity as

the sole member of the First Merger Surviving Entity, effective at the Effective Time, and the First Merger Surviving Entity shall continue without dissolution.

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(b) If, during the period from the date of this Agreement through the Effective Time, the outstanding Newco Common Units or shares of NetScout Common Stock are changed into a different number or class of shares by reason of any stock or interest split, division or subdivision of shares, stock dividend, distribution of limited liability company interests, reverse stock or interest split, combination of shares, reclassification, recapitalization or other similar transaction, or if a distribution of limited liability company interests or stock dividend is declared by Newco or NetScout, respectively, during such period, then the payment calculations set forth in Section 1.5(a)(iii) shall be adjusted to the extent appropriate to provide the same economic effect as contemplated by this Agreement prior to such action.

(c) If any Newco Membership Interest outstanding immediately prior to the Effective Time is unvested or is subject to a repurchase option, risk of forfeiture or other condition under any applicable restricted equity purchase agreement or other Contract with Newco or under which Newco has any rights, then (except to the extent provided in any binding agreement between Newco and the holder thereof): (i) the shares of NetScout Common Stock issued in exchange for such Newco Membership Interests will also be unvested and subject to the same repurchase option, risk of forfeiture or other condition; and (ii) such shares of NetScout Common Stock, whether represented by certificates or in book entry form, may accordingly be marked with appropriate legends. Prior to the Effective Time, Newco shall ensure that, from and after the Effective Time, NetScout or the First Merger Surviving Entity or Second Merger Surviving Entity, as applicable, is entitled to exercise any such repurchase option or other right set forth in any such restricted stock or interest purchase agreement or other Contract.

(d) No fractional shares of NetScout Common Stock shall be issued in connection with the First Merger, and no certificates or scrip for any such fractional shares shall be issued. Any holder of Newco Membership Interests who would otherwise be entitled to receive a fraction of a share of NetScout Common Stock (after aggregating all fractional shares of NetScout Common Stock issuable to such holder) shall, in lieu of such fraction of a share, be paid in cash the dollar amount (rounded to the nearest whole cent), after deducting any required withholding taxes, on a pro rata basis, without interest, determined by multiplying such fraction by the closing price of a share of NetScout Common Stock on the NASDAQ Global Select Market on the last business day prior to the date on which the First Merger becomes effective. Payment of cash in lieu of fractional shares of NetScout Common Stock shall be made solely for the purpose of avoiding the expense and inconvenience to NetScout of issuing fractional shares of NetScout Common Stock and shall not represent separately bargained-for consideration.

**1.6 Exchange of Newco Membership Interests.**

(a) Pursuant to Article III of the Distribution Agreement, the Exchange Agent (as defined below) shall hold, for the account of the relevant Danaher stockholders, the global certificate(s) representing all of the outstanding Newco Common Units distributed in the Distribution. Such Newco Common Units shall be converted into shares of NetScout Common Stock in accordance with the terms of this Section 1.

(b) Prior to the Closing Date, Danaher shall appoint a reputable bank or trust company reasonably satisfactory to NetScout as exchange agent in the First Merger (the **Exchange Agent** ). Prior to the Effective Time, NetScout shall issue and cause to be deposited with the Exchange Agent, for the benefit of the holders of Newco Common Units, for exchange in accordance with this Section 1, non-certificated shares of NetScout Common Stock represented by book entry issuable pursuant to Section 1.5 (such shares of NetScout Common Stock, together with any dividends or distributions pursuant to Section 1.6(c) received by the Exchange Agent with respect to such shares of NetScout Common Stock, are referred to collectively as the **Exchange Fund** ). For the purposes of such deposit, NetScout will assume that there will not be any fractional shares of NetScout Common Stock. NetScout will make available to the Exchange Agent, for addition to the Exchange Fund, from time to time as needed or as reasonably requested by Danaher, cash sufficient to pay cash in lieu of fractional shares in accordance with Section 1.5(d). Following the

Effective Time, the Exchange Agent shall, pursuant to irrevocable instructions, deliver the NetScout Common Stock to be issued pursuant to this Section 1 from the shares of NetScout Common Stock held in the Exchange Fund. The Exchange Fund shall not be used for any other purpose.

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(c) Promptly after the Effective Time, and to the extent not previously distributed in connection with the Distribution, the Exchange Agent will mail to the Persons who were record holders of Newco Membership Interests immediately prior to the Effective Time: (i) a letter of transmittal in customary form; and (ii) instructions for use in effecting the exchange of any Newco Membership Interests for the Per Share Merger Consideration. Upon surrender of a duly executed letter of transmittal, together with such other customary documents as may be reasonably required by the Exchange Agent or NetScout, the holder of such Newco Membership Interests shall be entitled to receive, and the Exchange Agent shall (and NetScout shall cause the Exchange Agent to) in exchange therefor transfer from the Exchange Fund to such holder the number of whole shares of NetScout Common Stock that such holder has the right to receive pursuant to the provisions of Section 1.5(a)(iii) (and cash in lieu of any fractional share of NetScout Common Stock pursuant to Section 1.5(d) and any dividends or other distributions pursuant to Section 1.6(d)). From and after the Effective Time, any certificates formerly representing Newco Membership Interests will represent only the right to receive shares of NetScout Common Stock (and cash in lieu of any fractional share of NetScout Common Stock as contemplated by Section 1.5(d) and any dividends or other distributions pursuant to Section 1.6(d)).

(d) No dividends or other distributions declared or made with respect to NetScout Common Stock with a record date after the Effective Time shall be paid or otherwise delivered to the holder of any unsurrendered Newco Membership Interest with respect to the shares of NetScout Common Stock that such holder has the right to receive in the First Merger until such holder exchanges such Newco Membership Interest in accordance with this Section 1.6 (at which time such holder shall be entitled, subject to the effect of applicable abandoned property law, escheat law or other Legal Requirement, to receive all such dividends and distributions theretofore paid or, at the appropriate payment date, payable, in each case, without interest). NetScout shall deposit all such dividends and distributions in the Exchange Fund.

(e) Any portion of the Exchange Fund that remains undistributed to holders of unexchanged Newco Membership Interests as of the date that is one year after the Effective Time shall be delivered to NetScout upon demand, and any holders of Newco Membership Interests who have not theretofore exchanged their Newco Membership Interests in accordance with this Section 1.6 shall thereafter look only to NetScout for satisfaction of their claims for NetScout Common Stock, cash in lieu of fractional shares of NetScout Common Stock as contemplated by Section 1.5(d) and any dividends or distributions pursuant to Section 1.6(d) with respect to shares of NetScout Common Stock, in each case without interest thereon.

(f) Each of the Exchange Agent, NetScout and the First Merger Surviving Entity or Second Merger Surviving Entity, as applicable, shall be entitled to deduct and withhold from any consideration payable or otherwise deliverable pursuant to this Agreement to any holder or former holder of Newco Membership Interest such amounts as may be required to be deducted or withheld from such consideration under the Code or any provision of state, local or foreign tax law or under any other applicable Legal Requirement. To the extent such amounts are so deducted or withheld and paid to the appropriate Governmental Body, such amounts shall be treated for all purposes under this Agreement as having been paid to the Person to whom such amounts would otherwise have been paid.

(g) Neither NetScout nor the First Merger Surviving Entity nor Second Merger Surviving Entity shall be liable to any holder or former holder of Newco Membership Interests or to any other Person with respect to any shares of NetScout Common Stock (or dividends or distributions with respect thereto), or for any cash amounts, required to be delivered to any public official pursuant to any applicable abandoned property law, escheat law or other Legal Requirement.

**1.7 Closing of Transfer Books.** From and after the Effective Time, the membership transfer books of Newco shall be closed and no transfer shall be made of any Newco Membership Interests that were outstanding as of the Effective Time.

**1.8 Tax Consequences.** For U.S. federal income tax purposes, the Mergers are intended to be treated as integrated steps in a single transaction and together qualify as a reorganization within the meaning of

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Section 368(a)(1) of the Code. The parties to this Agreement adopt this Agreement as a plan of reorganization within the meaning of Sections 1.368-2(g) and 1.368-3(a) of the U.S. Treasury Regulations. Each party hereto shall cause all Tax Returns relating to the Mergers filed by such party to be filed on the basis of treating the Mergers as a reorganization within the meaning of Section 368(a)(1) of the Code unless otherwise required by a determination (within the meaning of Section 1313(a) of the Code).

**1.9 Further Action.** If, at any time after the Effective Time, any further action is determined by NetScout or the First Merger Surviving Entity or Second Merger Surviving Entity to be necessary or desirable to carry out the purposes of this Agreement or to vest the First Merger Surviving Entity or Second Merger Surviving Entity with full right, title and possession of and to all rights and property of Merger Sub and Newco, the officers and directors of the First Merger Surviving Entity or Second Merger Surviving Entity and NetScout shall be fully authorized (in the name of the Merger Subs, in the name of Newco and otherwise) to take such action.

**1.10 Conversion of Shares in the Second Merger.** Subject to the terms and conditions of this Agreement, at the Second Merger Effective Time, by virtue of the Second Merger and without any further action on the part of NetScout, the First Merger Surviving Entity, Merger Sub II or any stockholder of NetScout:

(a) each limited liability company interest of the First Merger Surviving Entity outstanding immediately prior to the Second Merger Effective Time shall be canceled and shall cease to exist and no consideration shall be delivered in exchange therefor; and

(b) each limited liability company interest in Merger Sub II outstanding immediately prior to the Second Merger Effective Time shall remain unchanged and continue to remain outstanding as a limited liability company interest in the Second Merger Surviving Entity. At the Second Merger Effective Time, NetScout shall continue as the sole member of the Second Merger Surviving Entity, and the Second Merger Surviving Entity shall continue without dissolution.

## **1.11 Adjustment.**

(a) Promptly following the delivery of the Audited Financial Statements pursuant to Section 5.13, Danaher shall cause to be delivered to NetScout a statement setting forth a calculation of the Operating Profit derived from the audited financial statements of the Communications Business for the year ended December 31, 2013 included in the Audited Financial Statements (the **Operating Profit** ).

(b) In the event that the Operating Profit is less than the amount set forth on Schedule 1.11(b), then Danaher shall pay to NetScout an amount equal to the product of (x) such shortfall *multiplied* by (y) 13.1; provided, however, that in no event shall such payment amount exceed \$150,000,000 in cash. Such amount shall be paid to NetScout only in the event that the Closing occurs and shall be payable by wire transfer of same-day funds within three (3) business days after the Closing Date. The foregoing adjustment shall not impact NetScout's rights to terminate this Agreement under Section 8 or its closing conditions under Section 6.

(c) Any payment made pursuant to this Section 1.11 is intended to be treated as a contribution by Danaher to Newco occurring immediately prior to the Closing Date.

## **2. REPRESENTATIONS AND WARRANTIES OF DANAHER AND NEWCO**

Danaher and Newco hereby represent and warrant to NetScout and the Merger Subs as follows (it being understood that each representation and warranty contained in this Section 2 is subject to: (a) the exceptions and disclosures set

forth in the part or subpart of the Danaher Disclosure Letter corresponding to the particular Section or subsection in this Section 2 in which such representation and warranty appears; (b) the assumption that the transactions contemplated by the Distribution Agreement have occurred in compliance with the terms thereof; (c) any exception or disclosure set forth in any other part or subpart of the Danaher Disclosure Letter to

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the extent it is readily apparent that such exception or disclosure is relevant to such representation and warranty; and (d) any information set forth in the Danaher SEC Documents filed on the SEC's EDGAR database on or after January 1, 2013 and publicly available prior to the date of this Agreement (but excluding any supplements or amendments thereto to the extent such supplement or amendment is not publicly filed prior to the date hereof), other than information set forth therein under the headings Risk Factors or Forward-Looking Statements and any other information or statement set forth therein that is primarily cautionary, predictive or forward-looking in nature):

### **2.1 Subsidiaries; Due Organization; Etc.**

(a) Part 2.1(a) of the Danaher Disclosure Letter identifies, as of the date hereof, each existing Entity that will be a Subsidiary of Newco as of immediately prior to the Distribution based on the Plan of Reorganization as of the date hereof and indicates its jurisdiction of organization.

(b) Each of the Communications Companies is (or, if formed after the date of this Agreement, shall be at the Effective Time) a corporation or other business organization duly organized, validly existing and in good standing (to the extent that the laws of the jurisdiction of its formation recognize the concept of good standing) under the laws of the jurisdiction of its incorporation, and has (or, if formed after the date of this Agreement, shall have at the Effective Time) all necessary organizational power and authority: (i) to conduct its business in the manner in which its business is currently being conducted; (ii) to own and use its assets in the manner in which its assets are currently owned and used; and (iii) to perform its obligations under all Contracts by which it is bound, other than in the case of clauses (i) through (iii) as would not, either individually or in the aggregate, reasonably be expected to have a Newco Material Adverse Effect.

(c) Each of the Communications Companies is (or, if formed after the date of this Agreement, shall be at the Effective Time) qualified to do business as a foreign corporation, and is (or, if formed after the date of this Agreement, shall be at the Effective Time) in good standing (to the extent that the laws of the applicable jurisdiction recognize the concept of good standing), under the laws of all jurisdictions where the nature of its business requires such qualification, except for jurisdictions in which the failure to be so qualified or in good standing, individually or in the aggregate, would not reasonably be expected to have a Newco Material Adverse Effect.

**2.2 Certificate of Formation and Other Governing Documents.** Danaher has delivered or Made Available to NetScout accurate and complete copies of the certificate of formation, limited liability company operating agreement, certificate of incorporation, bylaws, memorandum of association and articles of association or equivalent governing documents of each of the Communications Companies (to the extent existing as of the date of this Agreement), including all amendments thereto.

### **2.3 Capitalization, Etc.**

(a) On the date of this Agreement, the authorized limited liability company interests of Newco consist of 100 Newco Common Units, of which 100 Newco Common Units are outstanding. Immediately prior to the Distribution, all the outstanding Newco Common Units will be owned directly by Danaher free and clear of any Encumbrance, other than restrictions under applicable securities laws. Immediately following the Distribution, (i) there will be outstanding a number of Newco Common Units determined in accordance with this Agreement and the Distribution Agreement and (ii) no Newco Common Units will be held in Newco's treasury. As of the date hereof and as of the Effective Time, all of the outstanding Newco Membership Interests will be duly authorized and validly issued.

(b) Except as set forth in Part 2.3(b) of the Danaher Disclosure Letter: (i) none of the outstanding Newco Membership Interests is entitled or subject to any preemptive right, right of repurchase or forfeiture, right of participation, right of

maintenance or any similar right; (ii) none of the outstanding Newco Membership Interests is subject to any right of first refusal in favor of Newco; and (iii) there is no Newco Contract relating to

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the voting or registration of, or restricting any Person from purchasing, selling, pledging or otherwise disposing of (or from granting any option or similar right with respect to), any Newco Membership Interests. None of the Communications Companies is under any obligation, or is bound by any Contract pursuant to which it may become obligated, to repurchase, redeem or otherwise acquire any outstanding Newco Membership Interests.

(c) Danaher has delivered or Made Available to NetScout a complete and accurate in all material respects (it being understood that any deviation of less than 10,000 shares (or corresponding or equivalent interests) shall not be deemed a material difference) list, reflecting grants through October 3, 2014, that sets forth the following information with respect to National Equity Awards: (i) the employee identification number of the holder of such Danaher Equity Award; (ii) the type of such Danaher Equity Award (whether a Danaher Option or Danaher RSU); (iii) the number of shares of Danaher Common Stock subject to such Danaher Equity Award; (iv) the per share exercise price (if any) of such Danaher Equity Award; and (v) the applicable vesting schedule in respect of such Danaher Equity Award. Except as otherwise noted on the list referenced in this Section 2.3(c), each Danaher Equity Award that is a Danaher Option is not intended to be an incentive stock option (as defined in the Code) nor to qualify for any comparable tax regime in any country. Danaher will deliver or make available to NetScout an updated version of the list referenced in this Section 2.3(c) to reflect any applicable changes thereto within 90 days after the date hereof (which such list will include the country in which each holder is employed or providing services) and periodically thereafter prior to the Closing Date, but in no event later than 60 days after the date on which the previous update is provided. Within 30 days after the date hereof, Danaher will deliver or make available to NetScout (to the extent not provided as of the date hereof) accurate and complete copies of all equity plans and sub-plans pursuant to which any Danaher Equity Awards were granted by Danaher, and the forms of agreements evidencing such Danaher Equity Awards. There are no outstanding stock appreciation, phantom stock, profit participation or similar rights or equity-based awards with respect to any of the Communications Companies.

(d) Except as set forth in Sections 2.3(a) and 2.3(c), or as permitted from and after the date of this Agreement pursuant to Section 4.2, there is no: (i) outstanding subscription, option, call, warrant or right (whether or not currently exercisable) to acquire any shares of the capital stock, membership interests, or other securities of any of the Communications Companies; (ii) outstanding security, bond, debenture, instrument or obligation that is or may become convertible into or exchangeable for any shares of the capital stock, membership interests or other securities of any of the Communications Companies or that has the right to vote on any matter on which the members of Newco have the right to vote; (iii) Contract under which any of the Communications Companies is or may become obligated to sell or otherwise issue any shares of its capital stock, membership interests, or any other securities; or (iv) shareholder rights plan or agreement (*i.e.*, poison pill ).

(e) All outstanding Newco Membership Interests, all Danaher Equity Awards and other outstanding securities of the Communications Companies, have been issued and granted in compliance in all material respects with: (i) all applicable securities laws and other applicable Legal Requirements; and (ii) all requirements set forth in applicable Contracts.

(f) All of the outstanding shares of capital stock or limited liability company interests, as the case may be, of each of Newco's Subsidiaries have been duly authorized and validly issued, are fully paid and nonassessable (to the extent applicable) and free of preemptive rights, with no personal liability attaching to the ownership thereof, and are owned beneficially and of record by Newco, free and clear of any Encumbrances, other than restrictions under applicable securities laws.

**2.4 Financial Statements.**

(a) Part 2.4(a) of the Danaher Disclosure Letter contains copies of (i) unaudited combined and consolidated balance sheets of the Communications Business as of December 31, 2013 and December 31, 2012 and the unaudited combined and consolidated statements of earnings of the Communications Business for the years ended December 31, 2013, December 31, 2012 and December 31, 2011 (the **Year-End Communications Business Unaudited Financial Statements** ), and (ii) unaudited and unadjusted financial data of Fluke Networks, Tektronix Communications and Arbor Networks as of and for the nine months ended September 26,

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2014 (comprised of unadjusted Hyperion data together with a schedule (included in Part 2.4(a) of the Danaher Disclosure Letter) describing the basis of presentation and adjustments that would be necessary to derive financial statements on the same basis of presentation (included in Part 2.4(a) of the Danaher Disclosure Letter) as the Year End Communications Business Unaudited Financials) (the **Unaudited Interim Communications Business Financial Data** ) (together with the Year-End Communications Business Unaudited Financial Statements, the **Communications Business Unaudited Financial Statements** ). The Communications Business Unaudited Financial Statements were prepared in good faith and derived from the books and records of Danaher and its Subsidiaries and were prepared in accordance with GAAP, consistently applied, as at the dates and for the periods presented (except as noted therein), and present fairly in all material respects the financial position and results of operations of the Communications Business as of the dates and for the periods presented on the basis by which the Communications Business Unaudited Financial Statements were prepared (subject to adjustments which are not material, individually or in the aggregate) (it being understood, however, that the Communications Business has not been operating historically as a separate standalone entity or reporting segment and, therefore, the Communications Business Unaudited Financial Statements will reflect certain cost allocations made that may not reflect what would have been incurred if the Communications Business had been a standalone business).

(b) When delivered pursuant to Section 5.13, the Audited Financial Statements shall present fairly in all material respects the financial position and results of operations of the Communications Business as of the dates thereof or for the periods covered thereby, and will have been prepared in accordance with GAAP consistently applied based on the historic practices and accounting policies of Danaher to the extent compliant with GAAP (it being understood, however, that the Communications Business has not been operating historically as a separate standalone entity or reporting segment and, therefore, the Audited Financial Statements will reflect certain cost allocations made that may not reflect what would have been incurred if the Communications Business had been a standalone business). The Audited Financial Statements shall conform in all material respects to the published rules and regulations of the SEC applicable to financial statements for each of the periods that will be required to be included in the NetScout Form S-4 Registration Statement.

(c) Danaher maintains a system of internal controls over financial reporting which is designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP, in each case, with respect to Danaher and its Subsidiaries, taken as a whole. To the Knowledge of Danaher, since December 31, 2013, neither Danaher nor any of its Subsidiaries has identified or been made aware of any material illegal act or fraud related to the business of the Communications Business.

(d) None of the information to be supplied by or on behalf of Danaher or Newco for inclusion or incorporation by reference in the NetScout Form S-4 Registration Statement or the Newco Registration Statements will, at the time the NetScout Form S-4 Registration Statement or the Newco Registration Statements, respectively, is filed with the SEC or at the time it, or any amendment or supplement thereto, becomes effective under the Securities Act, 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 the light of the circumstances under which they are made, not misleading. None of the information supplied or to be supplied by or on behalf of Danaher or Newco for inclusion or incorporation by reference in the Proxy Statement/Prospectus will, at the time the Proxy Statement/Prospectus is mailed to the stockholders of NetScout or at the time of the NetScout Stockholders Meeting (or any adjournment or postponement thereof), 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 the light of the circumstances under which they are made, not misleading. The Newco Registration Statements will comply as to form in all material respects with the provisions of the Securities Act, the Exchange Act and the rules and regulations promulgated by the SEC thereunder, except that no representation or warranty is made by Danaher or Newco with respect to statements made or incorporated by reference therein based on information supplied by or on behalf of NetScout for inclusion or incorporation by

reference in the Newco Registration Statements.

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(e) After giving effect to the Distribution and the other transactions contemplated by the Distribution Agreement, the Communications Business has not incurred any liabilities or obligations of any nature whatsoever (whether accrued, absolute, contingent or otherwise) that are required to be reflected in the Communications Business Unaudited Financial Statements in accordance with GAAP, as in effect on the date of this Agreement, except for (i) those liabilities that are reflected or reserved for in the Unaudited Interim Communications Business Financial Data, (ii) liabilities that have been incurred by the Communications Business since June 27, 2014 in the ordinary course of the Communications Business consistent with past practice, (iii) liabilities under this Agreement or incurred in connection with the Contemplated Transactions and (iv) liabilities that are not, individually or in the aggregate, material to the Communications Business, or that are described in Part 2.4(e) of the Danaher Disclosure Letter.

**2.5 Absence of Changes.** Except as expressly contemplated by this Agreement, since June 27, 2014 through the date of this Agreement, (a) except for discussions, negotiations and transactions related to this Agreement or the other Transaction Documents (including the Internal Restructuring described in the Distribution Agreement), the Communications Business has operated in all material respects in the ordinary course of business consistent with past practice and (b) there has not occurred any event, change, action, failure to act or transaction that, individually or in the aggregate, has had or would be reasonably expected to have, a Newco Material Adverse Effect. Except as expressly contemplated by this Agreement, since June 27, 2014 through the date of this Agreement, neither the Communications Business nor the Communications Companies have taken any actions which, had such actions been taken after the date of this Agreement, would have required the written consent of NetScout pursuant to Sections 4.2(b)(iv) and 4.2(b)(vii)-(xi).

**2.6 Title to and Sufficiency of Assets.**

(a) After giving effect to the Contemplated Transactions described in or contemplated by the Distribution Agreement, the Communications Companies will have good and valid title to all of the Newco Assets transferred under the Distribution Agreement. All of said assets are, or after the Distribution will be, owned by the Communications Companies free and clear of any Encumbrances, except where (i) the conveyance of any such assets requires a Consent which is not obtained, in which case the provisions of Section 1.08 of the Distribution Agreement will govern or (ii) the failure to have such good and valid title results from any liens described in Part 2.6(a) of the Danaher Disclosure Letter, liens created or otherwise imposed by the NetScout Companies or any other Permitted Encumbrance. After giving effect to the Distribution and the other Contemplated Transactions described in or contemplated by the Distribution Agreement, the Communications Companies are the lessees of, and hold valid leasehold interests in, all assets purported to have been leased by them and the Communications Companies enjoy undisturbed possession of such leased assets, except where (i) the conveyance of any such assets requires a Consent which is not obtained, in which case the provisions of Section 1.08 of the Distribution Agreement will govern or (ii) the failure to have such valid leasehold interest results from any liens described in Part 2.6(a) of the Danaher Disclosure Letter, liens created or otherwise imposed by the NetScout Companies or any other Permitted Encumbrance.

(b) At the Effective Time, the Newco Assets and the properties and rights of the Communications Companies, taken together with the benefits of any alternative arrangements provided pursuant to Section 1.08 of the Distribution Agreement, the services available from Danaher under the Transition Services Agreement and the licenses from Danaher under the Trademark License Agreement, the IP License Agreement and the DBS License Agreement, will be sufficient for NetScout and the Communications Companies to operate the Communications Business immediately following the Effective Time in all material respects as it is currently conducted.

(c) No representation is made in this Section 2.6 with respect to title to or the sufficiency of any intellectual property assets.

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**2.7 Real Property; Leasehold.**

(a) No Communications Company owns any real property.

(b) Part 2.7(b) of the Danaher Disclosure Letter sets forth an accurate list of each lease pursuant to which any of the Communications Companies leases or uses real property from any other Person for annual rent payments in excess of \$500,000. (All real property leased to or used by the Communications Companies pursuant to the real property leases identified or required to be identified in Part 2.7(b) of the Danaher Disclosure Letter, including all buildings, structures, fixtures and other improvements leased to the Communications Companies, is referred to as the **Newco Leased Real Property**. ) To the Knowledge of Danaher, there is no existing plan or study by any Governmental Body or by any other Person that challenges or otherwise adversely affects the continuation of the use or operation of any Newco Leased Real Property. Part 2.7(b) of the Danaher Disclosure Letter contains an accurate and complete list of all subleases, occupancy agreements and other Newco Contracts granting to any Person (other than any Communications Company) a right of use or occupancy of any of the Newco Leased Real Property in effect as of the date of this Agreement. Except as set forth in the leases or subleases identified in Part 2.7(b) of the Danaher Disclosure Letter, there is no Person in possession of any Newco Leased Real Property other than a Communications Company.

**2.8 Intellectual Property; Privacy.**

(a) **Registered IP.** Part 2.8(a)(i) of the Danaher Disclosure Letter identifies, as of the date of this Agreement: (i) each material item of Registered IP in which Danaher or any of its Subsidiaries (including the Communications Companies) has or purports to have (including as a result of the transfers under the Distribution Agreement) an ownership interest of any nature (whether exclusively, jointly with another Person, or otherwise) and that either: (A) covers any Newco Product or (B) that covers or that would be infringed by the operation of the Communications Business, including the manufacture, development, sale, import, support, maintenance or testing of any Newco Product or the provision of any service or test using the Newco Product (the **Newco Material Registered IP** ); and (ii) any Person other than the Communication Companies that has an ownership interest in such item of Newco Material Registered IP and the nature of such ownership interest. Except as set forth in Parts 2.8(a)(ii) and 2.8(c) of the Danaher Disclosure Letter, and except with regard to non-exclusive licenses granted to Communications Companies distributors, resellers and end-user customers in connection with the sale, distribution or use of the Newco Products in the ordinary course of business of the Communications Companies, no material licenses, covenants not to sue, or other similar rights under the Newco Material Registered IP have been granted to any Person, including as a result of any participation in an industry association, standard setting organization or similar body.

(b) **Inbound Licenses.** Part 2.8(b) of the Danaher Disclosure Letter accurately identifies each Contract in effect as of the date of this Agreement pursuant to which any Intellectual Property Right or Intellectual Property is or has been licensed by any Person to Danaher, its Subsidiaries or the Communications Companies, which Contract is material to the Communications Business, including material licenses to any Intellectual Property included in, or Intellectual Property Rights embodied by, the Newco Products or used in connection with or necessary to any development, manufacture, distribution, other commercialization, maintenance or support of the Newco Products as currently conducted ( **Newco Material Inbound License** ), other than (1) Contracts between Danaher or its Subsidiaries, on the one hand, and their respective employees, on the other hand, in Danaher's standard form thereof, (2) licenses for standard commercially available off the shelf software or hardware with annual fees of less than \$200,000 ( **Shrink-Wrap** ), (3) licenses to Open Source Code, other than that set forth in Section 2.8(i), (4) licenses for technology used exclusively by the data communication cable installation and communications service provider business of Danaher and its Subsidiaries, and (5) non-exclusive licenses to third-party software or hardware that is not incorporated into, or necessary for the development, manufacturing, testing, distribution, maintenance, or support of,

any Newco Product and that is not otherwise material to the Communications Business (together with Newco Material Inbound Licenses, the **Newco Inbound Licenses** ). To the Knowledge of Danaher, no material royalties or similar amounts in excess of \$200,000 during any calendar year are payable by Danaher or its Subsidiaries or, after or as a result of the

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consummation of the transactions contemplated hereby, will be payable by the Communications Companies under the terms of any Newco Inbound Licenses other than Newco Material Inbound Licenses.

**(c) Outbound Licenses.** Part 2.8(c) of the Danaher Disclosure Letter identifies each material Contract, other than non-exclusive customer or sales channel Contracts for Newco Products entered into in the ordinary course of business and that does not materially differ in substance from standard form agreements and other than Contracts listed in Section 2.9(a), to which any Person has been granted any license under, or otherwise has received or acquired any right (whether or not currently exercisable) or interest in, any Newco IP, in each case in effect as of the date of this Agreement.

**(d) Ownership Free and Clear.** The Communications Companies exclusively own all right, title, and interest to and in the Newco IP free and clear of any Encumbrances other than licenses and similar rights granted by any Communications Company (including as set forth in Parts 2.8(a), 2.8(b) and 2.8(c) of the Danaher Disclosure Letter, and subject to the exceptions set forth in Sections 2.8(a), 2.8(b) and 2.8(c)) and other than Permitted Encumbrances. Without limiting the foregoing, to the Knowledge of Danaher, neither Danaher nor any of its Subsidiaries has transferred to, or permitted under any Contract to which Danaher or its Subsidiary is a party, any Person other than the Communications Companies to retain ownership of, or an exclusive license to: (i) the Intellectual Property Rights in or to any Derivatives of any Proprietary Newco Product, whether developed by or for Danaher or its Subsidiaries, or by or for such other Person, under any such Contract; or (ii) any interfaces developed by, with, or on behalf of, Danaher or its Subsidiaries between any Newco Product and any Person's software or product; except in the foregoing (i) and (ii) under any Contract set forth in Parts 2.8(a), 2.8(b) or 2.8(c) of the Danaher Disclosure Letter or that is not otherwise material to the Communications Business. As of the date of this Agreement, no material item of Newco IP is subject to any action or outstanding Order or settlement agreement or stipulation in litigation that restricts in any manner the use, provision, transfer, assignment or licensing thereof by Danaher or its Subsidiaries (including any Communications Company) or affects the validity, use, ownership, registrability or enforceability of such Newco IP. Except with regard to certain Danaher corporate names and marks set forth in Part 2.8(d) of the Danaher Disclosure Letter, no rights, title or interest in the names or other indicia of commercial source or origin used to designate any material Newco Products prior to Closing are owned by any Entity (including Danaher or its Subsidiaries) other than the Communications Companies.

**(e) Valid and Enforceable.** To the Knowledge of Danaher, none of the material Newco IP is invalid or unenforceable.

**(f) Protection of Proprietary Information.** Danaher and each of its Subsidiaries (including the Communications Companies) have taken commercially reasonable steps to maintain the confidentiality of and otherwise protect and enforce their respective rights in all material proprietary information pertaining to the Communications Business and all Proprietary Newco Products, and except as set forth in Part 2.8(f) of the Danaher Disclosure Letter, no source code owned by Danaher or its Subsidiaries for any Proprietary Newco Product has been disclosed or delivered to any Person who is not a Newco Employee.

**(g) Sufficiency.** Danaher or its Subsidiaries owns or otherwise has, and after the Closing the Communications Companies will have (including as a result of the transfers under the Distribution Agreement), taken together with the benefits of any alternative arrangements provided pursuant to Section 1.08 of the Distribution Agreement, the services available from Danaher under the Transition Services Agreement and the licenses from Danaher under the Trademark License Agreement, the IP License Agreement and the DBS License Agreement, all Intellectual Property and Intellectual Property Rights needed to conduct the Communications Business in all material respects as it is currently conducted, including as may be necessary to so design, develop, copy, modify, make, test, support, maintain, market, license, sell or otherwise commercialize (as applicable) the Newco Products without infringing the Intellectual

Property Rights of Danaher or its Affiliates; provided that the foregoing is not a representation or warranty with respect to infringement, misappropriation or other violation of third party Intellectual Property Rights or unfair competition, which solely is covered under Section 2.8(i).

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**(h) Third-Party Infringement of Newco IP.** To the Knowledge of Danaher, no Person in the past three (3) years has infringed, misappropriated, or otherwise violated, and no Person is currently infringing, misappropriating, or otherwise violating, any material Newco IP.

**(i) No Infringement of Third Party IP Rights.** To the Knowledge of Danaher, the conduct of the Communications Business and of the Communications Companies as conducted in the past three (3) years, including the development, manufacture, use, import, export, offer for sale, sale or other commercialization of any of the Newco Products as so conducted, does not and has not in the past three (3) years infringed (directly, contributorily, by inducement, or otherwise), misappropriated, or otherwise violated or made unlawful use of any Intellectual Property Right of any other Person. Without limiting the generality of the foregoing, as relates to the Communications Business, including Newco IP or the Newco Products, as of the date of this Agreement, no infringement, misappropriation, or similar claim or Legal Proceeding is pending or, to the Knowledge of Danaher, threatened in writing against Danaher or its Subsidiaries (including the Communications Business and Communications Companies) or, to the Knowledge of Danaher, against any other Person who is or may be entitled to be indemnified, defended, held harmless, or reimbursed by Danaher or its Subsidiaries (including the Communications Business and Communications Companies) of the foregoing with respect to such claim or Legal Proceeding, and except as set forth in Part 2.8(i) of the Danaher Disclosure Letter, no Person has made a written request against Danaher or its Subsidiaries (including the Communications Business and Communications Companies) to be indemnified, defended, held harmless, or reimbursed with respect to any such claim or Legal Proceeding. No Proprietary Newco Product contains, is derived from, or is distributed with Open Source Code in a manner that has resulted in a requirement or condition that any Proprietary Newco Product or part thereof (1) be disclosed or distributed in source code form, (2) be licensed for the purpose of making modifications or derivative works, or (3) be redistributable at no charge.

**(j)** To the Knowledge of Danaher, (i) Danaher and its Subsidiaries have since January 1, 2012 materially complied with, and, as of the date of this Agreement, no Person (including any Governmental Body) has asserted a claim against, or otherwise tendered written notice to, Danaher or its Subsidiaries, in connection with the Communications Business, alleging a material violation of any privacy policy of the Communications Companies (including those posted on the Newco Web Sites) or the applicable Legal Requirements pertaining to privacy and data (including Personal Data) protection, and (ii) there have been no unauthorized intrusions or breaches of the security of the Communications Companies' information technology systems resulting in any material data breach.

**(k)** This Section 2.8 contains the sole and exclusive representations and warranties of Danaher and Newco under this Agreement with respect to Intellectual Property matters (other than Contracts required to be disclosed pursuant to Section 2.9(a)(iii)).

**2.9 Contracts.**

**(a)** Part 2.9(a) of the Danaher Disclosure Letter identifies each Newco Material Contract that is executory as of the date of this Agreement. For purposes of this Agreement, **Newco Material Contract** shall mean:

**(i)** any Contract which is in effect and is material to the Communications Business taken as a whole and not entered into in the ordinary course of business;

**(ii)** any Contract: (A) pursuant to which any of the Communications Companies is or may become obligated to make any severance, termination or similar payment to any Newco Associate or any spouse, heir or Representative of any Newco Associate except for severance, termination or similar payments required by applicable Legal Requirements that does not exceed \$500,000 per employee; or (B) pursuant to which any of the Communications Companies is or reasonably would be expected to become obligated to make any bonus or similar payment (other than payments

constituting base salary, incentive bonuses or commissions paid in the ordinary course of business) in excess of \$500,000 to any Newco Associate for the calendar year 2014;

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- (iii) any Contract identified or required to be identified in Part 2.8 of the Danaher Disclosure Letter;
- (iv) with respect to the Communications Business, any Contract with any distributor and any Contract with any other reseller or sales representative involving sales in excess of \$5,000,000 in the fiscal year ended December 31, 2013, in each case that provides exclusivity rights to any third party;
- (v) any Contract that is with a supplier of equipment, consumables, products, raw materials or any component, or any services used in the Proprietary Newco Products, which supplier is the only source of supply in the market place or only supplier to the Communications Business or that imposes a minimum purchase order, in each case, involving payments in excess of \$5,000,000 in the fiscal year ended December 31, 2013;
- (vi) any Contract imposing any material restriction on the right or ability of the Communications Business taken as a whole: (A) to compete with any other Person; (B) to develop, sell, supply, distribute, offer, support or service any product or any technology or other asset to or for any other Person; (C) to perform services for any other Person; or (D) to transact business with any other Person, in each case which restriction would or would reasonably be expected to materially and adversely affect the conduct of the Communications Business taken as a whole as currently conducted;
- (vii) with respect to which a Communications Company will be party at the Effective Time, any Contract relating to any currency hedging;
- (viii) any Contract relating to the lease or sublease of Newco Leased Real Property or of any real property owned by any Communications Company, in each case with annual rent payments in excess of \$500,000;
- (ix) with respect to the Communications Business, any Contract that: (A) resulted in revenue to or expenses of the Communications Business in excess of \$5,000,000 in the fiscal year ending December 31, 2013 or (B) is reasonably expected to result in revenue to or expenses of the Communications Business in excess of \$5,000,000 in the fiscal year ending December 31, 2014; and
- (x) any Contract, the termination of which would reasonably be expected to have a Newco Material Adverse Effect.
- Danaher has delivered or Made Available to NetScout an accurate and complete copy of each Newco Contract that constitutes a Newco Material Contract.
- (b) Each Newco Contract that constitutes a Newco Material Contract is valid and in full force and effect, and is enforceable in accordance with its terms, subject to: (i) laws of general application relating to bankruptcy, insolvency and the relief of debtors; and (ii) rules of law governing specific performance, injunctive relief and other equitable remedies.
- (c) Except as set forth in Part 2.9(c) of the Danaher Disclosure Letter: (i) neither Danaher nor any of its Subsidiaries has violated or breached in any material respect, or committed any default in any material respect under, any Newco Material Contract; and (ii) to the Knowledge of Danaher, no other Person has violated or breached in any material respect, or committed any default in any material respect under, any Newco Material Contract, in each case of subsections (i) and (ii) of this Section 2.9(c).
- (d) Except as set forth in Part 2.9(d) of the Danaher Disclosure Letter:

(i) neither the Communications Business nor any Communications Company has had any determination of noncompliance, entered into any consent order relating to any Government Contract or Government Bid;

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(ii) each Communications Company has complied in all material respects with all Legal Requirements with respect to all Government Contracts and Government Bids; and

(iii) the Communications Companies have not, nor to the Knowledge of Danaher have any of the Newco Employees, been barred or suspended from doing business with any Governmental Body.

**2.10 Compliance with Legal Requirements; Regulatory Matters.** The Communications Business and each of the Communications Companies is, and since January 1, 2012 has been, in compliance with all applicable Legal Requirements, except where the failure to so comply would not, individually or in the aggregate, reasonably be expected to have a Newco Material Adverse Effect.

Since January 1, 2012, neither Danaher nor any of its Subsidiaries (with respect to the Communications Business) nor any of the Communications Companies has received any written notice or other written communication from any Governmental Body (i) regarding any actual or possible violation of, or failure to comply with, any Legal Requirement or (ii) that it is or has been the subject of any inspection, investigation, survey, audit, monitoring or other form of review by any Governmental Body.

**2.11 Anti-Corruption Compliance; Export Control and Sanctions Compliance.**

(a) Since January 1, 2009 no Communications Business nor any Communications Company nor, to the Knowledge of Danaher, any of their respective agents, channel partners, resellers, or representatives with respect to the Communications Business (i) has directly or indirectly offered, promised or made any contribution, gift, bribe, rebate, payoff, influence payment, kickback or other payment to any Person in respect of the Communications Business, private or public, regardless of what form, (ii) is or has otherwise been in violation of any applicable anti-bribery, anti-corruption or similar Laws, including the U.S. Foreign Corrupt Practices Act of 1977 (15 U.S. Code Section 78dd-1, et seq.), (as amended the **FCPA** ) or the UK Bribery Act 2010 and (iii) has received any notice from, or voluntarily provided any notice to, a Governmental Authority with respect to the Communications Business or a Communications Company that alleges any of the foregoing. With respect to any relevant portion of the Communications Business or a Communications Company that was acquired by Danaher after January 1, 2009, the foregoing representation is made to the Knowledge of Danaher with respect to the time period between January 1, 2009 and such acquisition.

(b) Since January 1, 2012, the Communications Business and each Communications Company has complied and is in compliance in all material respects with applicable provisions of the U.S. export, anti-boycott, and sanctions laws, and regulations implemented thereunder, including, but not limited to, the Arms Export Control Act of 1976 (22 U.S. Code Ch. 39), the Export Administration Act of 1979 (50 U.S. Code §§ 2401 et. seq.), the International Emergency Economic Powers Act (50 U.S. Code §§ 1701 et. seq.), the Trading with the Enemy Act (50 U.S.C. app. §§ 1 et. seq.), and the various sanctions programs and regulations administered by the U.S. Treasury Department's Office of Foreign Assets Control, all as amended (collectively, **U.S. Export Control Laws** ).

(c) Since January 1, 2012, the Communications Business and each Communications Company have obtained all approvals or licenses necessary for exporting and importing the Newco Products in accordance with all applicable U.S. Export Control Laws, non-U.S. export control laws, and import laws.

**2.12 Governmental Authorizations.** Danaher and its Subsidiaries (and after giving effect to the Distribution and the other transactions contemplated by the Distribution Agreement, the Communications Companies will) hold all material Governmental Authorizations necessary to enable the Communications Companies to conduct their respective businesses in the manner in which such businesses are currently being conducted, including all

Governmental Authorizations required under Environmental Laws, except where the failure to so hold would not, individually or in the aggregate, reasonably be expected to have a Newco Material Adverse Effect. All such Governmental Authorizations are valid and in full force and effect. Danaher and its Subsidiaries (including each Communications Company) are, and at all times since January 1, 2012 have been, in

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compliance with the terms and requirements of such Governmental Authorizations, except where the failure to so comply would not, individually or in the aggregate, reasonably be expected to have a Newco Material Adverse Effect.

**2.13 Tax Matters.**

(a) Each material Tax Return required to be filed by or on behalf of the respective Communications Companies or with respect to the Communications Business with any Governmental Body with respect to any taxable period ending on or before the Closing Date (the **Communications Company Returns**): (i) has been or will be filed on or before the applicable due date (including any extensions of such due date); and (ii) has been, or will be when filed, prepared in all material respects in compliance with all applicable Legal Requirements. All amounts shown on the Communications Company Returns to be due on or before the Closing Date have been or will be paid on or before the Closing Date, except with respect to matters contested in good faith in appropriate proceedings and for which adequate reserves have been established in accordance with GAAP.

(b) To the Knowledge of Danaher, no Communications Company and no Communications Company Return is subject to an audit with respect to Taxes by any Governmental Body. No extension or waiver of the limitation period applicable to any of the Communications Company Returns has been granted (by Danaher, Newco or any other Person), and no such extension or waiver has been requested from any Communications Company.

(c) No claim or Legal Proceeding is pending or, to the Knowledge of Danaher, has been threatened against or with respect to any Communications Company or with respect to the Communications Business in respect of any material Tax. There are no unsatisfied liabilities for material Taxes with respect to any notice of deficiency or similar document received by Danaher or any of its Subsidiaries with respect to the Communications Business or with respect to any Communications Company with respect to any material Tax (other than liabilities for Taxes asserted under any such notice of deficiency or similar document which are being contested in good faith by the Communications Companies and with respect to which adequate reserves for payment have been established on the Communications Business Unaudited Financial Statements). There are no liens for material Taxes upon any of the Newco Assets except liens for current Taxes not yet due and payable.

(d) No written claim has ever been made by any Governmental Body in a jurisdiction where a Communications Company does not file a Tax Return that it is or may be subject to taxation by that jurisdiction which has resulted or could reasonably be expected to result in an obligation to pay material Taxes.

(e) There are no Contracts relating to the allocating, sharing or indemnification of Taxes to which any Communications Company is a party, other than (i) the Tax Matters Agreement, and (ii) Contracts containing customary gross-up or indemnification provisions in credit agreements, derivatives, leases, and similar agreements entered into in the ordinary course of business.

(f) Other than in connection with the Distribution or otherwise in connection with the separation of the Communications Business, no Communications Company has constituted either a distributing corporation or a controlled corporation within the meaning of Section 355(a)(1)(A) of the Code.

(g) No Communications Company is or has been a U.S. real property holding corporation within the meaning of Section 897(c)(2) of the Code during the applicable period specified in Section 897(c)(1)(A)(ii) of the Code.

(h) No Communications Company has participated in, or is currently participating in, a listed transaction within the meaning of Treasury Regulation Section 1.6011-4(b).

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(i) The Communications Companies have withheld and paid all material Taxes required to have been withheld and paid in connection with amounts paid or owing to any employee, independent contractor, creditor, shareholder or other person.

(j) Neither Danaher nor any Communications Company has taken any action or knows of any fact that could reasonably be expected to prevent the Mergers from qualifying as a reorganization within the meaning of Section 368(a) of the Code.

(k) This Section 2.13 contains the sole and exclusive representations and warranties of Danaher and Newco herein with respect to Tax matters.

**2.14 Employee and Labor Matters; Benefit Plans.**

(a) Except as set forth in Part 2.14(a) of the Danaher Disclosure Letter or as would not reasonably be expected to result in material liability to NetScout, (i) as of the date of this Agreement, none of the Communications Companies is a party to any collective bargaining agreement or other Contract with a labor organization, employee representative or works council representing any of its employees and there are no labor organizations, employee representatives or works councils representing, purporting to represent or, to the Knowledge of Danaher, seeking to represent any employees of any of the Communications Companies; (ii) since January 1, 2012 through the date hereof, there has not been any material strike, slowdown, work stoppage, lockout, job action, picketing, labor dispute, question concerning representation, union organizing activity, or any threat thereof, or any similar activity or dispute, affecting any of the Communications Companies or any of their employees; (iii) as of the date of this Agreement, there are no pending, and, to the Knowledge of Danaher, no Person has threatened to commence, any such strike, slowdown, work stoppage, lockout, job action or picketing; and (iv) as of the date of this Agreement, there is no material claim or grievance pending or, to the Knowledge of Danaher, threatened against any Communications Company arising under any collective bargaining agreement or other Contract with a labor organization, employee representative or works council relating to any terms or conditions of employment.

(b) Within 30 days after the date hereof, Danaher will deliver or make available to NetScout (to the extent not provided as of the date hereof) accurate and complete copies of, in each case with respect solely to any material Danaher Employee Plan or material Danaher Employee Agreement (x) under which any member of the Newco Group (as defined in the Employee Matters Agreement) or NetScout has or may have any material liability or a material obligation under the terms of the Employee Matters Agreement, (y) with respect to Danaher Employee Plans, the terms and conditions of which serve as the basis for the provision of comparable or similar benefits to the Newco Employees after the Closing Date, in accordance with the terms and conditions of the Employee Matters Agreement, or (z) as to which, in accordance with the Employee Matters Agreement, NetScout is required to determine whether NetScout or any member of the Newco Group is obligated under applicable Law to assume sponsorship or material liabilities for or otherwise maintain a Danaher Employee Plan after the Closing Date (any such Danaher Employee Plan referenced in (x), (y) or (z), the **Newco Plans**): (i) all documents setting forth the terms of each such Newco Plan, including all amendments thereto and all related trust documents; (ii) the most recent summary plan description; (iii) the most recent annual reports (Form 5500s and all schedules and financial statements attached thereto), if any; and (iv) all material correspondence in its possession regarding any such Newco Plan regarding any audit, investigation or proceeding before any Governmental Body regarding such Newco Plan or any fiduciary thereof; provided that, if Danaher uses commercially reasonable efforts to provide or make available any such document to NetScout, but is not able to so deliver it within 30 days after the date hereof, it will provide or make available such document to NetScout within 60 days after the date hereof. Danaher will deliver or Make Available to NetScout an updated version of the list referenced in this Section 2.14(b) to reflect any applicable changes thereto within 90 days after the date hereof and periodically thereafter prior to the Closing Date, but in no event later than 60 days after the

date on which the previous update is provided. Danaher has delivered or Made Available to NetScout an accurate and complete copy of the most recent IRS determination or opinion letter issued with respect to the Danaher Employee Plan intended to be qualified under Section 401(a) of the Code in which Newco Employees participate as of the date hereof.

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(c) Except as set forth in Part 2.14(c) of the Danaher Disclosure Letter or as would not reasonably be expected to result in material liability to NetScout, (i) each of the Communications Companies and Danaher Affiliates has performed in all material respects all obligations required to be performed by it under each Newco Plan and each Newco Plan has been established and maintained in all material respects in accordance with its terms and applicable Legal Requirements; (ii) as of the date of this Agreement, there are no material audits or inquiries pending or, to the Knowledge of Danaher, threatened by the IRS, the DOL or any other Governmental Body with respect to any such Newco Plan (or any fiduciary thereof); (iii) as of the date of this Agreement, there are no material actions, suits or claims pending, or to the Knowledge of Danaher, threatened or reasonably anticipated (other than routine claims for benefits) against any such Newco Plans, or against the assets of any such Newco Plan; (iv) full and timely payment has been made of all material amounts which Danaher or its Affiliates or the Communications Companies are required, under applicable law or under any Newco Plan, to have paid as a contribution or payment for any Newco Associate, in respect of any Newco Plan, and all such contributions or payments for any period that are not yet due have been made, paid or properly accrued in accordance with GAAP applied on a consistent basis.

(d) Any Newco Plan in which any Newco Employee is a beneficiary that is intended to be qualified under Section 401(a) of the Code has obtained a favorable determination letter (or opinion letter, if applicable) as to its qualified status under the Code.

(e) Except as set forth in Part 2.14(e) of the Danaher Disclosure Letter or as would not reasonably be expected to result in material liability to NetScout, (i) none of the Communications Companies, and no Danaher Affiliate, has ever maintained, established, sponsored, participated in or contributed to any: (A) Danaher Pension Plan subject to Title IV of ERISA; (B) multiemployer plan within the meaning of Section (3)(37) of ERISA; or (C) plan described in Section 413 of the Code, in each case pursuant to which a Newco Employee is or was a beneficiary and (ii) no Danaher Employee Plan provides (except at no cost to the Communications Companies or any Danaher Affiliate), or reflects or represents any liability of any of the Communications Companies or any Danaher Affiliate to provide, post-termination or retiree life insurance, post-termination or retiree health benefits or other post-termination or retiree employee welfare benefits to any Newco Employee, except as may be required by COBRA or other applicable Legal Requirements.

(f) Except as set forth in Part 2.14(f) of the Danaher Disclosure Letter or as would not reasonably be expected to result in material liability to NetScout, as relates to the Newco Associates, none of the Communications Companies has any obligation to compensate any Person for excise taxes payable pursuant to Section 4999 of the Code or for taxes payable pursuant to Section 409A of the Code.

(g) Except as set forth in Part 2.14(g) of the Danaher Disclosure Letter or as would not reasonably be expected to result in material liability to NetScout, Danaher and its Affiliates, including the Communications Companies, are in compliance in all material respects with all Legal Requirements relating to terms and conditions of employment, employment practices, wages, hours, and other labor related matters with respect to the Newco Employees.

**2.15 Environmental Matters.** The Communications Companies and the Communications Business has complied with all Legal Requirements intended to protect the environment and/or human health or safety (collectively, Environmental Laws ) except where any such noncompliance would, individually or in the aggregate, be reasonably expected to have a Newco Material Adverse Effect. No Communications Company has released, handled, generated, used, stored, transported or disposed of any material, substance or waste which is regulated by Environmental Laws ( **Hazardous Materials** ), except where any such release, handling, generation, use, storage, transport or disposal would not, individually or in the aggregate, be reasonably expected to have a Newco Material Adverse Effect. Danaher has no Knowledge of any environmental investigation, study, test or analysis, the purpose of which was to discovery, identify, or otherwise characterize the condition of the soil, groundwater, air or the presence of Hazardous

Materials at any location at which the Communications Business has been conducted. The Communications Companies have no Environmental Liabilities that would reasonably be expected to have a Newco Material Adverse Effect. As used herein, Environmental Liabilities

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are any claims, demands, or liabilities under Environmental Law which (i) arise out of or in any way relate to the operations or activities of the Communications Companies, or any real property at any time owned, operated or leased by the Communications Companies, whether contingent or fixed, actual or potential, and (ii) arise from or relate to actions occurring (including any failure to act) or conditions existing on or before the Closing Date.

**2.16 Insurance.** Except as would not reasonably be expected to have, individually or in the aggregate, a Newco Material Adverse Effect, each insurance policy and self-insurance program and arrangement relating to the Communications Business, the Newco Assets and the Communications Companies is in full force and effect.

### **2.17 Legal Proceedings; Orders.**

(a) Except as set forth in Part 2.17(a) of the Danaher Disclosure Letter, there is no material pending and served Legal Proceeding affecting the Newco Assets, Communications Business or the Communications Companies, or (to the Knowledge of Danaher) any pending but not served Legal Proceeding affecting the Newco Assets, Communications Business or the Communications Companies and, to the Knowledge of Danaher, no Person has threatened to commence any material Legal Proceeding affecting the Communications Business.

(b) There is no Order to which any of the Communications Companies, or any of the Newco Assets, is subject. To the Knowledge of Danaher, no officer or other key employee of any of the Communications Companies is subject to any Order that prohibits such officer or other employee from engaging in or continuing any conduct, activity or practice relating to the Communications Business.

**2.18 Authority; Binding Nature of Agreement.** Danaher and Newco have all requisite corporate or limited liability company, as applicable, right, power and authority to enter into and perform their respective obligations under this Agreement, the Distribution Agreement and the other Transaction Documents and, subject to the adoption of this Agreement by Danaher as sole member of Newco (which shall occur immediately after the execution and delivery hereof), to consummate the Contemplated Transactions. The Danaher Board (at a meeting duly called and held) and Danaher as sole member of Newco have: (a) determined that this Agreement, the Distribution Agreement, the Distribution and the Mergers are advisable and fair to, and in the best interests of, Newco and its members and (b) authorized and approved the execution, delivery and performance of this Agreement, the Distribution Agreement and the other Transaction Documents by Danaher and Newco, as applicable, and approved the Distribution and the Mergers and the other Contemplated Transactions. Danaher, as the sole member of Newco prior to the Distribution, has approved the Distribution and the other Contemplated Transactions (other than the Mergers) and will adopt this Agreement as sole member of Newco immediately following the execution and delivery of this Agreement. No other vote of Newco's members is necessary to consummate the Contemplated Transactions. Subject to the adoption of this Agreement by Danaher as sole member of Newco and assuming the due authorization, execution and delivery of this Agreement by NetScout and Merger Subs, this Agreement constitutes a legal, valid and binding obligation of Danaher and Newco, enforceable against Danaher and Newco in accordance with its terms, subject to: (i) laws of general application relating to bankruptcy, insolvency, the relief of debtors and creditors' rights generally; and (ii) rules of law governing specific performance, injunctive relief and other equitable remedies.

**2.19 Ownership of NetScout Common Stock.** None of Danaher or, to the Knowledge of Danaher, any of its respective affiliates or associates is or has been an interested stockholder (as defined in Section 203 of the DGCL) with respect to NetScout.

**2.20 Vote Required.** The affirmative vote of the holders of a majority of the voting power of the outstanding Newco Common Units is the only vote of the holders of Newco Membership Interests necessary to adopt this Agreement or consummate the Contemplated Transactions. Danaher shall, in its capacity as sole member of Newco, adopt this

Agreement and approve the Mergers by written consent as soon as practicable following execution and delivery of this Agreement.

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**2.21 Non-Contravention; Consents.** Assuming compliance with the applicable provisions of the DGCL, the DLLCA, the HSR Act and all applicable foreign competition act filings, the listing requirements of the NASDAQ Global Select Market and the requirements of the New York Stock Exchange, except as set forth in Part 2.21 of the Danaher Disclosure Letter, neither (1) the execution, delivery or performance of this Agreement, nor (2) the consummation of the Mergers or any of the other Contemplated Transactions, will, directly or indirectly (with or without notice or lapse of time):

(a) contravene, conflict with or result in a violation of any of the provisions of the certificate of incorporation, bylaws, certificate of formation, limited liability company operating agreement, or other charter or organizational documents of Danaher or any of the Communications Companies;

(b) contravene, conflict with or result in a violation of, any Legal Requirement or any Order to which Danaher or any of the Communications Companies, or any of the assets owned or used by any of the Communications Companies, is subject, except where such contravention, conflict or violation, individually or in the aggregate, would not reasonably be expected to have a Newco Material Adverse Effect;

(c) contravene, conflict with or result in a violation of any of the terms or requirements of, or give any Governmental Body the right to revoke, withdraw, suspend, cancel, terminate or modify, any Governmental Authorization that is held by any of the Communications Companies or that otherwise relates to the Communications Business or to any of the assets owned or used by any of the Communications Companies, except where such contravention, conflict, violation, revocation, withdrawal, suspension, cancellation, termination or modification, individually or in the aggregate, would not reasonably be expected to have a Newco Material Adverse Effect;

(d) contravene, conflict with or result in a violation or breach of, or result in a default under, any provision of any Newco Material Contract, or give any Person the right to: (i) declare a default or exercise any remedy under any such Newco Material Contract; (ii) accelerate the maturity or performance of any such Newco Material Contract; or (iii) cancel, terminate or modify any right, benefit, obligation or other term of such Newco Material Contract, except where such contravention, conflict, violation or default, individually or in the aggregate, would not reasonably be expected to be material to Tektronix Communications, Fluke Networks or Arbor Networks, as the case may be; or

(e) result in the imposition or creation of any material Encumbrance (other than a Permitted Encumbrance) upon or with respect to any asset owned or used by any of the Communications Companies, except where such contravention, conflict, violation or default, individually or in the aggregate, would not reasonably be expected to be material to Tektronix Communications, Fluke Networks or Arbor Networks, as the case may be.

Except as may be required by the Securities Act, the Exchange Act, state securities laws or blue sky laws, the DGCL, the DLLCA, the HSR Act, all applicable foreign competition act filings, the listing requirements of the NASDAQ Global Select Market and the requirements of the New York Stock Exchange, neither Danaher nor any of the Communications Companies is or will be required to make any filing with or give any notice to, or to obtain any Consent from, any Governmental Body in connection with: (x) the execution, delivery or performance of this Agreement; or (y) the consummation of the Mergers or any of the other Contemplated Transactions, except where the failure to make any such filing or give any such notice or to obtain any such Consent would not, individually or in the aggregate, be material to the Communications Companies, and except for the novation of Government Contracts.

**2.22 Financial Advisor.** No broker, finder or investment banker is entitled to any brokerage, finder's or other fee or commission in connection with the Mergers or any of the other Contemplated Transactions based upon arrangements made by or on behalf of Danaher or any of its Subsidiaries, other than any broker, finder or investment banker whose fees will be paid for by Danaher.

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**2.23 Acknowledgement by Danaher and Newco.** Neither Danaher nor Newco is relying or has relied on any representations or warranties whatsoever regarding the subject matter of this Agreement, express or implied, except for the representations and warranties in Section 3. The representations and warranties by NetScout and Merger Subs contained in Section 3 constitute the sole and exclusive representations and warranties of NetScout, the other NetScout Companies and their respective Representatives in connection with the Contemplated Transactions and Danaher and Newco understand, acknowledge and agree that all other representations and warranties of any kind or nature whether express, implied or statutory are specifically disclaimed by NetScout and Merger Subs.

**3. REPRESENTATIONS AND WARRANTIES OF NETSCOUT AND MERGER SUBS**

Each of NetScout and Merger Subs hereby represent and warrant to Danaher as follows (it being understood that each representation and warranty contained in this Section 3 is subject to: (a) the exceptions and disclosures set forth in the part or subpart of the NetScout Disclosure Letter corresponding to the particular Section or subsection in this Section 3 in which such representation and warranty appears; (b) any exception or disclosure set forth in any other part or subpart of the NetScout Disclosure Letter to the extent it is readily apparent that such exception or disclosure is relevant to such representation and warranty; and (c) any information set forth in the NetScout SEC Documents filed on the SEC's EDGAR database on or after January 1, 2013 and publicly available prior to the date of this Agreement (but excluding any supplements or amendments thereto to the extent such supplement or amendment is not publicly filed prior to the date hereof), other than information set forth therein under the headings "Risk Factors" or "Forward-Looking Statements" and any other information or statement set forth therein that is primarily cautionary, predictive or forward-looking in nature):

**3.1 Subsidiaries; Due Organization; Etc.**

(a) Part 3.1(a) of the NetScout Disclosure Letter identifies, as of the date hereof, each Entity that is a Subsidiary of NetScout and indicates its jurisdiction of organization.

(b) Each of the NetScout Companies is (or, if formed after the date of this Agreement, shall be at the Effective Time) a corporation or other business organization duly organized, validly existing and in good standing (to the extent that the laws of the jurisdiction of its formation recognize the concept of good standing) under the laws of the jurisdiction of its incorporation, and has (or, if formed after the date of this Agreement, shall have at the Effective Time) all necessary organizational power and authority: (i) to conduct its business in the manner in which its business is currently being conducted; (ii) to own and use its assets in the manner in which its assets are currently owned and used; and (iii) to perform its obligations under all Contracts by which it is bound, other than in the case of clauses (i) through (iii) as would not, either individually or in the aggregate, reasonably be expected to have a NetScout Material Adverse Effect.

(c) Each of the NetScout Companies is (or, if formed after the date of this Agreement, shall be at the Effective Time) qualified to do business as a foreign corporation, and is (or, if formed after the date of this Agreement, shall be at the Effective Time) in good standing (to the extent that the laws of the applicable jurisdiction recognize the concept of good standing), under the laws of all jurisdictions where the nature of its business requires such qualification, except for jurisdictions in which the failure to be so qualified or in good standing, individually or in the aggregate, would not reasonably be expected to have a NetScout Material Adverse Effect.

**3.2 Certificate of Incorporation and Bylaws.** NetScout has delivered or Made Available to Danaher accurate and complete copies of the certificate of incorporation, bylaws, memorandum of association and articles of association or equivalent governing documents of each of the NetScout Companies (to the extent existing as of the date of this Agreement), including all amendments thereto.

**3.3 Capitalization, Etc.**

(a) The authorized capital stock of NetScout consists of (i) 150,000,000 shares of NetScout Common Stock, of which 41,181,526 shares have been issued and are outstanding as of the last business day

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ending immediately prior to the date of this Agreement and (ii) five million (5,000,000) shares of preferred stock, \$0.001 par value per share, none of which are issued and outstanding as of the date hereof. All of the outstanding shares of NetScout Common Stock have been duly authorized and validly issued, and are fully paid and nonassessable.

(b) Except as set forth in Part 3.3(b) of the NetScout Disclosure Letter: (i) none of the outstanding shares of NetScout Common Stock is entitled or subject to any preemptive right, right of repurchase or forfeiture, right of participation, right of maintenance or any similar right; (ii) none of the outstanding shares of NetScout Common Stock is subject to any right of first refusal in favor of NetScout; and (iii) there is no NetScout Contract relating to the voting or registration of, or restricting any Person from purchasing, selling, pledging or otherwise disposing of (or from granting any option or similar right with respect to), any shares of NetScout Common Stock. None of the NetScout Companies is under any obligation, or is bound by any Contract pursuant to which it may become obligated, to repurchase, redeem or otherwise acquire any outstanding shares of NetScout Common Stock or other securities, except for NetScout's right to repurchase or reacquire restricted shares of NetScout Common Stock held by an employee of NetScout upon termination of such employee's employment or upon any other forfeiture of a vesting condition.

(c) As of the date of this Agreement: (i) 12,000 shares of NetScout Common Stock are subject to issuance pursuant to NetScout Options; (ii) 2,092,603 shares of NetScout Common Stock are reserved for future issuance pursuant to the Amended and Restated 2011 Employee Stock Purchase Plan (the NetScout ESPP); (iii) 1,046,566 shares of NetScout Common Stock are subject to issuance upon the vesting of NetScout RSUs; and (iv) 7,521,569 shares of NetScout Common Stock are reserved for future issuance pursuant to equity awards not yet granted under the NetScout Option Plans.

(d) NetScout has delivered or Made Available to Danaher a complete and accurate in all material respects (it being understood that any deviation of less than 10,000 shares (or corresponding or equivalent interests) shall not be deemed a material difference) list that sets forth with respect to each NetScout Equity Award outstanding as of the date of this Agreement the following information with respect to NetScout Equity Awards: (i) the employee identification number of the holder of such NetScout Equity Award; (ii) the type of such NetScout Equity Award (whether a NetScout Option or NetScout RSU); (iii) the number of shares of NetScout Common Stock subject to such NetScout Equity Award; (iv) the per share exercise price (if any) of such NetScout Equity Award; and (v) the applicable vesting schedule in respect of such NetScout Equity Award. Except as otherwise noted on the list referenced in this Section 3.3(d), each NetScout Equity Award that is a NetScout Option is not intended to be an incentive stock option (as defined in the Code) nor to qualify for any comparable tax regime in any country. NetScout will deliver or make available to Danaher an updated version of the list referenced in this Section 3.3(d) to reflect any applicable changes thereto within 90 days after the date hereof (which such list will include the country in which each holder is employed or providing services) and periodically thereafter prior to the Closing Date, but in no event later than 60 days after the date on which the previous update is provided. Within 30 days after the date hereof, NetScout will deliver or make available to Danaher (to the extent not provided as of the date hereof) accurate and complete copies of all equity plans and sub-plans pursuant to which any NetScout Equity Awards were granted by NetScout, and the forms of agreements evidencing such NetScout Equity Awards. There are no outstanding stock appreciation, phantom stock, profit participation or similar rights or equity-based awards with respect to any of the NetScout Companies.

(e) Except as set forth in Sections 3.3(a), 3.3(b) and 3.3(d), or as permitted from and after the date of this Agreement pursuant to Section 4.3, there is no: (i) outstanding subscription, option, call, warrant or right (whether or not currently exercisable) to acquire any shares of the capital stock or other securities of any of the NetScout Companies; (ii) outstanding security, bond, debenture, instrument or obligation that is or may become convertible into or exchangeable for any shares of the capital stock or other securities of any of the NetScout Companies or that has the right to vote on any matter on which the stockholders of NetScout have the right to vote; (iii) Contract under which

any of the NetScout Companies is or may become obligated to sell or otherwise issue any shares of its capital stock or any other securities; or (iv) shareholder rights plan or agreement (*i.e.*, poison pill )

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(f) All outstanding shares of NetScout Common Stock, and all options and other NetScout Equity Awards and other outstanding securities of the NetScout Companies, have been issued and granted in compliance in all material respects with: (i) all applicable securities laws and other applicable Legal Requirements; and (ii) all requirements set forth in applicable Contracts.

(g) All of the outstanding shares of capital stock or other equity interest, as the case may be, of each of NetScout's Subsidiaries have been duly authorized and validly issued, are fully paid and nonassessable (to the extent applicable) and free of preemptive rights, with no personal liability attaching to the ownership thereof, and are owned beneficially and of record by NetScout, free and clear of any Encumbrances, other than restrictions under applicable securities laws.

**3.4 SEC Filings; Financial Statements.**

(a) NetScout has delivered or Made Available to Danaher accurate and complete copies of all registration statements, proxy statements, NetScout Certifications and other statements, reports, schedules, forms and other documents filed by NetScout with the SEC, including all amendments thereto, since January 1, 2013 (collectively, the **NetScout SEC Documents**). All statements, reports, schedules, forms and other documents required to have been filed by NetScout or its officers with the SEC since January 1, 2013 have been so filed on a timely basis. None of NetScout's Subsidiaries is required to file any documents with the SEC. As of the time it was filed with the SEC (or, if amended or superseded by a filing prior to the date of this Agreement, then on the date of such filing): (i) each of the NetScout SEC Documents complied as to form in all material respects with the applicable requirements of the Securities Act or the Exchange Act (as the case may be); and (ii) none of the NetScout SEC Documents contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading. Each of the certifications and statements relating to the NetScout SEC Documents required by: (A) Rule 13a-14 or Rule 15d-14 under the Exchange Act; (B) 18 U.S.C. §1350 (Section 906 of the Sarbanes-Oxley Act); or (C) any other rule or regulation promulgated by the SEC or applicable to the NetScout SEC Documents (collectively, the **NetScout Certifications**) is accurate and complete, and complies as to form in all material respects with all applicable Legal Requirements. As used in the introduction to this [Section 3](#) and in this [Section 3.4](#), the term "file" and variations thereof shall be broadly construed to include any manner in which a document or information is filed, furnished, submitted, supplied or otherwise made available to the SEC or any member of its staff.

(b) The financial statements (including any related notes) contained or incorporated by reference in the NetScout SEC Documents: (i) complied as to form in all material respects with the published rules and regulations of the SEC applicable thereto; (ii) were prepared in accordance with GAAP applied on a consistent basis throughout the periods covered (except as may be indicated in the notes to such financial statements or, in the case of unaudited financial statements, as permitted by Form 10-Q, Form 8-K or any successor form under the Exchange Act, and except that the unaudited financial statements may not contain footnotes and are subject to normal and recurring year-end adjustments, none of which will be material); and (iii) fairly present, in all material respects, the consolidated financial position of NetScout and its consolidated Subsidiaries as of the respective dates thereof and the consolidated results of operations and cash flows of NetScout and its consolidated Subsidiaries for the periods covered thereby. No financial statements of any Person other than the NetScout Companies are required by GAAP to be included in the consolidated financial statements of NetScout. There are no comments from the SEC or its staff pending with respect to any statements, reports, schedules, forms or other documents filed by NetScout with the SEC that remain outstanding and unresolved.

(c) NetScout's auditor has at all times since the date of enactment of the Sarbanes-Oxley Act been: (i) a registered public accounting firm (as defined in Section 2(a)(12) of the Sarbanes-Oxley Act); (ii) independent with respect to

NetScout within the meaning of Regulation S-X under the Exchange Act; and (iii) to the knowledge of NetScout, in compliance with subsections (g) through (l) of Section 10A of the Exchange Act and the rules and regulations promulgated by the SEC and the Public Company Accounting

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Oversight Board thereunder. All non-audit services performed by NetScout's auditors for the NetScout Companies that were required to be approved in accordance with Section 202 of the Sarbanes-Oxley Act were so approved.

(d) To the Knowledge of NetScout, since March 31, 2014, neither NetScout nor any of its Subsidiaries has identified or been made aware of any material illegal act or fraud related to the business of the NetScout Companies.

(e) None of the information to be supplied by or on behalf of NetScout for inclusion or incorporation by reference in the NetScout Form S-4 Registration Statement or the Newco Registration Statements will, at the time the NetScout Form S-4 Registration Statement or the Newco Registration Statements, respectively, is filed with the SEC or at the time it, or any amendment or supplement thereto, becomes effective under the Securities Act, 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 the light of the circumstances under which they are made, not misleading. None of the information supplied or to be supplied by or on behalf of NetScout for inclusion or incorporation by reference in the Proxy Statement/Prospectus will, at the time the Proxy Statement/Prospectus is mailed to the stockholders of NetScout or at the time of the NetScout Stockholders Meeting (or any adjournment or postponement thereof), 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 the light of the circumstances under which they are made, not misleading. The Proxy Statement/Prospectus will, at the time the Proxy Statement/Prospectus is mailed to the stockholders of NetScout or at the time of the NetScout Stockholders Meeting (or any adjournment or postponement thereof), comply as to form in all material respects with the provisions of the Securities Act, the Exchange Act and the rules and regulations promulgated by the SEC thereunder, except that no representation or warranty is made by NetScout or Merger Subs with respect to statements made or incorporated by reference therein based on information supplied by or on behalf of Danaher for inclusion or incorporation by reference in the Proxy Statement/Prospectus.

**3.5 Absence of Changes.** Except as expressly contemplated by this Agreement, since June 30, 2014 through the date of this Agreement, (a) except for discussions, negotiations and transactions related to this Agreement or the other Transaction Documents (including the Internal Restructuring described in the Distribution Agreement), the NetScout Companies have operated in all material respects in the ordinary course of business consistent with past practice and (b) there has not occurred any event, change, action, failure to act or transaction that, individually or in the aggregate, has had or would be reasonably expected to have, a NetScout Material Adverse Effect. Except as expressly contemplated by this Agreement since June 30, 2014, through the date of this Agreement, the NetScout Companies have not taken any actions which, had such actions been taken after the date of this Agreement, would have required the written consent of Danaher pursuant to Section 4.3(b)(iv) or Section 4.3(b)(v) or Sections 4.3(b)(vii) through 4.3(b)(xi).

**3.6 Title to and Sufficiency of Assets.** The NetScout Companies own, and have good and valid title to, all assets purported to be owned by them, including: (a) all assets reflected on the NetScout Interim Balance Sheet (except for inventory sold or otherwise disposed of in the ordinary course of business since the date of the NetScout Interim Balance Sheet); and (b) all other assets reflected in the books and records of the NetScout Companies as being owned by the NetScout Companies. All of said assets are owned by the NetScout Companies free and clear of any Encumbrances, except (i) for Encumbrances securing the NetScout Credit Agreements, (ii) where the failure to have such good and valid title results from any liens described in Part 3.6 of the NetScout Disclosure Letter or (iii) any other Permitted Encumbrance. The NetScout Companies are the lessees of, and hold valid leasehold interests in, all assets purported to have been leased by them and the NetScout Companies enjoy undisturbed possession of such leased assets, except where the failure to have such valid leasehold interest results from any liens described in Part 3.6 of the NetScout Disclosure letter, liens created or otherwise imposed by Danaher or the Communications Companies or any other Permitted Encumbrance. No representation is made in this Section 3.6 with respect to the title to or sufficiency of any intellectual property assets.

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**3.7 Real Property; Leasehold.**

(a) No NetScout Company owns any real property.

(b) Part 3.7(b) of the NetScout Disclosure Letter sets forth an accurate list of each lease pursuant to which any of the NetScout Companies leases or uses real property from any other Person for annual rent payments in excess of \$500,000. (All real property leased to the NetScout Companies pursuant to the real property leases identified or required to be identified in Part 3.7(b) of the NetScout Disclosure Letter, including all buildings, structures, fixtures and other improvements leased to the NetScout Companies, is referred to as the **NetScout Leased Real Property**.) To the Knowledge of NetScout, there is no existing plan or study by any Governmental Body or by any other Person that challenges or otherwise adversely affects the continuation of the use or operation of any NetScout Leased Real Property. Part 3.7(b) of the NetScout Disclosure Letter contains an accurate and complete list of all subleases, occupancy agreements and other NetScout Contracts granting to any Person (other than any NetScout Company) a right of use or occupancy of any of the NetScout Leased Real Property in effect as of the date of this Agreement. Except as set forth in the leases or subleases identified in Part 3.7(b) of the NetScout Disclosure Letter there is no Person in possession of any NetScout Leased Real Property other than a NetScout Company.

**3.8 Intellectual Property; Privacy.**

(a) **Registered IP.** Part 3.8(a)(i) of the NetScout Disclosure Letter identifies, as of the date of this Agreement: (i) each material item of Registered IP in which a NetScout Company has or purports to have an ownership interest of any nature (whether exclusively, jointly with another Person, or otherwise) and that either: (A) covers any NetScout Product or (B) that covers or that would be infringed by the operation of the business of the NetScout Companies, including the manufacture, development, sale, import, support, maintenance or testing of any NetScout Product or the provision of any service or test using the NetScout Product (the **NetScout Material Registered IP**); and (ii) any Person other than the NetScout Companies that has an ownership interest in such item of NetScout Material Registered IP and the nature of such ownership interest. Except as set forth in Part 3.8(a)(ii) and 3.8(c) of the NetScout Disclosure Letter, and except with regard to non-exclusive licenses granted to NetScout Companies distributors, resellers and end-user customers in connection with the sale, distribution or use of NetScout Products in the ordinary course of business of the NetScout Companies, no material licenses, covenants not to sue, or other similar rights under the NetScout Material Registered IP have been granted to any Person, including as a result of any participation in an industry association, standard setting organization or similar body.

(b) **Inbound Licenses.** Part 3.8(b) of the NetScout Disclosure Letter accurately identifies each Contract in effect as of the date of this Agreement pursuant to which any Intellectual Property Right or Intellectual Property is or has been licensed by any Person to any NetScout Company, which Contract is material to the business of the NetScout Companies, including material licenses to any Intellectual Property included in, or Intellectual Property Rights embodied by, the NetScout Products or used in connection with or necessary to any development, manufacture, distribution, other commercialization, maintenance or support of the NetScout Products as currently conducted ( **NetScout Material Inbound License** ), other than (1) Contracts between a NetScout Company, on the one hand, and its employees, on the other hand, in NetScout's standard form thereof, (2) Shrink-Wrap, (3) licenses to Open Source Code other than that set forth in Section 3.8(i), (4) licenses for technology used exclusively by the data communication cable installation and communications service provider business of Danaher and its Subsidiaries, and (5) non-exclusive licenses to third-party software or hardware that is not incorporated into, or necessary for the development, manufacturing, testing, distribution, maintenance, or support of, any NetScout Product and that is not otherwise material to the business of the NetScout Companies (together with NetScout Material Inbound Licenses, the **NetScout Inbound Licenses** ). To the Knowledge of NetScout, no material royalties or similar amounts in excess of \$200,000 during any calendar year are payable by NetScout or its Subsidiaries under any NetScout Inbound License.

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**(c) Outbound Licenses.** Part 3.8(c) of the NetScout Disclosure Letter identifies each material Contract, other than non-exclusive customer or sales channel Contracts for NetScout Products entered into in the ordinary course of business and that does not materially differ in substance from standard form agreements and other than the Contracts listed in Section 3.9(a), to which any Person has been granted any license under, or otherwise has received or acquired any right (whether or not currently exercisable) or interest in, any NetScout IP, in each case in effect as of the date of this Agreement.

**(d) Ownership Free and Clear.** The NetScout Companies exclusively own all right, title, and interest to and in the NetScout IP (other than as set forth in Part 3.8(d) of the NetScout Disclosure Letter) free and clear of any Encumbrances (other than licenses and similar rights granted by any NetScout Company (including as set forth in Parts 3.8(a), 3.8(b) and 3.8(c) of the NetScout Disclosure Letter, and subject to the exceptions set forth in Sections 3.8(a), 3.8(b) and 3.8(c)) and other than Permitted Encumbrances). Without limiting the foregoing, to the Knowledge of NetScout, no NetScout Company has transferred to, or permitted under any Contract to which a NetScout Company is a party, any Person other than the NetScout Companies to retain ownership of, or an exclusive license to: (i) the Intellectual Property Rights in or to any Derivatives of any Proprietary NetScout Product, whether developed by or for NetScout or its Subsidiaries, or by or for such other Person, under any such Contract; or (ii) any interfaces developed by, with, or on behalf of, any NetScout Company between any NetScout Product and any Person's software or product; except in the foregoing (i) and (ii) under any Contract set forth in Parts 3.8(a), 3.8(b) and 3.8(c) of the NetScout Disclosure Letter or that is not otherwise material to the business of the NetScout Companies. As of the date of this Agreement, no material item of NetScout IP is subject to any action or outstanding Order or settlement agreement or stipulation in litigation that restricts in any manner the use, provision, transfer, assignment or licensing thereof by the NetScout Companies or affects the validity, use, ownership, registrability or enforceability of such NetScout IP. Except with regard to certain NetScout corporate names and marks set forth in Part 3.8(d) of the NetScout Disclosure Letter, no rights, title or interest in the names or other indicia of commercial source or origin used to designate any material NetScout Products prior to Closing are owned by any Entity other than the NetScout Companies.

**(e) Valid and Enforceable.** To the Knowledge of NetScout, none of the material NetScout IP is invalid or unenforceable.

**(f) Protection of Proprietary Information.** Each NetScout Company has taken commercially reasonable steps to maintain the confidentiality of and otherwise protect and enforce their respective rights in all material proprietary information pertaining to such NetScout Company and all NetScout Products, and except as set forth in Part 3.8(f) of the NetScout Disclosure Letter, no source code owned by a NetScout Company for any NetScout Product has been disclosed or delivered to any Person who is not a NetScout Employee.

**(g) Sufficiency.** The NetScout Companies own or otherwise have, and after the Closing will continue to have, all Intellectual Property and Intellectual Property Rights needed to conduct the business of the NetScout Companies in all material respects as it is currently conducted; provided that the foregoing is not a representation or warranty with respect to infringement, misappropriation or other violation of third party Intellectual Property Rights or unfair competition, which solely is covered under Section 3.8(i).

**(h) Third-Party Infringement of NetScout IP.** To the Knowledge of NetScout, no Person in the past three (3) years has infringed, misappropriated, or otherwise violated, and no Person is currently infringing, misappropriating, or otherwise violating, any material NetScout IP.

**(i) No Infringement of Third Party IP Rights.** To the Knowledge of NetScout, the conduct of the business of any of the NetScout Companies as conducted in the past three (3) years, including the development, manufacture, use, import, export, offer for sale, sale or other commercialization of any of the NetScout Products as so conducted, does

not and has not in the past three (3) years infringed (directly, contributorily, by inducement, or otherwise), misappropriated, or otherwise violated or made unlawful use of any Intellectual Property Right of any other Person. Without limiting the generality of the foregoing, as relates to the

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NetScout IP or the NetScout Products, as of the date of this Agreement, no infringement, misappropriation, or similar claim or Legal Proceeding is pending or, to the Knowledge of NetScout, threatened in writing against the NetScout Companies or, to the Knowledge of NetScout, against any other Person who is or may be entitled to be indemnified, defended, held harmless, or reimbursed by any of the foregoing with respect to such claim or Legal Proceeding, and except as set forth in Part 3.8(i) of the NetScout Disclosure Letter, no Person has made a written request against a NetScout Company to be indemnified, defended, held harmless, or reimbursed with respect to any such claim or Legal Proceeding. No Proprietary NetScout Product contains, is derived from or is distributed with Open Source Code in a manner that has resulted in a requirement or condition that any Proprietary NetScout Product or part thereof (1) be disclosed or distributed in source code form, (2) be licensed for the purpose of making modifications or derivative works, or (3) be redistributable at no charge.

(j) To the Knowledge of NetScout (i) the NetScout Companies have since January 1, 2012 materially complied with and, as of the date of this Agreement, no Person (including any Governmental Body) has asserted a claim against, or otherwise tendered written notice to any of the NetScout Companies alleging a material violation of any privacy policy of the NetScout Companies (including those posted on the NetScout Web Sites) or the applicable Legal Requirements pertaining to privacy and data (including Personal Data) protection, and (ii) there have been no unauthorized intrusions or breaches of the security of the NetScout Companies information technology systems resulting in any material data breach.

(k) This Section 3.8 contains the sole and exclusive representations and warranties of NetScout under this Agreement with respect to Intellectual Property matters, other than Contracts required to be disclosed pursuant to Section 3.9(a)(iii).

**3.9 Contracts.**

(a) Part 3.9(a) of the NetScout Disclosure Letter identifies each NetScout Material Contract that is executory as of the date of this Agreement. For purposes of this Agreement, **NetScout Material Contract** shall mean:

(i) any Contract which is in effect and is material to the business of the NetScout Companies taken as a whole and not entered into the ordinary course of business;

(ii) any Contract: (A) pursuant to which any of the NetScout Companies is or may become obligated to make any severance, termination or similar payment to any NetScout Associate or any spouse, heir or Representative of any NetScout Associate except for severance, termination or similar payments required by applicable Legal Requirements that does not exceed \$500,000 per employee; or (B) pursuant to which any of the NetScout Companies is or reasonably would be expected to become obligated to make any bonus or similar payment (other than payments constituting base salary, incentive bonuses or commissions paid in the ordinary course of business) in excess of \$500,000 to any NetScout Associate for the calendar year 2014;

(iii) any Contract identified or required to be identified in Part 3.8 of the NetScout Disclosure Letter;

(iv) any Contract with any distributor and any Contract with any other reseller or sales representative involving sales in excess of \$5,000,000 in the fiscal year ended December 31, 2013, in each case that provides exclusivity rights to any third party;

(v) any Contract that is with a supplier of equipment, consumables, products, raw materials or any component, or any services used in the Proprietary NetScout Products, which supplier is the only source of supply in the market place or only supplier to the NetScout Companies or that imposes a minimum purchase order, in each case, involving

payments in excess of \$5,000,000 in the fiscal year ended March 31, 2014;

(vi) any Contract imposing any material restriction on the right or ability of the NetScout Companies, taken as a whole: (A) to compete with any other Person; (B) to develop, sell, supply,

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distribute, offer, support or service any product or any technology or other asset to or for any other Person; (C) to perform services for any other Person; or (D) to transact business with any other Person, in each case which restriction would or would reasonably be expected to materially and adversely affect the conduct of the business of the NetScout Companies as currently conducted;

(vii) any Contract relating to any currency hedging;

(viii) any Contract relating to the lease or sublease of NetScout Leased Real Property or of any real property owned by any NetScout Company, in each case with annual rent payments in excess of \$500,000;

(ix) any Contract that: resulted in revenue to or expenses of a NetScout Company in excess of \$5,000,000 in the fiscal year ending March 31, 2013 or the fiscal year ending March 31, 2014; and

(x) any Contract, the termination of which would reasonably be expected to have a NetScout Material Adverse Effect.

NetScout has delivered or Made Available to Danaher an accurate and complete copy of each NetScout Contract that constitutes a NetScout Material Contract.

(b) Each NetScout Contract that constitutes a NetScout Material Contract is valid and in full force and effect, and is enforceable in accordance with its terms, subject to: (i) laws of general application relating to bankruptcy, insolvency and the relief of debtors; and (ii) rules of law governing specific performance, injunctive relief and other equitable remedies.

(c) Except as set forth in Part 3.9(c) of the NetScout Disclosure Letter: (i) neither NetScout nor any of its Subsidiaries has violated or breached in any material respect, or committed any default in any material respect under, any NetScout Material Contract; and (ii) to the Knowledge of NetScout, no other Person has violated or breached in any material respect, or committed any default in any material respect under, any NetScout Material Contract, in each case of subsections (i) and (ii) of this Section 3.9(c).

(d) Except as set forth in Part 3.9(d) of the NetScout Disclosure Letter:

(i) no NetScout Company has had any determination of noncompliance, entered into any consent order relating to any Government Contract or Government Bid;

(ii) each NetScout Company has complied in all material respects with all Legal Requirements with respect to all Government Contracts and Government Bids; and

(iii) no NetScout Company has, nor to the Knowledge of NetScout have any of the NetScout Employees, been barred or suspended from doing business with any Governmental Body.

**3.10 Compliance with Legal Requirements; Regulatory Matters.** Each of the NetScout Companies is, and since January 1, 2012 has been, in compliance with all applicable Legal Requirements, except where the failure to so comply would not, individually or in the aggregate, reasonably be expected to have a NetScout Material Adverse Effect. Since January 1, 2012, none of the NetScout Companies has received any written notice or other written communication from any Governmental Body (i) regarding any actual or possible violation of, or failure to comply with, any Legal Requirement or (ii) that it is or has been the subject of any inspection, investigation, survey, audit, monitoring or other form of review by any Governmental Body.

**3.11 Anti-Corruption Compliance; Export Control and Sanctions Compliance.**

(a) Since January 1, 2009, no NetScout Company nor, to the Knowledge of NetScout, any of their respective agents, channel partners, resellers, or representatives with respect to the business of the NetScout Companies (i) has directly or indirectly offered, promised or made any contribution, gift, bribe, rebate, payoff,

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influence payment, kickback or other payment to any Person, private or public, regardless of what form, (ii) is or has otherwise been in violation of any applicable anti-bribery, anti-corruption or similar Laws, including the FCPA or the U.K. Bribery Act 2010 and (iii) has received any notice from, or voluntarily provided any notice to, a Governmental Authority with respect to the Communications Business or a Communications Company that alleges any of the foregoing. With respect to any relevant portion of the business of NetScout or a NetScout Company that was acquired by NetScout after January 1, 2009, the foregoing representation is made to the Knowledge of NetScout with respect to the time period between January 1, 2009 and such acquisition.

(b) Since January 1, 2012, the NetScout Companies have complied and are in compliance in all material respects with applicable provisions of the U.S. Export Control Laws.

(c) Since January 1, 2012, the NetScout Companies have obtained all approvals or licenses necessary for exporting and importing the NetScout Products in accordance with all applicable U.S. Export Control Laws, non-U.S. export control laws, and import laws.

**3.12 Governmental Authorizations.** The NetScout Companies hold all material Governmental Authorizations necessary to enable the NetScout Companies to conduct their respective businesses in the manner in which such businesses are currently being conducted, including all Governmental Authorizations required under Environmental Laws, except where the failure to so hold would not, individually or in the aggregate, reasonably be expected to have a NetScout Material Adverse Effect. All such Governmental Authorizations are valid and in full force and effect. Each NetScout Company is, and at all times since January 1, 2012 has been, in compliance with the terms and requirements of such Governmental Authorizations, except where the failure to so comply would not, individually or in the aggregate, reasonably be expected to have a NetScout Material Adverse Effect.

## **3.13 Tax Matters.**

(a) Each material Tax Return required to be filed by or on behalf of the respective NetScout Companies with any Governmental Body with respect to any taxable period ending on or before the Closing Date (the **NetScout Company Returns**): (i) has been or will be filed on or before the applicable due date (including any extensions of such due date); and (ii) has been, or will be when filed, prepared in all material respects in compliance with all applicable Legal Requirements. All amounts shown on the NetScout Company Returns to be due on or before the Closing Date have been or will be paid on or before the Closing Date, except with respect to matters contested in good faith in appropriate proceedings and for which adequate reserves have been established in accordance with GAAP.

(b) To the Knowledge of NetScout, no NetScout Company and no NetScout Company Return is subject to an audit with respect to Taxes by any Governmental Body. No extension or waiver of the limitation period applicable to any of the NetScout Company Returns has been granted (by NetScout or any other Person), and no such extension or waiver has been requested from any NetScout Company.

(c) No claim or Legal Proceeding is pending or, to the Knowledge of NetScout, has been threatened against or with respect to any NetScout Company in respect of any material Tax. There are no unsatisfied liabilities for material Taxes with respect to any notice of deficiency or similar document received by any NetScout Company with respect to any material Tax (other than liabilities for Taxes asserted under any such notice of deficiency or similar document which are being contested in good faith by the NetScout Companies and with respect to which adequate reserves for payment have been established on the NetScout Interim Balance Sheet). There are no liens for material Taxes upon any of the NetScout Companies except liens for current Taxes not yet due and payable.

**(d)** No written claim has ever been made by any Governmental Body in a jurisdiction where a NetScout Company does not file a Tax Return that it is or may be subject to taxation by that jurisdiction which has resulted or could reasonably be expected to result in an obligation to pay material Taxes.

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- (e) There are no Contracts relating to the allocating, sharing or indemnification of Taxes to which any NetScout Company is a party, other than (i) the Tax Matters Agreement, and (ii) Contracts containing customary gross-up or indemnification provisions in credit agreements, derivatives, leases, and similar agreements entered into in the ordinary course of business.
- (f) No NetScout Company has constituted either a distributing corporation or a controlled corporation within the meaning of Section 355(a)(1)(A) of the Code.
- (g) No NetScout Company is or has been a U.S. real property holding corporation within the meaning of Section 897(c)(2) of the Code during the applicable period specified in Section 897(c)(1)(A)(ii) of the Code.
- (h) No NetScout Company has participated in, or is currently participating in, a listed transaction within the meaning of Treasury Regulation Section 1.6011-4(b).
- (i) The NetScout Companies have withheld and paid all material Taxes required to have been withheld and paid in connection with amounts paid or owing to any employee, independent contractor, creditor, shareholder or other person.
- (j) No NetScout Company has taken any action or knows of any fact that could reasonably be expected to prevent the Mergers from qualifying as a reorganization within the meaning of Section 368(a) of the Code.
- (k) This Section 3.13 contains the sole and exclusive representations and warranties of NetScout herein with respect to Tax matters.

**3.14 Employee and Labor Matters; Benefit Plans.**

- (a) Except as set forth in Part 3.14(a) of the NetScout Disclosure Letter or as would not reasonably be expected to result in material liability to NetScout: (i) as of the date of this Agreement, none of the NetScout Companies is a party to any collective bargaining agreement or other Contract with a labor organization, employee representative or works council representing any of its employees and there are no labor organizations, employee representatives or works councils representing, purporting to represent or, to the Knowledge of NetScout, seeking to represent any employees of any of the NetScout Companies; (ii) since January 1, 2012 through the date hereof, there has not been any material strike, slowdown, work stoppage, lockout, job action, picketing, labor dispute, question concerning representation, union organizing activity, or any threat thereof, or any similar activity or dispute, affecting any of the NetScout Companies or any of their employees; (iii) as of the date of this Agreement, there are no pending, and, to the Knowledge of NetScout, no Person has threatened to commence, any such strike, slowdown, work stoppage, lockout, job action or picketing; and (iv) as of the date of this Agreement, there is no material claim or grievance pending or, to the Knowledge of NetScout, threatened against any NetScout Company arising under any collective bargaining agreement or other Contract with a labor organization, employee representative or works council relating to any terms or conditions of employment.
- (b) Within 30 days after the date hereof, NetScout will deliver or make available to Danaher (to the extent not provided as of the date hereof) accurate and complete copies of, in each case with respect solely to any material NetScout Employee Plan or material NetScout Employee Agreement in effect as of the date of this Agreement in which any NetScout Associate is a beneficiary or a party, respectively: (i) all documents setting forth the terms of each such NetScout Employee Plan and NetScout Employee Agreement, including all amendments thereto and all related trust documents; (ii) the most recent summary plan description; (iii) the most recent annual reports (Form 5500s and all schedules and financial statements attached thereto), if any; and (iv) all material correspondence in its

possession regarding any such NetScout Employee Plan and NetScout Employee

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Agreement regarding any audit, investigation or proceeding before any Governmental Body regarding such NetScout Employee Plan or NetScout Employee Agreement or any fiduciary thereof; provided that, if NetScout uses commercially reasonable efforts to provide or make available any such document to Danaher, but it is not able to so deliver it within 30 days after the date hereof, it will provide or make available such document to Danaher within 60 days after the date hereof. NetScout will deliver or Make Available to Danaher an updated version of the list referenced in this Section 3.14(b) to reflect any applicable changes thereto within 90 days after the date hereof and periodically thereafter prior to the Closing Date, but in no event later than 60 days after the date on which the previous update is provided. NetScout has delivered or Made Available to Danaher an accurate and complete copy of the most recent IRS determination or opinion letter issued with respect to the NetScout Employee Plan intended to be qualified under Section 401(a) of the Code.

(c) Except as set forth in Part 3.14(c) of the NetScout Disclosure Letter or as would not reasonably be expected to result in material liability to NetScout, (i) each of the NetScout Companies and NetScout Affiliates has performed in all material respects all obligations required to be performed by it under each NetScout Employee Plan and NetScout Employee Agreement in respect of which any NetScout Associate is a beneficiary or a party, respectively, and each NetScout Employee Plan and NetScout Employee Agreement in respect of which any NetScout Associate is a beneficiary or a party has been established and maintained in all material respects in accordance with its terms and applicable Legal Requirements; (ii) as of the date of this Agreement, there are no material audits or inquiries pending or, to the Knowledge of NetScout, threatened by the IRS, the DOL or any other Governmental Body with respect to any such NetScout Employee Plan or NetScout Employee Agreement (or any fiduciary thereof) in respect of which any NetScout Associate is a beneficiary or a party; (iii) as of the date of this Agreement, there are no material actions, suits or claims pending, or to the Knowledge of NetScout, threatened or reasonably anticipated (other than routine claims for benefits) against any such NetScout Employee Plan or NetScout Employee Agreement, or against the assets of any such NetScout Employee Plan or NetScout Employee Agreement, of which any NetScout Associate is a beneficiary or a party; (iv) full and timely payment has been made of all material amounts which NetScout or its Affiliates or the NetScout Companies are required, under applicable law or under any NetScout Employee Plan or NetScout Employee Agreement, to have paid as a contribution or payment for any NetScout Associate, in respect of any NetScout Employee Plan or NetScout Employee Agreement, and all such contributions or payments for any period that are not yet due have been made, paid or properly accrued in accordance with GAAP applied on a consistent basis.

(d) Any NetScout Employee Plan in which any NetScout Employee is a beneficiary that is intended to be qualified under Section 401(a) of the Code has obtained a favorable determination letter (or opinion letter, if applicable) as to its qualified status under the Code.

(e) Except as set forth in Part 3.14(e) of the NetScout Disclosure Letter or as would not reasonably be expected to result in material liability to NetScout, (i) none of the NetScout Companies, and no NetScout Affiliate, has ever maintained, established, sponsored, participated in or contributed to any: (A) NetScout Pension Plan subject to Title IV of ERISA; (B) multiemployer plan within the meaning of Section (3)(37) of ERISA; or (C) plan described in Section 413 of the Code, in each case pursuant to which a Newco Employee is or was a beneficiary and (ii) no NetScout Employee Plan provides (except at no cost to the NetScout Companies or any NetScout Affiliate), or reflects or represents any liability of any of the NetScout Companies or any NetScout Affiliate to provide, post-termination or retiree life insurance, post-termination or retiree health benefits or other post-termination or retiree employee welfare benefits to any NetScout Employee, except as may be required by COBRA or other applicable Legal Requirements.

(f) Except as set forth in Part 3.14(f) of the NetScout Disclosure Letter or as would not reasonably be expected to result in material liability to NetScout, as relates to the NetScout Associates, none of the NetScout Companies has any obligation to compensate any Person for excise taxes payable pursuant to Section 4999 of the Code or for taxes

payable pursuant to Section 409A of the Code.

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(g) Except as set forth in Part 3.14(g) of the NetScout Disclosure Letter or as would not reasonably be expected to result in material liability to NetScout, NetScout and its Affiliates, including the NetScout Companies, are in compliance in all material respects with all Legal Requirements relating to terms and conditions of employment, employment practices, wages, hours, and other labor related matters with respect to the NetScout Employees.

(h) Except as set forth in Part 3.14(h) of the NetScout Disclosure Letter or as would not reasonably be expected to result in material liability to NetScout, each NetScout Employee Plan and NetScout Employee Agreement of which any NetScout Associate is a beneficiary or a party, respectively, that is a nonqualified deferred compensation plan (as defined under Section 409A of the Code) has been operated in compliance in all material respects with Section 409A of the Code and has complied in all material respects with applicable documentary requirements of Section 409A of the Code. No NetScout Equity Award has an exercise price that is less than the fair market value of the underlying stock or equity units (as the case may be) as of the date such option or right was granted, or has any feature for the deferral of compensation other than the deferral of recognition of income until the later of exercise or disposition of such option or right.

**3.15 Environmental Matters.** The NetScout Companies have complied with all Environmental Laws except where any such noncompliance would, individually or in the aggregate, be reasonably expected to have a NetScout Material Adverse Effect. No NetScout Company has released, handled, generated, used, stored, transported or disposed of any Hazardous Materials except where any such release, handling, generation, use, storage, transport or disposal would not, individually or in the aggregate, be reasonably expected to have a NetScout Material Adverse Effect. NetScout has no Knowledge of any environmental investigation, study, test or analysis, the purpose of which was to discover, identify, or otherwise characterize the condition of the soil, groundwater, air or the presence of Hazardous Materials at any location at which the business of the NetScout Companies has been conducted. The NetScout Companies have no Environmental Liabilities that would reasonably be expected to have a NetScout Material Adverse Effect.

**3.16 Insurance.** Except as would not reasonably be expected to have, individually or in the aggregate, a NetScout Material Adverse Effect, each insurance policy and self-insurance program and arrangement relating to the business of the NetScout Companies, the NetScout Companies is in full force and effect.

### **3.17 Legal Proceedings; Orders.**

(a) Except as set forth in Part 3.17(a) of the NetScout Disclosure Letter, there is no material pending and served Legal Proceeding affecting the NetScout Companies, or (to the Knowledge of NetScout) any pending but not served Legal Proceeding affecting the NetScout Companies and no Person has threatened to commence any material Legal Proceeding affecting the NetScout Companies.

(b) There is no Order to which any of the NetScout Companies is subject. To the Knowledge of NetScout, no officer or other key employee of any of the NetScout Companies is subject to any Order that prohibits such officer or other employee from engaging in or continuing any conduct, activity or practice relating to the business of the NetScout Companies.

**3.18 Authority; Binding Nature of Agreement.** Each of NetScout and Merger Subs have all requisite corporate or limited liability company, as applicable, right, power and authority to enter into and perform their respective obligations under this Agreement, the Distribution Agreement and the other Transaction Documents, as applicable, to which it is a party and, subject to obtaining the Required NetScout Stockholder Vote and the Required Merger Sub Stockholder Vote, respectively, to consummate the Contemplated Transactions. The NetScout Board (at a meeting duly called and held) and NetScout, as the sole stockholder of Merger Sub and as the sole member of Merger Sub II, have: (a) determined that this Agreement and the Mergers are advisable and fair to, and in the best interests of,

NetScout and its stockholders and (b) authorized and approved the execution, delivery and performance of this Agreement by NetScout and the issuance of shares of NetScout Common Stock pursuant to this Agreement; and (c) recommended the approval of the issuance of the NetScout Common Stock

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pursuant to this Agreement for purposes of Nasdaq Listing Rule 5635 by the holders of NetScout Common Stock and directed that the issuance of such shares be submitted for consideration by NetScout's stockholders at the NetScout Stockholders Meeting. Assuming the due authorization, execution and delivery of this Agreement by Danaher and Newco, this Agreement constitutes a legal, valid and binding obligation of each of NetScout and Merger Subs, enforceable against each of NetScout and Merger Subs in accordance with its terms, subject to: (i) laws of general application relating to bankruptcy, insolvency, the relief of debtors and creditors' rights generally; and (ii) rules of law governing specific performance, injunctive relief and other equitable remedies.

**3.19 Ownership of Danaher Common Stock.** None of NetScout or, to the Knowledge of NetScout, any of its respective affiliates or associates is or has been an interested stockholder (as defined in Section 203 of the DGCL) with respect to Danaher.

**3.20 Vote Required.** The only vote of NetScout's stockholders required to consummate the Contemplated Transactions is the affirmative vote of the holders of a majority of the shares of NetScout Common Stock present in person or by proxy at the NetScout Stockholders Meeting in favor of the approval of the issuance of the NetScout Common Stock pursuant to this Agreement for the purpose of approving such issuance pursuant to Nasdaq Listing Rule 5635 (the **Required NetScout Stockholder Vote**). The affirmative vote of the holders of a majority of the voting power of the shares of common stock of Merger Sub (the **Required Merger Sub Stockholder Vote**) is the only vote of the holders of any class or series of Merger Sub's capital stock necessary to adopt this Agreement or consummate the Contemplated Transactions. NetScout is the sole stockholder of record of Merger Sub. NetScout shall, in its capacity as sole stockholder of Merger Sub, adopt this Agreement and approve the First Merger by written consent as soon as practicable following execution and delivery of this Agreement.

**3.21 Non-Contravention; Consents.** Assuming compliance with the applicable provisions of the DGCL, the DLLCA, the HSR Act and all applicable foreign competition act filings, the listing requirements of the NASDAQ Global Select Market and the requirements of the New York Stock Exchange, except as set forth in Part 3.21 of the NetScout Disclosure Letter, neither (1) the execution, delivery or performance of this Agreement, nor (2) the consummation of the Mergers or any of the other Contemplated Transactions, will, directly or indirectly (with or without notice or lapse of time):

(a) contravene, conflict with or result in a violation of any of the provisions of the certificate of incorporation, bylaws, certificate of formation, limited liability company operating agreement, or other charter or organizational documents of any of the NetScout Companies;

(b) contravene, conflict with or result in a violation of, any Legal Requirement or any Order to which any of the NetScout Companies, or any of the assets owned or used by any of the NetScout Companies, is subject, except where such contravention, conflict or violation, individually or in the aggregate, would not reasonably be expected to have a NetScout Material Adverse Effect;

(c) contravene, conflict with or result in a violation of any of the terms or requirements of, or give any Governmental Body the right to revoke, withdraw, suspend, cancel, terminate or modify, any Governmental Authorization that is held by any of the NetScout Companies or that otherwise relates to the business of the NetScout Companies or to any of the assets owned or used by any of the NetScout Companies, except where such contravention, conflict, violation, revocation, withdrawal, suspension, cancellation, termination or modification, individually or in the aggregate, would not reasonably be expected to have a NetScout Material Adverse Effect;

(d) contravene, conflict with or result in a violation or breach of, or result in a default under, any provision of any NetScout Material Contract, or give any Person the right to: (i) declare a default or exercise any remedy under any

such NetScout Material Contract; (ii) accelerate the maturity or performance of any such NetScout Material Contract; or (iii) cancel, terminate or modify any right, benefit, obligation or other term of

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such NetScout Material Contract, except where such contravention, conflict, violation or default, individually or in the aggregate, would not reasonably be expected to be material to any of the NetScout Companies; or

(e) result in the imposition or creation of any material Encumbrance (other than a Permitted Encumbrance) upon or with respect to any asset owned or used by any of the NetScout Companies, except where such contravention, conflict, violation or default, individually or in the aggregate, would not reasonably be expected to be material to any of the NetScout Companies.

Except as may be required by the Securities Act, the Exchange Act, state securities laws or blue sky laws, the DGCL, the DLLCA, the HSR Act, all applicable foreign competition act filings, the listing requirements of the NASDAQ Global Select Market and the requirements of the New York Stock Exchange, neither NetScout nor any of the NetScout Companies is or will be required to make any filing with or give any notice to, or to obtain any Consent from, any Governmental Body in connection with: (x) the execution, delivery or performance of this Agreement; or (y) the consummation of the Mergers or any of the other Contemplated Transactions, except where the failure to make any such filing or give any such notice or to obtain any such Consent would not, individually or in the aggregate, be material to the NetScout Companies.

**3.22 Financial Advisor.** Except as set forth in Part 3.22 of the NetScout Disclosure Letter, no broker, finder or investment banker is entitled to any brokerage, finder's or other fee or commission in connection with the Mergers or any of the other Contemplated Transactions based upon arrangements made by or on behalf of NetScout or any of its Subsidiaries.

**3.23 Valid Issuance.** The NetScout Common Stock to be issued pursuant to the First Merger has been duly authorized and, when issued in accordance with the provisions of this Agreement, be validly issued, fully paid and nonassessable and will not be subject to any restriction on resale under the Securities Act, other than restrictions imposed by Rules 144 and 145 under the Securities Act.

**3.24 Acknowledgement by NetScout.** Neither NetScout, Merger Sub nor Merger Sub II is relying or has relied on any representations or warranties whatsoever regarding the subject matter of this Agreement, express or implied, except for the representations and warranties in Section 2. The representations and warranties by Danaher and Newco contained in Section 2 constitute the sole and exclusive representations and warranties of Danaher, the Communications Companies and their respective Representatives in connection with the Contemplated Transactions and each of NetScout and the Merger Subs understand, acknowledge and agree that all other representations and warranties of any kind or nature whether express, implied or statutory are specifically disclaimed by Danaher.

**3.25 Merger Subs.** Each Merger Sub was formed solely for the purpose of engaging in the Contemplated Transactions and has not engaged in any business activities or conducted any operations other than in connection with the Contemplated Transactions.

## **4. CERTAIN COVENANTS OF THE PARTIES REGARDING OPERATIONS DURING THE PRE-CLOSING PERIOD**

**4.1 Access and Investigation.** During the period commencing on the date of this Agreement and ending as of the earlier of the termination of this Agreement or the Effective Time (the **Pre-Closing Period**), subject to applicable Legal Requirements, upon reasonable notice Danaher and NetScout shall each, and shall cause each of their respective Subsidiaries to: (i) provide the Representatives of the other party with reasonable access during normal business hours (insofar as such access is reasonably required by the requesting party) to its Representatives and assets and to all existing books, records, Tax Returns, work papers and other documents and information relating to such Entity or any

of its Subsidiaries (but in the case of Danaher and its Subsidiaries, solely as it relates to the Communications Business or the Communications Companies), in each case as reasonably requested by NetScout or Danaher, as the case may be; and (ii) provide the Representatives of the

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other party with such copies of the existing books, records, Tax Returns, work papers and other documents and information relating to such Entity and its Subsidiaries (but in the case of Danaher and its Subsidiaries, solely as it relates to the Communications Business or the Communications Companies) as reasonably requested by NetScout or Danaher, as the case may be. During the Pre-Closing Period, Danaher and NetScout shall, and shall use reasonable best efforts to cause their respective Representatives to, cause their senior officers to meet, upon reasonable notice and during normal business hours, with their respective officers responsible for Danaher's and NetScout's financial statements and the internal controls, respectively, to discuss such matters as Danaher or NetScout may deem necessary or appropriate in order to enable NetScout to comply following the Closing with the Sarbanes-Oxley Act and the rules and regulations relating thereto. Subject to [Section 5.3](#) and without limiting the generality of any of the foregoing, during the Pre-Closing Period, Danaher and NetScout shall provide the other with copies of any notice, report or other document filed with or sent to any Governmental Body on behalf of any of the Communications Companies or the NetScout Companies, respectively, in connection with the Mergers or any of the other Contemplated Transactions a reasonable time in advance of the filing or sending of such document in order to permit a review thereof. Nothing herein shall require Danaher or NetScout to disclose any information if such disclosure would jeopardize any attorney-client privilege or contravene any applicable Legal Requirement or binding agreement entered into prior to the date of this Agreement; provided that the parties shall cooperate to disclose such information to the extent possible without jeopardizing such privilege or contravening such Legal Requirements or binding agreements. All information exchanged pursuant to this [Section 4.1](#) shall be subject to the Confidentiality Agreement.

#### **4.2 Operation of the Business of the Communications Companies.**

(a) During the Pre-Closing Period, except as set forth in Part 4.2(a) of the Danaher Disclosure Letter, as otherwise contemplated by this Agreement, the Distribution Agreement (including, for the avoidance of doubt, the Internal Restructuring, the Newco Transfer, the transfer or advance of Excluded Assets (including cash) and Excluded Liabilities, and the Distribution, each as described therein), any other Transaction Document, as required by Legal Requirements or if NetScout shall otherwise consent in writing (which consent shall not be unreasonably withheld, conditioned or delayed): (i) Danaher shall use its commercially reasonable efforts to ensure that the Communications Companies conduct their business and operations in the ordinary course in all material respects; and (ii) to the extent consistent therewith, Danaher shall use its commercially reasonable efforts to ensure that the Communications Companies preserves intact the material components of its current business organization (it being understood that Danaher shall not have any requirement to pay retention bonuses or similar arrangements without NetScout's agreement to reimburse Danaher), and maintains its relations and goodwill in all material respects with all material suppliers, material customers, material licensors, and Governmental Bodies, in each case solely with respect to the Communications Business; provided, however, that no action by Danaher or any of its Subsidiaries with respect to matters specifically addressed by any provision of [Section 4.2\(b\)](#) shall be deemed a breach of this sentence unless such action would constitute a breach of such other provision.

(b) During the Pre-Closing Period, Danaher shall take all actions described in Part 4.2(b)(1) of the Danaher Disclosure Letter. Except as set forth in Part 4.2(b)(2) of the Danaher Disclosure Letter, during the Pre-Closing Period, Danaher shall not (solely as it relates to the Communications Business or the Communications Companies), and Danaher shall ensure that Danaher and each of the Communications Companies does not (in each case, except as otherwise contemplated by this Agreement, the Distribution Agreement (including, for the avoidance of doubt, the Internal Restructuring, the Newco Transfer, the transfer or advance of Excluded Assets (including cash) and Excluded Liabilities, and the Distribution, each as described therein), any other Transaction Document, as required by Legal Requirements or with the prior written consent of NetScout, which consent shall not be unreasonably withheld, conditioned or delayed):

(i) sell, issue, grant, authorize the sale, issuance or grant of, or publicly announce its intention to sell, issue, or grant: (A) any capital stock or other security to any Newco Employee; (B) any option, call, warrant or right to acquire any capital stock or other security to any Newco Employee; or (C) any instrument convertible into or exchangeable for any capital stock or other

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security to any Newco Employee, in each case, which would constitute Danaher Equity Awards (except that: (1) Danaher may issue shares of Danaher Common Stock upon the valid exercise of Danaher Options or upon the vesting of any Danaher RSUs, in each case outstanding as of the date of this Agreement or granted in accordance with clause (2); and (2) Danaher may (x) make grants of Danaher Equity Awards to Newco Employees in November 2014 as previously disclosed to NetScout, (y) make grants of Danaher Equity Awards of up to 100,000 additional shares of Danaher Common Stock to Newco Employees and (z) make grants to Newco Employees in respect of a number of shares of Danaher Common Stock underlying Danaher Equity Awards that, on or after the date hereof, are either forfeited without a delivery of Danaher Common Stock, tendered as payment for the exercise of a Danaher Option or withheld from delivery to satisfy applicable Taxes in respect of the Danaher Equity Award; provided that if the Closing Date has not occurred by August 4, 2015, Danaher may continue to make ordinary course grants of Danaher Equity Awards to Newco Employees irrespective of the limitations set forth in this clause (i));

(ii) with respect to any Danaher Equity Awards, except as otherwise required by the terms of any Danaher Employee Plan or Danaher Employee Agreement or as otherwise permitted by clause (i), (A) amend or waive any of its rights under, or accelerate the vesting under, any provision of any of the Danaher Option Plans, (B) amend any provision of any agreement evidencing any outstanding stock option, restricted stock grant, or any restricted stock unit purchase agreement, or (C) otherwise modify any of the terms of any outstanding option, restricted stock agreement, restricted stock unit, warrant or other security or any related Contract;

(iii) amend or permit the adoption of any amendment to the certificate of incorporation, bylaws, certificate of formation, limited liability company operating agreement, or other charter or organizational documents of any Communications Company;

(iv) with respect to the Communications Business, make or commit to make any capital expenditure outside the ordinary course of business (except that the Communications Companies may make any capital expenditure that: (A) is provided for in such Communications Company's capital expense budget delivered to NetScout prior to the date of this Agreement; or (B) when added to all other capital expenditures made on behalf of all of the Communications Companies since the date of this Agreement but not provided for in the Communications Companies' capital expense budgets delivered to NetScout prior to the date of this Agreement, does not exceed \$5,000,000 in the aggregate per calendar quarter);

(v) other than in the ordinary course of business, amend, terminate, or waive any material right or remedy under, any Newco Material Contract or any other Contract that is material to the Communications Companies (taken as a whole), other than termination thereof upon the expiration of any such Contract in accordance with its terms or upon a material breach thereof by the counterparty thereto;

(vi) establish, adopt, enter into or amend any Danaher Employee Plan or Danaher Employee Agreement of which any Newco Employee is a beneficiary or a party, pay any bonus or make any profit-sharing or similar payment to, pay any severance, retention or change-of-control or similar benefits, or increase the compensation payable to, any Newco Employees (except that Danaher (A) may take any such actions to the extent either contemplated by the Employee Matters Agreement or as required by applicable Legal Requirements or the terms of any Danaher Employee Plan or Danaher Employee Agreement as in effect as of the date of this Agreement; (B) may make grants of Danaher Equity Awards in accordance with clause (i); (C) may amend applicable Danaher Employee Plans in a manner that either applies to all employees of Danaher in the applicable jurisdiction generally or would not reasonably be expected to result in material liability to NetScout; (D) may make bonus payments and profit sharing payments to Newco Employees in the ordinary course of business consistent with past practice; (E) may enter into compensation arrangements with any prospective Newco Employee in the ordinary course of

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business consistent with past practice; and (F) may increase the amount of compensation payable in connection with the promotion of any Newco Employee in the ordinary course of business consistent with past practice);

(vii) with respect to the Communications Business, acquire any equity interest or other interest in any other Entity or acquire, lease or license any right or other asset from any other Person or sell or otherwise dispose of, or lease or license, any right or other asset to any other Person (except in each case for: (A) assets acquired, leased, licensed or disposed of by the Communications Companies in the ordinary course of business; (B) assets that are immaterial to the business of the Communications Companies; (C) sales of inventory or other assets in the ordinary course of business; or (D) acquisitions (together with acquisitions pursuant to clause (iv) above) for cash consideration that does not exceed \$50,000,000 in the aggregate);

(viii) make any pledge of any of the Newco Assets or permit any of the Newco Assets to become subject to any Encumbrances, other than Permitted Encumbrances;

(ix) with respect to the Communications Companies, lend money to any Person (other than (i) routine travel and business expense advances made to directors or employees in the ordinary course of business, or (ii) loans to Danaher or any of its Subsidiaries), or, except as set forth in Part 4.2(b)(ix) of the Danaher Disclosure Letter, incur or guarantee any indebtedness in excess of \$5,000,000 in the aggregate;

(x) with respect to the Communications Companies or the Communications Business, other than (A) in the ordinary course of business and consistent with past practices, (B) changes made by Danaher with respect to both the Communications Business and one or more of its other businesses or (C) as required by concurrent changes in GAAP or SEC rules and regulations, change any of its methods of accounting or accounting practices in any respect;

(xi) with respect to the Communications Companies or the Communications Business, except as permitted pursuant to Section 5.12 or as would not, individually or in the aggregate, reasonably be expected to have a Newco Material Adverse Effect, settle any Legal Proceeding or other material claim;

(xii) take any action that would reasonably be expected to cause the Mergers to fail to qualify as a reorganization under Section 368(a) of the Code (whether or not otherwise permitted by the provisions of this Section 4.2); or

(xiii) agree or commit to take any of the actions described in clauses (i) through (xii) of this Section 4.2(b).

(c) During the Pre-Closing Period, Danaher shall promptly notify NetScout in writing of any event, condition, fact or circumstance that would reasonably be expected to make the timely satisfaction of any of the conditions set forth in Section 6 impossible or that has had or would reasonably be expected to have or result in a Newco Material Adverse Effect. Without limiting the generality of the foregoing, Danaher shall promptly: (i) advise NetScout in writing of any Legal Proceeding or claim threatened, commenced or asserted against or with respect to any of the Communications Business, Newco Assets or Communications Companies that is material to the Communications Business, taken as a whole, and (ii) provide copies to NetScout of any letters, notices or other written communications from any Governmental Body that it receives during the Pre-Closing Period that are material to the Communications Business, taken as a whole. No notification given to NetScout pursuant to this Section 4.2(c) shall limit or otherwise affect any of the representations, warranties, covenants or obligations of Danaher contained in this Agreement or the conditions to the obligations of the parties under this Agreement; provided however, that a failure to comply with this Section 4.2(c) will not constitute the failure of any condition set forth in Section 6 to be satisfied unless the underlying event, condition, fact or circumstance would independently result in the failure of a condition set forth in Section 6 to be satisfied.

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**4.3 Operation of the Business of the NetScout Companies.**

(a) During the Pre-Closing Period, except as set forth in Part 4.3(a) of the NetScout Disclosure Letter, as otherwise contemplated by this Agreement, the other Transaction Documents, as required by Legal Requirements or if Danaher shall otherwise consent in writing (which consent shall not be unreasonably withheld, conditioned or delayed):

(i) NetScout shall use its commercially reasonable efforts to ensure that the NetScout Companies conducts its business and operations in the ordinary course in all material respects; (ii) to the extent consistent therewith, NetScout shall use its commercially reasonable efforts to ensure that the NetScout Companies preserves intact the material components of its current business organization, and maintains its relations and goodwill in all material respects with all material suppliers, material customers, material licensors, and Governmental Bodies; and (iii) NetScout shall promptly notify Danaher of any claim asserted or Legal Proceeding commenced, or, to NetScout's Knowledge, threatened in writing by a third Person, against, relating to, involving or otherwise affecting any of the NetScout Companies that relates to any of the Contemplated Transactions; provided, however, that no action by NetScout or any of its Subsidiaries with respect to matters specifically addressed by any provision of Section 4.3(b) shall be deemed a breach of this sentence unless such action would constitute a breach of such other provision.

(b) Except as set forth in Part 4.3(b) of the NetScout Disclosure Letter, during the Pre-Closing Period, NetScout shall not, and NetScout shall ensure that each of the other NetScout Companies does not (in each case, except as otherwise contemplated by this Agreement, the other Transaction Documents, as required by Legal Requirements or with the prior written consent of Danaher, which consent shall not be unreasonably withheld, conditioned or delayed):

(i) declare, accrue, set aside or pay any dividend or make any other distribution in respect of any shares of capital stock or other securities, or repurchase, redeem or otherwise reacquire any shares of capital stock or other securities, other than: (A) dividends or distributions between or among any of the NetScout Companies to the extent consistent with past practices; (B) pursuant to NetScout's right to purchase restricted shares of NetScout Common Stock held by an employee of, or other service provider to, NetScout upon termination of such individual's employment or service or upon the cashless or net exercise of outstanding NetScout Options or to satisfy withholding obligations upon vesting or exercise of equity awards or (C) pursuant to NetScout's stock repurchase programs to the extent consistent with past practices;

(ii) sell, issue, grant, authorize the sale, issuance or grant of, or publicly announce its intention to sell, issue, or grant: (A) any capital stock or other security; (B) any option, call, warrant or right to acquire any capital stock or other security; or (C) any instrument convertible into or exchangeable for any capital stock or other security (except that NetScout may: (1) issue shares of NetScout Common Stock pursuant to Section 4.3(b)(v); (2) issue shares of NetScout Common Stock: (a) upon the valid exercise of NetScout Options or upon the vesting of any NetScout RSUs, in each case outstanding as of the date of this Agreement; and (b) pursuant to the NetScout ESPP); and (3) in the ordinary course of business and consistent with past practices, grant NetScout Equity Awards under the NetScout Option Plans; provided that such NetScout Equity Awards may not exceed 1,000,000 shares of NetScout Common Stock in the aggregate under the NetScout Option Plans);

(iii) amend or permit the adoption of any amendment to its certificate of incorporation or bylaws or other charter or organizational documents in any event to the extent reasonably likely to adversely affect the Contemplated Transactions;

(iv) make any capital expenditure outside the ordinary course of business (except that the NetScout Companies may make any capital expenditure that: (A) is provided for in NetScout's capital expense budget delivered to Danaher prior to the date of this Agreement; or (B) when added to all other capital expenditures made on behalf of all of the NetScout Companies since the date of this Agreement but not provided for in NetScout's capital expense budget

delivered to Danaher prior to the date of this Agreement, does not exceed \$5,000,000 in the aggregate);

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(v) acquire any equity interest or other interest in any other Entity; provided that NetScout shall not be prohibited from any such acquisitions or acquire, lease or license any right or other asset from any other Person or sell or otherwise dispose of, or lease or license, any right or other asset to any other Person (except in each case for: (A) assets acquired, leased, licensed or disposed of by NetScout in the ordinary course of business; (B) assets that are immaterial to the business of the NetScout Companies; (C) sales of inventory or other assets in the ordinary course of business; or (D) acquisitions (1) for consideration that does not exceed \$50,000,000 in the aggregate) or (2) for equity consideration that do not exceed 450,000 shares of NetScout Common Stock in the aggregate (provided, however, that the fair value of any such equity consideration shall also be counted for purposes of measuring whether the amounts in clause (1) have been exceeded);

(vi) establish, adopt, enter into or amend any NetScout Employee Plan or NetScout Employee Agreement, pay any bonus or make any profit-sharing or similar payment to, pay any severance, retention or change-of-control or similar benefits, or increase the compensation payable to, any NetScout Employees (except that NetScout (A) may take any such actions to the extent required by applicable Legal Requirements or the terms of any NetScout Employee Plan or NetScout Employee Agreement as in effect as of the date of this Agreement; (B) may make grants of NetScout Equity Awards in accordance with clause (ii); (C) may increase the compensation of NetScout Employees in the ordinary course of business consistent with past practice; (D) may make bonus payments and profit sharing payments to NetScout Employees in the ordinary course of business consistent with past practice; (E) may enter into compensation arrangements with any prospective NetScout Employees in the ordinary course of business consistent with past practice; and (F) may increase the amount of compensation payable in connection with the promotion of any NetScout Employee in the ordinary course of business consistent with past practice);

(vii) make any pledge of any of its material assets or permit any of its material assets to become subject to any Encumbrances, in each case other than in the ordinary course of business, other than pursuant to the Debt Financing;

(viii) lend money to any Person (other than routine travel and business expense advances made to directors or employees in the ordinary course of business), or, except in the ordinary course of business and consistent with past practices, incur or guarantee any indebtedness in excess of \$5,000,000 in the aggregate (other than the Debt Financing);

(ix) other than in the ordinary course of business and consistent with past practices or as required by concurrent changes in GAAP or SEC rules and regulations, change any of its methods of accounting or accounting practices in any respect;

(x) except as permitted pursuant to Section 5.12 or as would not, individually or in the aggregate, reasonably be expected to have a NetScout Material Adverse Effect, settle any Legal Proceeding or other material claim;

(xi) take any action that would reasonably be expected to cause the Mergers to fail to qualify as a reorganization under Section 368(a) of the Code (whether or not otherwise permitted by the provisions of this Section 4.3); or

(xii) agree or commit to take any of the actions described in clauses (i) through (xi) of this Section 4.3(b).

(c) During the Pre-Closing Period, NetScout shall promptly notify Danaher in writing of any event, condition, fact or circumstance that would reasonably be expected to make the timely satisfaction of any of the conditions set forth in Section 7 impossible or that has had or would reasonably be expected to have or result in a NetScout Material Adverse Effect. No notification given to Danaher pursuant to this Section 4.3(c) shall limit or otherwise affect any of the representations, warranties, covenants or obligations of NetScout contained in this Agreement or the conditions to the obligations of the parties under this Agreement; provided,

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however, that a failure to comply with this Section 4.3(c) will not constitute the failure of any condition set forth in Section 7 to be satisfied unless the underlying event, condition, fact or circumstance would independently result in the failure of a condition set forth in Section 7 to be satisfied.

**4.4 Control of Other Party's Business.** Nothing contained in this Agreement shall give Danaher or Newco, directly or indirectly, the right to control or direct NetScout's operations prior to the Effective Time. Nothing contained in this Agreement shall give NetScout, directly or indirectly, the right to control or direct the operations of the Communications Business, or the business of Newco and the Communications Companies prior to the Effective Time. Prior to the Effective Time, each of Danaher, Newco and NetScout shall exercise, consistent with the terms and conditions of this Agreement, complete control and supervision over its respective operations.

**4.5 No Solicitation.**

(a) During the Pre-Closing Period, Danaher shall not, directly or indirectly, and Danaher shall cause its Subsidiaries and use its reasonable best efforts to cause the respective Representatives of Danaher and the Communications Companies not to, directly or indirectly:

(i) solicit, initiate, knowingly encourage or knowingly facilitate the making, submission or announcement of any Acquisition Proposal with respect to the Communications Business, the Newco Assets or a Communications Company or Acquisition Inquiry with respect to the Communications Business, the Newco Assets or a Communications Company;

(ii) furnish any information regarding the Communications Business, any of the Newco Assets or any of the Communications Companies to any Person in connection with or in response to an Acquisition Proposal with respect to the Communications Business, the Newco Assets or a Communications Company or Acquisition Inquiry with respect to the Communications Business, the Newco Assets or a Communications Company;

(iii) engage in discussions or negotiations with any Person relating to any Acquisition Proposal with respect to the Communications Business, the Newco Assets or a Communications Company or Acquisition Inquiry with respect to the Communications Business, the Newco Assets or a Communications Company;

(iv) approve, endorse or recommend any Acquisition Proposal with respect to the Communications Business, the Newco Assets or a Communications Company or Acquisition Inquiry with respect to the Communications Business, the Newco Assets or a Communications Company; or

(v) enter into any letter of intent or similar document or any Contract contemplating or otherwise relating to any Acquisition Transaction or Acquisition Inquiry with respect to the Communications Business, the Newco Assets or a Communications Company.

*provided, however,* that nothing in this Agreement shall preclude Danaher from considering, engaging in any discussions or negotiations regarding, or furnishing to any Person any information in connection with or in furtherance of, or entering into any agreement providing for or in connection with, any Acquisition Proposal with respect to Danaher, its Subsidiaries, assets or businesses (other than the Communications Business, the Newco Assets or a Communications Company), so long as such agreement (i) provides for the acquisition by a third party, directly or indirectly, of outstanding shares of Danaher Common Stock or assets of one or more other businesses of Danaher (other than the Communications Business, the Newco Assets or a Communications Company), (ii) does not contemplate the termination of this Agreement and (iii) would not prevent or materially impair Danaher from complying with its obligations hereunder or consummating the Contemplated Transactions.

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(b) During the Pre-Closing Period, NetScout shall not, directly or indirectly, and NetScout shall cause its Subsidiaries and use its reasonable best efforts to cause the respective Representatives of the NetScout Companies not to, directly or indirectly:

(i) solicit, initiate, knowingly encourage or knowingly facilitate the making, submission or announcement of any Acquisition Proposal with respect to NetScout or Acquisition Inquiry with respect to NetScout;

(ii) furnish any information regarding any of the NetScout Companies to any Person in connection with or in response to an Acquisition Proposal with respect to NetScout or Acquisition Inquiry with respect to NetScout;

(iii) engage in discussions or negotiations with any Person relating to any Acquisition Proposal with respect to NetScout or Acquisition Inquiry with respect to NetScout;

(iv) approve, endorse or recommend any Acquisition Proposal with respect to NetScout or Acquisition Inquiry with respect to NetScout; or

(v) enter into any letter of intent or similar document or any Contract contemplating or otherwise relating to any Acquisition Transaction or Acquisition Inquiry with respect to NetScout.

*provided, however*, that prior to the approval of the issuance of shares of NetScout Common Stock pursuant to the First Merger by the Required NetScout Stockholder Vote (and in no event after obtaining the Required NetScout Stockholder Vote), this Section 4.5(b) shall not prohibit NetScout from furnishing information regarding the NetScout Companies (it being understood that in no event shall any of the NetScout Companies or their respective Representatives furnish any information regarding Danaher or any of its Subsidiaries (including the Communications Companies) or the Communications Business) to, or entering into discussions and negotiations with, any Person in response to a bona fide Acquisition Proposal made after the date of this Agreement that is submitted to NetScout by such Person (and not withdrawn) which after consultation with its financial advisor and outside legal counsel, the NetScout Board determines in good faith is, or is reasonably expected to, result in a NetScout Superior Offer if: (A) such Acquisition Proposal did not result from any material breach of any of the provisions set forth in this Section 4.5(b); (B) the NetScout Board concludes in good faith, after having consulted with its outside legal counsel, that failure to take such action would be reasonably likely to constitute a breach of the fiduciary duties of the NetScout Board to NetScout's stockholders under applicable Legal Requirements; (C) prior to furnishing any such information to such Person, NetScout receives from such Person an executed confidentiality agreement containing customary provisions (including nondisclosure provisions, use restrictions and non-solicitation provisions) at least as favorable to NetScout as the provisions of the Confidentiality Agreement as in effect immediately prior to the execution of this Agreement and allows for NetScout to comply with its obligations in this Agreement; (D) NetScout gives Danaher written notice of the identity of such Person and (E) NetScout furnishes or Makes Available such information to Danaher (to the extent such information has not been previously furnished or Made Available by NetScout to Danaher) prior to or substantially concurrent with the time it is provided or made available to such Person.

(c) Each of NetScout and Danaher shall promptly (and in no event later than 24 hours after receipt of any Acquisition Proposal with respect to either (i) the Communications Business, the Newco Assets or a Communications Company or (ii) NetScout, as the case may be, or Acquisition Inquiry with respect to either (x) the Communications Business, the Newco Assets or a Communications Company or (y) NetScout, as the case may be) advise the other party to this Agreement orally and in writing of any such Acquisition Proposal or Acquisition Inquiry (including the identity of the Person making or submitting such Acquisition Proposal or Acquisition Inquiry and the terms thereof, including a copy of any written Acquisition Proposal or Acquisition Inquiry and any other documentation in respect of such Acquisition Proposal or Acquisition Inquiry received from the proponent thereof or its Representative) that is made or

submitted by any Person during the Pre-Closing Period. Each party receiving an Acquisition Proposal or Acquisition Inquiry shall keep the other party reasonably informed on a reasonably prompt basis with respect to: (i) the status of any such Acquisition Proposal or Acquisition Inquiry, including, with respect to an Acquisition Proposal or Acquisition Inquiry received by

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NetScout only, any negotiations with respect thereto; and (ii) the status and terms of any material modification or proposed material modification thereto, including copies of any written materials (including e-mail correspondence) received from the proponent thereof or its Representative in connection with any such Acquisition Proposal or Acquisition Inquiry.

(d) Each of NetScout and Danaher shall, and shall cause their respective Subsidiaries and Representatives to, immediately cease and cause to be terminated any discussions conducted on or before the date of this Agreement with any Person that relate to any Acquisition Proposal with respect to either (i) the Communications Business, the Newco Assets or a Communications Company or (ii) NetScout, as the case may be, or Acquisition Inquiry with respect to either (x) the Communications Business, the Newco Assets or a Communications Company or (y) NetScout, as the case may be, and request the prompt return or destruction of all confidential information previously furnished.

(e) Each of NetScout and Danaher (solely with respect to the Communications Business, the Newco Assets and the Communications Companies) agrees not to release or permit the release of any Person from, or to waive or permit the waiver of any provision of, any confidentiality, non-solicitation, no hire, standstill or similar Contract to which any such party or any of its Subsidiaries is a party or under which any such party or any of its Subsidiaries has any rights, and will use its reasonable efforts to cause each such agreement to be enforced at the request of the other party to this Agreement except, in the case of NetScout, to the extent that the NetScout Board determines in good faith, after having consulted with its outside legal counsel, that failure to take such action would be reasonably likely to constitute a breach of the fiduciary duties of the NetScout Board to its stockholders under applicable Legal Requirements.

## **5. ADDITIONAL COVENANTS AND AGREEMENTS OF THE PARTIES**

### **5.1 Registration Statement; Proxy Statement/Prospectus.**

(a) As promptly as practicable after the date hereof, Danaher shall cause to be prepared the financial statements contemplated by Section 5.13(a) and as promptly as practicable after the date such financial statements are delivered to NetScout, (i) NetScout shall cause to be filed with the SEC the NetScout Form S-4 Registration Statement, in which the Proxy Statement/Prospectus will be included as a prospectus; (ii) Danaher shall cause to be filed with the SEC a registration statement on Form 10 or a registration statement on Form S-1/S-4, as applicable (either, and together with any amendments, supplements, prospectus or information statements thereto, the **Newco Registration Statements**) to register the Newco Common Units to be distributed in the Distribution; (iii) promptly after the NetScout Form S-4 Registration Statement and the Newco Registration Statements have been declared effective, Danaher shall file with the SEC a Schedule TO (together with any amendments thereto, the **Schedule TO**) if Danaher elects to effect the Distribution in whole or in part by means of an Exchange Offer (as defined in the Distribution Agreement); and (iv) NetScout and Danaher shall file such other appropriate documents with the SEC as may be applicable. Each of NetScout and Danaher shall: (A) cause the NetScout Form S-4 Registration Statement, the Proxy Statement/Prospectus, the Newco Registration Statements and the Schedule TO to comply with the applicable rules and regulations promulgated by the SEC; (B) promptly notify the other of, cooperate with each other with respect to, provide the other party (and its counsel) with a reasonable opportunity to review and comment on, and respond promptly to any comments of the SEC or its staff with respect to the NetScout Form S-4 Registration Statement, the Proxy Statement/Prospectus, the Newco Registration Statements or the Schedule TO; (C) provide the other party (and its counsel) with a reasonable opportunity to review and comment on the NetScout Form S-4 Registration Statement, the Proxy Statement/Prospectus, the Newco Registration Statements or the Schedule TO, prior to filing of any such document with the SEC; (D) have each of the NetScout Form S-4 Registration Statement and the Newco Registration Statements become effective under the Securities Act and the Exchange Act, respectively, as promptly as practicable after each is filed with the SEC (it being understood that each of NetScout and Danaher shall use its reasonable best efforts to cause the NetScout Form S-4 to become effective under the Securities Act prior to the date on which the

financial statements included therein would become stale); and (E) keep each of the NetScout Form S-4 Registration Statement and the Newco Registration Statements effective through the

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Closing in order to permit the consummation of the Contemplated Transactions. NetScout shall cause to be filed with the SEC the Proxy Statement/Prospectus and shall cause the Proxy Statement/Prospectus to be mailed to NetScout's stockholders, as promptly as practicable after the NetScout Form S-4 Registration Statement becomes effective under the Securities Act. Each of NetScout and Danaher shall promptly furnish the other party all information concerning such party, its Subsidiaries and stockholders that may be required or reasonably requested in connection with any action contemplated by this Section 5.1. If either NetScout or Danaher becomes aware of any information furnished by it that should be disclosed in an amendment or supplement to the NetScout Form S-4 Registration Statement, the Proxy Statement/Prospectus, the Newco Registration Statements or the Schedule TO, then such party: (i) shall promptly inform the other party thereof; (ii) shall provide the other party (and its counsel) with a reasonable opportunity to review and comment on any amendment or supplement to the NetScout Form S-4 Registration Statement, the Proxy Statement/Prospectus, the Newco Registration Statements or the Schedule TO prior to it being filed with the SEC; (iii) shall provide the other party with a copy of such amendment or supplement promptly after it is filed with the SEC; and (iv) shall cooperate, if appropriate, in mailing such amendment or supplement to the stockholders of NetScout or Danaher (as the case may be).

(b) Each of NetScout and Danaher will also take all commercially reasonable actions (other than qualifying to do business in any jurisdiction in which it is not now so qualified) required to be taken under any applicable state securities laws in connection with, in the case of the NetScout, the issuance of NetScout Common Stock pursuant to the First Merger and, in the case of Danaher, the issuance of Newco Common Units in the Distribution.

**5.2 NetScout Stockholders Meeting.**

(a) As promptly as practicable following the date on which the SEC shall clear (whether orally or in writing) the Proxy Statement/Prospectus, NetScout: (i) shall take all action necessary under all applicable Legal Requirements to call, give notice of and hold a meeting of the holders of NetScout Common Stock (the **NetScout Stockholders Meeting**) to vote on a proposal to approve the issuance of shares of NetScout Common Stock pursuant to the First Merger pursuant to Nasdaq Listing Rule 5635 and (ii) shall submit such proposal to such holders at the NetScout Stockholders Meeting. NetScout shall not submit any other proposals for approval at the NetScout Stockholders Meeting without the prior written consent of Danaher. NetScout in consultation with Danaher shall set a record date for Persons entitled to notice of, and to vote at, the NetScout Stockholders Meeting and shall not change such record date without the prior written consent of Danaher (such consent not to be unreasonably withheld, conditioned or delayed). NetScout shall use its reasonable best efforts to ensure that all proxies solicited by the NetScout Companies and their Representatives in connection with the NetScout Stockholders Meeting are solicited in compliance with all applicable Legal Requirements. Notwithstanding anything to the contrary contained in this Agreement, NetScout may after consultation with Danaher adjourn or postpone the NetScout Stockholders Meeting: (i) to the extent necessary to ensure that any supplement or amendment to the Proxy Statement/Prospectus that is required by applicable Legal Requirement (or in connection with the settlement of any applicable litigation) is timely provided to NetScout's stockholders; (ii) if as of the time for which the NetScout's Meeting is originally scheduled there are insufficient shares of NetScout Common Stock represented (either in person or by proxy) to constitute a quorum necessary to conduct the business to be conducted at the NetScout Stockholders Meeting; or (iii) if additional time is reasonably required to solicit proxies in favor of the approval of the issuance of shares of NetScout Common Stock pursuant to the First Merger. Nothing contained in this Agreement shall be deemed to relieve NetScout of its obligation to submit the issuance of shares of NetScout Common Stock pursuant to the First Merger to its stockholders for a vote on the approval thereof. NetScout agrees that, unless this Agreement shall have been terminated in accordance with Section 8, its obligations to hold the NetScout Stockholders Meeting pursuant to this Section 5.2(a) shall not be affected by the commencement, public proposal, public disclosure or communication to NetScout of any Acquisition Proposal with respect to NetScout or Acquisition Inquiry with respect to NetScout or by any NetScout Change in Recommendation.

**(b)** Except to the extent permitted by Section 5.2(c): (i) the NetScout Board shall recommend that NetScout's stockholders vote in favor of the issuance of shares of NetScout Common Stock pursuant to the First

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Merger at the NetScout Stockholders Meeting, (ii) the Proxy Statement/Prospectus shall include a statement to the effect that the NetScout Board recommends that NetScout's stockholders vote to approve the issuance of shares of NetScout Common Stock pursuant to the First Merger at the NetScout Stockholders Meeting (such determination and recommendation being referred to as the **NetScout Board Recommendation**) and (iii) except as expressly permitted by Section 5.2(c), the NetScout Board Recommendation shall not be directly or indirectly withdrawn or modified (or proposed to be withdrawn or modified) by the NetScout Board nor any committee thereof in a manner adverse to Danaher (a **NetScout Change in Recommendation**).

(c) Notwithstanding anything to the contrary contained in Section 5.2(a) or elsewhere in this Agreement, at any time prior to the approval of the issuance of shares of NetScout Common Stock pursuant to the First Merger by the Required NetScout Stockholder Vote, the NetScout Board may effect, or cause NetScout to effect, as the case may be, a NetScout Change in Recommendation:

(i) if: (A) NetScout has not materially breached its obligations under Section 4.5; (B) after the date of this Agreement, an unsolicited, bona fide written Acquisition Proposal is made to NetScout and is not withdrawn; (C) the NetScout Board determines in its good faith judgment, after consulting with its financial advisor and outside legal counsel, that such Acquisition Proposal constitutes a NetScout Superior Offer; (D) the NetScout Board does not effect, or cause NetScout to effect, a NetScout Change in Recommendation at any time within four (4) business days (together with any subsequent shorter period as contemplated by clause (E) below, the **Notice Period**) after Danaher receives (x) written notice from NetScout that the NetScout Board has determined that such Acquisition Proposal is a NetScout Superior Offer and (y) a summary of the material terms and conditions of the Acquisition Proposal and other information required to be provided pursuant to Section 4.5 (provided, a new notice shall be required with respect to each material modification to such offer (it being understood that any change in the purchase price or form of consideration in such offer shall be deemed a material modification) and a new Notice Period (of three (3) business days) shall begin); (E) during the applicable Notice Period, if requested by Danaher, NetScout engages in good faith negotiations, and directs its financial advisors and outside legal advisors to, engage in good faith negotiations, with Danaher to amend this Agreement in such a manner that the competing Acquisition Proposal does not constitute a NetScout Superior Offer; (F) at the end of the applicable Notice Period, such Acquisition Proposal has not been withdrawn and constitutes a NetScout Superior Offer (taking into account any changes to the terms of this Agreement proposed by Danaher as a result of the negotiations required by clause (E) or otherwise); and (G) the NetScout Board determines in good faith, after having consulted with its outside legal counsel, that, in light of such NetScout Superior Offer, a failure to make a NetScout Change in Recommendation would be reasonably likely to constitute a breach of the fiduciary duties of the NetScout Board to NetScout stockholders under applicable Legal Requirements; or

(ii) if other than in connection with or as a result of the making of an Acquisition Proposal with respect to NetScout or an Acquisition Inquiry with respect to NetScout, a material development or change in circumstances that was not known or reasonably foreseeable (or if known or reasonably foreseeable, the probability or magnitude of consequences of which were not known or reasonably foreseeable) to the NetScout Board on the date of this Agreement occurs or arises after the date of this Agreement, which material development or change in circumstances becomes known to the NetScout Board prior to the approval of the issuance of shares of NetScout Common Stock pursuant to the First Merger by the Required NetScout Stockholder Vote (such material development or change in circumstances being referred to as an **Intervening Event** (it being understood that that in no event shall (i) any action taken by either party pursuant to and in compliance with the affirmative covenants set forth in Section 5.3, and the consequences of any such action or (ii) the receipt, existence of or terms of an Acquisition Proposal with respect to NetScout or an Acquisition Inquiry with respect to NetScout or the consequences thereof constitute an Intervening Event); (A) the NetScout Board determines in its good faith judgment,



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after consulting with its financial advisor and outside legal counsel that an Intervening Event has occurred; (B) the NetScout Board does not effect, or cause NetScout to effect, a NetScout Change in Recommendation at any time within four (4) business days after Danaher receives written notice from NetScout that the NetScout Board has determined that an Intervening Event requires the NetScout Board to effect, or cause NetScout to effect, a NetScout Change in Recommendation (provided, a new notice shall be required with respect to any change in circumstances and a new notice period of three (3) business days shall begin); (C) during such applicable period, if requested by Danaher, NetScout engages in good faith negotiations, and directs its financial advisors and outside legal advisors to, engage in good faith negotiations, with Danaher to amend this Agreement in such a manner that obviates the need for the NetScout Board to effect, or cause NetScout to effect, a NetScout Change in Recommendation as a result of such Intervening Event; and (D) the NetScout Board determines in good faith, after having consulted with its outside legal counsel, that, in light of such Intervening Event, a failure to make a NetScout Change in Recommendation would be reasonably likely to constitute a breach of the fiduciary duties of the NetScout Board to NetScout's stockholders under applicable Legal Requirements.

(d) (i) Nothing contained in this Section 5.2 will prohibit NetScout from taking and disclosing to its stockholders a position required by Rule 14e-2(a) or Rule 14d-9 promulgated under the Exchange Act and (ii) no disclosure that the NetScout Board may determine in good faith (after consultation with outside counsel) that it or NetScout, as applicable, is required to make under applicable Legal Requirements will constitute a violation of this Agreement; provided, however, that in any event under clause (i) or (ii) the NetScout Board shall not make a NetScout Change in Recommendation except in accordance with this Section 5.2. It is expressly understood and agreed by the parties that a stop, look and listen or similar communication of the type contemplated by Rule 14d-9(f) of the Exchange Act shall not be deemed a NetScout Change in Recommendation; provided that the NetScout Board expressly reaffirms the NetScout Board Recommendation within five (5) business days of the public announcement of any applicable Acquisition Proposal.

**5.3 Regulatory Approvals and Related Matters.**

(a) Each party shall file all notices, reports and other documents required to be filed by such party with any Governmental Body with respect to the Mergers and the other Contemplated Transactions, and to submit promptly any additional information requested by any such Governmental Body. Without limiting the generality of the foregoing or Section 5.3(b) below, NetScout and Danaher each shall, promptly (and in any event, with respect to clause (x), within 10 business days after the date of this Agreement), prepare and file (x) the notifications required under the HSR Act and (y) any applicable mandatory foreign competition act filings in connection with the Merger. NetScout and Danaher each shall use its reasonable best efforts to cause the expiration or early termination of any waiting period under the HSR Act, and NetScout and Danaher shall each (i) cooperate with the other party in connection with any filing or submission and in connection with any investigation or other inquiry, including any proceeding initiated by a private party, (ii) promptly supply the other party with any information which may be required in order to effectuate notices, reports, documents or other filings with any Governmental Body required to be made pursuant to the HSR Act and any applicable mandatory foreign competition act filings (the **Antitrust Filings**); and (iii) promptly supply any additional information which reasonably may be required by any Governmental Body in connection with Antitrust Filings or which the parties may reasonably deem appropriate. Each of NetScout and Danaher will notify the other party promptly upon the receipt of (and, if in writing, share a copy of) any communication received by such party from, or given by such party to, any Governmental Bodies and of any material communication received or given in connection with any proceeding by a private party, in each case in connection with the Contemplated Transactions. Whenever any event occurs that is required to be set forth in an amendment or supplement to any Antitrust Filings, NetScout or Danaher, as the case may be, will promptly inform the other party of such occurrence and cooperate in filing with the applicable Governmental Body (and share a copy of) such amendment or supplement. Each of NetScout and Danaher shall give the other party prompt notice of the

commencement or known threat of commencement of any Legal Proceeding by or before any Governmental Body with respect to the Mergers or

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any of the other Contemplated Transactions, shall keep the other party reasonably informed as to the status of any such Legal Proceeding or threat, and, in connection with any such Legal Proceeding, will permit authorized representatives of the other party to be present at each meeting or conference relating to any such Legal Proceeding and to have access to and be consulted in connection with any document, opinion or proposal made or submitted to any Governmental Body in connection with any such Legal Proceeding.

(b) Upon the terms and subject to the conditions set forth in this Agreement and subject to Section 5.3(b), each of NetScout, Danaher, Merger Sub and Newco agrees to use its reasonable best efforts to take, or cause to be taken, all actions necessary or advisable to satisfy each of the conditions set forth in Sections 6 and 7, consummate the Mergers and make effective the other Contemplated Transactions (provided that no party shall be required to waive any of the conditions set forth in Sections 6 or 7, as applicable, to its obligations to consummate the Mergers and the other Contemplated Transactions). Without limiting the generality of the foregoing, but subject to Section 5.3(b), each party to this Agreement agrees to use its reasonable best efforts to: (i) as promptly as practicable, prepare and file all filings (if any) and give all notices (if any) required to be made and given by such party in connection with the Mergers and the other Contemplated Transactions; (ii) obtain each Consent (if any) required to be obtained (pursuant to any applicable Legal Requirement or Contract, or otherwise) by such party in connection with the Mergers or any of the other Contemplated Transactions (including NetScout providing a guarantee of Newco's obligations reasonable necessary to obtain such Consents); and (iii) lift any restraint, injunction or other legal bar to the Mergers.

(c) Notwithstanding anything to the contrary in this Section 5.3, neither NetScout, Danaher, Merger Sub nor Newco shall have any obligation under this Agreement (except as specifically set forth in this Agreement, the Distribution Agreement or any other Transaction Document) to divest or agree to divest (or cause any of its Subsidiaries to divest or agree to divest) any of its respective material businesses, material product lines or material assets, or to take or agree to take (or cause any of its Subsidiaries to take or agree to take) any other material action or agree (or cause any of its Subsidiaries to agree) to any material limitation or material restriction on any of its respective material businesses, material product lines or material assets, except as would not, or as would not reasonably be expected to, involve the divestiture of assets that generated in the aggregate more than 10% of the combined gross revenues of the Communications Companies and the NetScout Companies for the 12 months ending June 27, 2014 (a **Burdensome Condition**) (it being understood that no such action shall be considered for purposes of determining whether a NetScout Material Adverse Effect or Newco Material Adverse Effect has occurred or is reasonably likely to occur and the parties shall not be required to take any of the foregoing actions in this clause (c) unless the effectiveness of such action is conditioned on the Closing). Notwithstanding the foregoing, no such divestiture of assets may occur if such divestiture would constitute a Disqualifying Action (as defined in the Tax Matters Agreement).

(d) Each party shall not, and shall cause its Affiliates not to, acquire or agree to acquire any business or entity, or otherwise acquire or agree to acquire any assets, if doing so could reasonably be expected to delay or prevent consummation of the Contemplated Transactions, increase the risk of not obtaining any consents of any Governmental Body necessary to consummate the Contemplated Transactions or give rise to a requirement to obtain any additional Governmental Authorizations not currently required to consummate the Contemplated Transactions.

**5.4 Disclosure.** NetScout and Danaher shall consult with each other before issuing any press release or otherwise making any public statement regarding this Agreement or the Contemplated Transactions. Danaher shall consult with NetScout and consider the views and comments of NetScout before any of the Communications Companies or any of their Representatives sends any emails or other documents to the Newco Associates generally or otherwise communicate with the Newco Associates generally, with respect to the Mergers or any of the other Contemplated Transactions. NetScout shall consult with Danaher and consider the views and comments of Danaher before any of the NetScout Companies or any of their Representatives sends any emails or other documents to the Danaher Associates generally or otherwise communicate with the Danaher Associates generally, with respect to the Mergers or any of the

other Contemplated Transactions.

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Notwithstanding the foregoing: (i) each party may, without such consultation or consent, make any public statement in response to questions from the press, analysts, investors or those attending industry conferences and make internal announcements to employees, so long as such statements are consistent with previous press releases, public disclosures or public statements made jointly by the parties (or individually, if approved by the other party), (ii) each party may, without the prior consent of the other party hereto, issue any such press release or make any such public announcement or statement as may be required by Legal Requirement or the rules and regulations of the NASDAQ Global Select Market (with respect to NetScout) and the New York Stock Exchange (with respect to Danaher), in which case such party shall use its reasonable best efforts to consult in good faith with the other party hereto prior to issuing any such press release or making any such public announcement or statement; and (iii) NetScout need not consult with Danaher in connection with any press release, public statement or filing to be issued or made with respect to any NetScout Change in Recommendation.

**5.5 Tax Matters.**

(a) Danaher shall use reasonable best efforts to cause the delivery of the opinion contemplated by Section 7.7(a). In rendering such opinion, counsel shall be permitted to rely upon covenants and assume the accuracy of customary representations provided by (A) NetScout, Merger Sub and Merger Sub II, and (B) Danaher and Newco.

(b) NetScout shall cause Merger Sub II to be treated as a disregarded entity for U.S. federal tax purposes.

**5.6 Listing.** As promptly as practicable following the date hereof, NetScout shall use best efforts to cause the shares of NetScout Common Stock to be issued pursuant to the First Merger, including the NetScout Common Stock to be issued upon (a) the exercise of exchanged Danaher Options, and (b) the vesting and issuance of exchanged Danaher RSUs, to be approved for listing (subject to notice of issuance) on the NASDAQ Global Select Market at or prior to the Effective Time.

**5.7 Resignation of Officers and Directors.** Danaher shall obtain and deliver to NetScout at or prior to the Effective Time the resignation of each officer and director of each of the Communications Companies other than those continuing in office in accordance with Section 5.8 as officers and directors of the surviving entities in the Mergers.

**5.8 Board of Directors of the Combined Company; Management of the Combined Company.**

(a) The parties shall take all actions necessary to ensure that effective immediately following the Effective Time, the NetScout Board shall consist of the directors set forth on Schedule 5.8(a)(i), to remain in office or to be appointed to class indicated on Schedule 5.8(a)(i) to hold office until his or her respective successor is duly elected or his or her earlier resignation or removal. NetScout shall take all actions reasonably necessary to ensure that the NetScout Board nominates, consistent with its fiduciary duties, the Danaher's designated director indicated on Schedule 5.8(a)(ii), who shall be a Class I director of NetScout, to serve a full new term on the NetScout Board immediately following the expiration of such director's class terms. In the event that the Danaher's designated director (i) is unwilling or unable to serve at the Effective Time, (ii) is unwilling or unable to serve at the time of the commencement of such new term or (iii) is not nominated to serve such new term, then Danaher shall designate a replacement, acceptable to NetScout in its sole discretion, for such director prior to the Effective Time or the commencement of such new term, as applicable.

(b) The parties shall take all actions necessary to ensure that effective immediately following the Effective Time, the officers of NetScout shall consist of the persons set forth on Schedule 5.8(b), each to hold office from and after the Effective Time until the earliest of appointment of his or her respective successor, resignation or removal.



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(c) The parties shall take all actions necessary to ensure that effective immediately following the Effective Time, (i) the boards of directors or boards of managers, if and to the extent applicable, of each Communications Company shall consist of the number of members and shall consist of the directors set forth opposite the name of such Communications Company as indicated on Schedule 5.8(c) and (ii) the officers of each Communications Company shall be the officers set forth opposite the name of the Communications Company as indicated on Schedule 5.8(c), each to hold office from and after the Effective Time until his or her respective successor is duly elected or his or her earlier resignation or removal.

**5.9 Section 16 Matters.** Subject to the following sentence, prior to the Effective Time, each of NetScout, Danaher and Newco shall take all such steps as may be required (to the extent permitted under applicable Legal Requirements) to approve in advance in accordance with the procedures set forth in Rule 16b-3 under the Exchange Act (and any applicable no-action letters issued by the SEC) any dispositions of Newco Common Units (including derivative securities with respect to Newco Common Units) arising in connection with the Contemplated Transactions directly or indirectly made by each individual who is subject to Section 16 of the Exchange Act with respect to Newco as an officer or director of Newco, and any acquisitions of NetScout Common Stock (including derivative securities with respect to NetScout Common Stock) arising in connection with the Contemplated Transactions directly or indirectly made by each individual who is or will be subject to Section 16 of the Exchange Act with respect to NetScout as an officer or director of NetScout. At least 10 days prior to the Closing Date, Danaher shall furnish the following information to NetScout for each Person who, immediately after the Effective Time, will become subject to the requirements of Section 16 of the Exchange Act with respect to NetScout as an officer or director of NetScout (to the extent then known): (a) the number of Newco Common Units held by such Person and expected to be exchanged for shares of NetScout Common Stock pursuant to the First Merger; (b) the number of shares of Danaher Common Stock underlying Danaher Equity Awards held by such Person and expected to be exchanged by NetScout into shares of NetScout Common Stock in connection with the First Merger; (c) the number of other derivative securities (if any) with respect to Danaher Common Stock or Newco Common Units held by such Person and expected to be converted into shares of NetScout Common Stock or derivative securities with respect to NetScout Common Stock in connection with the First Merger; and (d) the EDGAR codes for each such Person.

**5.10 Name of the Combined Company and Headquarters.** The name of NetScout and its headquarters will not be changed at the Effective Time or as a result of the Mergers or any of the other Contemplated Transactions.

**5.11 Obligations of Merger Subs and Newco.** NetScout shall take all action necessary to cause the Merger Subs and, after the Effective Time, the First Merger Surviving Entity or Second Merger Surviving Entity, as applicable, to perform their respective obligations under this Agreement and to consummate the Contemplated Transactions upon the terms and subject to the conditions set forth in this Agreement. Danaher shall take all action necessary to cause Newco, prior to the Effective Time, to perform its obligations under this Agreement and to consummate the Contemplated Transactions upon the terms and subject to the conditions set forth in this Agreement.

### **5.12 Securityholder Litigation.**

(a) Danaher shall give NetScout the right to participate in the defense or settlement of any securityholder litigation against Danaher and/or the Danaher Board relating to the Contemplated Transactions. In no event shall Danaher enter into or agree to any settlement with respect to such securityholder litigation without NetScout's prior written consent (which consent shall not be unreasonably withheld, conditioned or delayed).

(b) NetScout shall give Danaher the right to participate in the defense or settlement of any securityholder litigation against NetScout and/or the NetScout Board relating to the Contemplated Transactions. In no event shall NetScout enter into or agree to any settlement with respect to such securityholder litigation without Danaher's prior written

consent (which consent shall not be unreasonably withheld, conditioned or delayed).

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(c) For purposes of this Section 5.12, participate means that the non-litigating party will be kept apprised of proposed strategy and other significant decisions with respect to any securityholder litigation by the litigating party (to the extent the attorney-client privilege between the litigating party and its counsel is not undermined or otherwise affected), and the non-litigating party may offer comments or suggestions with respect to the litigation but will not be afforded any decision making power or authority over the litigation, except for the right to consent to any settlement as set forth in Section 5.12(a) or Section 5.12(b), as applicable.

**5.13 Financial Statements.**

(a) Danaher shall engage its auditors to perform an audit of the financial statements of (x) the Communications Business and (y) Newco (before giving effect to the Internal Restructuring) and will use its reasonable best efforts to provide NetScout, as promptly as practicable after the date hereof and prior to November 15, 2014, with (i) the audited combined and consolidated financial statements of (x) the Communications Business and (y) Newco (before giving effect to the Internal Restructuring), including the combined and consolidated balance sheets of (x) the Communications Business and (y) Newco (before giving effect to the Internal Restructuring) as of December 31, 2012 and December 31, 2013, and the combined and consolidated statements of earnings, cash flows and parent equity of (x) the Communications Business and (y) Newco (before giving effect to the Internal Restructuring) for the years ended December 31, 2011, December 31, 2012 and December 31, 2013 together with a report on the financial statements from the independent accounts for the Communications Business (collectively, the **Audited Financial Statements** ) and (ii) the unaudited combined and consolidated financial statements of (x) the Communications Business and (y) Newco (before giving effect to the Internal Restructuring) for applicable interim periods ending prior to the date of this Agreement required for SEC filings, prepared from the books and records of Danaher and its Subsidiaries and in accordance with GAAP consistently applied and the rules and regulations of the SEC, including the requirements of Regulation S-X and the Public Company Accounting Oversight Board Rules, and which present fairly in all material respects the combined financial position and combined results of operations of (x) the Communications Business and (y) Newco (before giving effect to the Internal Restructuring) as of the dates and for the periods shown therein (except as otherwise noted therein) (it being understood, however, that the Communications Business has not been operating historically as a separate standalone entity or reporting segment and, therefore, the Audited Financial Statements and the unaudited interim financial statements of the Communications Business will reflect certain cost allocations made that may not reflect what would have been incurred if the Communications Business had been a standalone business). Danaher will use reasonable best efforts to procure, at its expense, the delivery of the consents of its independent accountants required to be filed with the NetScout Form S-4 Registration Statement or any future registration statement until such independent accountant consents are no longer required.

(b) Danaher shall use its reasonable best efforts to, as promptly as practicable and no later than forty five (45) calendar days after the end of any fiscal quarter or sixty (60) calendar days after the end of any fiscal year (or as promptly thereafter as possible), prepare and furnish to NetScout copies of financial statements of the Communications Business as of and for the periods ending on any fiscal quarterly and annual periods ending after the date of this Agreement and prior to the Closing Date, in each case together with the notes thereto, and prepared from the books and records of Danaher and its Subsidiaries and in accordance with GAAP with no exception or qualification thereto (it being understood, however, that the Communications Business has not been operating historically as a separate standalone entity or reporting segment and, therefore, the financial statements of the Communications Business will reflect certain cost allocations made that may not reflect what would have been incurred if the Communications Business had been a standalone business) applied on a consistent basis through the periods involved (except as may otherwise be required under GAAP) and the rules and regulations of the SEC, including the requirements of Regulation S-X, and, in the case of the combined financial statements of the Communications Business for any fiscal year, Danaher shall use its reasonable best efforts to ensure that such financial statements shall be audited and accompanied by a report of the independent accountants for the Communications Business and for any quarterly

period, Danaher shall use its reasonable best efforts to ensure that such financial statements shall be reviewed by the independent accountants for the

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Communications Business. When delivered, such financial statements shall present fairly in all material respects the combined financial position and combined and consolidated results of operations of the Communications Business as of the dates and for the periods shown therein. Danaher acknowledges that NetScout's ability to comply with its obligations under Section 5.1 depend, in part, on Danaher's timely compliance with this Section 5.13, and therefore NetScout shall be afforded a reasonable period to comply with such obligations based upon the timing of Danaher providing the financial statements herein contemplated.

(c) In connection with the filing of the NetScout Form S-4 Registration Statement and other SEC filings, Danaher shall use its reasonable efforts during the Pre-Closing Period and after the Closing to (i) cooperate with NetScout to prepare pro forma financial statements that comply with the rules and regulations of the SEC to the extent required for SEC filings, including the requirements of Regulation S-X and (ii) provide and make reasonably available upon reasonable notice the senior management employees of Danaher to discuss the materials prepared and delivered pursuant to this Section 5.13(c). NetScout shall, promptly upon request by the Danaher, reimburse Danaher for all documented and reasonable out-of-pocket costs incurred by Danaher or its Subsidiaries for actions taken at the request of NetScout pursuant to this Section 5.13(c) following the Closing.

**5.14 Financing.** Danaher and the Communications Companies shall, and shall cause their respective Representatives to, use commercially reasonable efforts to provide such cooperation (including with respect to timeliness) to NetScout, at NetScout's sole expense, in connection with the arrangement of the Debt Financing as may be reasonably requested by NetScout, including by using commercially reasonable efforts in providing to NetScout and its Debt Financing Sources from time to time information regarding the Communications Companies reasonably requested by the lenders providing the Debt Financing (it being understood that such information shall not be required to be of a level of detail greater than the information made available by Danaher to NetScout in the virtual data room maintained by Danaher on the Data Site from Merrill Corporation); provided that, in all cases, such activities do not interfere with or disrupt the operation and management of the Communications Business; provided, however, that, irrespective of the above, no obligation of Danaher or its Subsidiaries (including the Communications Companies) under any certificate, document or instrument shall be effective until the Effective Time (except for customary pre-filing of UCC financing statements) and none of Danaher or its Subsidiaries (including the Communications Companies) shall be required to take any action (A) under any certificate, document or instrument that is not contingent upon the Closing (including the entry into any agreement that is effective before the Effective Time) or that would be effective prior to the Effective Time (except, in any such case, for customary pre-filing of UCC financing statements) or (B) that would reasonably be expected to cause any director, officer or employee of Danaher or its Subsidiaries (including the Communications Companies) to incur any personal liability. For the avoidance of doubt, none of the Danaher or the Communications Companies shall be required to pay any commitment or other similar fee in connection with, or incur any other expenses or costs associated with NetScout's arrangement of the Debt Financing. NetScout shall, promptly upon request by the Danaher, reimburse Danaher for all documented and reasonable out-of-pocket costs incurred by Danaher or its Subsidiaries (including the Communications Companies) in connection with this Section 5.14. NetScout shall indemnify and hold harmless Danaher and its Subsidiaries (including the Communications Companies) and their respective Representatives from and against any and all liabilities, losses, damages, claims, costs, reasonable expenses, interest, awards, judgments and penalties suffered or incurred in connection with the arrangement of the Debt Financing (including any action taken in accordance with this Section 5.14) and any information utilized in connection therewith (other than information relating to Danaher and its Subsidiaries (including the Communications Companies) provided by Danaher in writing specifically for use in the Debt Financing offering documents); provided, however, that NetScout shall not be obligated to indemnify and hold harmless Danaher and its Subsidiaries (including the Communications Companies) and their respective Representatives pursuant to this sentence the extent any such otherwise indemnifiable proximately resulted from the willful misconduct, gross negligence or fraud of Danaher and its Subsidiaries (including the Communications Companies). Further, and for avoidance of doubt, NetScout's obligations to effect the Contemplated Transactions shall not be subject to its ability to obtain Debt Financing, or any

alternative financing, nor shall they be subject to any form of financing contingency.

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**5.15 Covenant Not to Compete.**

(a) In furtherance of the Mergers and the Contemplated Transactions, Danaher covenants and agrees that, for a period beginning on the Effective Time and ending on the two (2) year anniversary of the Effective Time, neither Danaher nor any of its Subsidiaries shall, without the prior written consent of NetScout, engage in, directly or indirectly, the Communications Business as conducted as of the Effective Time (the **NetScout Restricted Business** ) anywhere throughout the world. Notwithstanding anything to the contrary in the foregoing:

(i) Nothing in this Section 5.15(a) shall prohibit Danaher or its Subsidiaries from engaging in the businesses conducted by Danaher or its Subsidiaries (excluding the Communications Business) as of the Effective Time;

(ii) The restrictions set forth in this Section 5.15(a) shall not apply to any joint venture or non-consolidated entity in which Danaher or its Subsidiaries owns a non-controlling interest;

(iii) Danaher may acquire interests in or securities of any Person engaged in the NetScout Restricted Business where the revenues of such Person that are derived from the NetScout Restricted Business are (A) thirty-five percent (35%) or less of such Person's total revenues or (B) less than \$50,000,000 annually;

(iv) In the event that Danaher completes a business combination transaction with a Person that is engaged in any NetScout Restricted Business, which transaction results in the holders of the voting securities of Danaher outstanding immediately prior to the consummation of such transaction owning less than 50% of the voting power of the voting securities of Danaher or the surviving entity in the transaction or any parent thereof outstanding immediately after the consummation of such transaction, such surviving entity or parent or any of its Subsidiaries or Affiliates (but not Danaher or any of its Subsidiaries) may engage in any NetScout Restricted Business;

(v) Nothing set forth in this Section 5.15(a) shall prohibit Danaher or its Subsidiaries from owning not in excess of 10% in the aggregate of any class of capital stock or other equity interest of any publicly traded Person engaged in the NetScout Restricted Business;

(vi) Danaher may acquire interests in or securities of any Person as an investment by their pension funds or funds of any other benefit plan of Danaher whether or not such Person is engaged in any NetScout Restricted Business; and

(vii) Danaher may perform its obligations under this Agreement and the Transaction Documents.

The parties hereto acknowledge and agree that nothing herein shall be deemed to require Danaher to give notice to or obtain the consent of NetScout in order to engage in any activity or transaction of the types described in Section 5.15(a)(i) through (vii).

(b) Danaher acknowledges and agrees that the covenants included in Section 5.15(a) are, taken as a whole, reasonable in their geographic and temporal coverage and Danaher shall not raise any issue of geographic or temporal reasonableness in any proceeding to enforce such covenant; provided, however, that (i) if the final judgment of a court of competent jurisdiction declares that any term or provision of this Section 5.15 is invalid or unenforceable, the parties hereto agree that the court making such determination shall have the power to limit the term or provision, to delete specific words or phrases, or to replace any invalid or unenforceable term or provision with a term or provision that is valid and enforceable and that comes closest to expressing the intention of the invalid or unenforceable term or provision, and this Section 5.15 shall be enforceable as so modified and (ii) in the event such court does not exercise the power granted to it in the prior clause, the parties hereto agree to replace such invalid or unenforceable term or provision with a valid and enforceable term or

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provision that will achieve, to the extent possible, the economic, business and other purposes of such invalid or unenforceable term. Danaher acknowledges and agrees that in the event of a breach by Danaher of the provisions of this [Section 5.15](#), monetary damages shall not constitute a sufficient remedy. Consequently, in the event of any such breach, NetScout may, in addition to any other rights and remedies existing in its favor, apply to any court of law or equity of competent jurisdiction for specific performance and/or preliminary and final injunctive relief or other relief in order to enforce or prevent any violation of the provisions hereof, without the necessity of proving actual damages or posting a bond.

**5.16 Non-Solicitation of Employees.** Danaher and NetScout each agree that, except as specifically set forth below, for a period of three (3) years from and after the Closing Date (the **Non-Solicit Period**), they shall not, and they shall cause their respective Subsidiaries not to, without the prior written consent of the other party, directly or indirectly, solicit to hire (or cause or seek to cause to leave the employ of the other party or the other party's Subsidiary), or solicit to enter into a consulting agreement with, (a) for the first year of the Non-Solicit Period, any employee or category of employee and (b) for the second and third year of the Non-Solicit Period, any executive officer or senior manager, in each case, of the other party or the other party's Subsidiaries. The restrictions set forth in this [Section 5.16](#) shall not apply to (i) general solicitations (such as advertisements) for employment placed by a party or any party's Subsidiary and not specifically targeted at the other party's employees (or the employees of a Subsidiary of the other party), (ii) responding to or hiring any employee of the other party (or of the other party's Subsidiary) who contacts a party without any prior solicitation (other than as permitted by clause (i) above) or (iii) the solicitation or hiring of (or entering into a consulting agreement with) any employee of the other party (or the other party's Subsidiary) who is contacted by a recruitment agency (provided that such party and its Representatives did not identify any employees of the other party to such recruitment agency or otherwise instruct such agency to target any employees of the other party), in each case with no other action by such party or its Representatives in violation of this provision.

**5.17 Agreement for Exchange of Information.**

**(a) Generally.** NetScout and its Affiliates, on the one hand, and Danaher and its Affiliates, on the other hand, will provide, or cause to be provided, to the other party, at any time after the Effective Time and until the later of (x) the sixth anniversary of the Effective Time and (y) the expiration of the relevant statute of limitations period, if applicable, as soon as reasonably practicable after written request therefor, reasonable access during normal business hours (insofar as such access is reasonably required by the requesting party), any Shared Information specifically identified in such written request in its possession or under its control in order to enable the applicable party to comply with Legal Requirements. Each of NetScout and Danaher agree to make their respective personnel reasonably available during regular business hours to discuss any Shared Information exchanged pursuant to this [Section 5.17](#). The requesting party shall, promptly upon request by the party providing such information, reimburse the providing party for all documented and reasonable third-party out-of-pocket costs incurred by providing party or its Subsidiaries in connection with this [Section 5.17\(a\)](#).

**(b) Financial Information.**

**(i)** Until the end of the sixth full fiscal year occurring after the Closing Date, Danaher and its Subsidiaries will cooperate in good faith with NetScout to enable NetScout to timely prepare and file SEC and Public Company Accounting Oversight Board compliant consolidated financial statements that include the financial results of Newco or any of the Communications Companies. NetScout agrees to promptly reimburse Danaher for the reasonable out-of-pocket third-party costs, if any, incurred in connection with this [Section 5.17\(b\)\(i\)](#).

**(ii)** Until the end of the sixth full fiscal year occurring after the Closing Date, NetScout and its Subsidiaries will cooperate in good faith with Danaher to enable Danaher to timely prepare and file SEC and Public Company

Accounting Oversight Board compliant consolidated financial statements or complete a financial statement audit for any period during which the financial results of the Communications Companies

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were consolidated with those of Danaher. As part of such efforts, to the extent reasonably necessary for the preparation of financial statements or completing an audit or review of financial statements or an audit of internal control over financial reporting, (i) NetScout will authorize and direct its auditors to make available to Danaher's auditors, within a reasonable time prior to the date of Danaher's auditors opinion or review report, both (x) the personnel who performed or will perform the annual audits and quarterly reviews of Newco and (y) work papers related to such annual audits and quarterly reviews, to enable Danaher's auditors to perform any procedures they consider reasonably necessary to take responsibility for the work of Newco's auditors as it relates to Danaher's auditors opinion or report and (ii) until all governmental audits are complete, NetScout will provide reasonable access during normal business hours for Danaher's internal auditors, counsel and other designated representatives to (x) the premises of the Communications Companies all Information (and duplicating rights) within the knowledge, possession or control of the Communications Companies and (y) the officers and employees of the Communications Companies, so that Danaher may conduct reasonable audits relating to the financial statements provided by the Communications Companies; provided, however, that such access will not be unreasonably disruptive to the business and affairs of the Communications Companies. Danaher agrees to promptly reimburse NetScout for the reasonable out-of-pocket third-party costs, if any, incurred in connection with this Section 5.17(b)(ii).

**(c) Ownership of Information.** Any Information owned at a particular moment in time by a party hereto that is provided to another party hereto pursuant to this Section 5.17(c) remains the property of the party that owned and provided such Information. Except as expressly provided in the Transaction Documents, no party hereto nor any of their Affiliates hereunder grants or confers rights of license in any Information owned by such party or any of its Affiliates to any other party hereto or its Affiliates hereunder.

**(d) Record Retention.** Each party hereto agrees to use its commercially reasonable efforts to retain all Shared Information that relates to the operations of the Communications Business or any of the Communications Companies in its respective possession or control at the Effective Time for a period of six (6) years following the Effective Time. Notwithstanding the foregoing, Section 7.02 of the Tax Matters Agreement will govern the retention of Tax Returns, schedules and work papers and all material records or other documents relating thereto.

**(e) Costs of Providing Information.** Except as provided in Section 5.17(f), the party to this Agreement requesting Shared Information will be responsible for paying the third-party fees and expenses incurred by the parties in connection with complying with the provisions of this Section 5.17.

**(f) Production of Witnesses; Privileged Matters.** With respect to (i) the production of witnesses and (ii) the attorney-client and work product privileged information, following the Effective Time, the respective rights and obligations of Danaher and its Subsidiaries, on the one hand, and the Communications Companies, on the other hand, to produce witnesses and to maintain, preserve, assert or waive any or all privileges will be governed by the provisions of Sections 5.02 and 5.03, respectively, of the Distribution Agreement.

**5.18 Certain Compensation Actions.** Prior to the Closing and except as would not reasonably be expected to result in material liability to NetScout, NetScout will take all actions necessary, including adopting any required plan amendments and obtaining any necessary consents, such that the transactions contemplated by this Agreement (either alone or in connection with any other circumstance or event) will not (i) constitute a change in control, change of control or other triggering event under any NetScout Benefit Plan or NetScout Benefit Arrangement or otherwise result in any payment, acceleration, forgiveness of indebtedness, vesting, distribution, increase in benefits or obligation to fund benefits with respect to any NetScout Associate or (ii) result in any payment or benefit in respect of any NetScout Associate that would reasonably be expected to be a parachute payment within the meaning of Section 280G(b)(2) of the Code.

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**6. CONDITIONS PRECEDENT TO OBLIGATIONS OF NETSCOUT AND MERGER SUB**

The obligations of NetScout and Merger Sub to effect the First Merger and otherwise consummate the Contemplated Transactions are subject to the satisfaction or waiver, at or prior to the Closing, of each of the following conditions:

**6.1 Accuracy of Representations.**

(a) Each of the Danaher Designated Representations shall have been accurate in all material respects as of the date of this Agreement and shall be accurate in all material respects as of the Closing Date as if made on and as of the Closing Date (except for any such representations and warranties made as of a specific date, which shall have been accurate in all material respects as of such date); provided, however, that, for purposes of determining the accuracy of such representations and warranties as of the foregoing dates all materiality or Newco Material Adverse Effect qualifications limiting the scope of such representations and warranties shall be disregarded.

(b) Each of the representations and warranties of Danaher (other than the Danaher Designated Representations) shall have been accurate in all respects as of the date of this Agreement and shall be accurate in all respects as of the Closing Date as if made on and as of the Closing Date (except for any such representations and warranties made as of a specific date, which shall have been accurate in all respects as of such date); provided, however, that: (i) for purposes of determining the accuracy of such representations and warranties as of the foregoing dates all materiality or Newco Material Adverse Effect qualifications limiting the scope of such representations and warranties shall be disregarded; and (ii) any inaccuracies in such representations and warranties will be disregarded if all such inaccuracies (considered collectively) do not constitute, and would not reasonably be expected to have or result in, individually or in the aggregate, a Newco Material Adverse Effect.

**6.2 Performance of Covenants.** The covenants and obligations in this Agreement that Danaher, Newco or the other Communications Companies are required to comply with or to perform at or prior to the Closing shall have been complied with and performed in all material respects.

**6.3 Effectiveness of Registration Statements.** The NetScout Form S-4 Registration Statement and the applicable Newco Registration Statement each shall have become effective in accordance with the provisions of the Securities Act and the Exchange Act, respectively; no stop order shall have been issued by the SEC and each shall remain in effect; no proceeding seeking such a stop order shall have been initiated by the SEC and remain pending or shall be threatened by the SEC; and (i) if the Distribution is effected in whole or in part as an Exchange Offer, the applicable offer period and any extensions thereof in the Exchange Offer required by applicable securities laws shall have expired and (ii) if the Distribution is effected in whole or in part as a Spin-Off (as defined in the Distribution Agreement), the applicable notice periods required by applicable stock exchange rules or securities laws shall have expired.

**6.4 NetScout Stockholder Approval.** The issuance of shares of NetScout Common Stock pursuant to the First Merger shall have been duly approved by the applicable Required NetScout Stockholder Vote.

**6.5 Separation and Distribution.** The transactions contemplated by the Distribution Agreement shall have been consummated in accordance with and subject to the terms of this Agreement and the Distribution Agreement, and the Distribution Agreement, the Tax Matters Agreement, the Transition Services Agreement, the Employee Matters Agreement, the Trademark License Agreement, the IP License Agreement, the DBS License Agreement, the Lease Agreement and the IP License Agreement each shall have been executed and delivered by the parties (other than NetScout or Merger Subs) thereto.

**6.6 Certificate.** NetScout and Merger Sub shall have received a certificate executed by the Chief Executive Officer of Danaher confirming that the conditions set forth in Sections 6.1, 6.2, 6.5 and 6.7 have been duly satisfied.

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**6.7 No Newco Material Adverse Effect.** Since the date of this Agreement, there shall not have occurred any Newco Material Adverse Effect, and no event shall have occurred or circumstance shall exist that, in combination with any other events or circumstances, would reasonably be expected to have or result in a Newco Material Adverse Effect.

**6.8 Governmental Approvals.** Any waiting period applicable to the consummation of the First Merger under the HSR Act shall have expired or been terminated.

**6.9 Listing.** The shares of NetScout Common Stock to be issued pursuant to the First Merger shall have been approved for listing (subject to notice of issuance) on the NASDAQ Global Select Market.

**6.10 No Restraints.** No temporary restraining order, preliminary or permanent injunction or other Order preventing the consummation of the Mergers shall have been issued by any court of competent jurisdiction or other Governmental Body and remain in effect, and there shall not be any Legal Requirement enacted or deemed applicable to the Mergers that makes consummation of the Mergers illegal.

**6.11 No Governmental Litigation.** There shall not be pending any Legal Proceeding in which a Governmental Body with jurisdiction over the parties is a party: (a) challenging or seeking to restrain, prohibit, rescind or unwind the consummation of the Mergers or any of the other Contemplated Transactions; (b) seeking to prohibit or limit in any material respect NetScout's ability to vote, transfer, receive dividends with respect to or otherwise exercise ownership rights with respect to the limited liability company interests of the First Merger Surviving Entity or Second Merger Surviving Entity, as applicable; (c) relating to the Mergers or the other Contemplated Transactions and that would reasonably be expected to result in a Burdensome Condition; (d) seeking to compel any of the Communications Companies, NetScout or any Subsidiary of NetScout to dispose of or hold separate any material assets or material business as a result of the Mergers or any of the other Contemplated Transactions that would be a Burdensome Condition; or (e) relating to the Mergers or the other Contemplated Transactions and seeking to impose (or that would reasonably be expected to result in the imposition of) any criminal sanctions or criminal liability on NetScout, Danaher or any of the Communications Companies.

**6.12 FIRPTA Matters.** Danaher shall have delivered to NetScout a statement described in Section 1.1445-2(c)(3)(i) of the U.S. Treasury Regulations certifying that the interests of Newco are not U.S. real property interests.

## **7. CONDITIONS PRECEDENT TO OBLIGATION OF DANAHER AND NEWCO**

The obligations of Danaher and Newco to effect the First Merger and otherwise consummate the Contemplated Transactions is subject to the satisfaction or waiver, at or prior to the Closing, of each of the following conditions:

### **7.1 Accuracy of Representations.**

(a) Each of the NetScout Designated Representations shall have been accurate in all material respects as of the date of this Agreement and shall be accurate in all material respects as of the Closing Date as if made on and as of the Closing Date (except, in each case, for any such representations and warranties made as of a specific date, which shall have been accurate in all material respects as of such date); provided, however, that, for purposes of determining the accuracy of such representations and warranties as of the foregoing dates all materiality or NetScout Material Adverse Effect qualifications limiting the scope of such representations and warranties shall be disregarded.

(b) Each of the representations and warranties of NetScout and Merger Sub (other than the NetScout Designated Representations) shall have been accurate in all respects as of the date of this Agreement and shall be accurate in all respects as of the Closing Date as if made on and as of the Closing Date (except for

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any such representations and warranties made as of a specific date, which shall have been accurate in all respects as of such date); provided, however, that: (i) for purposes of determining the accuracy of such representations and warranties as of the foregoing dates all materiality or NetScout Material Adverse Effect qualifications limiting the scope of such representations and warranties shall be disregarded; and (ii) any inaccuracies in such representations and warranties will be disregarded if all such inaccuracies (considered collectively) do not constitute, and would not reasonably be expected to have or result in, individually or in the aggregate, a NetScout Material Adverse Effect.

**7.2 Performance of Covenants.** The covenants and obligations in this Agreement that NetScout and Merger Sub are required to comply with or to perform at or prior to the Closing shall have been complied with and performed in all material respects.

**7.3 Effectiveness of Registration Statements.** The NetScout Form S-4 Registration Statement and the applicable Newco Registration Statement each shall have become effective in accordance with the provisions of the Securities Act and the Exchange Act, respectively; no stop order shall have been issued by the SEC and each shall remain in effect; and no proceeding seeking such a stop order shall have been initiated by the SEC and remain pending or shall be threatened by the SEC.

**7.4 NetScout Stockholder Approval.** The issuance of shares of NetScout Common Stock pursuant to the First Merger shall have been duly approved by the applicable Required NetScout Stockholder Vote.

**7.5 Separation and Distribution.** The transactions contemplated by the Distribution Agreement shall have been consummated in accordance with and subject to the terms of this Agreement and the Distribution Agreement, and the Distribution Agreement, the Tax Matters Agreement, the Transition Services Agreement, the Employee Matters Agreement, the Trademark License Agreement, the IP License Agreement, the DBS License Agreement and the Lease Agreement each shall have been executed and delivered by the parties (other than Danaher, Newco and the other Communications Companies) thereto.

**7.6 Ruling.** Danaher shall have received the Ruling, and such Ruling continues to be in effect; provided, however, that the condition set forth in this [Section 7.6](#) shall be deemed to be satisfied or waived on June 30, 2015.

**7.7 Opinion and Certificate.** Danaher shall have received the following opinion and certificate, each of which shall be in full force and effect:

(a) a written opinion of Skadden, Arps, Slate, Meagher & Flom LLP, or if Skadden, Arps, Slate, Meagher & Flom LLP is unwilling or unable to issue the opinion, a written opinion of another nationally recognized law firm or accounting firm reasonably acceptable to Danaher, in form and substance reasonably acceptable to Danaher, dated as of the Closing Date to the effect that, on the basis of the facts, representations and assumptions set forth or referred to in such opinion, (i) the transfer of assets from Danaher to Newco pursuant to the Distribution Agreement, taken together with the Distribution, will qualify as a reorganization pursuant to Sections 355, 361 and 368(a)(1)(D) of the Code that is tax-free to Danaher, the Danaher stockholders and Newco, in each case for U.S. federal income tax purposes, (ii) each of the Internal Distributions should qualify as a transaction that is tax-free pursuant to Sections 355, 361 and/or 368 of the Code, in each case for U.S. federal income tax purposes; and (iii) the Mergers will be treated as a tax-free reorganization in which no gain will be recognized for U.S. federal income tax purposes. In rendering such opinion, Skadden, Arps, Slate, Meagher & Flom LLP (or such other law firm or accounting firm) may rely upon customary assumptions and representations reasonably satisfactory to it, including, with respect to clause (iii) of the preceding sentence, representations set forth in certificates of officers of NetScout, Merger Sub and Danaher, in substantially the forms attached hereto as [Exhibits E](#) and [E](#); and

(b) a certificate executed by the Chief Executive Officer of NetScout confirming that the conditions set forth in Sections 7.1, 7.2, 7.4 and 7.8 have been duly satisfied.

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**7.8 No NetScout Material Adverse Effect.** Since the date of this Agreement, there shall not have occurred any NetScout Material Adverse Effect, and no event shall have occurred or circumstance shall exist that, in combination with any other events or circumstances, would reasonably be expected to have or result in a NetScout Material Adverse Effect.

**7.9 Governmental Approvals.** Any waiting period applicable to the consummation of the First Merger under the HSR Act shall have expired or been terminated.

**7.10 Listing.** The shares of NetScout Common Stock to be issued pursuant to the First Merger shall have been approved for listing (subject to notice of issuance) on the NASDAQ Global Select Market.

**7.11 No Restraints.** No temporary restraining order, preliminary or permanent injunction or other Order preventing the consummation of the Mergers shall have been issued by any court of competent jurisdiction or other Governmental Body and remain in effect, and there shall not be any Legal Requirement enacted or deemed applicable to the Mergers that makes consummation of the Mergers illegal.

**7.12 No Governmental Litigation.** There shall not be pending any Legal Proceeding in which a Governmental Body with jurisdiction over the parties is a party: (a) challenging or seeking to restrain, prohibit, rescind or unwind the consummation of the Mergers or any of the other Contemplated Transactions; (b) seeking to prohibit or limit in any material respect NetScout's ability to vote, transfer, receive dividends with respect to or otherwise exercise ownership rights with respect to the limited liability company interests of the First Merger Surviving Entity or Second Merger Surviving Entity, as applicable; (c) relating to the Mergers or the other Contemplated Transactions and that would reasonably be expected to result in a Burdensome Condition; (d) seeking to compel any of the Communications Companies, NetScout or any Subsidiary of NetScout to dispose of or hold separate any material assets or material business as a result of the Mergers or any of the other Contemplated Transactions that would be a Burdensome Condition; or (e) relating to the Mergers or the other Contemplated Transactions and seeking to impose (or that would reasonably be expected to result in the imposition of) any criminal sanctions or criminal liability on NetScout, Danaher or any of the Communications Companies.

**7.13 Directors.** Effective as of the Effective Time, the directors of NetScout shall be as provided in [Section 5.8](#).

## **8. TERMINATION**

**8.1 Termination.** This Agreement may be terminated prior to the Effective Time (whether before or after approval of the issuance of shares of NetScout Common Stock pursuant to the First Merger by NetScout's stockholders):

(a) by mutual written consent of NetScout and Danaher;

(b) by either NetScout or Danaher if the First Merger shall not have been consummated by October 12, 2015 (such applicable date, the **End Date**); provided, further, that a party shall not be permitted to terminate this Agreement pursuant to this [Section 8.1\(b\)](#) if the failure to consummate the First Merger by the End Date is primarily attributable to a failure on the part of such party to perform any covenant or obligation in this Agreement required to be performed by such party at or prior to the Effective Time;

(c) by either NetScout or Danaher if a court of competent jurisdiction or other Governmental Body shall have issued a final and nonappealable Order, or shall have taken any other action, having the effect of permanently restraining, enjoining or otherwise prohibiting the Mergers;

**(d)** by either Danaher or NetScout if: (i) the NetScout Stockholders Meeting (including any adjournments and postponements thereof) shall have been held and completed and NetScout's stockholders shall have taken a final vote on the issuance of shares of NetScout Common Stock pursuant to the First Merger; and

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(ii) the issuance of shares of NetScout Common Stock pursuant to the First Merger shall not have been approved at the NetScout Stockholders Meeting (and shall not have been approved at any adjournment or postponement thereof) by the applicable Required NetScout Stockholder Vote;

(e) by Danaher (at any time prior to the approval of the issuance of shares of NetScout Common Stock pursuant to the First Merger by the Required NetScout Stockholder Vote) if a NetScout Triggering Event shall have occurred, but only within the first twenty (20) business days after NetScout has confirmed in writing to Danaher that a NetScout Triggering Event has occurred;

(f) by NetScout if: (i) any of Danaher's or Newco's representations and warranties contained in this Agreement shall be inaccurate as of the date of this Agreement such that the condition set forth in Section 6.1(a) or the condition set forth in Section 6.1(b) would not then be satisfied, or shall have become inaccurate as of a date subsequent to the date of this Agreement (as if made on such subsequent date) such that the condition set forth in Section 6.1(a) or the condition set forth in Section 6.1(b) would not then be satisfied; or (ii) any of Danaher's or Newco's covenants or obligations contained in this Agreement shall have been breached such that the condition set forth in Section 6.2 would not be satisfied; provided, however, that, for purposes of clauses (i) and (ii) above, if an inaccuracy in any of Danaher's or Newco's representations and warranties (as of the date of this Agreement or as of a date subsequent to the date of this Agreement) or a breach of a covenant or obligation by Danaher or Newco is curable by Danaher or Newco by the End Date and Danaher and Newco is continuing to exercise its reasonable best efforts to cure such inaccuracy or breach, then NetScout may not terminate this Agreement under this Section 8.1(f) on account of such inaccuracy or breach unless such inaccuracy or breach shall remain uncured for a period of 30 days commencing on the date that NetScout Danaher gives Danaher notice of such inaccuracy or breach

(g) by Danaher if: (i) any of NetScout's or Merger Subs' representations and warranties contained in this Agreement shall be inaccurate as of the date of this Agreement such that the condition set forth in Section 7.1(a) or the condition set forth in Section 7.1(b) would not then be satisfied, or shall have become inaccurate as of a date subsequent to the date of this Agreement (as if made on such subsequent date) such that the condition set forth in Section 7.1(a) or the condition set forth in Section 7.1(b) would not then be satisfied; or (ii) any of NetScout's or Merger Subs' covenants or obligations contained in this Agreement shall have been breached such that the condition set forth in Section 7.2 would not be satisfied; provided, however, that, for purposes of clauses (i) and (ii) above, if an inaccuracy in any of NetScout's or Merger Subs' representations and warranties (as of the date of this Agreement or as of a date subsequent to the date of this Agreement) or a breach of a covenant or obligation by NetScout or the Merger Subs is curable by NetScout or the Merger Subs by the End Date and Danaher is continuing to exercise its reasonable best efforts to cure such inaccuracy or breach, then Danaher may not terminate this Agreement under this Section 8.1(g) on account of such inaccuracy or breach unless such inaccuracy or breach shall remain uncured for a period of 30 days commencing on the date that Danaher gives NetScout notice of such inaccuracy or breach; or

(h) by NetScout, on or after June 30, 2015, if all of the conditions set forth in Section 6 and Section 7 have been satisfied or waived (other than conditions that by their nature are to be satisfied at the Closing; provided that such conditions are capable of being satisfied by such date) other than: (i) Sections 6.5 and 7.5 (but only to the extent that such condition remains unsatisfied solely due to the failure of Section 7.7(a) to be satisfied or waived); and (ii) Section 7.7(a); provided that NetScout shall not be permitted to terminate this Agreement pursuant to this Section 8.1(h) without providing Danaher with at least 14 calendar days prior written notice (during which period Danaher may satisfy or waive such condition).

**8.2 Effect of Termination.** In the event of the termination of this Agreement as provided in Section 8.1, this Agreement shall be of no further force or effect; provided, however, that: (i) this Section 8.2, Section 8.3 and Section 9 shall survive the termination of this Agreement and shall remain in full force and effect; (ii) the

Confidentiality Agreement shall survive the termination of this Agreement and shall remain in full force and effect in accordance with its terms; and (iii) the termination of this Agreement shall not relieve any party from any liability for any willful and material breach of any representation, warranty, covenant, obligation or other provision contained in this Agreement.

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**Table of Contents****8.3 Fees and Expenses.**

(a) Except as set forth in this Section 8.3, all fees and expenses incurred in connection with this Agreement and the Contemplated Transactions shall be paid by the party incurring such expenses, whether or not the Mergers are consummated; provided, however, that NetScout and Danaher shall share equally all printing costs and all filing fees incurred in connection with the filing by the parties hereto of any notice or other document under the HSR Act and applicable foreign competition filings. For the avoidance of doubt, all Liabilities incurred by the Communications Companies in connection with the Contemplated Transactions are deemed to be Liabilities of Danaher.

(b) In the event that:

(i) this Agreement is terminated by Danaher pursuant to Section 8.1(e); or

(ii) this Agreement is terminated (x) by either NetScout (but only if Danaher could have terminated pursuant to Section 8.1(b)) or Danaher pursuant to Section 8.1(b) or (y) by Danaher pursuant to Section 8.1(g), and (A) after the date of this Agreement but before any such termination a bona fide Acquisition Proposal with respect to NetScout shall have been made or communicated to NetScout or shall have been made directly to the shareholders of NetScout generally, and (B) within nine (9) months after such termination NetScout shall have reached a definitive agreement to consummate, or shall have consummated, such Acquisition Proposal; provided that for purposes of this clause (B) all references in the definition of Acquisition Proposal to 15% shall instead refer to 50%;

then NetScout shall pay to Danaher, in cash by wire transfer of same-day funds, (1) in the case of a fee payable pursuant to clause (b)(i) above, within two business days after termination of this Agreement or (2) in the case of a fee payable pursuant to clause (b)(ii) above, upon consummation of an Acquisition Proposal, a nonrefundable fee in the amount of \$55,000,000 (the **NetScout Termination Fee** ). Notwithstanding the foregoing sentence, for purposes of this Section 8.3(b), any termination of this Agreement under Section 8.1(b) by NetScout shall be deemed to be a termination of this Agreement under Section 8.1(g) if Danaher is entitled to terminate this Agreement under Section 8.1(e) or Section 8.1(g) (or would have been entitled to terminate this Agreement but for Danaher's inability to terminate this Agreement as a result of any applicable waiting or notice period as prescribed in such provisions), respectively, at the time of such termination by NetScout.

(c) In the event that this Agreement is terminated by NetScout or Danaher pursuant to Section 8.1(d), and (A) after the date of this Agreement but before the termination of this Agreement a bona fide Acquisition Proposal with respect to NetScout shall have been made or communicated to NetScout or shall have been made directly to the shareholders of NetScout generally, and (B) within nine (9) months after such termination NetScout shall have reached a definitive agreement to consummate, or shall have consummated, an Acquisition Proposal, then NetScout shall, upon consummation of an Acquisition Proposal, pay Danaher the NetScout Termination Fee, in cash by wire transfer of same-day funds; provided that for purposes of this clause (B) all references in the definition of Acquisition Proposal to 15% shall instead refer to 50%.

(d) In the event that Danaher shall be entitled to receive the NetScout Termination Fee, such fee is not a penalty but shall be liquidated damages in a reasonable amount for any and all losses or damages suffered or incurred by Danaher in connection with the matter forming the basis for such termination. Notwithstanding any other provision of this Agreement to the contrary, other than as provided in this Section 8.3(d), the parties agree that the payments contemplated by Section 8.3(b) and Section 8.3(c) represent the sole and exclusive remedy of Danaher in respect of a termination pursuant to Section 8.1 and that, except for the payment expressly set forth in this Section 8.3, Danaher and its Affiliates shall not be entitled to bring or maintain any other claim, action or proceeding against NetScout or its Affiliates, shall be precluded from any other remedy against the other, at law or in equity or otherwise, and shall not

seek to obtain any recovery, judgment or damages of any kind against NetScout (or any partner, member, stockholder, director, officer, employee, Subsidiary, affiliate, agent or other representative of the NetScout Companies) in connection with or arising out of the termination of

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this Agreement, any breach of or by any party giving rise to such termination or the failure of the Mergers and the other Contemplated Transactions to be consummated. The parties hereby agree that the NetScout Termination Fee (including the right to receive such fee or the payment of such fee) shall not limit in any respect any rights or remedies available to Danaher and Newco relating to any willful breach or willful failure to perform any representation, warranty, covenant or agreement set forth in this Agreement resulting, directly or indirectly, in the right to receive such NetScout Termination Fee.

(e) If a party fails to pay when due any amount payable by such party under this Section 8.3(e), then: (i) such party shall reimburse the other party for all costs and expenses (including reasonable fees and disbursements of counsel) incurred in connection with the collection of such overdue amount and the enforcement by the other party of its rights under this Section 8.3(e); and (ii) such party shall pay to the other party interest on such overdue amount (for the period commencing as of the date such overdue amount was originally required to be paid through the date such overdue amount is actually paid to the other party in full) at a rate per annum equal to the lower of: (A) 350 basis points over the prime rate (as announced by Bank of America, N.A. or any successor thereto) in effect on the date such overdue amount was originally required to be paid; or (B) the maximum rate permitted by applicable Legal Requirements.

(f) Notwithstanding anything to the contrary contained in this Agreement, NetScout in no event shall be obligated to pay more than one such NetScout Termination Fee with respect to all such agreements and occurrences and such termination.

## **9. MISCELLANEOUS PROVISIONS**

**9.1 Amendment.** This Agreement may be amended with the approval of the respective NetScout Board and Danaher Board at any time prior to the Effective Time (whether before or after approval of the issuance of NetScout Common Stock pursuant to the First Merger by NetScout's stockholders); provided, however, that, after any such approval of the issuance of shares of NetScout Common Stock pursuant to the First Merger by NetScout's stockholders, no amendment shall be made which by law or regulation of the NASDAQ Global Select Market requires further approval of NetScout's stockholders without the further approval of such stockholders. This Agreement may not be amended except by an instrument in writing signed by an authorized representative of each of the parties hereto.

### **9.2 Waiver.**

(a) No failure on the part of any party to exercise any power, right, privilege or remedy under this Agreement, and no delay on the part of any party in exercising any power, right, privilege or remedy under this Agreement, shall operate as a waiver of such power, right, privilege or remedy; and no single or partial exercise of any such power, right, privilege or remedy shall preclude any other or further exercise thereof or of any other power, right, privilege or remedy.

(b) No party shall be deemed to have waived any claim arising out of this Agreement, or any power, right, privilege or remedy under this Agreement (including under Section 6, with respect to NetScout and Merger Sub and Section 7 with respect to Danaher and Newco), unless the waiver of such claim, power, right, privilege or remedy is expressly set forth in a written instrument duly executed and delivered on behalf of such party; and any such waiver shall not be applicable or have any effect except in the specific instance in which it is given.

**9.3 No Survival of Representations, Warranties and Agreements.** The covenants and agreements that by their terms are to be performed following the Closing pursuant to this Agreement, the Distribution Agreement or any other Transaction Agreement shall survive the Closing in accordance with their terms, and all other covenants and

agreements herein and therein shall terminate and shall not survive the Closing. Except as provided in the immediately following sentence, none of the representations and warranties contained in this Agreement or in any certificate or instrument delivered pursuant to this Agreement shall survive the Closing.

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Solely for purposes of the indemnification provisions set forth in Article IV of the Distribution Agreement, the representations and warranties set forth in the first sentence of [Section 2.6\(a\)](#), [Section 2.6\(b\)](#), the first sentence of [Section 2.8\(d\)](#) and [Section 2.8\(g\)](#) shall survive until the one (1) year anniversary of the Closing. The Confidentiality Agreement shall survive the execution and delivery of this Agreement and any termination of this Agreement, and the provisions of the Confidentiality Agreement shall apply to all information and material furnished by any party or its representatives thereunder or hereunder.

**9.4 Entire Agreement; Counterparts; Exchanges by Facsimile.** This Agreement, including the schedules, exhibits and amendments hereto and the other agreements referred to herein constitute the entire agreement and supersede all prior agreements and understandings, both written and oral, among or between any of the parties with respect to the subject matter hereof and thereof; provided, however, that the Confidentiality Agreement shall not be superseded and shall remain in full force and effect in accordance with its terms (it being understood that no provision in the Confidentiality Agreement shall limit any party's rights or remedies in the case of fraud). This Agreement may be executed in several counterparts, each of which shall be deemed an original and all of which shall constitute one and the same instrument. The exchange of a fully executed Agreement (in counterparts or otherwise) by facsimile or electronic transmission shall be sufficient to bind the parties to the terms and conditions of this Agreement.

**9.5 Applicable Law; Jurisdiction; Specific Performance; Remedies.** This Agreement shall be governed by, and construed in accordance with, the laws of the State of Delaware, regardless of the laws that might otherwise govern under applicable principles of conflicts of laws thereof. In any action between any of the parties arising out of or relating to this Agreement or any of the Contemplated Transactions: (a) each of the parties irrevocably and unconditionally consents and submits to the exclusive jurisdiction and venue of the Court of Chancery of the State of Delaware or, if under applicable Legal Requirements, exclusive jurisdiction over such matter is vested in the federal courts, any federal court in the State of Delaware and any appellate court from any thereof; and (b) each of the parties irrevocably waives the right to trial by jury. Each of the parties hereto further agrees that, to the fullest extent permitted by applicable law, service of any process, summons, notice or document by U.S. registered mail to such Person's respective address set forth in [Section 9.8](#) will be effective service of process for any claim, action, suit or other proceeding in the Court of Chancery of the State of Delaware or, to the extent required by law, any federal court in the State of Delaware, with respect to any matters to which it has submitted to jurisdiction as set forth in this paragraph. The parties hereto hereby agree that a final judgment in any such claim, suit, action or other proceeding will be conclusive, subject to any appeal, and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by applicable law. The parties agree that irreparable damage would occur and that the parties would not have any adequate remedy at law in the event that any of the provisions of this Agreement were not performed in accordance with their specific terms or were otherwise breached. It is accordingly agreed that the parties shall be entitled to specific performance and injunctive or other equitable relief to prevent breaches of this Agreement and to enforce specifically the terms and provisions of this Agreement without the requirement for the posting of any bond, this being in addition to any other remedy to which they are entitled at law or in equity. All rights and remedies existing under this Agreement are cumulative to, and not exclusive of, any rights or remedies otherwise available.

**9.6 Disclosure Letters.** The Danaher Disclosure Letter shall be arranged in separate parts corresponding to the numbered and lettered sections contained in [Section 2](#). The NetScout Disclosure Letter shall be arranged in separate parts corresponding to the numbered and lettered sections contained in [Section 3](#). For purposes of this Agreement: (a) each statement or other item of information set forth in the Danaher Disclosure Letter is intended only to qualify and limit the representations, warranties, covenants and agreements of Danaher and Newco contained in this Agreement and shall not be deemed to expand in any way the scope or effect of any such representations, warranties, covenants and agreements; and (b) each statement or other item of information set forth in the NetScout Disclosure Letter is intended only to qualify and limit the representations, warranties, covenants and agreements of NetScout and Merger Sub contained in this Agreement and shall not be deemed to expand in any way the scope or effect of any such

representations, warranties, covenants and agreements. The

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Danaher Disclosure Letter and NetScout Disclosure Letter shall each be delivered as of the date hereof, and no amendments or modifications thereto shall be made without the prior written consent of Danaher and NetScout, as applicable. Any purported update or modification to the Danaher Disclosure Letter or NetScout Disclosure Letter after the date hereof without the prior written consent of Danaher and NetScout, as applicable, shall be disregarded.

**9.7 Assignability; No Third Party Rights.** This Agreement shall be binding upon, and shall be enforceable by and inure solely to the benefit of, the parties hereto and their respective successors and assigns; provided, however, that neither this Agreement nor any party's rights or obligations hereunder may be assigned or delegated by such party without the prior written consent of the other parties, and any attempted assignment or delegation of this Agreement or any of such rights or obligations by any party without the prior written consent of the other parties shall be void and of no effect. Nothing in this Agreement, express or implied, is intended to or shall confer upon any Person (other than the parties hereto) any right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.

**9.8 Notices.** All notices, requests, demands and other communications under this Agreement shall be in writing and shall be deemed to have been duly given or made as follows: (a) if sent by registered or certified mail in the U.S. return receipt requested, upon receipt; (b) if sent by nationally recognized overnight air courier (such as Federal Express), two business days after mailing; (c) if sent by facsimile transmission or e-mail before 5:00 p.m. Eastern Time, when transmitted and receipt is confirmed; (d) if sent by facsimile transmission or e-mail after 5:00 p.m. Eastern Time and receipt is confirmed, on the following business day; or (e) if otherwise actually personally delivered, when delivered; provided that such notices, requests, demands and other communications are delivered to the physical address, e-mail address or facsimile number set forth below, or to such other address as any party shall provide by like notice to the other parties to this Agreement:

if to NetScout or Merger Sub:

NetScout Systems, Inc.  
310 Littleton Road  
Westford, Massachusetts 01886  
Tel: (978) 614-4000  
Attention: Anil Singhal  
E-mail: Anil.Singhal@netscout.com  
Facsimile: (978) 614-4004

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

Cooley LLP  
500 Boylston Street, 14<sup>th</sup> Floor  
Boston, Massachusetts 02116  
Tel: (617) 937-2319  
Attention: Miguel J. Vega and  
Barbara Borden  
E-mails: mvega@cooley.com  
bborden@cooley.com  
Facsimile: (617) 937-2400

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if to Danaher or Newco:

c/o Danaher Corporation  
2200 Pennsylvania Ave., NW - Suite 800W  
Washington, DC 20037-1701  
Attn: Attila Bodi  
E-mail: attila.bodi@danaher.com  
Facsimile: (202) 419-7676  
Attn: Jonathan Schwarz  
E-mail: jonathan.schwarz@danaher.com  
Facsimile: (202) 419-7668

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

Skadden, Arps, Slate, Meagher & Flom LLP  
Four Times Square  
New York, New York 10036  
Tel: (212) 735-3000  
Attention: Joseph A. Coco  
Thomas W. Greenberg  
E-mail: joseph.coco@skadden.com  
thomas.greenberg@skadden.com  
Facsimile: (212) 735-2000

**9.9 Cooperation.** NetScout and Merger Subs, on the one hand, and Danaher and Newco, on the other hand, agree to cooperate fully with Danaher and Newco and NetScout and Merger Subs, respectively, and to execute and deliver such further documents, certificates, agreements and instruments and to take such other actions as may be reasonably requested by the other parties to evidence or reflect the Contemplated Transactions and to carry out the intent and purposes of this Agreement.

**9.10 Severability.** Any term or provision of this Agreement (or part thereof) that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions of this Agreement or the validity or enforceability of the offending term or provision (or part thereof) in any other situation or in any other jurisdiction. If a final judgment of a court of competent jurisdiction declares that any term or provision of this Agreement (or part thereof) is invalid or unenforceable, the parties hereto agree that the court making such determination shall have the power to limit such term or provision (or part thereof), to delete specific words or phrases or to replace such term or provision with a term or provision that is valid and enforceable and that comes closest to expressing the intention of the invalid or unenforceable term or provision (or part thereof), and this Agreement shall be valid and enforceable as so modified. In the event such court does not exercise the power granted to it in the prior sentence, the parties hereto agree to replace such invalid or unenforceable term or provision (or part thereof) with a valid and enforceable term or provision that will achieve, to the extent possible, the economic, business and other purposes of such invalid or unenforceable term or provision.

**9.11 Construction.**

(a) For purposes of this Agreement, whenever the context requires: the singular number shall include the plural, and vice versa; the masculine gender shall include the feminine and neuter genders; the feminine gender shall include the masculine and neuter genders; and the neuter gender shall include masculine and feminine genders.

**(b)** The parties hereto agree that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be applied in the construction or interpretation of this Agreement.

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(c) As used in this Agreement, the words include and including, and variations thereof, shall not be deemed to be terms of limitation, but rather shall be deemed to be followed by the words without limitation.

(d) Except as otherwise indicated, all references in this Agreement to Sections, Exhibits and Schedules are intended to refer to Sections of this Agreement and Exhibits or Schedules to this Agreement.

(e) The bold-faced headings contained in this Agreement are for convenience of reference only, shall not be deemed to be a part of this Agreement and shall not be referred to in connection with the construction or interpretation of this Agreement.

(f) Any payment to be made pursuant hereto shall be made in U.S. dollars and by wire transfer of immediately available funds.

*[Remainder of page intentionally left blank]*

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IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date first above written.

**NETSCOUT SYSTEMS, INC.**

By: /s/ Anil K. Singhal  
Name: Anil K. Singhal  
Title: President and Chief Executive Officer

**RS MERGER SUB I, INC.**

By: /s/ Jean Bua  
Name: Jean Bua  
Title: Chief Executive Officer

**RS MERGER SUB II, LLC**

By: /s/ Jean Bua  
Name: Jean Bua  
Title: Manager

**DANAHER CORPORATION**

By: /s/ Daniel L. Comas  
Name: Daniel L. Comas  
Title: Executive Vice President and Chief  
Financial Officer

**POTOMAC HOLDING LLC**

By: /s/ Frank T. McFaden  
Name: Frank T. McFaden  
Title: Vice President and Treasurer

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**EXHIBIT A**

**CERTAIN DEFINITIONS**

For purposes of this Agreement (including this Exhibit A):

**Acquisition Inquiry.** Acquisition Inquiry shall mean an inquiry, indication of interest or request for information (other than an inquiry, indication of interest or request for information made or submitted by NetScout to Danaher or Newco or by Danaher to NetScout) that would reasonably be expected to lead to an Acquisition Proposal.

**Acquisition Proposal.** Acquisition Proposal shall mean any offer or proposal (other than an offer or proposal made or submitted by NetScout to Danaher or Newco or by Danaher to NetScout) contemplating or otherwise relating to any Acquisition Transaction.

**Acquisition Transaction.** Acquisition Transaction with respect to an Entity shall mean any transaction or series of transactions (other than the Contemplated Transactions) involving, directly or indirectly:

(a) any merger, exchange, consolidation, business combination, issuance of securities, acquisition of securities, reorganization, recapitalization, takeover offer, tender offer, exchange offer or other similar transaction: (i) in which such Entity or any of its Subsidiaries is a constituent corporation and which would result in a third party, or the stockholders of that third party, beneficially owning 15% or more of any class of equity or voting securities of such Entity or any of its Subsidiaries, or the Entity resulting from such transaction or the parent of such Entity; (ii) in which a Person or group (as defined in the Exchange Act and the rules promulgated thereunder) of Persons directly or indirectly acquires beneficial or record ownership of securities representing more than 15% of the outstanding securities of any class of voting securities of such Entity or any of its Subsidiaries; or (iii) in which such Entity or any of its Subsidiaries issues securities representing more than 15% of the outstanding securities of any class of voting securities of such Entity or any of its Subsidiaries;

(b) any sale, lease, exchange, transfer, exclusive license, acquisition or disposition of any business or businesses or assets of such Entity or its Subsidiaries that constitute or account for 15% or more of the consolidated net revenues, or consolidated net income for the 12 full months immediately prior to the receipt of the related Acquisition Proposal or 15% or more of the fair market value of the consolidated assets of such Entity or any of its Subsidiaries; or

(c) any liquidation or dissolution of such Entity or any of its Subsidiaries.

**Affiliate.** An affiliate of any Person shall mean any other Person, that, directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, such Person, and, for the purposes of this definition only, control (including the terms controlling, controlled by and under common control with) shall mean the possession, direct or indirect, of the power to direct or cause the direction of the management, policies or activities of a Person whether through the ownership of securities, by contract or agency or otherwise.

**Agreement.** Agreement shall mean this Agreement and Plan of Merger and Reorganization to which this Exhibit A is attached, as it may be amended from time to time.

**Arbor Networks.** Arbor Networks shall mean Danaher's Arbor Networks business.

**Business Day.** A business day shall mean any day other than (i) a Saturday or a Sunday or (ii) a day on which commercial banking institutions are authorized or required by applicable Legal Requirements to be closed in the

Commonwealth of Massachusetts or the District of Columbia.

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**COBRA.** COBRA shall mean the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended.

**Code.** Code shall mean the U.S. Internal Revenue Code of 1986, as amended.

**Communications Business.** Communications Business shall mean the communications group business of Danaher conducted under the brands Tektronix Communications, Fluke Networks and Arbor Networks, and including Newco and its Subsidiaries; provided, however, that the Communications Business shall exclude Danaher's data communications cable installation business and its communication service provider (field and test tools systems) business.

**Communications Companies.** Communications Companies shall mean Newco and its Subsidiaries after giving effect to the Newco Transfer.

**Confidentiality Agreement.** Confidentiality Agreement shall mean that certain Confidentiality Agreement dated as of July 29, 2014, between Danaher and NetScout.

**Consent.** Consent shall mean any approval, consent, ratification, permission, waiver or authorization (including any Governmental Authorization).

**Contemplated Transactions.** Contemplated Transactions shall mean the Mergers, the Distribution and the other transactions contemplated by the Transaction Documents.

**Contract.** Contract shall mean any written, oral or other agreement, contract, subcontract, lease, instrument, note, option, warranty, purchase order, license, sublicense, insurance policy, benefit plan or legally binding commitment or undertaking of any nature.

**Danaher Affiliate.** Danaher Affiliate shall mean any Person under common control with any of the Communications Companies within the meaning of Section 414(b), Section 414(c), Section 414(m) or Section 414(o) of the Code, and the regulations issued thereunder.

**Danaher Associate.** Danaher Associate shall mean any current or former officer or other employee, or any individual who is a current or former independent contractor, consultant or director, of or to Danaher or its Subsidiaries. For the avoidance of doubt, Danaher Associate includes each Newco Associate.

**Danaher Board.** Danaher Board shall mean Danaher's board of directors.

**Danaher Common Stock.** Danaher Common Stock shall mean the common stock, \$0.01 par value per share, of Danaher.

**Danaher Designated Representations.** Danaher Designated Representations shall mean the representations and warranties set forth in Sections 2.3, 2.18, 2.20 and 2.22.

**Danaher Disclosure Letter.** Danaher Disclosure Letter shall mean the Danaher Disclosure Letter that has been prepared by Danaher in accordance with the requirements of Section 9.6 of this Agreement and that has been delivered by Danaher to NetScout concurrently with the execution of this Agreement.

**Danaher Employee Agreement.** Danaher Employee Agreement shall mean each management, employment, severance, retention, transaction bonus, change in control, consulting, relocation, repatriation or expatriation

agreement or other Contract between: (a) Danaher or any of its Subsidiaries; and (b) any Newco Associate, other than any such Contract that is (i) terminable at will (or following a notice period imposed by applicable law) without any obligation on the part of any Communications Company to make any severance, termination, change in control or similar payment or to provide any benefit or (ii) mandated by a Governmental Body.

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**Danaher Employee Plan.** Danaher Employee Plan shall mean each plan, program, policy, practice or Contract providing for compensation, severance, termination pay, deferred compensation, performance awards, stock or stock-related awards, fringe benefits, change in control payments, sick pay, paid time off, vacation pay, retirement benefits or other benefits or remuneration of any kind, whether or not in writing and whether or not funded, including each employee benefit plan, within the meaning of Section 3(3) of ERISA (whether or not ERISA is applicable to such plan): (a) that is or has been maintained or contributed to, or required to be maintained or contributed to, by Danaher or any of its Subsidiaries for the benefit of any Newco Associate; or (b) with respect to which any of the Communications Companies has or may incur or become subject to any liability or obligation; provided, however, that (i) a Danaher Employee Agreement shall not be considered a Danaher Employee Plan and (ii) in no event shall any plan, program, policy, practice, Contract or other arrangement mandated by a Governmental Body be considered to be a Danaher Employee Plan.

**Danaher Equity Award.** Danaher Equity Award shall mean any Danaher Option and Danaher RSU that is issued and unexercised at the Effective Time, and which is assumed by NetScout or converted by NetScout into an equity award relating to NetScout Common Stock, in each case in accordance with the Employee Matters Agreement.

**Danaher Option Plans.** Danaher Option Plans shall mean Danaher's 1998 Stock Option Plan, Danaher's 2007 Stock Incentive Plan, Tektronix Communications' 2002 Stock Incentive Plan and Tektronix Communications' Stock Incentive Plan.

**Danaher Options.** Danaher Options shall mean options to purchase shares of Danaher Common Stock from Danaher (whether granted by Danaher pursuant to the Danaher Option Plans, assumed by Danaher or otherwise).

**Danaher Pension Plan.** Danaher Pension Plan shall mean each: (a) Danaher Employee Plan that is an employee pension benefit plan, within the meaning of Section 3(2) of ERISA; or (b) other occupational pension plan, including any final salary or money purchase plan.

**Danaher RSU.** Danaher RSU shall mean each restricted stock unit representing the right to vest in and be issued shares of Danaher Common Stock by Danaher, whether granted by Danaher pursuant to a Danaher Option Plan, assumed by Danaher in connection with any merger, acquisition or similar transaction or otherwise issued or granted and whether vested or unvested.

**Danaher SEC Documents.** Danaher SEC Documents shall mean all registration statements, proxy statements, Danaher certifications and other statements, reports, schedules, forms and other documents filed by Danaher with the SEC, including all amendments thereto, since January 1, 2013.

**DBS License Agreement.** DBS License Agreement shall have the meaning set forth in the Distribution Agreement.

**Debt Financing.** Debt Financing shall mean any debt financing entered into by the NetScout Companies in connection with the Contemplated Transactions, including the amendment of the NetScout Credit Agreements.

**Derivative.** Derivative means: (i) any derivative work (as defined in Section 101 of the U.S. Copyright Act) of any copyrighted work; and (ii) all improvements, modifications, alterations, adaptations, enhancements and new versions of any technology.

**DGCL.** DGCL shall mean the Delaware General Corporation Law.

**DLLCA.** DLLCA shall mean the Delaware Limited Liability Company Act.

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**Distribution.** Distribution shall have the meaning set forth in the Distribution Agreement.

**Distribution Agreement.** Distribution Agreement shall mean the Separation and Distribution Agreement by and between Danaher, NetScout and Newco dated of even date with this Agreement, as it may be amended from time to time in accordance with the terms thereof.

**DOL.** DOL shall mean the U.S. Department of Labor.

**Employee Matters Agreement.** Employee Matters Agreement shall have the meaning set forth in the Distribution Agreement.

**Encumbrance.** Encumbrance shall mean any lien, pledge, hypothecation, charge, mortgage, easement, encroachment, imperfection of title, title exception, title defect, right of possession, lease, tenancy license, security interest, encumbrance, claim, infringement, interference, option, right of first refusal, preemptive right, community property interest or restriction of any nature (including any restriction on the voting of any security, any restriction on the transfer of any security or other asset, any restriction on the receipt of any income derived from any asset, any restriction on the use of any asset and any restriction on the possession, exercise or transfer of any other attribute of ownership of any asset).

**Entity.** Entity shall mean any corporation (including any non-profit corporation), general partnership, limited partnership, limited liability partnership, joint venture, estate, trust, company (including any company limited by shares, limited liability company or joint stock company), firm, society or other enterprise, association, organization or entity.

**ERISA.** ERISA shall mean the Employee Retirement Income Security Act of 1974, as amended.

**Exchange Act.** Exchange Act shall mean the Securities and Exchange Act of 1934, as amended.

**Excluded Liabilities.** Excluded Liabilities shall have the meaning set forth in the Distribution Agreement.

**Fluke Networks.** Fluke Networks shall mean Danaher's Fluke Networks Enterprise business, excluding Danaher's data communications cable installation business and its communication service provider (field and test tool systems) business.

**GAAP.** GAAP shall mean generally accepted accounting principles in the United States.

**Governmental Authorization.** Governmental Authorization shall mean any: (a) permit, license, certificate, franchise, permission, variance, clearance, registration, qualification or authorization issued, granted, given or otherwise made available by or under the authority of any Governmental Body or pursuant to any Legal Requirement; or (b) right under any Contract with any Governmental Body.

**Governmental Body.** Governmental Body shall mean any: (a) nation, state, commonwealth, province, territory, county, municipality, district or other jurisdiction of any nature; (b) federal, state, local, municipal, foreign or other government; (c) governmental or quasi-governmental authority of any nature (including any governmental division, department, agency, commission, instrumentality, official, ministry, fund, foundation, center, organization, unit, body or Entity and any court or other tribunal); or (d) self-regulatory organization (including the New York Stock Exchange and the NASDAQ Global Select Market).

**Government Bid.** Government Bid shall mean any offer to sell made by the Communications Companies or the NetScout Companies, as applicable, prior to the Closing Date which, if accepted, would result in a Government Contract and for which an award has not been made thirty (30) days or more prior to the date of this Agreement.

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**Government Contract.** Government Contract shall mean any prime contract, subcontract, teaming agreement or arrangement, joint venture, basic ordering agreement, pricing agreement, letter contract, grant, cooperative agreement or other similar arrangement of any kind, between the Communications Companies or the NetScout Companies, as applicable, on one hand, and (i) any Governmental Body, (ii) any prime contractor of a Governmental Body in its capacity as a prime contractor or (iii) any subcontractor at any tier with respect to a contract with a Governmental Body if such subcontractor is acting in its capacity as a subcontractor, on the other hand.

**HSR Act.** HSR Act shall mean the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

**Information.** Information shall mean information in written, oral, electronic or other tangible or intangible form, stored in any medium, including studies, reports, records, books, Contracts, instruments, surveys, discoveries, ideas, concepts, know-how, techniques, designs, specifications, drawings, blueprints, diagrams, models, prototypes, samples, flow charts, data, computer data, disks, diskettes, tapes, computer programs or other software, marketing plans, customer names, communications by or to attorneys (including attorney-client privileged communications), memos and other materials prepared by attorneys or under their direction (including attorney work product), and other technical, financial, employee or business information or data, but in any case excluding back-up tapes.

**Intellectual Property.** Intellectual Property shall mean United States, foreign and international patents, patent applications, including provisional applications, statutory invention registrations, invention disclosures, inventions, trademarks, service marks, trade names, domain names, URLs, trade dress, logos and other source identifiers, including registrations and applications for registration thereof, together with the goodwill symbolized by any of the foregoing, copyrights, including registrations and applications for registration thereof, rights in software, databases, documentation, formulae, trade secrets, know-how, methods, processes, protocols, specifications, techniques, and other forms of technology (whether or not embodied in any tangible form).

**Intellectual Property Rights.** Intellectual Property Rights shall mean and include all rights of the following types, which exist under the laws of any jurisdiction in the world: (a) rights associated with works of authorship, including exclusive exploitation rights, copyrights, moral rights, and mask works; (b) trademark and trade name rights and similar rights; (c) trade secret rights; (d) patents and industrial property rights; (e) other proprietary rights in Intellectual Property of every kind and nature; and (f) all registrations, renewals, extensions, continuations, divisions, or reissues of, and applications for, any of the rights referred to in clauses (a) through (e) above.

**Internal Distributions.** Internal Distributions shall mean those steps of the Internal Restructuring, currently corresponding to Steps 1, 2, 3, 5, 8, 9, 10, 11, and 12 of the Preliminary Plan, as set forth in Schedule 1.01(b) to the Distribution Agreement, and as will be finally described in the Plan of Reorganization as contemplated in Section 1.01(b) of the Distribution Agreement.

**Internal Restructuring.** Internal Restructuring shall have the meaning set forth in the Distribution Agreement.

**IP License Agreement.** IP License Agreement shall have the meaning ascribed to the Cross-License Agreement in the Distribution Agreement.

**IRS.** IRS shall mean the United States Internal Revenue Service.

**Knowledge of Danaher.** Knowledge of Danaher or a similar phrase shall mean the actual knowledge, after reasonable investigation, of (i) James A. Lico, (ii) David Naemura, (iii) Doug Grandstaff, (iv) Jonathan L. Schwarz and (v) Rick King.

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**Knowledge of NetScout.** Knowledge of NetScout or a similar phrase shall mean the actual knowledge, after reasonable investigation, of (i) Anil Singhal, (ii) Jean Bua, (iii) Jeff Levinson and (iv) Michael Szabados.

**Lease Agreement.** Lease Agreement shall have the meaning ascribed to the Commercial Lease Agreement in the Distribution Agreement.

**Legal Proceeding.** Legal Proceeding shall mean any action, suit, litigation, arbitration, proceeding (including any civil, criminal, administrative, investigative or appellate proceeding), hearing, inquiry, audit, examination or investigation commenced, brought, conducted or heard by or before, or otherwise involving, any court or other Governmental Body or any arbitrator or arbitration panel.

**Legal Requirement.** Legal Requirement shall mean any federal, state, local, municipal, foreign or other law, statute, constitution, principle of common law, resolution, ordinance, code, edict, decree, rule, regulation, Order, award, ruling or requirement issued, enacted, adopted, promulgated, implemented or otherwise put into effect by or under the authority of any Governmental Body (or under the authority of the New York Stock Exchange and the NASDAQ Global Select Market).

**Made Available.** Any statement in this Agreement to the effect that any information, document or other material has been Made Available shall mean that: (a) with respect to any information, document or other material to which Danaher has given NetScout or its Representatives access: either (x) (i) such information, document or material was made available by Danaher for review by NetScout or NetScout's Representatives at least eighteen hours prior to the execution of this Agreement in the physical data room (a list of such documents and materials have been provided by Danaher to NetScout outside legal counsel) or the virtual data room maintained by Danaher on the Data Site from Merrill Corporation in connection with the transactions contemplated by this Agreement (it being understood that a document that was only made available for review in the physical or virtual data room in the eighteen hours prior to the execution of this Agreement shall only be deemed to have been made available if Danaher shall have promptly notified and given immediate access to NetScout or its outside legal counsel that such document was provided or uploaded into the physical or virtual data room); and (ii) NetScout or NetScout's Representatives had access to such information, document or material throughout such period of time or (y) that such information was filed by Danaher, with the SEC prior to the date of this Agreement and was, as of the date of this Agreement, publicly available on the SEC's EDGAR Database; and (b) with respect to any information, document or other material to which NetScout has given Danaher access: either (x) (i) such information, document or material was made available by NetScout for review by Danaher or Danaher's Representatives at least eighteen hours prior to the execution of this Agreement in the virtual data room maintained by NetScout with Data Site from Merrill Corporation in connection with the transactions contemplated by this Agreement (it being understood that a document that was only made available for review in the virtual data room in the eighteen hours prior to the execution of this Agreement shall only be deemed to have been made available if NetScout shall have promptly notified Danaher or its outside legal counsel that such document was uploaded into the virtual data room); and (ii) Danaher and Danaher's Representatives had access to such information, document or material throughout such period of time or (y) that such information was filed by NetScout, with the SEC prior to the date of this Agreement and was, as of the date of this Agreement, publicly available on the SEC's EDGAR database. As used in this definition of Made Available, the term file and variations thereof shall be construed to include any manner in which a document or information is filed, furnished, submitted, supplied or otherwise made available to the SEC or any member of its staff.

**NetScout Affiliate.** NetScout Affiliate shall mean any Person under common control with any of the NetScout Companies within the meaning of Section 414(b), Section 414(c), Section 414(m) or Section 414(o) of the Code, and the regulations issued thereunder.

**NetScout Associate.** NetScout Associate shall mean any current or former officer or other employee, or any individual who is a current or former independent contractor, consultant or director, of or to any of the NetScout Companies or of or to any NetScout Affiliate.

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**NetScout Board.** NetScout Board shall mean NetScout's board of directors.

**NetScout Common Stock.** NetScout Common Stock shall mean the Common Stock, \$0.001 par value per share, of NetScout.

**NetScout Companies.** NetScout Companies shall mean: (a) NetScout; and (b) each of NetScout's Subsidiaries, including Merger Subs.

**NetScout Contract.** NetScout Contract shall mean any Contract: (a) to which any of the NetScout Companies is a party; (b) by which any of the NetScout Companies or any NetScout IP or any other asset of any of the NetScout Companies is or may become bound or under which any of the NetScout Companies has, or may become subject to, any obligation; or (c) under which any of the NetScout Companies has or may acquire any right or interest.

**NetScout Credit Agreements.** NetScout Credit Agreements shall mean that certain Credit and Security Agreement, dated as of December 21, 2007, by and among NetScout, KeyBank National Association, as joint lead arranger, sole book runner and administrative agent, Wells Fargo Bank, National Association, as joint lead arranger and co-syndication agent, Merrill Lynch, Pierce, Fenner & Smith Incorporated, as joint lead arranger, Bank of America, N.A., as co-syndication agent, and Silicon Valley Bank and Comerica Bank, as co-documentation agents, and the Lenders party thereto, as amended by First Amendment Agreement, dated as of December 4, 2009, to the Credit and Security Agreement, dated as of December 21, 2007, by and among NetScout, Keybank National Association, as lead arranger, sole book runner and administrative agent, Silicon Valley Bank and Wells Fargo Foothill, LLC, as co-syndication agents, and Comerica Bank, as documentation agent, and the Lenders party thereto.

**NetScout Designated Representations.** NetScout Designated Representations shall mean the representations and warranties set forth in Sections 3.3, 3.18, 3.20 and 3.22.

**NetScout Disclosure Letter.** NetScout Disclosure Letter shall mean the NetScout Disclosure Letter that has been prepared by NetScout in accordance with the requirements of Section 9.6 of this Agreement and that has been delivered by NetScout to Danaher concurrently with the execution of this Agreement.

**NetScout Employee.** NetScout Employee shall mean any director or any officer or any other employee of any of the NetScout Companies.

**NetScout Employee Agreement.** NetScout Employee Agreement shall mean each management, employment, severance, retention, transaction bonus, change in control, consulting, relocation, repatriation or expatriation agreement or other Contract between: (a) any of the NetScout Companies; and (b) any NetScout Employee, other than any such Contract that is (i) terminable at will (or following a notice period imposed by applicable law) without any obligation on the part of any NetScout Company to make any severance, termination, change in control or similar payment or to provide any benefit or (ii) mandated by a Governmental Body.

**NetScout Employee Plan.** NetScout Employee Plan shall mean each plan, program, policy, practice or Contract providing for compensation, severance, termination pay, deferred compensation, performance awards, stock or stock-related awards, fringe benefits, change in control payments, sick pay, paid time off, vacation pay, retirement benefits or other benefits or remuneration of any kind, whether or not in writing and whether or not funded, including each employee benefit plan, within the meaning of Section 3(3) of ERISA (whether or not ERISA is applicable to such plan): (a) that is maintained or contributed to, or required to be maintained or contributed to, by any of the NetScout Companies for the benefit of any NetScout Employee; or (b) with respect to which any of the NetScout Companies has or may incur or become subject to any liability or obligation; provided, however, that (i) a NetScout

Employee Agreement shall not be considered a NetScout Employee Plan and (ii) in no event shall any plan, program, policy, practice, Contract or other arrangement mandated by a Governmental Body be considered to be a NetScout Employee Plan.

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**NetScout Equity Award.** NetScout Equity Award shall mean each NetScout Option and NetScout RSU.

**NetScout Form S-4 Registration Statement.** NetScout Form S-4 Registration Statement shall mean the registration statement on Form S-4 to be filed with the SEC by NetScout in connection with the issuance of NetScout Common Stock pursuant to the First Merger, as said registration statement may be amended prior to the time it becomes effective under the Securities Act.

**NetScout Interim Balance Sheet.** NetScout Interim Balance Sheet shall mean the unaudited consolidated balance sheet of NetScout and its consolidated Subsidiaries as of June 30, 2014.

**NetScout IP.** NetScout IP shall mean: (a) all Intellectual Property constituting, and all Intellectual Property Rights embodied by, the NetScout Products and for which NetScout has (or purports to have) ownership rights; and (b) all other material Intellectual Property Rights with respect to which any of the NetScout Companies has (or purports to have) an ownership interest.

**NetScout Material Adverse Effect.** NetScout Material Adverse Effect shall mean any effect, change, claim, event or circumstance (collectively, Effect) that, considered together with all other Effects, (a) is or would reasonably be expected to be or to become materially adverse to, or has or would reasonably be expected to have or result in a material adverse effect on the business, financial condition or results of operations of NetScout and its Subsidiaries taken as a whole; provided, however, that in no event shall any Effects resulting from any of the following, alone or in combination, be deemed to constitute, or be taken into account in determining whether there has occurred, a NetScout Material Adverse Effect: (i) conditions generally affecting the industry in which NetScout competes or the U.S. or global economy as a whole, to the extent that such conditions do not have a disproportionate impact on the NetScout Companies taken as a whole, relative to other companies in the industry in which the NetScout Companies operate; (ii) general conditions in the financial markets, and any changes therein (including any changes arising out of acts of terrorism, war, weather conditions or other force majeure events), to the extent that such conditions do not have a disproportionate impact on NetScout Companies taken as a whole, relative to other companies in the industry in which the NetScout Companies operate; (iii) changes in the trading price or trading volume of NetScout Common Stock (it being understood, however, that, except as otherwise provided in clauses (i), (ii), (iv), (v), (vi), (vii) or (viii) of this sentence, any Effect giving rise to or contributing to such changes in the trading price or trading volume of NetScout Common Stock may give rise to a NetScout Material Adverse Effect and may be taken into account in determining whether a NetScout Material Adverse Effect has occurred); (iv) changes in GAAP (or any interpretations of GAAP) or Legal Requirements applicable to NetScout or any of its Subsidiaries, to the extent that such conditions do not have a disproportionate impact on NetScout Companies taken as a whole, relative to other companies in the industry in which the NetScout Companies operate; (v) the failure to meet public estimates or forecasts of revenues, earnings of other financial metrics, in and of itself, or the failure to meet internal projections, forecasts or budgets of revenues, earnings or other financial metrics, in and of itself (it being understood, however, that, except as otherwise provided in clauses (i), (ii), (iii), (iv), (vi), (vii) or (viii) of this sentence, any Effect giving rise to or contributing to any such failure to meet public estimates or forecasts of revenues, earnings of other financial metrics, in and of itself, or the failure to meet internal projections, forecasts or budgets of revenues, earnings or other financial metrics, in and of itself may give rise to a NetScout Material Adverse Effect and may be taken into account in determining whether a NetScout Material Adverse Effect has occurred); (vi) any stockholder or derivative litigation arising from or relating to this Agreement or the Contemplated Transactions; (vii) Effects resulting directly from the announcement or pendency of this Agreement or the Contemplated Transactions, including loss of employees, suppliers or customers (including changes in customer bidding procedures or testing or award or scope of survey and/or loss of customer orders or Contracts) and any related decrease in sales volume of NetScout Products; or (viii) any items disclosed on Part 3 of the NetScout Disclosure Letter, or (b) would prevent or materially impair NetScout from complying with its obligations hereunder or consummating the Contemplated Transactions.

**NetScout Option Plans.** NetScout Option Plans shall mean NetScout's: 1999 Stock Option and Incentive Plan, Amended and Restated 2007 Equity Incentive Plan, and 2011 Employee Stock Purchase Plan.

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**NetScout Options.** NetScout Options shall mean options to purchase shares of NetScout Common Stock from NetScout (whether granted by NetScout pursuant to the NetScout Option Plans, assumed by NetScout or otherwise).

**NetScout Pension Plan.** NetScout Pension Plan shall mean each: (a) NetScout Employee Plan that is an employee pension benefit plan, within the meaning of Section 3(2) of ERISA; or (b) other occupational pension plan, including any final salary or money purchase plan.

**NetScout Product.** NetScout Product shall mean any product or service (i) both (x) designed or developed and (y) sold, or (ii) under development and substantially completed, or (iii) manufactured, sold or distributed, in each of the foregoing (i), (ii) and (iii), by or on behalf of the NetScout Companies as of the date of this Agreement, including the products listed in Part 3.8 of the NetScout Disclosure Letter. The NetScout Products under the foregoing clauses (i) and (ii) shall be referred to herein as the **Proprietary NetScout Products** .

**NetScout RSU.** NetScout RSU shall mean each restricted stock unit representing the right to vest in and be issued shares of NetScout Common Stock by NetScout, whether granted by NetScout pursuant to a NetScout Option Plan, assumed by NetScout in connection with any merger, acquisition or similar transaction or otherwise issued or granted and whether vested or unvested.

**NetScout Superior Offer.** NetScout Superior Offer shall mean an unsolicited bona fide written offer by a third party to purchase at least a majority of the outstanding shares of NetScout Common Stock or at least a majority of the assets of NetScout (whether through a tender offer, merger or otherwise), that is determined by the NetScout Board, in its good faith judgment, after consulting with its financial advisor and outside legal counsel, and after taking into account the terms and conditions of the offer, including the likelihood and anticipated timing of consummation, (i) to be more favorable, from a financial point of view, to NetScout's stockholders than the combination with Newco, (ii) is reasonably likely to be completed, taking into account any financing and approval requirements that the NetScout Board determines to be relevant and all other financial, legal, regulatory and other aspects of such proposal that the NetScout Board determines to be relevant, and (iii) for which financing, if a cash transaction (in whole or part), is then fully committed.

**NetScout Triggering Event.** A NetScout Triggering Event shall be deemed to have occurred if (a) the NetScout Board shall have failed to recommend that NetScout's stockholders vote to approve the issuance of shares of NetScout Common Stock pursuant to the First Merger, or shall have directly or indirectly withdrawn or modified in a manner adverse to Danaher the NetScout Board Recommendation, (b) NetScout shall have failed to include in the Proxy Statement/Prospectus the NetScout Board Recommendation, (c) NetScout shall have failed to publicly recommend against any publicly announced Acquisition Proposal with respect to NetScout or publicly announced Acquisition Inquiry with respect to NetScout, and reaffirm the NetScout Board Recommendation in connection therewith, within ten (10) business days of the request of Danaher, (d) the NetScout Board shall have approved, endorsed or recommended any Acquisition Proposal (other than any confidentiality agreement contemplated by [Section 4.5\(b\)](#)), (e) NetScout shall have entered into any letter of intent or similar document or any Contract relating to any Acquisition Proposal; or (f) NetScout shall have breached in any material respect [Section 4.5](#) of this Agreement.

**Newco Assets.** Newco Assets shall have the meaning ascribed to the Communications Assets in the Distribution Agreement.

**Newco Associate.** Newco Associate shall mean any current or former officer or other employee, or any individual who is a current or former independent contractor, consultant or director, of or to the Communications Business or any of the Communications Companies.

**Newco Common Units.** Newco Common Units shall mean the limited liability company interests of Newco which are designated as Common Units pursuant to the Newco LLC Agreement.

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**Newco Contract.** Newco Contract shall mean any Contract: (a) to which any of the Communications Companies is a party; (b) by which any of the Communications Companies or any Newco IP or any other asset of any of the Communications Companies is or may become bound or under which any of the Communications Companies has, or may become subject to, any obligation; or (c) under which any of the Communications Companies has or may acquire any right or interest.

**Newco Employee.** Newco Employee has the meaning set forth in the Employee Matters Agreement.

**Newco IP.** Newco IP shall mean: (a) all Intellectual Property constituting, and all Intellectual Property Rights embodied by, the Newco Products and for which Danaher has (or purports to have, including as a result of the transfers under the Distribution Agreement) ownership rights; and (b) all other material Intellectual Property Rights with respect to which any of the Communications Companies has (or purports to have, including as a result of the transfers under the Distribution Agreement) an ownership interest.

**Newco LLC Agreement.** Newco LLC Agreement shall mean the Limited Liability Company Agreement of Potomac Holding LLC, dated as of October 11, 2014 (as may be amended).

**Newco Material Adverse Effect.** Newco Material Adverse Effect shall mean any Effect that, considered together with all other Effects, (a) is or would reasonably be expected to be or to become materially adverse to, or has or would reasonably be expected to have or result in a material adverse effect on the business, financial condition or results of operations of the Communications Companies taken as a whole; provided, however, that in no event shall any Effects resulting from any of the following, alone or in combination, be deemed to constitute, or be taken into account in determining whether there has occurred, a Newco Material Adverse Effect: (i) conditions generally affecting the industry in which the Communications Companies compete or the U.S. or global economy as a whole, to the extent that such conditions do not have a disproportionate impact on the Communications Companies taken as a whole, relative to other companies in the industry in which the Communications Companies operate; (ii) general conditions in the financial markets, and any changes therein (including any changes arising out of acts of terrorism, war, weather conditions or other force majeure events), to the extent that such conditions do not have a disproportionate impact on the Communications Companies, taken as a whole, relative to other companies in the industry in which the Communications Companies operate; (iii) changes in the trading price or trading volume of Danaher Common Stock (it being understood, however, that, except as otherwise provided in clauses (i), (ii), (iv), (v), (vi), (vii) or (viii) of this sentence, any Effect giving rise to or contributing to such changes in the trading price or trading volume of Danaher Common Stock may give rise to a Newco Material Adverse Effect and may be taken into account in determining whether a Newco Material Adverse Effect has occurred); (iv) changes in GAAP (or any interpretations of GAAP) or Legal Requirements applicable to the Communications Companies, to the extent that such conditions do not have a disproportionate impact on the Communications Companies taken as a whole, relative to other companies in the industry in which the Communications Companies operate; (v) the failure to meet public estimates or forecasts of revenues, earnings or other financial metrics, in and of itself, or the failure to meet internal projections, forecasts or budgets of revenues, earnings or other financial metrics, in and of itself (it being understood, however, that, except as otherwise provided in clauses (i), (ii), (iii), (iv), (vi), (vii) or (viii) of this sentence, any Effect giving rise to or contributing to any such failure may give rise to a Newco Material Adverse Effect and may be taken into account in determining whether a Newco Material Adverse Effect has occurred); (vi) any stockholder or derivative litigation arising from or relating to this Agreement or the Contemplated Transactions; (vii) Effects resulting directly from the announcement or pendency of this Agreement or the Contemplated Transactions, including loss of employees, suppliers or customers (including changes in customer bidding procedures or testing or award or scope of survey and/or loss of customer orders or Contracts) and any related decrease in sales volume of Newco Products; or (viii) any items disclosed on Part 2 of the Danaher Disclosure Letter, or (b) would prevent or materially impair Danaher from complying with its obligations hereunder or consummating the Contemplated Transactions.

**Newco Membership Interest.** Newco Membership Interest shall mean the Newco Common Units and any other limited liability company interests issued by Newco.

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**Newco Product.** Newco Product shall mean any product or service (i) both (x) designed or developed and (y) sold, or (ii) under development and substantially completed, or (iii) manufactured, sold or distributed, in each of the foregoing (i), (ii) and (iii), by or on behalf of the Communications Business or the Communications Companies as of the date of this Agreement, including the products listed in Part 2.8 of the Danaher Disclosure Letter. The Newco Products under the foregoing clauses (i) and (ii) shall be referred to herein as the **Proprietary Newco Products** .

**Newco Transfer.** Newco Transfer shall have the meaning set forth in the Distribution Agreement.

**Newco Web Site.** Newco Web Site shall mean any public or private website owned, maintained, or operated at any time by or on behalf of the Communications Companies.

**Open Source Code.** Open Source Code shall mean any software code that is distributed as free software or open source software or is otherwise distributed publicly in source code form under terms that permit modification and redistribution of such software. Open Source Code includes software code that is licensed under the GNU General Public License, GNU Lesser General Public License, Mozilla License, Common Public License, Apache License, BSD License, Artistic License, or Sun Community Source License.

**Operating Profit.** Operating Profit shall mean the earnings before income taxes of the Communications Business, taken as a whole, for the fiscal year ended December 31, 2013, calculated in a manner consistent with GAAP consistently applied but before (1) impairment of intangible assets, (2) intangible amortization, (3) stock based compensations, (4) corporate allocations and (5) allocations from Fluke Industrial or Tektronix Instruments, calculated in a manner consistent with Schedule 1.11(b).

**Order.** Order shall mean any order, writ, injunction, judgment or decree of a Governmental Body of competent jurisdiction.

**Permitted Encumbrances.** Permitted Encumbrances shall mean (i) any lien for current taxes not yet due and payable as of the Closing Date or that are being contested in good faith and for which appropriate reserves have been established to the extent required by GAAP; (ii) zoning, building codes and other land use Legal Requirements regulating the use or occupancy of such Newco Leased Real Property or NetScout Leased Real Property, as applicable, or the activities conducted thereon that are imposed by any Governmental Body having jurisdiction over such Newco Leased Real Property or NetScout Leased Real Property, as applicable, or the operation of the business thereon; (iii) easements, covenants, conditions, restrictions and other similar matters of record, or matters that would be disclosed by a true and correct survey, affecting title to any Newco Leased Real Property or NetScout Leased Real Property, as applicable, that do not or would not materially impair the use or occupancy of such Newco Leased Real Property or NetScout Leased Real Property, as applicable, in the operation of the business conducted thereon; and (iv) solely with respect to the Communications Companies, liens described in Part 2.6(a) of the Danaher Disclosure Letter or created in connection with the Debt Financing, and solely with respect to the NetScout Companies, liens described in Part 3.6 of the NetScout Disclosure Letter.

**Person.** Person shall mean any individual, Entity or Governmental Body.

**Personal Data.** Personal Data shall mean a natural person's name, street address, telephone number, e-mail address, photograph, social security number, driver's license number, passport number, or customer or account number, or any other piece of information that allows the identification of a natural person.

**Plan of Reorganization.** Plan of Reorganization shall have the meaning set forth in the Distribution Agreement.

**Proxy Statement/Prospectus.** Proxy Statement/Prospectus shall mean the proxy statement/prospectus to be sent to NetScout's stockholders in connection with the NetScout Stockholders Meeting.

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**Registered IP.** Registered IP shall mean all Intellectual Property Rights that are registered, filed or issued with, by or under the authority of any Governmental Body, including all patents, registered copyrights, registered mask works and registered trademarks and all applications for any of the foregoing.

**Release.** Release shall mean any spilling, leaking, emitting, discharging, depositing, escaping, leaching, dumping or other releasing into the environment, whether intentional or unintentional.

**Representatives.** Representatives shall mean with respect to an Entity, the directors, officers, other employees, agents, attorneys, accountants, investment bankers, other advisors and representatives of such Entity.

**Ruling.** Ruling shall mean a private letter ruling from the IRS addressing the tax consequences of certain aspects of the Internal Distributions, the Distribution and/or the related transactions that were discussed in the pre-submission memorandum dated September 11, 2014 submitted by Ernst & Young LLP on behalf of Danaher.

**Sarbanes-Oxley Act.** Sarbanes-Oxley Act shall mean the Sarbanes-Oxley Act of 2002, as it may be amended from time to time.

**SEC.** SEC shall mean the United States Securities and Exchange Commission.

**Securities Act.** Securities Act shall mean the Securities Act of 1933, as amended.

**Shared Information.** Shared Information shall mean (i) all Information provided by any of Danaher or its Affiliates (including the Communications Companies) to any of NetScout or its Affiliates hereunder prior to the Effective Time, and (ii) any Information in the possession or under the control of Danaher, NetScout or their respective Affiliates that relates to the operation of the Communications Business or any Communications Company prior to the Effective Time and that the requesting party reasonably needs (A) to comply with reporting, disclosure, filing or other requirements imposed on the requesting party (including under applicable securities and Tax Legal Requirements) by a Governmental Body having jurisdiction over the requesting party, (B) for use in any other judicial, regulatory, administrative or other proceeding or in order to satisfy audit, accounting, claims, regulatory, litigation or other similar requirements, in each case other than claims or allegations that one party to this Agreement has against the other, (C) subject to the foregoing clause (B) above, to comply with its obligations under this Agreement, or (D) to the extent such Information and cooperation is necessary to comply with such reporting, filing and disclosure obligations, for the preparation of financial statements or completing an audit, and as reasonably necessary to conduct the ongoing businesses of NetScout, the Communications Companies or Danaher and their respective Affiliates, as the case may be.

**Subsidiary.** An Entity shall be deemed to be a Subsidiary of another Person if such Person directly or indirectly owns, beneficially or of record: (a) an amount of voting securities of or other interests in such Entity that is sufficient to enable such Person to elect at least a majority of the members of such Entity's board of directors or other governing body; or (b) at least 50% of the outstanding equity, voting or financial interests in such Entity.

**Tax.** Tax shall mean (a) all taxes, charges, fees, duties, levies, imposts, or other similar assessments, imposed by any U.S. federal, state or local or foreign governmental authority, including, but not limited to, net income, gross income, gross receipts, excise, real property, personal property, sales, use, service, service use, license, lease, capital stock, transfer, recording, franchise, business organization, occupation, premium, environmental, windfall profits, profits, customs, duties, payroll, wage, withholding, social security, employment, unemployment, insurance, severance, workers compensation, excise, stamp, alternative minimum, estimated, value added, ad valorem and other taxes, charges, fees, duties, levies, imposts, or other similar assessments, (b) any interest, penalties or additions attributable

thereto and (c) all liabilities in respect of any items described in clauses (a) or (b) payable by reason of assumption, transferee or successor liability, operation of Law or Treasury Regulation Section 1.1502-6(a) (or any predecessor or successor thereof or any analogous or similar provision under Law).

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**Tax Matters Agreement.** Tax Matters Agreement shall mean the Tax Matters Agreement in substantially the form attached to the Distribution Agreement as Exhibit A.

**Tax Return.** Tax Return shall mean any return (including any information return), report, statement, declaration, estimate, schedule, notice, notification, form, election, certificate or other document or information, and any amendment or supplement to any of the foregoing, filed with or submitted to, or required to be filed with or submitted to, any Governmental Body in connection with the determination, assessment, collection or payment of any Tax or in connection with the administration, implementation or enforcement of or compliance with any Legal Requirement relating to any Tax.

**Tektronix Communications.** Tektronix Communications shall mean Danaher's Tektronix Communications business.

**Trademark License Agreement.** Trademark License Agreement shall have the meaning set forth in the Distribution Agreement.

**Transaction Documents.** Transaction Documents shall mean this Agreement, the Distribution Agreement, the Tax Matters Agreement, the Transition Services Agreement, the Employee Matters Agreement, the Trademark License Agreement, the IP License Agreement, the DBS License Agreement, the Lease Agreement, and the Voting Agreement.

**Transition Services Agreement.** Transition Services Agreement shall mean the Transition Services Agreement in substantially the form attached to the Distribution Agreement as Exhibit B.

**Other Defined Terms.** In addition, each of the following terms shall have the meaning given to such term in the applicable Section of this Agreement listed opposite such term:

<b>Term</b>	<b>Section</b>
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Audited Financial Statements	5.13(a)
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Danaher	Preamble
Effective Time	1.3
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Exchange Agent	1.6(b)
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FCPA	2.11(a)
First Merger	Recitals
First Merger Surviving Entity	1.1(a)
Hazardous Materials	2.15

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Intervening Event	5.2(c)(ii)
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NetScout Material Registered IP	3.8(a)
NetScout Restricted Business	5.15(a)
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THE FOLLOWING EXHIBITS AND SCHEDULES TO THE AGREEMENT AND PLAN OF MERGER HAVE BEEN OMITTED IN ACCORDANCE WITH ITEM 601(B)(2) OF REGULATION S-K.

**Exhibits**

- Exhibit B: Voting Agreement
- Exhibit C: Form of Certificate of Formation of Newco
- Exhibit D: Form of Limited Liability Company Agreement of First Merger Surviving Entity
- Exhibit E: Form of Officers Certificate of NetScout and Merger Sub
- Exhibit F: Form of Officers Certificate of Danaher

**Danaher Disclosure Letter**

Part 2 Newco Material Adverse Effect

Part 2.1 Subsidiaries; Due Organization; Etc.

Part 2.2 Certificate of Formation and Other Governing Documents

Part 2.3 Capitalization, Etc.

Part 2.4 Financial Statements

Part 2.5 Absence of Changes

Part 2.6 Title to and Sufficiency of Assets

Part 2.7 Real Property; Leasehold

Part 2.8 Intellectual Property; Privacy

Part 2.9 Contracts

Part 2.10 Compliance with Legal Requirements; Regulatory Matters

Part 2.11 Anti-Corruption Compliance; Export Control and Sanctions Compliance

Part 2.13 Tax Matters

Part 2.14 Employee and Labor Matters; Benefit Plans

Part 2.17 Legal Proceedings; Orders

Part 2.21 Non-Contravention; Consents

Part 2.22 Financial Advisor

Part 4.2 Operation of the Business of the Communications Companies

NetScout Disclosure Letter

Part 3.1 Subsidiaries; Due Organization; Etc.

Part 3.2 Certificate of Incorporation and Bylaws

Part 3.3 Capitalization, Etc.

Part 3.4 SEC Filings; Financial Statements

Part 3.5 Absence of Changes

Part 3.6 Title to and Sufficiency of Assets

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Part 3.17 Legal Proceedings; Orders

Part 3.21 Non-Contravention; Consents

Part 3.22 Financial Advisor

Part 4.3 Operation of the Business of the NetScout Companies

Schedule 1.11(b) Operating Profit

Schedule 5.8(a) Board of Directors of the Combined Company

Schedule 5.8(b) Management of NetScout

Schedule 5.8(c) Board, Officers and Managers of Communications Companies

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NetScout Systems, Inc. will furnish supplementally a copy of any omitted schedule to the Securities and Exchange Commission upon request, provided however that NetScout Systems, Inc. may request confidential treatment pursuant to Rule 24b-2 of the Securities and Exchange Act of 1934, as amended for any schedule so furnished.

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Annex B

**SEPARATION AND DISTRIBUTION AGREEMENT**

**by and among**

**DANAHER CORPORATION**

**POTOMAC HOLDING LLC**

**and**

**NETSCOUT SYSTEMS, INC.**

**dated as of**

**October 12, 2014**

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**SEPARATION AND DISTRIBUTION AGREEMENT**

**THIS SEPARATION AND DISTRIBUTION AGREEMENT** (this *Agreement* ) is dated as of October 12, 2014, by and between Danaher Corporation, a Delaware corporation ( *Danaher* ), Potomac Holding LLC, a Delaware limited liability company and presently a wholly owned Subsidiary of Danaher ( *Newco* ) and NetScout Systems, Inc., a Delaware corporation ( *NetScout* ) (each a *Party* and together, the *Parties* ). Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in Article X.

**RECITALS**

**WHEREAS**, Danaher is engaged, directly and indirectly, in the Communications Business;

**WHEREAS**, the Board of Directors of Danaher (the *Danaher Board* ) has determined that it is advisable and in the best interests of Danaher and Danaher's stockholders to separate the Communications Business from the other businesses of Danaher and to divest the Communications Business in the manner contemplated by this Agreement and the Agreement and Plan of Merger and Reorganization, dated the date hereof (as it may be amended, modified or supplemented from time to time, the *Merger Agreement* ), by and among Danaher, Newco, NetScout, RS Merger Sub I, Inc., a Delaware corporation and a direct wholly owned Subsidiary of NetScout ( *Merger Sub* ), and RS Merger Sub II, LLC, a Delaware limited liability company and a direct wholly owned Subsidiary of NetScout ( *Merger Sub II* );

**WHEREAS**, Danaher currently indirectly owns all of the common units representing limited liability company membership interests of Newco (the *Newco Common Units* );

**WHEREAS**, on the terms and subject to the conditions set forth herein, prior to the Closing, the Parties contemplate that certain entities and assets constituting the Communications Business, to the extent not currently held by Newco or the Newco Subs, shall be transferred to Newco;

**WHEREAS**, on the terms and subject to the conditions set forth herein, following the Internal Restructuring, Danaher shall effect the distribution of all of the outstanding Newco Common Units to the Record Holders without consideration on a pro rata basis (the *Distribution* );

**WHEREAS**, the Parties contemplate that, pursuant to the Merger Agreement, immediately after the Distribution and at the Effective Time, Merger Sub shall be merged (the *First Merger* ) with and into Newco, with Newco surviving the First Merger as a wholly owned subsidiary of NetScout, and the Newco Common Units shall be converted into the right to receive shares of common stock of NetScout on the terms and subject to the conditions of the Merger Agreement and in accordance with the Delaware General Corporation Law and the Delaware Limited Liability Company Act;

**WHEREAS**, immediately following the First Merger, Newco will merge with and into Merger Sub II, with Merger Sub II surviving the merger (together with the First Merger, the *Mergers* ) in the manner contemplated by the Merger Agreement on the terms and subject to the conditions of the Merger Agreement and in accordance with the Delaware Limited Liability Company Act;

**WHEREAS**, for United States federal income tax purposes, the Parties intend that: (i) the transfer of assets from Danaher to Newco, taken together with the Distribution, qualify as a reorganization pursuant to Sections 355, 361 and 368(a)(1)(D) of the Code that is tax-free to Danaher, the Danaher stockholders and Newco; and (ii) the execution of this Agreement and the Merger Agreement evidence a plan of reorganization within the meaning of Section 368 of the

Code and Treasury Regulation Section 1.368-2(g);

**WHEREAS**, Danaher intends to request the Ruling from the IRS; and

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WHEREAS, the Parties desire to set forth the principal arrangements among them regarding the foregoing transactions and to make certain covenants and agreements specified herein in connection therewith and to prescribe certain conditions relating thereto.

NOW, THEREFORE, in consideration of the foregoing and the representations, warranties, covenants and agreements contained herein, and intending to be legally bound hereby, the Parties agree as follows:

**ARTICLE I**

**TRANSFER OF THE COMMUNICATIONS BUSINESS**

**Section 1.01 Transfer of Assets.** Except as provided in Section 1.08(b), effective as of the Separation Time:

(a) Danaher shall assign, transfer, convey and deliver ( *Convey* ) (and shall cause any applicable Subsidiary to Convey) to Newco or one or more Newco Subs in accordance with the Plan of Reorganization (as defined below) and the other terms and conditions of this Agreement, and Newco shall accept from Danaher, and shall cause the applicable Newco Sub to accept, the Communications Assets and all of Danaher's and its applicable Subsidiaries' respective direct or indirect right, title and interest in, to and under all Communications Assets (other than any Communications Assets that are already held as of the Separation Time by Newco or a Newco Sub, which Communications Assets shall continue to be held by Newco or such Newco Sub after the Separation Time), free and clear of all Security Interests (other than Permitted Encumbrances). The preliminary plan and structure set forth on Schedule 1.01(a) as of the date hereof is referred to herein as the *Preliminary Plan* , and the corporate structuring steps contemplated by the Plan of Reorganization as finally determined in accordance with Section 1.01(a) being referred to herein as the *Internal Restructuring* . Except as otherwise expressly set forth herein, the Preliminary Plan may be amended, modified or supplemented in the sole discretion of Danaher until such time as the Preliminary Plan becomes the Plan of Reorganization in accordance with Section 1.01(b).

(b) As promptly as practicable following the date of this Agreement (but in no event later than January 15, 2015), Danaher shall deliver to NetScout an updated version of the Preliminary Plan for NetScout's review and approval, such approval not to be unreasonably withheld, conditioned or delayed, setting forth Danaher's plan (with reasonable specificity on the corporate transaction steps) with respect to the Internal Restructuring necessary: (i) to allocate and Convey to Newco (or the applicable Newco Sub) the Communications Assets, the Communications Liabilities and ownership of the Newco Subs to reach the Newco structure as it will exist as of immediately prior to the Distribution; and (ii) to identify any material Government Approvals required in connection with the Internal Restructuring (such plan as finally delivered and accepted in accordance with this Section 1.01(b), the *Plan of Reorganization* ), provided, however, that NetScout's approval shall be deemed granted for purposes of this sentence and the immediately following sentence in the event that no detailed written proposed revisions are received by Danaher from NetScout within five (5) Business Days. Once the Plan of Reorganization has been delivered and accepted hereunder, such Plan of Reorganization may only be further amended, modified or supplemented by Danaher with the express written consent of NetScout, such consent not to be unreasonably withheld, conditioned or delayed.

(c) Danaher shall: (i) provide NetScout with an opportunity to review any contemplated amendments, modifications or supplements to the Preliminary Plan; (ii) consult with NetScout in good faith regarding any such amendments, modifications or supplements and consider in good faith any comments received from NetScout in connection therewith; and (iii) promptly provide NetScout with copies of any such amendments, modifications or supplements.

**Section 1.02 Assumption of Liabilities.** Effective as of the Separation Time, Danaher shall Convey (or shall cause any applicable Subsidiary to Convey) to Newco or one or more Newco Subs, in accordance with the

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Plan of Reorganization, and Newco shall assume, perform, satisfy, discharge and fulfill when due and, to the extent applicable, comply with on a timely basis, or shall cause any applicable Newco Sub to assume, perform, satisfy, discharge and fulfill when due and, to the extent applicable, comply with on a timely basis, all of the Communications Liabilities, in accordance with their respective terms (other than any Communications Liabilities that as of the Separation Time are already Liabilities of Newco or a Newco Sub, which Communications Liabilities shall continue to be Liabilities of Newco or such Newco Sub after the Separation Time). As between members of the Danaher Group, on the one hand, and members of the Newco Group, on the other hand, following the Separation Time, the members of the Newco Group will be solely responsible for all Communications Liabilities, on a joint and several basis.

**Section 1.03 Transfer of Excluded Assets; Excluded Liabilities.** Subject to Section 1.08(b), prior to the Separation Time: (i) Danaher shall cause any applicable Newco Sub to Convey to Danaher or an appropriately capitalized Subsidiary of Danaher (as Danaher may designate) (other than any member of the Newco Group) any Excluded Assets that it owns, leases or has any right to use, and Danaher shall accept from such Newco Sub, or shall cause any designated Subsidiary of Danaher (other than any member of the Newco Group) to accept, the Excluded Assets and all such respective right, title and interest in and to any and all of such Excluded Assets; and (ii) Danaher shall cause any applicable Newco Sub to Convey any Excluded Liability for which it is otherwise responsible to Danaher or an appropriately capitalized Subsidiary of Danaher (as Danaher may designate) (other than any member of the Newco Group), and Danaher shall assume, perform, satisfy, discharge and fulfill when due, and to the extent applicable, comply with on a timely basis, or shall cause the designated Subsidiary of Danaher to assume, perform, satisfy, discharge and fulfill when due, and to the extent applicable, comply with on a timely basis, any and all of such Excluded Liabilities in accordance with their respective terms. As between members of the Danaher Group, on the one hand, and members of the Newco Group, on the other hand, following the Separation Time, the members of the Danaher Group will be solely responsible for all Excluded Liabilities, on a joint and several basis.

**Section 1.04 Misallocated Transfers.** In the event that, at any time from and after the Separation Time, either Danaher or Newco (or any member of the Danaher Group or the Newco Group, as applicable) discovers that it or one of its Affiliates is the owner of, receives or otherwise comes to possess or benefit from any Asset (including the receipt of payments made pursuant to Contracts and proceeds from accounts receivable with respect to such Asset) or is liable for any Liability that is otherwise allocated to any Person that is a member of the other Group pursuant to this Agreement or any Ancillary Agreement (except in the case of any deliberate acquisition of Assets or assumption of Liabilities from the other Party for value subsequent to the Separation Time), such Party shall promptly Convey, or cause to be Conveyed, such Asset or Liability to the Person so entitled thereto (and the relevant Party shall cause such entitled Person to accept such Asset or assume such Liability) for no consideration. Prior to any such transfer, such Asset shall be held in accordance with Section 1.08(b). For the avoidance of doubt, if any cash or cash equivalents remain in Newco (or any member of the Newco Group) immediately following the Separation Time, Newco shall promptly Convey, or cause to be Conveyed, such amount of cash and cash equivalents (including any interest earned thereon) to Danaher or its designee(s).

**Section 1.05 Communications Assets; Excluded Assets.**

(a) For purposes of this Agreement, *Communications Assets* shall mean, in each case to the extent existing and owned or held immediately prior to the Separation Time by Danaher or any of its Subsidiaries, all of Danaher's and its Subsidiaries' respective right, title and interest in, to and under the following Assets, but in each case excluding the Excluded Assets:

(i) the leases set forth on Schedule 1.05(a)(i) to the premises listed on Schedule 1.05(a)(i) and all rights and interests of Danaher or its Subsidiaries thereunder;

(ii) all issued and outstanding capital stock of, or other equity interests in, the Subsidiaries of Danaher contemplated to be owned (directly or indirectly) by Newco immediately prior to the Separation Time pursuant to the Plan of Reorganization and Internal Restructuring (such Subsidiaries, the *Newco Subs* );

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(iii) (A) all the office equipment (including personal computers and mobile devices), furnishings and other tangible assets; and (B) all the machinery, equipment, tools and vehicles, in each case as to (A) and (B), as used, or held for use, primarily in the operation of the Communications Business (including, for the avoidance of doubt, any and all tangible assets primarily used by any Newco Employees and all tangible assets owned by Newco or any of the Newco Subs);

(iv) all of the Permits granted to Danaher or any of its Subsidiaries that are used, or held for use, primarily in the Communications Business (including any pending applications for such Permits) (the *Transferable Permits* ); provided, however, that the obligation to convey the Transferable Permits shall be subject to Section 1.08(a);

(v) all rights to causes of action, lawsuits, judgments, claims (including insurance claims), counterclaims or demands of Danaher, its Affiliates or any member of the Newco Group against a Person (other than NetScout or its Affiliates) to the extent such causes of action, lawsuits, judgments, claims, counterclaims or demands relate primarily to the Communications Business, a Communications Asset or a Communications Liability, including all claims made as of the Separation Date;

(vi) all inventories of materials, parts, raw materials, packaging materials, supplies, work-in-process, goods in transit and finished goods and products that are used, or held for use, primarily in the Communications Business;

(vii) all Newco IP, including: (x) the right to seek, recover and retain damages for any past or future infringement or misappropriation thereof and to register, prosecute, maintain or record any of such Intellectual Property Rights with any Governmental Authority after the Separation Date; and (y) all goodwill associated with the Communications Business;

(viii) all rights with respect to third-party warranties to the extent related to the Communications Assets;

(ix) the rights and interests to the extent related to the Communications Business (whether presently known or unknown, contingent or otherwise) under any Contract that is primarily related to the Communications Business (the *Newco Contracts* ), including under any such Contract that is related to the Communications Business and that also relates to any other business or business function of Danaher or its Subsidiaries, in each case, to which Danaher, Newco or any member of their respective Groups is a party or by which it or any of its Assets is bound (each such Contract, a *Newco Shared Contract* ), which Newco Shared Contracts shall be Communications Assets subject to the rights of Danaher and the obligations of the Parties set forth in Section 1.08(c)(i).

(x) (A) all business records to the extent related primarily to the Communications Assets or Communications Liabilities, including the corporate or limited liability company minute books and related stock records of the members of the Newco Group, information and records used to demonstrate compliance with applicable Law and any other compliance records related to the Communications Business; (B) all of the separate financial and property tax records of the members of the Newco Group that do not form part of the general ledger of Danaher or any of its Affiliates (other than the members of the Newco Group); (C) all other books, records, ledgers, files, documents, correspondence, lists, plats, drawings, photographs, product literature, equipment test records, advertising and promotional materials, distribution lists, customer lists, supplier lists, studies, reports, operating, production and other manuals, manufacturing and quality control records and procedures, research and development files, accounting and business books, records, files, documentation and materials, in all cases whether in paper, microfilm, microfiche, computer tape or disc, magnetic tape or any other form, to the extent related primarily to the Communications Business; and (D) with respect to Newco Employees and subject to any applicable Law (including, for such purpose, any collective bargaining obligations), performance reviews in respect of the period while employed by a member of the Newco Group, Forms I-9 and W-4, service credit

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records, vacation and other leave accrual/balance records, and employee benefit election records in effect as of Closing (collectively, the *Newco Books and Records* ); provided, however, that: (x) Danaher shall be entitled to retain a copy of any and all Newco Books and Records, which shall be subject to the provisions of Article II and deemed the Confidential Information of Newco and subject to the provisions of Section 6.06; (y) Danaher may retain any materials in clauses (A) and (C) that are not reasonably practicable to identify and extract subject to the right of access pursuant to Section 5.01; and (z) Danaher shall be entitled to redact any portion of the Newco Books and Records to the extent related to any matter other than the Communications Business; provided, however, that such retained materials shall be deemed Confidential Information of Newco and subject to the provisions of the Section 6.06;

(xi) the right to enforce the confidentiality provisions of any confidentiality, non-disclosure or other similar Contracts to the extent related to Confidential Information of the Communications Business and rights to enforce the assignment provisions of any Contract;

(xii) all accounts receivable or unbilled receivables of the Communications Business, including all accounts receivable of Newco and the Newco Subs;

(xiii) without duplication, any and all Assets reflected as an asset on the Newco Balance Sheet and any Assets acquired by or for Newco or any member of the Newco Group subsequent to the date of such balance sheet which, had they been so acquired on or before such date and owned as of such date, would have been reflected on such balance sheet if prepared on a consistent basis, subject to any dispositions of any of such Assets subsequent to the date of such balance sheet not made in violation of the Merger Agreement; provided, however, that in no event shall the assets in this clause (xiii) include cash and cash equivalents of the Newco Group described under Section 1.05(b)(i) or assets of the type described on Schedule 1.05(a)(xiii);

(xiv) all rights of the Newco Group under this Agreement and the Merger Agreement or any Ancillary Agreement and the certificates, instruments and Transfer Documents delivered in connection therewith; and

(xv) any and all other Assets owned or held immediately prior to the Separation Time by Danaher or any of its Subsidiaries that are not of a type covered by the preceding clauses (i)-(xiv) above and that are primarily used or held for use in the Communications Business and are not Excluded Assets.

(b) Notwithstanding Section 1.05(a), the Communications Assets shall not in any event include any of the following Assets (the *Excluded Assets* ):

(i) all cash and cash equivalents of the Newco Group (including investments and securities but excluding any capital stock or other equity interest in any member of the Newco Group), bank or other deposit accounts, of Danaher and its Affiliates other than Newco or any member of the Newco Group;

(ii) the Patents, registered and applied-for Trademarks and registered and applied-for Copyrights listed on Schedule 1.05(b)(ii), and any other Intellectual Property Rights owned by any member of the Danaher Group, except the Newco IP;

(iii) (A) the employment and personnel records of Danaher's and its Affiliates' employees who are not Newco Employees and (B) any employment and personnel records of the Newco Employees, the transfer of which is prohibited by Law or otherwise by reason of any agreement with Newco Employees or any body representing any of them (subject to the provisions of Section 1.08(a));

(iv) all rights to insurance policies or practices of Danaher and its Affiliates (including any captive insurance policies, fronted insurance policies, surety bonds or corporate insurance policies or practices, or any form of self-insurance whatsoever), any refunds paid or payable in connection with the cancellation or discontinuance of any such policies or practices, and any claims made under such policies (subject to the provisions of Section 6.05);

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(v) all rights to causes of action, lawsuits, judgments, claims, counterclaims or demands of Danaher, its Affiliates or any member of the Newco Group against a party other than NetScout or its Affiliates to the extent that they do not relate to the Communications Assets or the Communications Business;

(vi) all financial and Tax records relating to the Communications Business that form part of the general ledger of Danaher or any of its Affiliates (other than the members of the Newco Group), any working papers of Danaher's auditors, and any other Tax records (including accounting records) of Danaher or any of its Affiliates (other than the members of the Newco Group); provided, however, that Newco shall in all events be entitled to copies of, and shall be entitled to use, any such books and records to the extent related to the Communications Business or the Communications Assets;

(vii) other than rights to enforce the confidentiality provisions of any confidentiality, non-disclosure or other similar Contracts to the extent related to Confidential Information of the Communications Business, all records relating to the negotiation and consummation of the transactions contemplated by this Agreement and all records prepared in connection with the potential divestiture of all or a part of the Communications Business, including: (A) bids received from third parties and analyses relating to such transactions; and (B) confidential communications with legal counsel representing Danaher or its Affiliates and the right to assert the attorney-client privilege with respect thereto;

(viii) the rights and interests to the extent not related to the Communications Business (whether presently known or unknown, contingent or otherwise) under any Contract, including under any Contract relating to, but not relating primarily to, the Communications Business that also relates to any business or business function of the Danaher Group, in each case, to which Danaher, Newco or any member of their respective Groups is a party or by which it, or any of its Assets, is bound (each such Contract, a *Danaher Shared Contract*), which Danaher Shared Contracts shall be Excluded Assets subject to the rights of Newco and the obligations of the Parties set forth in Section 1.08(c)(ii);

(ix) all Permits of Danaher or its Affiliates other than Transferable Permits;

(x) all of the issued and outstanding capital stock of, or other equity interests in, the Subsidiaries of Danaher other than Newco and the Newco Subs;

(xi) any and all Assets that are expressly contemplated by any Ancillary Agreement as Assets to be retained by or Conveyed to Danaher or any other member of the Danaher Group;

(xii) any of the Assets listed on Schedule 1.05(b); and

(xiii) other than any Communications Asset or any Asset specifically listed or described in Section 1.05(a) or the Schedules thereto, any and all Assets of Danaher or its Affiliates that are used, held for use in, or related to, businesses of Danaher other than the Communications Business.

The Parties acknowledge and agree that, except for such rights as are otherwise expressly provided in this Agreement, the Merger Agreement or any Ancillary Agreements, neither Newco nor any of the Newco Subs shall acquire or be permitted to retain any direct or indirect right, title or interest in any Excluded Assets through the Conveyance of all of the authorized and outstanding equity interests in the Newco Subs and that if any of the Newco Subs owns, leases or has the right to use any such Excluded Assets, such Excluded Assets shall be Conveyed to Danaher as contemplated by Section 1.03.



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**Section 1.06 Communications Liabilities; Excluded Liabilities.**

(a) For the purposes of this Agreement, *Communications Liabilities* shall mean each of the following Liabilities of any of Danaher and its Subsidiaries, regardless of where, or against whom, such Liabilities are asserted or determined, but in each case excluding the Excluded Liabilities:

(i) all Liabilities that are: (A) expressly contemplated by this Agreement or any Ancillary Agreement (or any schedules hereto or thereto) as Liabilities to be retained, assumed or retired by Newco or any other member of the Newco Group, and all agreements, obligations and Liabilities of any Person in the Newco Group under this Agreement, the Merger Agreement or any of the Ancillary Agreements; or (B) listed or described on Schedule 1.06(a)(i);

(ii) all Liabilities to the extent relating to:

(1) the conduct and operation of the Communications Business, whether prior to, at or after the Separation Time (including any Liability relating to, arising out of or resulting from any act or failure to act (except with respect to any criminal matter or fraud) by any directors, officers, partners, managers, employees or agents of any member of the Newco Group (whether or not such act or failure to act is or was within such Person's authority));

(2) the conduct and operation of any other business conducted by any member of the Newco Group at any time after the Separation Time (including any Liability relating to, arising out of or resulting from any act or failure to act by any directors, officers, partners, managers, employees or agents of any member of the Newco Group (whether or not such act or failure to act is or was within such Person's authority));

(3) the ownership, operation or use of any Communications Assets, whether prior to, at or after the Separation Time; and

(4) any warranty or similar obligation entered into, created or incurred in the course of business of the Communications Business with respect to its products or services, whether prior to, at or after the Separation Time;

(iii) with respect to the Communications Business and the Communications Assets, any and all Liabilities, whether such Liabilities are known or unknown, contingent or accrued, relating to: (A) any violation or alleged violation of Environmental Laws, whether prior to, at or after the Separation Time, including fines and penalties associated with such violations and the third-party costs of any necessary corrective actions; (B) loss of life or injury to persons due to exposure to asbestos prior to, at or after the Separation Time; and (C) the off-site disposal, storage, transport, discharge or Release of Hazardous Materials prior to, at or after the Separation Time, including liability for loss of life, injury to persons or property, damage to natural resources or investigation and remediation of environmental media impacted by Hazardous Materials;

(iv) all Liabilities under the Newco Contracts and the allocated portion of any Newco Shared Contract or any other Contract that is assigned to a member of the Newco Group;

(v) all Liabilities to the extent relating to leases for the Communications Assets;

(vi) all customer deposits held by any member of the Danaher Group that are related to the provision of service by the Communications Business;

**(vii)** accounts payable to the extent relating to the construction or investment in the Communications Assets as of the Effective Time;

**(viii)** all Liabilities that are Newco Taxes (as defined in the Tax Matters Agreement); and

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(ix) except as otherwise provided in any Ancillary Agreement, herein or in the Schedules hereto and subject to Section 1.06(b), all Liabilities of the Danaher or its Subsidiaries to the extent arising out of, relating to or otherwise in respect of, the ownership or use of the Communications Assets or the operation or the conduct of the Communications Business, whether before, at or after the Separation Time.

(b) Notwithstanding the foregoing, the Communications Liabilities shall not, in any event, include any Liabilities of Danaher or its Subsidiaries the following Liabilities (the *Excluded Liabilities*):

(i) all Liabilities (including for the avoidance of doubt all Liabilities under or related to any Environmental Laws, including fines and penalties associated with such violations and the costs of any necessary corrective actions) directly relating to: (A) the loss of life or injury to persons due to exposure to asbestos; and (B) the off-site disposal, storage, transport, discharge or Release of Hazardous Materials, including liability for loss of life, injury to persons or property, damage to natural resources or investigation and remediation of environmental media impacted by Hazardous Materials, of a member of the Danaher Group to the extent relating to, in each case arising out of, resulting from or otherwise in respect of: (x) the ownership or use of the Excluded Assets; or (y) activities of a member of the Danaher Group at or affecting the Communications Assets, in either case (x) or (y) whether before, at or after the Separation Time, and other than as set forth in Section 1.06(a)(iii);

(ii) Liabilities for Indebtedness (other than Indebtedness solely between or among members of the Newco Group);

(iii) all Liabilities, costs or expenses (including any legal, investment banking or other advisory costs or expenses) incurred by or on behalf of any member of the Newco Group at or prior to the Effective Time in connection with the transactions contemplated by this Agreement, the Merger Agreement or any Ancillary Agreement;

(iv) all Liabilities that are Danaher Taxes (as defined in the Tax Matters Agreement);

(v) all Liabilities for Specified Items; and

(vi) all Liabilities that are expressly contemplated by this Agreement or any Ancillary Agreement as Liabilities to be retained or assumed by Danaher or any other member of the Danaher Group, and all Liabilities of any member of the Danaher Group under this Agreement or any of the Ancillary Agreements.

The Parties acknowledge and agree that neither Newco nor any other member of the Newco Group shall be required to assume or retain any Excluded Liabilities as a result of the Newco Transfer, and that if any of the Newco Subs is liable for any Excluded Liabilities, such Excluded Liabilities shall be assumed by Danaher as contemplated by Section 1.03. Any liability of any member of the Danaher Group not included in any of the clauses of Section 1.06(a) shall be an Excluded Liability, and no Excluded Liability shall be a Communications Liability.

**Section 1.07 Termination of Intercompany Agreements; Settlement of Intercompany Accounts.**

(a) Except as set forth in Section 1.08(b), Newco, on behalf of itself and each other member of the Newco Group, on the one hand, and Danaher, on behalf of itself and each other member of the Danaher Group, on the other hand, hereby terminate any and all Contracts, whether or not in writing and including any guarantee obligations, between or among Newco or any member of the Newco Group, on the one hand, and Danaher or any member of the Danaher Group, on the other hand (the *Related Party Agreements*), effective as of the Distribution Date. No such Contract (including any provision thereof which purports to survive termination) shall be of any further force or effect at or after the Distribution Date and all parties shall be released from all Liabilities thereunder other than the Liability to settle any Intercompany Account as provided in Section 1.07(c). From and after the Distribution Date, no member of

either Group shall have any rights or obligations under any Related Party Agreements, except as specifically provided in Section 1.07(b), in this Agreement, in the Merger Agreement or the Ancillary Agreements. Each Party shall, at the reasonable request of any other Party, take, or cause to be taken, such other actions as may be necessary to effect the foregoing.

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(b) The provisions of Section 1.07(a) shall not apply to any of the following Contracts (or to any of the provisions thereof):

(i) this Agreement, the Merger Agreement and the Ancillary Agreements (and each other Contract expressly contemplated by this Agreement, the Merger Agreement or any Ancillary Agreement to be entered into or continued by any of the Parties or any of the members of their respective Groups);

(ii) any Contracts or Intercompany Accounts solely between or among members of the Newco Group;

(iii) any Contracts to which any Person, other than the Parties and their respective Affiliates, is a Party;

(iv) any Contracts between: (i) a Subsidiary of Danaher that is in the business of selling or buying products or services to or from third parties; and (ii) a member of the Newco Group, and which Contract is related primarily to the provision of such products or services and was or is entered into in the ordinary course of business and on arms -length terms; and

(v) any other Contracts that this Agreement, the Merger Agreement or any Ancillary Agreement expressly contemplates shall survive the Distribution Date.

(c) Each Intercompany Account outstanding immediately prior to the Distribution Date will be satisfied and/or settled in full in cash or otherwise cancelled and terminated or extinguished (in each case with no further liability or obligation, including in respect of Taxes on Newco or any member of the Newco Group) by the relevant members of the Danaher Group and the Newco Group no later than the Distribution Date and prior to the Distribution, in each case in the manner agreed to by the Parties (including, for the avoidance of doubt, for so long as the Merger Agreement is not terminated in accordance with its terms, NetScout). For the avoidance of any doubt, any and all Liabilities arising from the activities contemplated by this Section 1.07 will constitute Excluded Liabilities for the purposes hereof.

**Section 1.08 Third-Party Consents.**

**(a) Obtaining Consents; Consent Committee.** The Parties shall, as promptly as practicable after the date hereof and for a period of eighteen (18) months following the Closing, cooperate with each other and use their respective reasonable best efforts to obtain: (i) the transfer, assignment or reissuance to Newco or a member of the Newco Group of all Transferable Permits; and (ii) all Consents and Governmental Approvals of all other Persons to the extent necessary to consummate the Newco Transfer as required by the terms of any Law, license, permit, concession or Contract to which Danaher or any of its Subsidiaries is currently a party or by which any of them is bound, subject to the limitations set forth in this Section 1.08; provided, however, that no Party or member of the Danaher Group shall be required to make any material payments, incur any material Liability or offer or grant any material accommodation (financial or otherwise, that is not provided for in the underlying Contract) (it being understood that materiality shall, in the case of Danaher or its Subsidiaries, be measured in relation to the Communications Business) to any third party to obtain any such Consents; provided, further, that Danaher and NetScout shall each be responsible for 50% of the costs associated with obtaining such consents. Each of the Parties agrees that it shall not commit, and shall cause its Subsidiaries not to commit, to any third party on behalf of Newco or any member of the Newco Group to make any payments, incur any Liability or offer or grant any accommodation (financial or otherwise, regardless of any provision to the contrary in the underlying Contract, including any requirements for the securing or posting of any bonds, letters of credit or similar instruments, or the furnishing of any guarantees) to any third party to obtain any such Consents that would be a Liability of Newco or any member of the Newco Group after the Separation Time, without Newco's prior express written consent (and, unless the Merger Agreement shall have been terminated in accordance with its terms, NetScout's prior express written consent). For the avoidance of doubt, the required efforts and responsibilities of

the Parties to seek the regulatory approvals contemplated by the Antitrust Filings (as defined in

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the Merger Agreement) shall be governed by the Merger Agreement. Promptly following the date hereof (and in any case within thirty (30) days after the date hereof), the Parties shall establish a committee (the *Consent Committee*), composed of at least one (1) manager-level employee of each of Danaher and NetScout, which shall be responsible for coordinating and helping to implement the provisions of this Section 1.07(a) (including discussing and agreeing on action plans to resolve any outstanding obligations under this Section 1.08(a)) for a period of time starting on the date hereof and ending eighteen (18) months following the Closing Date. The Consent Committee shall meet telephonically or in person on a monthly basis. The Consent Committee process described in this Section 1.08(a) shall be subject to modification or termination upon mutual consent of Danaher and NetScout.

**(b) Transfer in Violation of Laws or Requiring Consent or Governmental Approval.** If and to the extent that the Conveyance to any member of the Newco Group of any Communications Assets or to any member of the Danaher Group of any Excluded Assets would be a violation of applicable Laws or require any Consent or Governmental Approval in connection with the Newco Transfer that has not been obtained at the Separation Time, then, notwithstanding any other provision hereof, the Conveyance to the Newco Group of such Communications Assets or to the Danaher Group of such Excluded Assets (any such Asset, a *Deferred Asset*) shall automatically be deferred and no Conveyance shall occur until all legal impediments are removed or such Consents or Governmental Approvals have been obtained. Notwithstanding the foregoing, any such Deferred Asset shall still be considered a Communications Asset or Excluded Asset, as applicable, and the Person retaining such Asset shall thereafter hold such Asset in trust for the benefit of the Person entitled thereto (and at such Person's sole expense) until the consummation of the Conveyance thereof. To the extent that any Deferred Asset cannot be Conveyed without the Consent or Governmental Approval of any Person which Consent or Governmental Approval has not been obtained prior to the Separation Time, this Agreement will not constitute an agreement to Convey the same if an attempted Conveyance would constitute a breach thereof or violate any Law. The Parties shall use their reasonable best efforts to develop and implement mutually acceptable arrangements to place the Person entitled to receive such Deferred Asset, insofar as reasonably possible, in the same position as if such Deferred Asset had been Conveyed as contemplated hereby and so that all the benefits and burdens relating to such Deferred Asset, including possession, use, risk of loss, potential for gain, any Tax Liabilities in respect thereof and dominion, ability to enforce the rights under or with respect to, control and command over such Deferred Asset, are to inure from and after the Separation Time. Such arrangements may include, among others, the entry into reseller agreements with respect to government Contracts, or the entry into subcontracting agreements. If and when the legal or contractual impediments the presence of which caused the deferral of transfer of any Deferred Asset pursuant to this Section 1.08(b) are removed or any Consents and/or Governmental Approvals the absence of which caused the deferral of transfer of any Deferred Asset pursuant to this Section 1.08(b) are obtained, the transfer of the applicable Deferred Asset shall be effected in accordance with the terms of this Agreement and/or such applicable Ancillary Agreement. The obligations set forth in this Section 1.08(b) shall survive for the duration of the term of the applicable Contract (without any obligation to renew or extend).

**(c) Shared Contracts.**

**(i)** Danaher (including on behalf of the other members of the Danaher Group) shall use reasonable best efforts to separate and cause the applicable member of the Newco Group to enter into new agreements with the counterparties to the Danaher Shared Contracts prior to the Separation. Upon such separation of a Danaher Shared Contract, the separated Contract that is related to the Communications Business will be a Newco Contract and the other separated Contract will be an Excluded Asset. To the extent that Danaher is unable or the counterparties are unwilling to enter into agreements with respect to any Danaher Shared Contract, Danaher (or the applicable member of the Danaher Group) will partially assign the Communications Business functions to Newco in the manner agreed to by the Parties (but only if such Danaher Shared Contract is assignable) and in the event that such partial assignment is not permitted by the terms of the applicable Danaher Shared Contract or consented to by the applicable counterparty, Danaher shall

use reasonable best efforts to provide for an alternative arrangement so that the applicable member of the Newco Group will have the benefits of such

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Danaher Shared Contract as though it had been partially assigned; provided, however, that no member of the Danaher Group shall be required to make any payments (other than as provided for in the underlying Contract) to any third party in connection with the foregoing; provided, further, that Danaher shall obtain Newco's express written consent prior to agreeing to any waiver, amendment, modification or termination under any such Danaher Shared Contract if such waiver, amendment, modification would have the effect of limiting, restricting or increasing the costs to a member of the Newco Group's rights or interests under such Danaher Shared Contract in a materially disproportionate manner relative to Danaher's other businesses covered under such Danaher Shared Contract. Newco shall cooperate with Danaher in connection with the entering into of any new agreement or partial assignment. The obligations set forth in the first sentence of this Section 1.08(c)(i) regarding Danaher use of reasonable best efforts to separate and assign Danaher Shared Contracts shall terminate on the eighteen (18) month anniversary of the Closing Date, and the obligations set forth in the remainder of this Section 1.08(c)(i), including the obligations of Danaher to use reasonable best efforts to provide for alternative arrangements, shall survive for the duration of the term of the applicable Contract (without any obligation to renew or extend).

(ii) Newco (including on behalf of the other members of the Newco Group) shall use reasonable best efforts to separate and cause the applicable member of the Danaher Group to enter into new agreements with the counterparties to the Newco Shared Contracts prior to the Separation. Upon such separation of a Newco Shared Contract, the separated Contract that is related to the Communications Business will be a Newco Contract and the other separated Contract will be an Excluded Asset. To the extent that Newco is unable or the counterparties are unwilling to enter into agreements with respect to any Newco Shared Contract, Newco (or the applicable member of the Newco Group) will partially assign the non-Communications Business functions to Danaher in the manner agreed to by the Parties (but only if such Newco Shared Contract is assignable) and in the event that such partial assignment is not permitted by the terms of the applicable Newco Shared Contract or consented to by the applicable counterparty, Newco shall use reasonable best efforts to provide for an alternative arrangement so that the applicable member of the Danaher Group will have the benefits of such Newco Shared Contract as though it had been partially assigned; provided, however, that no member of the Newco Group shall be required to make any payments (other than as provided for in the underlying Contract) to any third party in connection with the foregoing; provided, further, that Newco shall obtain National's written consent prior to agreeing to any waiver, amendment, modification or termination under any such Newco Shared Contract if such waiver, amendment, modification or termination would have the effect of limiting, restricting or increasing the costs of a member of the Danaher Group's rights or interests under such Newco Shared Contract. Danaher shall cooperate with Newco in connection with the entering into of any new agreement or partial assignment. The obligations set forth in the first sentence of this Section 1.08(c)(ii) regarding Newco's use of reasonable best efforts to separate and assign Newco Shared Contracts shall terminate on the eighteen (18) month anniversary of the Closing Date, and the obligations set forth in the remainder of this Section 1.08(c)(ii), including the obligations of Newco to use reasonable best efforts to provide for alternative arrangements, shall survive for the duration of the term of the applicable Contract (without any obligation to renew or extend).

**Section 1.09 Novations of Newco Contracts.** Upon Danaher's request, the Parties (which, prior to the Effective Time shall not impose obligations on NetScout under any Newco Contract) shall use reasonable best efforts to obtain the novation of any Newco Contract so specified by Danaher, whether prior to, at or following the Separation Time (it being understood that such obligations shall apply following the Separation Time regardless of whether any such Newco Contract has been Conveyed pursuant to the terms hereof or such Conveyance was deferred in accordance with Section 1.08(b)); provided, however, that no member of the Danaher Group shall be required to make any payments (other than as provided for in the underlying Contract) to any third party in connection with the foregoing. The foregoing obligations shall terminate on the eighteen (18) month anniversary of the Closing Date.

**Section 1.10 No Representation or Warranty.** EACH OF DANAHER AND NEWCO (ON BEHALF OF ITSELF AND EACH OTHER MEMBER OF THE NEWCO GROUP) UNDERSTANDS AND AGREES THAT, EXCEPT

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AS EXPRESSLY SET FORTH HEREIN, IN THE MERGER AGREEMENT OR IN ANY

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ANCILLARY AGREEMENT OR ANY OTHER AGREEMENT OR DOCUMENT CONTEMPLATED BY THIS AGREEMENT, THE MERGER AGREEMENT, ANY ANCILLARY AGREEMENT OR OTHERWISE, NO PARTY TO THIS AGREEMENT IS REPRESENTING OR WARRANTING IN ANY WAY AS TO THE CONDITION OR THE VALUE OF ANY ASSETS, BUSINESSES OR THE AMOUNT OF ANY LIABILITIES CONTRIBUTED, TRANSFERRED, DISTRIBUTED OR ASSUMED AS CONTEMPLATED HEREBY, AS TO ANY CONSENTS OR GOVERNMENTAL APPROVALS REQUIRED IN CONNECTION HERewith OR THEREWITH, AS TO THE VALUE OF ANY ASSETS OF SUCH PARTY, AS TO THE ABSENCE OF ANY DEFENSES OR RIGHT OF SETOFF OR FREEDOM FROM COUNTERCLAIM WITH RESPECT TO ANY ACTION OR OTHER ASSET, INCLUDING ACCOUNTS RECEIVABLE, OF ANY PARTY, OR AS TO THE LEGAL SUFFICIENCY OF ANY CONTRIBUTION, DISTRIBUTION, ASSIGNMENT, DOCUMENT, CERTIFICATE OR INSTRUMENT DELIVERED HEREUNDER TO CONVEY TITLE TO ANY ASSET OR THING OF VALUE UPON THE EXECUTION, DELIVERY AND FILING HEREOF OR THEREOF. FOR THE AVOIDANCE OF DOUBT, THIS SECTION 1.10 SHALL HAVE NO EFFECT ON ANY REPRESENTATION OR WARRANTY MADE HEREIN, IN THE MERGER AGREEMENT OR IN ANY ANCILLARY AGREEMENT OR ANY OTHER AGREEMENT OR DOCUMENT CONTEMPLATED BY THIS AGREEMENT, THE MERGER AGREEMENT, ANY ANCILLARY AGREEMENT OR OTHERWISE.

**Section 1.11 Waiver of Bulk-Sales Laws.** Each of Newco and Danaher hereby waives compliance by each member of the other Party's respective Group with the requirements and provisions of the bulk-sale or bulk-transfer Laws of any jurisdiction that may otherwise be applicable with respect to the transfer or sale of any or all of the Assets to any member of the Newco Group or the Danaher Group, as applicable.

## ARTICLE II

### COMPLETION OF THE NEWCO TRANSFER

**Section 2.01 Separation Time.** Subject to the satisfaction and waiver (in accordance with the provisions hereof) of the conditions set forth in Article VII, and subject to Section 1.08(b), the effective time and date of each Conveyance and assumption of any Asset or Liability in accordance with Article I in connection with the Newco Transfer shall be 12:01 a.m., Eastern Time on the anticipated Distribution Date (such time, the *Separation Time*, and such date the *Separation Date* ) or such other time as determined pursuant to Section 1.08.

**Section 2.02 Separation Deliveries.**

**(a) Agreements to be Delivered by Danaher.** On the Separation Date, Danaher shall deliver, or shall cause its appropriate Subsidiaries to deliver, to Newco all of the following instruments:

- (i)** all Transfer Documents as described in Section 2.04 and Section 2.05;
- (ii)** the Tax Matters Agreement, substantially in the form attached hereto as Exhibit A (the *Tax Matters Agreement* ), duly executed by the members of the Danaher Group party thereto;
- (iii)** the Transition Services Agreement, substantially in the form attached hereto as Exhibit B (the *Transition Services Agreement* ), duly executed by the members of the Danaher Group party thereto; it being understood and agreed that the Parties shall negotiate in good faith to agree upon the terms of, and schedules to, the Transition Services Agreement prior to the Closing (provided that the definition of *Cost* , and the 10% markup and expense reimbursement concepts therein shall not be subject to further negotiation);

(iv) the Employee Matters Agreement, substantially in the form attached hereto as Exhibit C (the *Employee Matters Agreement* ), duly executed by the members of the Danaher Group party thereto;

(v) the Trademark License Agreement, substantially in the form attached hereto as Exhibit D (the *Trademark License Agreement* ), duly executed by the members of the Danaher Group party thereto;

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(vi) the DBS License Agreement, substantially in the form attached hereto as Exhibit E (the *DBS License Agreement* ), duly executed by the members of the Danaher Group party thereto;

(vii) the Commercial Lease Agreement, substantially in the form attached hereto as Exhibit F (the *Commercial Lease Agreement* ), duly executed by the members of the Danaher Group party thereto;

(viii) the Intellectual Property Cross-License Agreement, substantially in the form attached as Exhibit G (the *Cross-License Agreement* ), duly executed by the members of the Danaher Group party thereto; and

(ix) any other Ancillary Agreements to which the Parties mutually agree.

**(b) Agreements to be Delivered by Newco.** On the Separation Date, Newco shall deliver, or shall cause the Newco Subs to deliver, as appropriate, to Danaher, in each case where any member of the Newco Group is a party to any Ancillary Agreement, a counterpart of such Ancillary Agreement duly executed by each member of the Newco Group that is a party thereto.

**(c) Document Delivery.** On the Separation Date, Danaher shall deliver, or shall cause its appropriate Subsidiaries to deliver, to Newco, the Newco Books and Records, Newco Contracts and any other documents that are Communications Assets.

**Section 2.03 Certain Resignations.** At or prior to the Distribution Date, Danaher shall use its reasonable best efforts to cause each employee and director of Danaher and its Subsidiaries who will not be employed by Newco or a Newco Sub after the Distribution Date to resign, effective not later than the Distribution Date, from all boards of directors or similar governing bodies of Newco or any Newco Sub on which they serve, and from all positions as officers of Newco or any Newco Sub in which they serve.

**Section 2.04 Transfer of Communications Assets and Assumption of Communications Liabilities.** In furtherance of the Conveyance of Communications Assets and Communications Liabilities provided in Section 1.01 and Section 1.02, on the Separation Date (and thereafter at any time upon the request of Newco): (i) Danaher shall execute and deliver, and shall cause its Subsidiaries to execute and deliver, such bills of sale, stock powers, certificates of title and assignments of Contracts, assignments of Newco IP in a form required to record transfer of title in each applicable jurisdiction, Consents (to the extent obtained) and Transferable Permits, easements, leases, deeds and other instruments of Conveyance (in each case in a form that is consistent with the terms and conditions of this Agreement, and otherwise customary in the jurisdiction in which the relevant Assets are located and reasonably acceptable to the Parties), as and to the extent reasonably necessary or appropriate to evidence the Conveyance of all of Danaher's and its Subsidiaries' (other than Newco and the Newco Subs) right, title and interest in and to the Communications Assets to Newco and the Newco Subs (it being understood that no such bill of sale, stock power, certificate of title, deed, assignment or other instrument of Conveyance shall require Danaher or any of its Affiliates to make any representations, warranties or covenants, expressed or implied, not contained in this Agreement, the Merger Agreement or any Ancillary Agreement except to the extent required to comply with applicable Law, and in which case the Parties shall enter into such supplemental agreements or arrangements as are effective to preserve the allocation of economic benefits and burdens contemplated by this Agreement); and (ii) Newco shall execute and deliver such assumptions of Contracts and other instruments of assumption or Conveyance (in each case in a form that is consistent with the terms and conditions of this Agreement, and otherwise customary in the jurisdiction in which the relevant Liabilities are located and reasonably acceptable to the Parties) as and to the extent reasonably necessary to evidence the valid and effective assumption of the Communications Liabilities by Newco. All of the foregoing documents contemplated by this Section 2.04 shall be referred to collectively herein as the *Danaher Transfer Documents*.

**Section 2.05 Transfer of Excluded Assets; Assumption of Excluded Liabilities.** In furtherance of the Conveyance of Excluded Assets and the assumption of Excluded Liabilities provided in Section 1.03: (a) Newco shall execute and deliver, and shall cause the Newco Subs to execute and deliver, such bills of sale, certificates of title, assignments of Contracts and other instruments of Conveyance (in each case in a form that is consistent

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with the terms and conditions of this Agreement, and otherwise customary in the jurisdiction in which the relevant Assets are located and reasonably acceptable to the Parties) as and to the extent reasonably necessary or appropriate to evidence the Conveyance of all of Newco's and the Newco Subs' right, title and interest in and to the Excluded Assets to Danaher and its Subsidiaries (other than Newco and the Newco Subs) (it being understood that no such bill of sale, stock power, certificate of title, deed, assignment or other instrument of Conveyance shall require Newco or any of its Affiliates to make any additional representations, warranties or covenants, expressed or implied, not contained in this Agreement, the Merger Agreement or any Ancillary Agreement except to the extent required to comply with applicable local Law, and in which case the Parties shall enter into such supplemental agreements or arrangements as are effective to preserve the allocation of economic benefits and burdens contemplated by this Agreement) and (b) Danaher shall execute and deliver such assumptions of Contracts and other instruments of assumption or Conveyance (in each case in a form that is consistent with the terms and conditions of this Agreement, and otherwise customary in the jurisdiction in which the relevant Liabilities are located and reasonably acceptable to the Parties) as and to the extent reasonably necessary to evidence the valid and effective assumption of the Excluded Liabilities by Danaher. All of the foregoing documents contemplated by this Section 2.05, together with the Danaher Transfer Documents, shall be referred to collectively herein as the ***Transfer Documents***. The Parties shall perform the obligations set forth in Section 2.04 and this Section 2.05, in each case, in accordance with applicable Law.

**ARTICLE III****COMPLETION OF THE DISTRIBUTION**

**Section 3.01 Manner of Distribution.** Danaher may, in its sole discretion, elect to effect the Distribution as a Spin-Off, as an Exchange Offer, or as a combination of a Spin-Off and an Exchange Offer with or without a Clean-Up Spin-Off and shall advise NetScout of the form of the Distribution no later than thirty (30) Business Days prior to the anticipated Closing Date. Danaher will provide notice (with a copy to NetScout) to the Financial Industry Regulatory Authority ( ***FINRA*** ) no later than ten (10) days prior to the Record Date (as determined in accordance with Section 3.02(a)) in compliance with Rule 10b-17 under the Exchange Act. All Newco Common Units held by Danaher on the Distribution Date will be distributed to the Record Holders in the manner set forth in Section 3.02(a) and in accordance with Section 3.04(b). At least five (5) days prior to the Distribution Date, Danaher shall provide to Newco and NetScout a list of Record Holders entitled to receive Newco Common Units in connection with the Distribution.

**Section 3.02 The Distribution.**

(a) To the extent the Distribution includes a Spin-Off, subject to the terms thereof, in accordance with Section 3.02(c), each Record Holder will be entitled to receive for each share of common stock, par value \$0.01 per share ( ***Danaher Common Stock*** ), of Danaher held by such Record Holder as of the Record Date a number of Newco Common Units equal to the total number of Newco Common Units held by Danaher on the Distribution Date, multiplied by a fraction, the numerator of which is the number of Danaher Common Stock held by such Record Holder as of the Record Date and the denominator of which is the total amount of Danaher Common Stock outstanding on the Record Date. To the extent the Distribution is effected as a Spin-Off, prior to the Distribution Date, the Danaher Board, in accordance with applicable Law, shall establish (or designate a committee of the Danaher Board to establish) the Record Date for the Distribution and any appropriate procedures in connection with the Spin-Off. To the extent any of the Distribution is effected as an Exchange Offer followed by a Clean-Up Spin-Off of any remaining Newco Common Units to be distributed by Danaher pursuant to Section 3.02(b), the Danaher Board shall set the Record Date as the time on the Distribution Date immediately following the time at which the validly tendered shares of Danaher Common Stock are accepted for payment in the Exchange Offer.

**(b)** Subject to the terms and conditions thereof, to the extent any of the Distribution is effected as an Exchange Offer, each Danaher shareholder may elect in the Exchange Offer to exchange a number of shares of Danaher Common Stock held by such Danaher stockholder for Newco Common Units. Subject to applicable

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securities Laws, Danaher shall determine, in its sole discretion, the terms and conditions of the Exchange Offer, including the exchange ratio (including any discount to the reference price of common stock of NetScout), the timing of the offer period and any extensions thereto, and other customary provisions, each as will be set forth in the Newco Registration Statement (as defined below) and Schedule TO; provided, however, that the maximum number of days that the Exchange Offer may be extended following satisfaction of the conditions to Closing set forth in Article VI and Article VII of the Merger Agreement (other than consummation of the transactions contemplated by this Agreement and satisfaction of those conditions to be satisfied as of the Closing Date) shall be ten (10) Business Days. Before filing the Newco Registration Statement, the Schedule TO or any amendments or supplements thereto, or comparable documents under securities or state blue sky laws of any jurisdiction, Danaher and/or Newco (as applicable) will furnish to NetScout and its counsel copies of all such documents proposed to be filed (including all exhibits thereto), which documents will be subject to the reasonable comment of NetScout and its counsel, and, before filing any such document, Danaher and/or Newco (as applicable) shall reasonably consider any changes thereto that NetScout and its counsel shall reasonably request.

(c) The terms and conditions of any Clean-Up Spin-Off shall be as determined by Danaher in its sole discretion; provided, however, that: (i) any Newco Common Units that are not subscribed for in the Exchange Offer must be distributed to Danaher's shareholders in the Clean-Up Spin-Off; and (ii) subject to any applicable Law or stock exchange requirement, the Clean-Up Spin-Off shall take place on the Distribution Date immediately following the consummation of the Exchange Offer and the Record Date for the Clean-Up Spin-Off shall be established as of such date in the same manner as provided in Section 3.02(a).

(d) No action by any Record Holder shall be necessary for such Record Holder (or such Record Holder's designated transferee or transferees) to receive the applicable number of Newco Common Units such stockholder is entitled to in the Distribution. For stockholders of Danaher who own Danaher Common Stock through a broker or other nominee, their Newco Common Units will be credited to their respective accounts by such broker or nominee.

(e) Upon the consummation of the Distribution, Danaher shall deliver to the Exchange Agent a global certificate representing the Newco Common Units being transferred in the Distribution, for the account of Danaher's stockholders that are entitled thereto. The Exchange Agent shall hold such certificate or certificates, as the case may be, for the account of Danaher's stockholders pending the Mergers. In no event shall the number of Newco Common Units issued and distributed in the Distribution exceed the number of Newco Common Units determined pursuant to Section 3.02(a), as adjusted if necessary pursuant to Section 3.02(d).

(f) The Parties shall keep each other reasonably informed with respect to the transactions contemplated by this Section 3.02 in order to coordinate the timing of such transactions to the extent reasonably practicable and desirable and otherwise consistent with the other provisions of this Section 3.02.

(g) Neither of the Parties, and none of their respective Affiliates, will be liable to any Person in respect of any Newco Common Units (or dividends or distributions with respect thereto) that are properly delivered to a public official pursuant to any applicable abandoned property, escheat or similar Law.

**Section 3.03 Actions Prior to Distribution.**

(a) Newco will cooperate with Danaher to accomplish the Distribution, including in connection with the preparation of all documents and the making of all filings required in connection with the Distribution. Danaher will be permitted to reasonably direct and control the efforts, prior to the Distribution Date, of Newco in connection with the Distribution in accordance with the terms and subject to the conditions of this Agreement, the Merger Agreement and all Ancillary Agreements (including the selection of any investment bank or manager in connection with the

Distribution, as well as any financial printer, solicitation and/or transfer agent or exchange agent and financial, legal, accounting and other advisors for Danaher), and Newco will use commercially reasonable efforts to take, or cause to be taken, all actions and to do, or cause to be done, all other things reasonably necessary to facilitate the Distribution as reasonably directed by Danaher in good faith and in

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accordance with the terms and subject to the conditions of this Agreement, the Merger Agreement and all Ancillary Agreements. Without limiting the generality of the foregoing, Newco will, and will cause its Subsidiaries and its and their respective employees, advisors, agents, accountants, counsel and other representatives to, as reasonably directed by Danaher in good faith, reasonably cooperate in and take the following actions: (i) preparing and filing the registration under the Securities Act or the Exchange Act of Newco Common Units on an appropriate registration form or forms to be designated by Danaher (the *Newco Registration Statement* ) and, if applicable, Schedule TO; (ii) participating in meetings, drafting sessions, due diligence sessions, management presentation sessions, and road shows in connection with the Distribution (including any marketing efforts); (iii) furnishing to any dealer manager or other similar agent participating in the Distribution (A) cold comfort letters from independent public accountants in customary form and covering such matters as are customary for an underwritten public offering (including with respect to events subsequent to the date of financial statements included in any offering document) and (B) opinions and negative assurance letters of counsel in customary form and covering such matters as may be reasonably requested; and (iv) furnishing all historical and forward-looking financial and other pertinent financial and other information that is available to Newco and is reasonably required in connection with the Distribution.

(b) Danaher and Newco will prepare and mail, prior to the Distribution Date, to the holders of Danaher Common Stock, such information concerning Newco, NetScout, their respective businesses, operations and management, the Distribution and such other matters as Danaher will reasonably determine and as may be required by applicable Law. Danaher and Newco will prepare, and Newco will, to the extent required under applicable Law, file with the SEC any such documentation and any requisite no-action letters which Danaher determines are necessary or desirable to effectuate the Distribution and Danaher and Newco will each use its reasonable best efforts to obtain all necessary approvals from the SEC with respect thereto as soon as practicable.

(c) Danaher and Newco will take all such action as may be necessary or appropriate under the securities or blue sky laws of the United States (and any comparable Laws under any foreign jurisdiction) in connection with the Distribution.

(d) Danaher and Newco will take all reasonable steps necessary and appropriate to cause the conditions set forth in Section 7.02 to be satisfied and to effect the Distribution on the Distribution Date.

(e) Notwithstanding anything to the contrary, any and all costs, expenses and Liabilities incurred by or on behalf of Newco or any member of the Newco Group as a result of or in connection with the matters set forth in this Section 3.03 shall be the sole responsibility of Danaher and shall be deemed to be Excluded Liabilities for the purposes hereof.

(f) Notwithstanding anything to the contrary, without any further action required by any Party, effective as of immediately prior to the Effective Time, all provisions of this Section 3.03, with the exception of Section 3.03(a), shall automatically terminate and be of no further force and the Parties shall cease to have any rights or obligations thereunder.

**Section 3.04 Additional Matters.**

(a) **Tax Withholding.** Danaher and Newco, as the case may be, will be entitled, and will instruct the transfer agent or the Exchange Agent, as applicable, to deduct and withhold from the consideration otherwise payable pursuant to this Agreement such amounts required to be deducted and withheld with respect to the making of such payments under the Code or any provision of local or foreign Tax Law. Any withheld amounts will be treated for all purposes of this Agreement as having been paid to the Persons otherwise entitled thereto.

**(b) Delivery of Certificates.** Upon the consummation of the Distribution, Danaher will deliver to the transfer agent or Exchange Agent, as applicable, a global certificate representing the Newco Common Units being distributed in the Distribution for the account of the Danaher stockholders that are entitled thereto. The Exchange Agent will hold such certificate or certificates, as the case may be, for the account of the Danaher stockholders pending the First Merger, as provided in Section 1.6 of the Merger Agreement. Immediately after

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the time of the Distribution and prior to the Effective Time, the Newco Common Units will not be transferable and the transfer agent for the Newco Common Units will not transfer any Newco Common Units. The Distribution will be deemed to be effective upon written authorization from Danaher to the transfer agent or the Exchange Agent to proceed as set forth in Section 3.02.

**ARTICLE IV**

**MUTUAL RELEASES; INDEMNIFICATION**

**Section 4.01 Release of Pre-Distribution Date Claims.**

**(a) Newco Release.** Except as provided in Section 4.01(c) and Section 4.03, effective as of the Effective Time, Newco does hereby, for itself and for each other member of the Newco Group and (to the extent permitted by applicable Law) all Persons who at any time prior to the Effective Time were directors, officers, partners, managers, employees or agents of any member of the Newco Group (in their respective capacities as such), in each case, together with their respective heirs, executors, administrators, successors and assigns, release and forever discharge each of the Danaher Indemnitees from any and all Liabilities whatsoever (including any right of contribution), whether arising under any Contract, by operation of Law or otherwise, existing or arising from any acts or events occurring or failing to occur or alleged to have occurred or to have failed to occur on or before the Effective Time, or any conditions existing or alleged to have existed on or before the Effective Time, including in connection with the transactions and all other activities to implement the Newco Transfer contemplated by this Agreement or any Ancillary Agreement. Without limitation, the foregoing release includes a release of any rights and benefits with respect to such Liabilities that Newco and each member of the Newco Group, and their respective successor and assigns, now has or in the future may have conferred upon them by virtue of any statute or common law principle which provides that a general release does not extend to claims which a party does not know or suspect to exist in its favor at the time of executing the release, if knowledge of such claims would have materially affected such party's settlement with the obligor. In this connection, Newco hereby acknowledges that it is aware that factual matters now unknown to it may have given or may hereafter give rise to Liabilities that are presently unknown, unanticipated and unsuspected, and it further agrees that this release has been negotiated and agreed upon in light of that awareness and it nevertheless hereby intends to release the Danaher Indemnitees from the Liabilities described in the first sentence of this Section 4.01(a). Notwithstanding the foregoing, the release described in this Section 4.01(a) shall not apply with respect to obligations from and after the Closing under or relating to the Contracts referred to in Section 1.07(b)(iv).

**(b) Danaher Release.** Except as provided in Section 4.01(c) and Section 4.02, effective as of the Effective Time, Danaher does hereby, for itself and for each other member of the Danaher Group and (to the extent permitted by applicable Law) all Persons who at any time prior to the Effective Time were directors, officers, partners, managers, employees or agents of any member of the Danaher Group, in each case, together with their respective heirs, executors, administrators, successors and assigns, release and forever discharge each of the Newco Indemnitees from any and all Liabilities whatsoever (including any right of contribution), whether arising under any Contract, by operation of Law or otherwise, existing or arising from any acts or events occurring or failing to occur or alleged to have occurred or to have failed to occur on or before the Effective Time or any conditions existing or alleged to have existed on or before the Effective Time, including in connection with the transactions and all other activities to implement the Newco Transfer. Without limitation, the foregoing release includes a release of any rights and benefits with respect to such Liabilities that Danaher and each member of the Danaher Group, and their respective successor and assigns, now has or in the future may have conferred upon them by virtue of any statute or common law principle which provides that a general release does not extend to claims which a party does not know or suspect to exist in its favor at the time of executing the release, if knowledge of such claims would have materially affected such party's settlement with the obligor. In this connection, Danaher hereby acknowledges that it is aware that factual matters now

unknown to it may have given or may hereafter give rise to Liabilities that are presently unknown, unanticipated and unsuspected, and it

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further agrees that this release has been negotiated and agreed upon in light of that awareness and it nevertheless hereby intends to release the Newco Indemnitees from the Liabilities described in the first sentence of this Section 4.01(b). Notwithstanding the foregoing, the release described in this Section 4.01(a) shall not apply with respect to obligations from and after the Closing under or relating to the Contracts referred to in Section 1.07(b)(iv).

**(c) No Impairment.** Nothing contained in Section 4.01(a) or Section 4.01(b) shall: (i) limit or otherwise affect any Person's rights or obligations pursuant to or contemplated by, or ability to enforce, this Agreement, the Merger Agreement or any Ancillary Agreement, in each case in accordance with its terms, including (A) the obligation of Newco to assume and satisfy the Communications Liabilities, (B) the obligation of Danaher to retain, assume and satisfy the Excluded Liabilities, (C) the obligations of Danaher and its Affiliates to Convey the Communications Assets free and clear of all Security Interests (other than Permitted Encumbrances) in accordance with this Agreement, (D) the obligations of Danaher and Newco to perform their obligations and indemnify each other under this Agreement, including pursuant to this Article IV, the Merger Agreement and the Ancillary Agreements; (ii) apply to any Liability the release of which would result in the release of any Person other than a Person expressly released pursuant to Section 4.01(a) or Section 4.01(b); or (iii) release any Person from, or waive any rights under, any Liability provided in or resulting from any Contract to which any member of the Newco Group, on the one hand, and any Danaher Group, on the other hand, is a party, that does not terminate as of the Distribution Date in accordance with Section 1.07.

**(d) No Actions as to Released Claims.** Following the Closing, Newco shall not, and shall cause each of its respective Affiliates not to, make any claim or demand, or commence any Action asserting any claim or demand, including any claim of contribution, recovery or any indemnification, against Danaher or any member of the Danaher Group, or any other Person released with respect to any Liabilities released pursuant to Section 4.01(a). Danaher shall not, and shall cause each other member of the Danaher Group not to, make any claim or demand, or commence any Action asserting any claim or demand, including any claim of contribution, recovery or any indemnification, against Newco or any of its Affiliates, or any other Person released with respect to any Liabilities released pursuant to Section 4.01(b).

In addition, nothing in this Section 4.01 shall release Newco or any other member of the Newco Group from indemnifying any current or former director, officer, manager, employee or agent of Danaher or any other member of the Danaher Group who was a director, officer, manager, employee or agent of Newco or any other member of the Newco Group prior to the Distribution Date if such person was entitled to a right of indemnification pursuant to the organizational documents of Newco or any Newco Sub or pursuant to any Contract, it being understood that if the underlying obligation giving rise to such right to indemnification is an Excluded Liability retained by Danaher or any other member of the Danaher Group, Danaher shall indemnify Newco for such Liability (including Newco's costs to indemnify such director, officer, manager, employee or agent) in accordance with the provisions in Section 4.03.

**Section 4.02 Indemnification by the Newco Group.** Except as otherwise provided in the Merger Agreement or any Ancillary Agreement, from and after the Effective Time, Newco and each member of the Newco Group shall, on a joint and several basis, indemnify, defend and hold harmless the Danaher Indemnitees from and against, and shall reimburse such Danaher Indemnitees with respect to, any and all Losses that proximately result from, whether prior to, at or following the Effective Time, any of the following items (without duplication):

**(a)** the Communications Liabilities, including, after the Effective Time, the failure of Newco or any other member of the Newco Group or any other Person to pay, perform, fulfill, discharge and, to the extent applicable, comply with, in due course and in full, any such Liabilities;

**(b)** any breach by Newco or any other member of the Newco Group of any obligations to be performed by such Persons pursuant to this Agreement or the Ancillary Agreements subsequent to the Effective Time; and

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(c) any breach by NetScout or any of its Affiliates of any covenant of NetScout under the Merger Agreement, which, by its terms, is to be performed subsequent to the Effective Time.

**Section 4.03 Indemnification by Danaher.** Except as otherwise provided in the Merger Agreement or any Ancillary Agreement, from and after the Effective Time, Danaher shall indemnify, defend (or, where applicable, pay the defense costs for) and hold harmless the Newco Indemnitees from and against, and shall reimburse such Newco Indemnitees with respect to, any and all Losses that proximately result from, whether prior to, at or following the Effective Time, any of the following items (without duplication):

(a) any Excluded Liabilities, including the failure of Danaher or any other member of the Danaher Group or any other Person to pay, perform, fulfill, discharge and, to the extent applicable, comply with, in due course and in full, any such Liabilities;

(b) any breach by Danaher or any other member of the Danaher Group of any covenants or obligations to be performed by such Persons pursuant to this Agreement or the Ancillary Agreements on or subsequent to the Separation Time;

(c) any breach by Danaher or any of its Affiliates of any covenant of Danaher under the Merger Agreement, which, by its terms, is to be performed subsequent to the Effective Time;

(d) any breach of the representations and warranties set forth in the first sentence of Section 2.6(a), Section 2.6(b), the first sentence of Section 2.8(d) and Section 2.8(g) of the Merger Agreement (determined, in each case, for all purposes without regard to any material, materiality, Material Adverse Effect or other similar qualification contained therein).

**Section 4.04 Survival.** No claim or cause of action for indemnification under Section 4.03(d) may be made following the termination of the applicable survival period set forth in Section 9.3 of the Merger Agreement; it being understood that in the event notice of any claim for indemnification under Section 4.03(d) shall have been given within the applicable survival period set forth in Section 9.3 of the Merger Agreement, the representations and warranties that are the subject of such indemnification claim shall survive until such time as such claim is finally resolved.

**Section 4.05 Basket and Cap.** Danaher's obligation to indemnify Newco Indemnitees for Losses pursuant to Section 4.03(d) is subject to the limitation that no indemnification shall be made by Danaher with respect to any claim (including any Losses) until the aggregate amount of all such Losses for which indemnification may be sought hereunder exceeds \$5,000,000 (the ***Deductible***), at which point the Newco Indemnitees shall be entitled to indemnification only for those Losses in excess of the Deductible; provided, however, that only individual claims or series of related claims involving Losses in excess of \$100,000 shall be included in the Deductible or be counted for determining the amount of Losses to be indemnified to the Newco Indemnitees. Notwithstanding the foregoing, in no event shall the obligation of Danaher to indemnify Newco Indemnitees pursuant to Section 4.03(d) exceed, in the aggregate, \$250,000,000. For the avoidance of doubt, the limitations in this Section 4.05 shall not apply to any claims for indemnification pursuant to Section 4.03(a)-(c). For the avoidance of doubt, nothing herein shall limit the ability of Danaher to Convey Communications Assets to NetScout or Newco in respect of any alleged breach of the first sentence of Section 2.6(a), Section 2.6(b), the first sentence of Section 2.8(d) or Section 2.8(g) of the Merger Agreement.

**Section 4.06 Procedures for Indemnification.**

(a) An Indemnitee shall give the Indemnifying Party notice of any matter that an Indemnitee has determined has given or would reasonably be expected to give rise to a right of indemnification under this Agreement (other than a

Third-Party Claim, which shall be governed by Section 4.07(b)), within twenty (20) Business Days of such determination, stating the amount of the Loss claimed, if known, and method of computation thereof, and containing a reference to the provisions of this Agreement in respect of which such

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right of indemnification is claimed by such Indemnitee or arises; provided, however, that the failure to provide such notice shall not release the Indemnifying Party from any of its obligations except and solely to the extent the Indemnifying Party shall have been materially prejudiced as a result of such failure.

(b) If a claim or demand is made against a Danaher Indemnitee or a Newco Indemnitee (each, an *Indemnitee* ) by any Person who is not a party to this Agreement or an Affiliate of a Party (a *Third-Party Claim* ) as to which such Indemnitee is or reasonably expects to be entitled to indemnification pursuant to this Agreement, such Indemnitee shall notify the Party that is or may be required pursuant to this Article IV or pursuant to any Ancillary Agreement to make such indemnification (the *Indemnifying Party* ) in writing, and in reasonable detail, of the Third-Party Claim promptly (and in any event within thirty (30) calendar days) after receipt by such Indemnitee of written notice of the Third-Party Claim; provided, however, that the failure to provide notice of any such Third-Party Claim pursuant to this sentence shall not release the Indemnifying Party from any of its obligations except and solely to the extent the Indemnifying Party shall have been materially prejudiced as a result of such failure (except that the Indemnifying Party or Parties shall not be liable for any expenses incurred by the Indemnitee in defending such Third-Party Claim during the period in which the Indemnitee failed to give such notice). Thereafter, the Indemnitee shall deliver to the Indemnifying Party, promptly (and in any event within ten (10) Business Days) after the Indemnitee's receipt thereof, copies of all notices and documents (including court papers) received by the Indemnitee relating to the Third-Party Claim.

(c) Other than in the case of any Liability being managed by a Party in accordance with any Ancillary Agreement or as provided in Section 4.08(a), an Indemnifying Party shall be entitled (but shall not be required) to assume, control the defense of, and settle any Third-Party Claim, at such Indemnifying Party's own cost and expense and by such Indemnifying Party's own counsel, which counsel must be reasonably acceptable to the applicable Indemnitees, if it gives written notice of its intention to do so and agreement that the Indemnitee is entitled to indemnification under this Article IV to the applicable Indemnitees within thirty (30) calendar days of the receipt of notice from such Indemnitees of the Third-Party Claim. After such notice from an Indemnifying Party to an Indemnitee of its election to assume the defense of a Third-Party Claim, such Indemnitee shall have the right to employ separate counsel and to participate in (but not control) the defense, compromise or settlement thereof, at its own expense and, in any event, shall reasonably cooperate with the Indemnifying Party in such defense and make available to the Indemnifying Party all witnesses, pertinent and material Information and materials in such Indemnitee's possession or under such Indemnitee's control relating thereto as are reasonably required by the Indemnifying Party; provided, however, that such access shall not require the Indemnitee to disclose any information the disclosure of which would, in the reasonable judgment of the Indemnitee, result in the loss of any existing attorney-client privilege with respect to such information or violate any applicable Law.

(d) Notwithstanding anything to the contrary in this Section 4.06, in the event that: (i) an Indemnifying Party elects not to assume responsibility for defending a Third-Party Claim; (ii) there exists a conflict of interest or potential conflict of interest between the Indemnifying Party and the applicable Indemnitee(s), (iii) any Third-Party Claim seeks an order, injunction or other equitable relief or relief for other than money damages against the Indemnitee; (iv) the Indemnifying Party shall not have employed counsel to represent the Indemnitee within thirty (30) calendar days after notice from the Indemnitee of such Third-Party Claim; or (v) the party making such Third-Party Claim is a Governmental Authority with regulatory authority over the Indemnitee or any of its material Assets, such Indemnitee(s) shall be entitled to assume the defense of such Third-Party Claim, at the Indemnifying Party's expense, with counsel of such Indemnitee's choosing. If the Indemnitee is conducting the defense against any such Third-Party Claim, the Indemnifying Party shall reasonably cooperate with the Indemnitee in such defense and make available to the Indemnitee all witnesses, pertinent and material Information and materials in such Indemnifying Party's possession or under such Indemnifying Party's control relating thereto as are reasonably required by the Indemnitee pursuant to a joint defense agreement to be entered into by Indemnitee and the Indemnifying Party; provided, however, that such

access shall not require the Indemnifying Party to disclose any information the disclosure of which would, in the reasonable judgment of the Indemnifying Party, result in the loss of any existing attorney-client privilege with respect to such information or violate any applicable Law.

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(e) No Indemnitee may settle or compromise any Third-Party Claim without the consent of the Indemnifying Party, which consent shall not be unreasonably withheld, conditioned or delayed. If an Indemnifying Party has failed to assume the defense of the Third-Party Claim, it shall not be a defense to any obligation to pay any amount in respect of such Third-Party Claim that the Indemnifying Party was not consulted in the defense thereof, that such Indemnifying Party's views or opinions as to the conduct of such defense were not accepted or adopted, that such Indemnifying Party does not approve of the quality or manner of the defense thereof or that such Third-Party Claim was incurred by reason of a settlement rather than by a judgment or other determination of liability.

(f) In the case of a Third-Party Claim, no Indemnifying Party shall consent to entry of any judgment or enter into any settlement of the Third-Party Claim without the consent (not to be unreasonably withheld, conditioned or delayed) of the Indemnitee if the effect thereof is to permit any injunction, declaratory judgment, other order or other non-monetary relief to be entered, directly or indirectly, against any Indemnitee, or does not release the Indemnitee from all liabilities and obligations with respect to such Third-Party Claim or includes an admission of guilt or liability on behalf of the Indemnitee.

(g) Except as otherwise provided in Section 9.04, the Merger Agreement or any Ancillary Agreement, following the Closing, the indemnification provisions of this Article IV shall be the sole and exclusive remedy of an Indemnitee for any monetary or compensatory damages or Losses resulting from any breach of this Agreement (including with respect to monetary or compensatory damages or Losses arising out of or relating to, as the case may be, any Communications Liability or Excluded Liability), and each Indemnitee expressly waives and relinquishes any and all rights, claims or remedies such Person may have with respect to the foregoing other than under this Article IV against any Indemnifying Party.

### **Section 4.07 Indemnification Obligations Net of Proceeds Received from Third Parties.**

(a) Any Liability subject to indemnification or contribution pursuant to this Article IV will be net of any proceeds received by the Indemnitee from any third party (net of any deductible or retention amount or any other third-party costs or expenses incurred by the Indemnifying Party in obtaining such recovery, including any increased insurance premiums) for indemnification for such Liability that actually reduce the amount of the Liability ( *Third-Party Proceeds* ). Accordingly, the amount which any Indemnifying Party is required to pay pursuant to this Article IV to any Indemnitee pursuant to this Article IV will be reduced by Third-Party Proceeds theretofore actually recovered by or on behalf of the Indemnitee in respect of the related Liability. If an Indemnitee receives a payment required by this Agreement from an Indemnifying Party in respect of any Liability (an *Indemnity Payment* ) and subsequently receives Third-Party Proceeds, then the Indemnitee will pay to the Indemnifying Party an amount equal to the excess of the Indemnity Payment received over the amount of the Indemnity Payment that would have been due if the Third-Party Proceeds had been received, realized or recovered before the Indemnity Payment was made.

(b) The Indemnitee shall use commercially reasonable efforts to seek to collect or recover any Third-Party Proceeds to which the Indemnitee is entitled in connection with any Liability for which the Indemnitee seeks contribution or indemnification pursuant to this Article IV; provided, however, that the Indemnitee's inability to collect or recover any such Third-Party Proceeds shall not limit the Indemnifying Party's obligations hereunder.

### **Section 4.08 Certain Actions; Substitution; Subrogation.**

(a) **Certain Actions.** Notwithstanding anything to the contrary set forth in Section 4.06, and subject to the provisions of the Tax Matters Agreement and the Employee Matters Agreement, which shall remain exclusive as to Tax matters and employee and benefit matters, respectively, and except to the extent there are actual or potential conflicts of interest between Danaher and Newco with respect to a particular Action: (i) Danaher may elect to have exclusive

authority and control over the investigation, prosecution, defense and

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appeal of any and all Actions pending at the Separation Time which relate to or arise out of the Communications Business, the Communications Assets or the Communications Liabilities and as to which a member of the Danaher Group (other than Newco and the Newco Subs) is also named as a target or defendant thereunder, but excluding any such Actions described in clause (ii); and (ii) Newco may elect to have exclusive authority and control over the investigation, prosecution, defense and appeal of any and all Actions pending at the Separation Time which relate to or arise out of the Communications Business, the Communications Assets or the Communications Liabilities and as to which a member of the Danaher Group (other than Newco and the Newco Subs) is also named as a target or defendant thereunder, but only to the extent any such Actions primarily relate to or primarily arise in connection with the Communications Business, the Communications Assets or the Communications Liabilities and do not primarily relate to or primarily arise in connection with Excluded Liabilities; provided, however, that: (i) the Party in control of any such Action shall investigate, prosecute, defend and/or appeal such Action in good faith; (ii) the Parties shall reasonably consult with each other on a regular basis with respect to strategy and developments with respect to any such Action; (iii) the Party not in control of such Action shall have the right to participate in (but not control) and employ separate counsel in connection with the defense, compromise or settlement of such Action at its own cost and expense; and (iv) the Party in control of such Action must obtain the written consent of the other Party, such consent not to be unreasonably withheld, conditioned or delayed, to settle or compromise or consent to the entry of judgment with respect to such Action. After any such compromise, settlement, consent to entry of judgment or entry of judgment, Danaher and Newco shall agree upon a reasonable allocation to Newco of, and Newco shall be responsible for or receive, as the case may be, Newco's proportionate share of any such compromise, settlement, consent or judgment attributable to the Communications Business, the Communications Assets or the Communications Liabilities, including its proportionate share of the reasonable costs and expenses associated with defending the same.

**(b) Substitution.** In the event of an Action that involves solely matters that are indemnifiable and in which the Indemnifying Party is not a named defendant, if either the Indemnitee or the Indemnifying Party so requests, the Parties shall use commercially reasonable efforts to substitute the Indemnifying Party for the named but not liable defendant to be removed from such Action and such defendants shall not be required to make any payments or contribution in connection therewith (regardless if such removal is successful or not). If such substitution or addition cannot be achieved for any reason or is not requested, the rights and obligations of the Parties regarding indemnification and the management of the defense of claims as set forth in this Article IV shall not be affected.

**(c) Subrogation.** In the event of payment by or on behalf of any Indemnifying Party to or on behalf of any Indemnitee in connection with any Third-Party Claim, such Indemnifying Party shall be subrogated to and shall stand in the place of such Indemnitee, in whole or in part based upon and in proportion to the amount of the Indemnitee's Liability that the Indemnifying Party has paid, as to any events or circumstances in respect of which such Indemnitee may have any right, defense or claim relating to such Third-Party Claim against any claimant or plaintiff asserting such Third-Party Claim or against any other Person; provided, however, that in no event shall the Indemnifying Party have any rights under this Section 4.08(b) to assert any claim, action or proceeding against any customer or material supplier of the Indemnitee (whether or not the Indemnitee has been indemnified under this Agreement). Such Indemnitee shall cooperate with such Indemnifying Party in a reasonable manner, and at the cost and expense of such Indemnifying Party, in prosecuting any subrogated right, defense or claim.

**Section 4.09 Payments.** Indemnification required by this Article IV shall be made by periodic payments of the amount thereof during the course of the investigation or defense, as and when bills are received or a Loss or Liability incurred.

**Section 4.10 Non-Applicability to Taxes and Employee Matters.** Except as otherwise specifically provided herein, Tax matters shall be exclusively governed by the Tax Matters Agreement, employee and employee benefit matters shall be exclusively governed by the Employee Matters Agreement and, in the event of any inconsistency between the

Tax Matters Agreement or the Employee Matters Agreement and this Agreement,

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the Tax Matters Agreement or Employee Matters Agreement, as applicable, shall control. The procedures relating to indemnification for Tax matters and for employee and employee benefit matters shall be exclusively governed by the Tax Matters Agreement and the Employee Matters Agreement, respectively.

**Section 4.11 Characterization of and Adjustment to Payments.**

(a) For all Tax purposes, Danaher and Newco agree to treat any payment required by this Agreement or the Merger Agreement as either a contribution by Danaher to Newco or a distribution by Newco to Danaher, as the case may be, occurring immediately prior to the Closing Date.

(b) Notwithstanding the foregoing, any payment made pursuant to Article IV of this Agreement shall be: (i) decreased to take into account the present value of any Tax Benefit (as defined in the Tax Matters Agreement) made allowable to the Indemnitee (or any of its Affiliates) arising from the incurrence or payment of the relevant indemnified item (which Tax Benefit would not have arisen or been allowable but for such indemnified item); and (ii) increased to take into account any Tax Cost (as defined in the Tax Matters Agreement) of the Indemnitee (or any of its Affiliates) arising from the receipt of the relevant indemnity payment (but taking into account the present value of all correlative Tax Benefits resulting from the payment of such Tax Cost). For purposes of this Section 4.11(b), any Tax Benefit or Tax Cost, as applicable, shall be determined: (i) using the highest marginal rates in effect at the time of the determination; (ii) assuming the Indemnitee will be liable for such Taxes at such rate and has no Tax Attributes (as defined in the Tax Matters Agreement) at the time of the determination; and (iii) assuming that any such Tax Benefit is used at the earliest date allowable by applicable Law. The present value referred to in the first sentence of this Section 4.11(b) shall be determined using a discount rate equal to the mid term applicable federal rate in effect at the time of the payment of the relevant indemnity payment.

**ARTICLE V**

**ACCESS TO INFORMATION**

**Section 5.01 Access to Personnel and Property.** From and after the Separation Time until the sixth anniversary of the Separation Time, each of Danaher and Newco shall afford to the other and the Representatives of each, at such requesting Party's expense on a time and materials basis, reasonable access during normal business hours, subject to the restrictions for privileged or Confidential Information set forth in this Agreement and to the requirements of any applicable Law (including, without limitation, any applicable requirements relating to privacy or disclosure of personal information) such as a code of conduct or standard of conduct (provided, however, that the Parties will arrange for appropriate substitute access of disclosure to the extent necessary to comply with any such regulation), to the personnel, properties, and, in connection with access to such personnel and properties, Information of such Party and its Subsidiaries insofar as such access is reasonably required by the other Party, upon the reasonable prior written request by such Party for access to specific and identified personnel, properties and Information, and only for the duration such access is reasonably requested and required by the other Party, and (a) relates to such other Party or, in the case of requests from Danaher, the Communications Assets prior to the Separation Time solely as may be reasonably necessary in connection with the prosecution or defense of any Action for which the requesting Party may have Liability under this Agreement (except for claims, demands or Actions between members of each Group), and in the case of requests from Newco, the Communications Business, prior to the Separation Time or (b) is reasonably required by a Party to perform its obligations under any Ancillary Agreement to which such Party or any of its Affiliates is a party; provided, however, that the Party providing such access may require that such Representatives execute a confidential non-disclosure agreement agreeing to be bound by the provisions of this Article V, unless such individual is already subject to a non-disclosure agreement containing at least substantially the same terms and conditions as this Article V with respect to Confidential Information; provided, further, that nothing in this

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Section 5.01 shall be deemed to grant Newco or any Newco Sub any license, easement, servitude or similar right with respect to any real property that is an Excluded Asset; provided, further, that the requesting Party shall reimburse the other Party for the time expended by its employees in connection therewith in an amount determined by such other Party in good faith.

**Section 5.02 Witness Services.** For a period of six (6) years from and after the Separation Time (or for any pending matter arising prior to the expiration of such period), each of Danaher and Newco shall use its commercially reasonable efforts to make available to the other, upon reasonable prior written request, its and its Subsidiaries directors, officers, employees and agents (taking into account the work schedules and other commitments of such Persons) as witnesses to the extent that (a) such Persons may reasonably be required to testify in connection with the prosecution or defense of any Action for which the requesting Party may have Liability under this Agreement or in connection with the transactions contemplated by this Agreement, the Merger Agreement or any Ancillary Agreement (except for claims, demands or Actions between members of each Group) and (b) there is no adversity in the Action between the requesting Party and the other Party except for the time and effort required in connection with the services of the officers, directors and employees and agents of the other Party. The out-of-pocket costs and expenses incurred in the provision of such witnesses shall be paid by the Party requesting the availability of such persons (provided, however, that such requesting Party must obtain written approval of the other Party prior to incurring any such costs or expenses), and such requesting Party shall reimburse the other Party for the time expended by its employees in connection therewith in an amount determined by such other Party in good faith.

**Section 5.03 Privileged Matters.**

(a) The respective rights and obligations of the Parties to maintain, preserve, assert or waive any or all privileges belonging to either Party or its Subsidiaries with respect to the Communications Business or the other businesses of Danaher, including the attorney-client and work product privileges (collectively, **Privileges** ), will be governed by the provisions of this Section 5.03. With respect to Privileged Information (as defined below) of Danaher, Danaher will have sole authority in perpetuity to determine whether to assert or waive any or all Privileges, and Newco will not take any action (or permit any member of the Newco Group to take action) without the prior written consent of Danaher that could result in any waiver of any Privilege that could be asserted by any member of the Danaher Group under applicable Law and this Agreement. With respect to Privileged Information of Newco arising after the Separation Time, Newco will have sole authority in perpetuity to determine whether to assert or waive any or all Privileges, and Danaher will take no action (nor permit any member of the Danaher Group to take action) without the prior written consent of Newco that could result in any waiver of any Privilege that could be asserted by any member of the Newco Group under applicable Law and this Agreement. The rights and obligations created by this Section 5.03 will apply to all Information as to which a Party or its respective Groups would be entitled to assert, or has asserted, a Privilege without regard to the effect, if any, of the Transactions ( **Privileged Information** ).

(b) Privileged Information of the Danaher Group includes: (i) any and all Information regarding the Danaher Group and its businesses (other than Information relating to the Communications Business ( **Newco Information** )), whether or not such Information (other than Newco Information) is in the possession of Newco or any Affiliate thereof; (ii) all communications subject to a Privilege between counsel for Danaher (other than counsel for the Communications Business) (including any person who, at the time of the communication, was an employee of the Danaher Group in the capacity of in-house counsel, regardless of whether such employee is or becomes an employee of NetScout, Newco or any Affiliate thereof) and any person who, at the time of the communication, was an employee of Danaher, regardless of whether such employee is or becomes an employee of Newco or any Affiliate thereof; (iii) all Information generated, received or arising after the Separation Time that discloses Privileged Information of the Danaher Group generated, received or arising prior to the Separation Time; and (iv) all Information relating to all matters relating to Danaher's evaluation and negotiation of the Transactions.

(c) Privileged Information of the Newco Group includes: (i) any and all Newco Information, whether or not it is in the possession of Danaher or any member of its Group; (ii) all communications subject to a

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Privilege between counsel for the Communications Business (including any person who, at the time of the communication, was an employee of the Danaher Group in the capacity of in-house counsel, regardless of whether such employee is or remains an employee of Danaher or any Affiliate thereof) and any person who, at the time of the communication, was an employee of Danaher, Newco or any member of either Group or the Communications Business, regardless of whether such employee was, is or becomes an employee of Danaher or any of its Subsidiaries; and (iii) all Information generated, received or arising after the Separation Time that discloses Privileged Information of the Newco Group generated, received or arising after the Separation Time.

(d) Upon receipt by Danaher or Newco, or any of their respective Affiliates, as the case may be, of any subpoena, discovery or other request from any third party that actually or arguably calls for the production or disclosure of Privileged Information of the other or if Danaher or Newco, or any of their respective Affiliates, as the case may be, obtains knowledge that any current or former employee of Danaher or Newco, or any of their respective Affiliates, as the case may be, receives any subpoena, discovery or other request from any third-party that actually or arguably calls for the production or disclosure of Privileged Information of the other, Danaher or Newco, as the case may be, will promptly notify the relevant other Party of the existence of the request and will provide such other Party a reasonable opportunity to review the Information and to assert any rights it may have under this Section 5.03 or otherwise to prevent the production or disclosure of Privileged Information. Danaher or Newco, as the case may be, will not, and will cause their respective Affiliates not to, produce or disclose to any third-party any of the other Party's Privileged Information under this Section 5.03 unless: (i) the other Party has provided its express written consent to such production or disclosure; or (ii) a court of competent jurisdiction has entered an Order not subject to interlocutory appeal or review finding that the Information is not entitled to protection from disclosure under any applicable privilege, doctrine or rule.

(e) Danaher's transfer of books and records pertaining to the Communications Business and other Information to Newco, Danaher's agreement to permit Newco to obtain Information existing prior to the Internal Restructuring, Newco's transfer of books and records pertaining to Danaher, if any, and other Information to Danaher and Newco's agreement to permit Danaher to obtain Information existing prior to the Internal Restructuring are made in reliance on Danaher's and Newco's respective agreements, as set forth in Section 5.01 and this Section 5.03, to maintain the confidentiality of such Information and to take the steps provided herein for the preservation of all Privileges that may belong to or be asserted by Danaher or Newco, as the case may be. The access to Information, witnesses and individuals being granted pursuant to Section 5.01 and the disclosure to Newco and Danaher of Privileged Information relating to the Communications Business or the other businesses of Danaher pursuant to this Agreement in connection with the Internal Restructuring will not be asserted by Danaher or Newco to constitute, or otherwise deem, a waiver of any Privilege that has been or may be asserted under this Section 5.03 or otherwise. Nothing in this Agreement will operate to reduce, minimize or condition the rights granted to Danaher and Newco in, or the obligations imposed upon Danaher and Newco by, this Section 5.03.

**ARTICLE VI**

**ADDITIONAL AGREEMENTS**

**Section 6.01 Further Assurances.** Subject to the limitations or other provisions of this Agreement, the Merger Agreement and any Ancillary Agreement: (i) each of the Parties (which shall not include NetScout unless and until the Effective Time shall have occurred) shall use reasonable best efforts (subject to, and in accordance with, applicable Law) to take promptly, or cause to be taken promptly, all actions, and to do promptly, or cause to be done promptly, and to assist and cooperate with the other Parties in doing, all things reasonably necessary, proper or advisable to consummate and make effective the transactions contemplated by and carry out the intent and purposes of this Agreement and the Ancillary Agreements, including using reasonable best efforts to obtain satisfaction of the

conditions precedent to each Party's obligations hereunder or in any Ancillary Agreement within its reasonable control and to perform all covenants and agreements herein or any Ancillary Agreement applicable to such Party; and (ii) none of the Parties (which shall not include NetScout unless and until the

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Effective Time shall have occurred) will, without the prior written consent of the other applicable Party, take any action which would reasonably be expected to prevent or materially impede, interfere with or delay the transactions contemplated by this Agreement, the Merger Agreement or any Ancillary Agreement. Without limiting the generality of the foregoing, where the cooperation of third parties, such as insurers or trustees, would be necessary in order for a Party to completely fulfill its obligations under the Merger Agreement, this Agreement or the Ancillary Agreements, such Party shall use reasonable best efforts to cause such third parties to provide such cooperation.

**Section 6.02 Removal of Tangible Assets.** Except as may be otherwise provided in the Ancillary Agreements or otherwise agreed to by the Parties, all tangible Communications Assets that are located at any facilities of any member of the Danaher Group shall be moved or caused to be moved by Danaher as promptly as practicable after the Separation Time from such facilities, at Danaher's expense and in a manner so as not to unreasonably interfere with the operations of any member of the Danaher Group and not to cause damage to such facility, and such member of the Danaher Group shall provide reasonable access to such facility to effectuate the same.

**Section 6.03 Danaher Guarantees.** Following the Closing, if the Parties were unable to novate, assign or replace any Danaher Guarantees prior to the Closing, Newco will: (i) continue to use its reasonable best efforts to novate, assign or replace such Danaher Guarantees with NetScout as guarantor; and (ii) indemnify, defend and hold harmless Danaher and its Affiliates against, and reimburse Danaher and its Affiliates for, any Losses of Danaher and its Affiliates incurred because any such Danaher Guarantee is called upon and Danaher or its Affiliate is required to make any material payment under any such Danaher Guarantee. Newco's reasonable best efforts with respect to this Section 6.03 shall not require Newco to take any action that would be reasonably expected to expose it or any other member of the Newco Group to any material incremental expenses or losses of benefits.

### **Section 6.04 Insurance Matters.**

(a) Notwithstanding anything to the contrary herein, from and after the Separation Time, Newco, the Communications Assets and the Communications Business shall be, and Danaher shall use commercially reasonable efforts to cause them to continue to be, covered under insurance policies of Danaher or its Subsidiaries (as applicable), to the extent insurance coverage exists, until the Effective Time.

(b) Subject to, and other than as set forth in, Section 6.04(c) and Section 6.04(d), Newco acknowledges that: (i) coverage for Newco, the Communications Assets and the Communications Business for the period after the Effective Time under all of the insurance policies maintained by Danaher prior to the Effective Time will be terminated effective as of the Effective Time; and (ii) upon such termination, Newco, the Communications Assets and the Communications Business will cease to be covered under such policies with respect to the period after the Effective Time.

(c) For any claim asserted against any Newco or any Newco Sub after the Effective Time arising out of an occurrence taking place prior to the Effective Time ( *Post-Closing Claims* ), Newco and each Newco Sub may access coverage under the occurrence-based insurance policies of Danaher or its Subsidiaries (as applicable) issued or in place prior to the Effective Time under which Newco or any Newco Sub is insured (the *Pre-Closing Occurrence Based Policies* ), to the extent such insurance coverage exists. After the Effective Time, Newco or any Newco Sub may seek coverage for any Post-Closing Claim under any applicable Pre-Closing Occurrence Based Policies, to the extent such insurance coverage exists, and Danaher and its Subsidiaries (as applicable) shall cooperate with Newco and the Newco Subs in connection with the tendering of such claims; provided, however, that: (i) Newco or the Newco Subs shall promptly notify Danaher of all such Post-Closing Claims and; (ii) Newco shall be responsible for the satisfaction or payment of any applicable retention, deductible or retrospective premium with respect to any Post-Closing Claim. In the event that a Post-Closing Claim relates to the same occurrence for which Danaher or its Subsidiaries is seeking coverage

under Pre-Closing Occurrence Based Policies, and the limits under an applicable Pre-Closing Occurrence Based Policy are not sufficient to fund

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all covered claims of Newco or any Newco Sub (as applicable) and Danaher or its Subsidiaries (as applicable), amounts due under such a Pre-Closing Occurrence Based Policy shall be paid to the respective entities in proportion to the amounts which otherwise would be due were the limits of liability infinite. Notwithstanding anything to the contrary in this Agreement, following the Distribution Date members of the Newco Group shall have no rights or claims against or with respect to (1) any captive insurance company of Danaher or any of its Affiliates or (2) any fronted insurance program maintained by Danaher or any of its Affiliates that is not a risk transfer insurance program.

(d) Danaher shall maintain in effect for not less than six (6) years after the Effective Time, by prepaid run-off, tail coverage endorsement or otherwise (including, by continuing to provide coverage under Danaher existing policies), the coverage provided by directors and officers liability and fiduciary liability insurance under which Newco and the Newco Subs are insured as of immediately prior to the Effective Time; provided, however, that Danaher may substitute prepaid policies of at least the same coverage containing terms and conditions that are no less advantageous to Newco or any Newco Sub so long as such substitution does not result in gaps or lapses in coverage with respect to matters occurring prior to the Effective Time.

**Section 6.05 Casualty and Condemnation.** If, between the date hereof and the Separation Time, there shall occur any physical damage to or destruction of, or theft or similar loss of, any of the material tangible Assets described in Section 1.05(a) (a **Casualty Loss** ) or any condemnation or taking by eminent domain by a Governmental Authority of any of the Assets described in Section 1.05(a) (a **Condemnation Event** ), then: (i) Danaher shall use its reasonable best efforts to (A) replace or repair (as applicable) the asset or property related to such Casualty Loss, and (B) replace the asset or property that has been condemned or taken as necessary consistent with prudent operation of the Communications Business; or (ii) if the Separation is consummated notwithstanding such Casualty Loss or Condemnation Event, and if such damaged, destroyed, stolen, lost or condemned or taken Assets have not been repaired or replaced as of the Separation Time, then, without limiting Newco's or any member of the Newco Group's other rights hereunder, promptly after any casualty insurance proceeds, business interruption insurance proceeds or condemnation proceeds payable to Danaher or any of its Affiliates with respect to such Casualty Loss or Condemnation Event have been collected, Danaher shall, or shall cause its Affiliate to, pay to Newco: (x) the aggregate amount, if any, of such casualty insurance proceeds described above in connection with such Casualty Loss; (y) the aggregate amount, if any, of such business interruption insurance proceeds described above that were paid in connection with such Casualty Loss; and (z) the aggregate amount, if any, of such condemnation proceeds described above in connection with such Condemnation Event, in each case net of any deductible or retention amount or any other costs or expenses incurred in obtaining such recovery, including any increased insurance premiums. Danaher shall, and shall cause its Affiliates to, use commercially reasonable efforts to collect amounts due (if any) under insurance policies or programs in respect of any Casualty Loss or as a result of a Condemnation Event. The amount of any insurance or condemnation proceeds paid to Danaher shall be included as a Communications Asset and not be distributable cash available to Danaher or any other member of the Danaher Group.

**Section 6.06 Confidentiality.**

(a) From and after the Effective Time, the Parties shall hold, and shall cause each of their respective Affiliates to hold, and each of the foregoing shall cause their respective directors, officers, employees, agents, consultants and advisors to hold, in strict confidence, and not to disclose or release or use, for any purpose other than as permitted pursuant to this Agreement, the Merger Agreement or the Ancillary Agreements, without the prior written consent of the other Party, any and all Confidential Information concerning the other Party or such Party's Group; provided, however, that the Parties may disclose, or may permit disclosure of, Confidential Information: (i) to their respective auditors, attorneys, financial advisors, bankers and other appropriate consultants and advisors who have a need to know such information for auditing and other non-commercial purposes and are informed of their obligation to hold such information confidential to the same extent as is applicable to the Parties and in respect of whose failure to comply

with such obligations, the applicable Party will be responsible; (ii) if the Parties or any of their respective Affiliates are required or compelled to disclose any

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such Confidential Information by judicial or administrative process or by other requirements of Law or stock exchange rule; (iii) as required in connection with any legal or other proceeding by one Party against any other Party; or (iv) as necessary in order to permit a Party to prepare and disclose its financial statements, or other required disclosures required by Law or such applicable stock exchange. Notwithstanding the foregoing, in the event that any demand or request for disclosure of Confidential Information is made pursuant to clause (ii) above, each Party, as applicable, shall promptly notify the other of the existence of such request or demand and, to the extent commercially practicable, shall provide the other Party thirty (30) calendar days (or such lesser period as is commercially practicable) to seek an appropriate protective order or other remedy, which such Parties will cooperate in obtaining. In the event that such appropriate protective order or other remedy is not obtained, the Party whose Confidential Information is required to be disclosed shall or shall cause the other applicable Party or Parties to furnish, or cause to be furnished, only that portion of the Confidential Information that is legally required to be disclosed and shall take commercially reasonable steps to ensure that confidential treatment is accorded such information.

**(b)** The provisions of this Section 6.06 do not limit the obligations of: (i) the parties to the Merger Agreement pursuant to Section 4.1 of the Merger Agreement; or (ii) the parties to the Confidentiality Agreement (as defined in the Merger Agreement).

**ARTICLE VII**

**CONDITIONS**

**Section 7.01 Conditions to the Newco Transfer.** The obligations of Danaher to effect the Newco Transfer pursuant to this Agreement shall be subject to fulfillment (or waiver (subject to Section 9.07)) at or prior to the Separation Date of each of the following conditions (provided, however, that unless the Merger Agreement shall have been terminated in accordance with its terms, any such waiver shall be subject to the written consent of NetScout): each of the parties to the Merger Agreement has irrevocably confirmed to each other that each condition in Sections 6 and 7 of the Merger Agreement (other than Sections 6.5 and 7.5 thereto) to such party's respective obligations to effect the Mergers: (i) has been fulfilled; (ii) will be fulfilled at the Effective Time; or (iii) is or has been waived by such party, as the case may be.

**Section 7.02 Conditions to the Distribution.** The obligations of Danaher to effect the Distribution pursuant to this Agreement shall be subject to the fulfillment (or waiver (subject to Section 9.07)) at or prior to the Separation Date of each the following conditions; provided, however, that unless the Merger Agreement shall have been terminated in accordance with its terms, any such waiver shall be subject to the written consent of NetScout:

**(a)** the Newco Transfer shall have been consummated;

**(b)** Danaher shall have established the Record Date (as determined in accordance with Section 3.02(a)) and shall have provided a notice to FINRA no later than ten (10) days prior to the Record Date in compliance with Rule 10b-17 under the Exchange Act;

**(c)** Danaher and Newco shall have prepared and mailed to the holders of record of Danaher Common Stock such information concerning Newco, its business, operations and management, the Distribution and such other matters as Danaher shall determine in its sole and absolute discretion (after consultation with NetScout) and as may otherwise be required by applicable Law;

**(d)** Each material Governmental Approval required in connection with the Internal Restructuring or as otherwise may be required in connection with any of the transactions contemplated by the Plan of Reorganization shall have been

obtained and must be in full force and effect; and

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(e) each of the conditions in Section 7 of the Merger Agreement to Danaher's obligations to effect the Mergers shall have been satisfied or waived (other than those conditions that by their nature are to be satisfied at the Distribution Date and other than the conditions set forth in Section 7.5 thereto).

**Section 7.03 Guarantee.** Following the Effective Time, NetScout unconditionally, absolutely and irrevocably guarantees to Danaher the prompt payment, in full, when due, of any payment obligations of all members of the Newco Group under this Agreement and the other Transaction Documents after the Closing and the prompt performance, when due, of all other obligations of any member of the Newco Group under this Agreement and the other Transaction Documents after the Closing. NetScout's obligations to Danaher under this Section 7.03 are referred to as the ***Guaranteed Obligations***. The Guaranteed Obligations are absolute and unconditional, irrespective of, and NetScout hereby expressly waives to the extent permitted by law, any defense to its obligations under this Section 7.03, any circumstance whatsoever which might otherwise constitute a legal or equitable defense available to, or discharge of, a surety or a guarantor, including any right to require or claim that Danaher seek recovery directly from any member of the Newco Group in respect of the Guaranteed Obligations.

**ARTICLE VIII**

**DISPUTE RESOLUTION**

**Section 8.01 Negotiation.**

(a) Each Party shall appoint a representative who shall be responsible for administering this dispute resolution provision (the ***Appointed Representative*** ). The Appointed Representative shall have the authority to resolve any such disputes.

(b) Except as otherwise provided in this Agreement or in any Ancillary Agreement, in the event of a controversy, dispute or claim arising out of, in connection with, or in relation to the interpretation, performance, nonperformance, validity, termination or breach of this Agreement or any Ancillary Agreement or otherwise arising out of, or in any way related to, this Agreement or any Ancillary Agreement or the transactions contemplated hereby or thereby (but specifically excluding the Merger Agreement where any disputes under the Merger Agreement shall be resolved pursuant to the terms thereof) (collectively, the ***Agreement Disputes*** ), the Appointed Representatives shall negotiate in good faith for a reasonable period of time to settle such Agreement Dispute; provided, however, that: (i) such reasonable period shall not, unless otherwise agreed to by the relevant Parties in writing, exceed thirty (30) calendar days from the time of receipt by a Party of written notice of such Agreement Dispute; and (ii) the relevant employees from both Parties with knowledge and interest in the dispute shall first have tried to resolve the differences between the Parties. Nothing said or disclosed, nor any document produced, in the course of any negotiations, conferences and discussions in connection with efforts to settle an Agreement Dispute that is not otherwise independently discoverable shall be offered or received as evidence or used for impeachment or for any other purpose, but shall be considered as to have been disclosed for settlement purposes.

**ARTICLE IX**

**MISCELLANEOUS**

**Section 9.01 Expenses.** Except as otherwise provided in this Agreement, including Section 1.06(b), Section 1.08(b), Section 4.02, Section 4.03, the Merger Agreement or any Ancillary Agreement, whether or not the Distribution or the other transactions contemplated by this Agreement are consummated, all costs and expenses incurred in connection with this Agreement and the transactions contemplated hereby (including costs

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and expenses attributable to the Conveyance of the Assets as contemplated herein) shall be paid by the Party incurring such costs or expenses. For the avoidance of doubt, all Liabilities, costs and expenses incurred in connection with this Agreement, the Merger Agreement, any Ancillary Agreement or the Transfer Documents and the transactions contemplated hereby or thereby by or on behalf of Newco or any of the Newco Subs prior to the Effective Time shall be the responsibility of Danaher and shall be assumed in full by Danaher.

**Section 9.02 Entire Agreement.** This Agreement, the Merger Agreement and the Ancillary Agreements, including any related annexes, schedules and exhibits, as well as any other agreements and documents referred to herein and therein, shall together constitute the entire agreement between the Parties with respect to the subject matter hereof and thereof and shall supersede all prior negotiations, agreements and understandings of the Parties of any nature, whether oral or written, with respect to such subject matter.

**Section 9.03 Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, without giving effect to any choice or conflict of law provision or rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of Delaware.

**Section 9.04 Specific Performance; Jurisdiction.** The Parties understand and agree that the covenants and agreements on each of their parts herein contained are uniquely related to the desire of the Parties and their respective Affiliates to consummate the Transactions, that the Transactions are a unique business opportunity at a unique time for each of Danaher, NetScout and Newco and their respective Affiliates, and further agree that irreparable damage would occur in the event that any provision of this Agreement were not performed in accordance with its specific terms, and further agree that, although monetary damages may be available for the breach of such covenants and agreements, monetary damages would be an inadequate remedy therefor. It is accordingly agreed that, in addition to any other remedy that may be available to it, including monetary damages, each of the Parties (including NetScout for so long as the Merger Agreement has not been terminated in accordance with its terms) shall be entitled to an injunction or injunctions to prevent breaches of this Agreement and to enforce specifically the terms and provisions of this Agreement exclusively in the Delaware Court of Chancery and any state appellate court therefrom within the State of Delaware (or, if the Delaware Court of Chancery declines to accept jurisdiction over a particular matter, any state or federal court within the State of Delaware). Each of the Parties (including NetScout for so long as the Merger Agreement has not been terminated in accordance with its terms) further agrees that no party to this Agreement shall be required to obtain, furnish or post any bond or similar instrument in connection with or as a condition to obtaining any remedy referred to in this Section 9.04 and each Party waives any objection to the imposition of such relief or any right it may have to require the obtaining, furnishing or posting of any such bond or similar instrument. In addition, each of the Parties (including NetScout for so long as the Merger Agreement has not been terminated in accordance with its terms) irrevocably agrees that any legal action or proceeding with respect to this Agreement and the rights and obligations arising hereunder, or for recognition and enforcement of any judgment in respect of this Agreement and the rights and obligations arising hereunder brought by the other party hereto or its successors or assigns, shall be brought and determined exclusively in the Delaware Court of Chancery and any state appellate court therefrom within the State of Delaware (or, if the Delaware Court of Chancery declines to accept jurisdiction over a particular matter, any state or federal court within the State of Delaware). Each of the Parties (including NetScout for so long as the Merger Agreement has not been terminated in accordance with its terms) hereby irrevocably submits with regard to any such action or proceeding for itself and in respect of its property, generally and unconditionally, to the personal jurisdiction of the aforesaid courts and agrees that it will not bring any action relating to this Agreement or any of the transactions contemplated by this Agreement in any court other than the aforesaid courts. Each of the Parties (including NetScout for so long as the Merger Agreement has not been terminated in accordance with its terms) hereby irrevocably waives, and agrees not to assert, by way of motion, as a defense, counterclaim or otherwise, in any action or proceeding with respect to this Agreement: (a) any claim that it is not personally subject to the jurisdiction of

the above named courts for any reason other than the failure to serve in accordance with this Section 9.04; (b) any claim that it or its property is exempt or immune from jurisdiction of any such court or from any legal process commenced in such courts (whether

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through service of notice, attachment prior to judgment, attachment in aid of execution of judgment, execution of judgment or otherwise); and (c) to the fullest extent permitted by the applicable Law, any claim that: (i) the suit, action or proceeding in such court is brought in an inconvenient forum; (ii) the venue of such suit, action or proceeding is improper; or (iii) this Agreement, or the subject matter hereof, may not be enforced in or by such courts.

**Section 9.05 Waiver of Jury Trial.** EACH OF THE PARTIES IRREVOCABLY WAIVES ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY ACTION ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

**Section 9.06 Notices.** All notices, requests, permissions, waivers and other communications hereunder shall be in writing and shall be deemed to have been duly given (a) five (5) Business Days following sending by registered or certified mail, postage prepaid, (b) when sent, if sent by facsimile, provided, however, that the facsimile transmission is promptly confirmed and any facsimile transmission received after 5:00 p.m. Eastern time shall be deemed received at 9:00 a.m. Eastern time on the following Business Day, (c) when delivered, if delivered personally to the intended recipient and (d) one (1) Business Day following sending by overnight delivery via a national courier service and, in each case, addressed to a Party at the following address for such Party:

(a) If to Danaher:

c/o Danaher Corporation  
2200 Pennsylvania Ave., NW - Suite 800W  
Washington, DC 20037-1701  
Attn: Attila Bodi  
Facsimile: (202) 419-7676  
Email: attila.bodi@danaher.com  
Attn: Jonathan Schwarz  
Facsimile: (202) 419-7668  
Email: jonathan.schwarz@danaher.com

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

Skadden, Arps, Slate, Meagher & Flom LLP  
Four Times Square  
New York, NY 10036  
Attn: Joseph A. Coco  
Thomas W. Greenberg  
E-mail: joseph.coco@skadden.com  
thomas.greenberg@skadden.com  
Facsimile: (212) 735-2000

(b) If to Newco prior to the Distribution Date:

Edgar Filing: PHOENIX FOOTWEAR GROUP INC - Form 8-K/A

c/o Danaher Corporation  
2200 Pennsylvania Ave., NW - Suite 800W  
Washington, DC 20037-1701  
Attn: Attila Bodi  
Facsimile: (202) 419-7676  
Email: attila.bodi@danaher.com  
Attn: Jonathan Schwarz  
Facsimile: (202) 419-7668  
Email: jonathan.schwarz@danaher.com

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

Skadden, Arps, Slate, Meagher & Flom LLP  
Four Times Square  
New York, NY 10036  
Attn: Joseph A. Coco  
Thomas W. Greenberg  
E-mail: joseph.coco@skadden.com  
thomas.greenberg@skadden.com  
Facsimile: (212) 735-2000

(c) If to NetScout:

NetScout Systems, Inc.  
310 Littleton Road  
Westford, Massachusetts 01886  
Attn: Anil K. Singhal, CEO  
Email: Anil.Singhal@netscout.com  
Facsimile: (978) 614-4004

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

Cooley LLP  
500 Boylston Street, 14th Floor  
Boston, MA 02116  
Attn: Miguel J. Vega  
Barbara Borden  
E-mails: mvega@cooley.com  
bborden@cooley.com  
Facsimile: (617) 937-2400

and with a copy to (which shall not constitute notice):

Baker & McKenzie LLP  
660 Hansen Way  
Palo Alto, CA 94304  
Attn: Matthew Gemello  
Email: Matthew.Gemello@bakermckenzie.com  
Facsimile: (650) 856-9299

(d) If to Newco on or after the Distribution Date:

c/o NetScout Systems, Inc.  
310 Littleton Road  
Westford, Massachusetts 01886  
Attn: Anil K. Singhal, CEO  
Facsimile: (978) 614-4004

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

Cooley LLP  
500 Boylston Street, 14th Floor  
Boston, MA 02116  
Attn: Miguel J. Vega  
Barbara Borden  
E-mails: mvega@cooley.com  
bborden@cooley.com  
Facsimile: (617) 937-2400

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and with a copy to (which shall not constitute notice):

Baker & McKenzie LLP  
660 Hansen Way  
Palo Alto, CA 94304  
Attn: Matthew Gemello  
Email: Matthew.Gemello@bakermckenzie.com  
Facsimile: (650) 856-9299

or to such other address(es) as shall be furnished in writing by any such Party to the other Party in accordance with the provisions of this Section 9.06. Any notice to Danaher will be deemed notice to all members of the Danaher Group, and any notice to Newco will be deemed notice to all members of the Newco Group.

**Section 9.07 Amendments and Waivers.**

(a) This Agreement may be amended and any provision of this Agreement may be waived, provided, however, that any such waiver shall be binding upon a Party only if such waiver is set forth in a writing executed by such Party and any such amendment shall be effective only if set forth in a writing executed by each of the Parties. In addition, unless the Merger Agreement shall have been terminated in accordance with its terms, any such amendment or waiver (including, for the avoidance of doubt and without limitation, any waiver of the conditions in Section 7.01 or Section 7.02) shall be subject to the written consent of NetScout. No course of dealing between or among any Persons having any interest in this Agreement shall be deemed effective to modify, amend or discharge any part of this Agreement or any rights or obligations of any Party under or by reason of this Agreement.

(b) No delay or failure in exercising any right, power or remedy hereunder shall affect or operate as a waiver thereof; nor shall any single or partial exercise thereof or any abandonment or discontinuance of steps to enforce such a right, power or remedy preclude any further exercise thereof or of any other right, power or remedy. The rights and remedies hereunder are cumulative and not exclusive of any rights or remedies that any Party would otherwise have. Any waiver, permit, consent or approval of any kind or character of any breach or default under this Agreement or any such waiver of any provision of this Agreement must satisfy the conditions set forth in Section 9.07(a) and shall be effective only to the extent in such writing specifically set forth.

**Section 9.08 Early Termination.** This Agreement shall terminate without further action at any time before the Closing upon termination of the Merger Agreement. If so terminated, no Party shall have any Liability of any kind to the other Party or any other Person on account of this Agreement, except as provided in the Merger Agreement.

**Section 9.09 No Third-Party Beneficiaries.** Except for the provisions of Article IV with respect to indemnification of Indemnitees, which is intended to benefit and be enforceable by the Persons specified therein as Indemnitees, this Agreement is solely for the benefit of the Parties and does not confer on third parties (including any employees of any member of the NetScout Group or the Newco Group) any remedy, claim, reimbursement, claim of action or other right in addition to those existing without reference to this Agreement.

**Section 9.10 Assignability; Binding Effect.** This Agreement is not assignable by any Party without the prior written consent of the other Parties and any attempt to assign this Agreement without such consent shall be void and of no effect. Notwithstanding anything to the contrary, and by way of expansion and not limitation, (a) Newco may assign its rights and delegate its duties under this Agreement to the Second Merger Surviving Entity (as defined in the Merger Agreement) or any other Affiliate of NetScout, (b) Danaher hereby consents and agrees to the assignment and delegation by Newco of its rights and duties under this Agreement to the Second Merger Surviving Entity upon the

occurrence of the Second Merger Effective Time (as defined in the Merger Agreement) with no further action required hereunder to effect such assignment and delegation. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns.

**Section 9.11 Priority of Agreements.** If there is a conflict between any provision of this Agreement and a provision in any of the Ancillary Agreements, the provision of this Agreement will control unless specifically provided otherwise in this Agreement or in the Ancillary Agreement.

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**Section 9.12 Survival of Covenants.** The covenants in this Agreement that by their terms are to be performed following the Separation Time will survive each of the Internal Restructuring and the Distribution and will remain in full force and effect in accordance with their terms.

**Section 9.13 Construction; Interpretation.** Headings of the Articles and Sections of this Agreement are for convenience of the Parties only and shall be given no substantive or interpretive effect whatsoever. The table of contents to this Agreement is for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement. Whenever required by the context, any pronoun used in this Agreement or the Schedules hereto shall include the corresponding masculine, feminine or neuter forms, and the singular forms of nouns, pronouns and verbs shall include the plural and vice versa. Reference to any agreement, document or instrument means such agreement, document or instrument as amended or otherwise modified from time to time in accordance with the terms thereof, and if applicable hereof. Whenever the words include, includes or including are used in this Agreement, they shall be deemed to be followed by the words without limitation. The words hereof, herein and hereunder and words similar import when used in this Agreement shall refer to this Agreement as a whole and not to any particular provision of this Agreement. The Parties have participated jointly in the negotiation and drafting of this Agreement, the Merger Agreement and the Ancillary Agreements. In the event an ambiguity or 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 of the provisions of this Agreement.

**Section 9.14 Severability.** Any term or provision of this Agreement which is invalid or unenforceable in any jurisdiction shall, as to that jurisdiction, be ineffective to the extent of such invalidity or unenforceability without rendering invalid or unenforceable the remaining terms and provisions of this Agreement in any other jurisdiction. If any provision of this Agreement is so broad as to be unenforceable, such provision shall be interpreted to be only so broad as is enforceable.

**Section 9.15 Counterparts.** This Agreement may be executed in multiple counterparts (any one of which need not contain the signatures of more than one Party), each of which shall be deemed to be an original but all of which taken together shall constitute one and the same agreement. This Agreement, and any amendments hereto, to the extent signed and delivered by means of a facsimile machine or other electronic transmission, shall be treated in all manner and respects as an original agreement and shall be considered to have the same binding legal effects as if it were the original signed version thereof delivered in person. At the request of any Party, the other Party shall re-execute original forms thereof and deliver them to the requesting Party. No Party shall raise the use of a facsimile machine or other electronic means to deliver a signature or the fact that any signature was transmitted or communicated through the use of a facsimile machine or other electronic means as a defense to the formation of a Contract and each such Party forever waives any such defense.

**Section 9.16 Plan of Reorganization.** This Agreement and the Merger Agreement together shall constitute a plan of reorganization under Treasury Regulation Section 1.368-2(g) for the Internal Restructuring and the Distribution.

**ARTICLE X**

**DEFINITIONS**

**Section 10.01 Definitions.** For purposes of this Agreement, the following terms, when utilized in a capitalized form, shall have the following meanings:

**Action** means any demand, charge, claim, action, suit, counter suit, arbitration, mediation, hearing, inquiry, proceeding, audit, review, complaint, litigation or investigation, or proceeding of any nature whether administrative,

civil, criminal, regulatory or otherwise, by or before any federal, state, local, foreign or international Governmental Authority or any arbitration or mediation tribunal.

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**Affiliate** means, with respect to any Person, any other Person directly or indirectly controlling, controlled by, or under common control with such other Person as of the date on which, or at any time during the period for which, the determination of affiliation is being made. For purposes of this definition, the term control (including, with correlative meanings, the terms controlled by and under common control with ), as used with respect to any Person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities, by Contract or otherwise.

**Agreement** has the meaning set forth in the preamble.

**Agreement Disputes** has the meaning set forth in Section 8.01(b).

**Ancillary Agreements** means the Tax Matters Agreement, the Transition Services Agreement, the Employee Matters Agreement, the Trademark License Agreement, the DBS License Agreement, the Cross-License Agreement, the Commercial Lease Agreement and any other agreements mutually agreed to by the Parties pursuant to Section 2.02(a).

**Appointed Representative** has the meaning set forth in Section 8.01(a).

**Assets** means any and all assets, properties and rights (including goodwill), wherever located (including in the possession of vendors or other third parties or elsewhere), whether real, personal or mixed, tangible, intangible or contingent, in each case whether or not recorded or reflected or required to be recorded or reflected on the books and records or financial statements of any Person, including the following: (i) all computers and other electronic data processing equipment, telecommunication equipment and data, fixtures, machinery, equipment, furniture, office equipment, motor vehicles and other transportation equipment, special and general tools, apparatus, cables, electrical devices, prototypes and models, test devices, transmitters, other miscellaneous supplies and other tangible personal property of any kind; (ii) all inventories of materials, parts, raw materials, packing materials, supplies, works-in-process, goods in transit, consigned goods and finished goods and products; (iii) all Real Property Interests; (iv) all interests in any capital stock or other equity interests of any Subsidiary or any other Person; all bonds, notes, debentures, evidences of indebtedness, puts, calls, straddles, options and other securities of any kind issued by any Subsidiary or any other Person; all loans, advances or other extensions of credit or capital contributions to any Subsidiary or any other Person, and all other investments in securities of any Person; (v) all Permits, distribution and supplier arrangements, sale and purchase agreements, joint operating agreements, license agreements, leases of personal property, open purchase orders for raw materials, supplies, parts or services, unfilled orders for the manufacture and sale of products and all other Contracts and business arrangements; (vi) all deposits, letters of credit and performance and surety bonds; (vii) all Intellectual Property Rights; (viii) all Technology; (ix) all Software; (x) all cost information, sales and pricing data, customer prospect lists, supplier records, customer, distribution and supplier lists, customer and vendor data, correspondence and lists, product literature (including historical), advertising and promotional materials, and other printed or written materials, artwork; design, development, manufacturing and quality control records, procedures and files, vendor and customer drawings, formulations and specifications, quality records and reports and other books, records, ledgers, files, documents, plats, photographs, studies, surveys, reports, plans and documents, operating, production and other manuals, including corporate minute books and related stock records, financial and Tax records (including Tax Returns), in all cases whether in paper, microfilm, microfiche, computer tape or disc, magnetic tape or any other form; (xi) all prepaid expenses, including prepaid leases and prepaid rentals, trade accounts and other accounts and notes receivable (whether current or non-current); (xii) all interests, rights to causes of action, lawsuits, judgments, claims, counterclaims, rights under express or implied warranties, rights of recovery and rights of setoff of any kind, demands and benefits of any Person, including all claims or rights against any Person arising from the ownership of any Asset, all rights in connection with any bids or offers, causes of action or similar rights, whether accrued or contingent; and (xiii) all Governmental Approvals, and other licenses and

authorizations issued by any Governmental Authority.

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***Business Day*** means any day that is not a Saturday, a Sunday or other day that is a statutory holiday under the federal Laws of the United States. In the event that any action is required or permitted to be taken under this Agreement on or by a date that is not a Business Day, such action may be taken on or by the Business Day immediately following such date.

***Casualty Loss*** has the meaning set forth in Section 6.05.

***Clean-Up Spin-Off*** means the distribution by Danaher, pro rata to its shareholders, of any unsubscribed Newco Common Units immediately following the consummation of the Exchange Offer.

***Closing*** has the meaning set forth in the Merger Agreement.

***Closing Date*** has the meaning set forth in the Merger Agreement.

***Code*** means the United States Internal Revenue Code of 1986 (or any successor statute), as amended from time to time.

***Commercial Lease Agreement*** has the meaning set forth in Section 2.02(a)(vii).

***Communications Assets*** has the meaning set forth in Section 1.05(a).

***Communications Business*** means all of the communications group business of Danaher conducted under the brands Tektronix Communications, Fluke Networks and Arbor Networks, and including Newco and its Subsidiaries; provided, however, that the Communications Business shall exclude Danaher's data communications cable installation business and its communication service provider (field and test tools systems) business.

***Communications Liabilities*** has the meaning set forth in Section 1.06(a).

***Condemnation Event*** has the meaning set forth in Section 6.05.

***Confidential Business Information*** shall mean all information, data or material other than Confidential Operational Information, including: (i) earnings reports and forecasts; (ii) macro-economic reports and forecasts; (iii) business and strategic plans; (iv) general market evaluations and surveys; (v) litigation presentations and risk assessments; (vi) budgets; and (vii) financing and credit-related information.

***Confidential Information*** shall mean Confidential Business Information and Confidential Operational Information concerning a Party and/or its Subsidiaries which, prior to, at or following the Effective Time, has been disclosed by a Party or its Subsidiaries to the other Party or its Subsidiaries, in written, oral (including by recording), electronic or visual form, or otherwise has come into the possession of the other Party, including pursuant to the access provisions of Section 5.01 or any other provision of this Agreement or any Ancillary Agreement (except to the extent that such information can be shown to have been: (i) in the public domain through no action of such Party or its Subsidiaries; (ii) lawfully acquired from other sources by such Party or its Subsidiaries to which it was furnished; (iii) independently developed by a Party or its Subsidiaries after the date hereof without reference to the Confidential Business Information or Confidential Operational Information of the other Party or its Subsidiaries and without a breach of this Agreement; or (iv) approved for release by written authorization of the disclosing Party and/or the third-party owner of the disclosed information; provided, however, that, in the case of clause (ii), to the furnished Party's knowledge, such sources did not provide such information in breach of any confidentiality obligations).

***Confidential Operational Information*** shall mean all operational information, data or material including: (i) specifications, ideas and concepts for products, services and operations; (ii) quality assurance policies, procedures and specifications; (iii) customer information; (iv) software; (v) training materials and information; and (vi) all other know-how, methodologies, procedures, techniques and Trade Secrets related to design, development and operational processes.

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***Consent Committee*** has the meaning set forth in Section 1.08(a).

***Consents*** means any consents, waivers or approvals from, or notification requirements to, or authorizations by, any third parties.

***Contract*** means any legally binding written or oral agreement, contract, subcontract, lease, understanding, instrument, note, option, warranty, sales order, purchase order, license, sublicense, insurance policy, benefit plan or commitment or undertaking of any nature, excluding any Permit.

***Convey*** has the meaning set forth in Section 1.01(a). Variants of this term such as ***Conveyance*** shall have correlative meanings.

***Cross-License Agreement*** has the meaning set forth in Section 2.02(a)(viii).

***Danaher*** has the meaning set forth in the preamble.

***Danaher Board*** has the meaning set forth in the recitals.

***Danaher Group*** means Danaher and each of its Subsidiaries, but excluding any member of the Newco Group.

***Danaher Common Stock*** has the meaning set forth in Section 3.02(a).

***Danaher Guarantees*** means arrangements in which guaranties (including guaranties of performance or payment under Contracts, commitments, Liabilities and Permits), letters of credit or other credit or credit support arrangements, including bid bonds, advance payment bonds, performance bonds, payment bonds, retention and/or warranty bonds or other bonds or similar instruments, were or are issued, entered into or otherwise put in place by any Person other than any member of the Newco Group to support or facilitate, or otherwise in respect of, the obligations of any member of the Newco Group or the Communications Business or Contracts, commitments, Liabilities and Permits of any member of the Newco Group or the Communications Business.

***Danaher Indemnitees*** means Danaher, each member of the Danaher Group, and all Persons who are or have been stockholders, directors, partners, managers, managing members, officers, agents or employees of any member of the Danaher Group (in each case, in their respective capacities as such) (excluding any shareholder of Danaher), together with their respective heirs, executors, administrators, successors and assigns.

***Danaher Shared Contract*** has the meaning set forth in Section 1.05(b)(viii).

***Danaher Transfer Documents*** has the meaning set forth in Section 2.04.

***DBS License Agreement*** has the meaning set forth in Section 2.02(a)(vi).

***Deductible*** has the meaning set forth in Section 4.03.

***Deferred Asset*** has the meaning set forth in Section 1.08(b).

***Distribution*** means the distribution by Danaher of all of the outstanding Newco Common Units to the Record Holders.

***Distribution Date*** means, as applicable, the date selected by the Danaher Board or its designee for the distribution of the Newco Common Units to the Record Holders in connection with the Distribution as set forth in Section 3.02(b).

***Effective Time*** has the meaning set forth in the Merger Agreement.

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***Employee Matters Agreement*** has the meaning set forth in Section 2.02(a)(iv).

***Environmental Laws*** means all Laws relating to pollution or protection of the environment, natural resources (including non-human species) or human health and safety as affected by exposure to hazardous substances, pollutants or contaminants, including laws relating to Releases or threatened Releases of Hazardous Materials (including, without limitation, Releases to ambient air, surface water, groundwater, land, surface and subsurface strata) or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, Release, transport, disposal or handling of Hazardous Materials. ***Environmental Laws*** include CERCLA (42 U.S.C. Section 9601 et seq.), the Hazardous Materials Transportation Act (49 U.S.C. Sections 1801 et seq.), the Resource Conservation and Recovery Act (42 U.S.C. Sections 6901 et seq.), the Federal Water Pollution Control Act (33 U.S.C. Sections 1251 et seq.), the Clean Air Act (42 U.S.C. Sections 7401 et seq.), the Toxic Substances Control Act (15 U.S.C. Sections 2601 et seq.), the Oil Pollution Act (33 U.S.C. Sections 2701 et seq.), the Emergency Planning and Community Right-to-Know Act (42 U.S.C. Sections 11001 et seq.), the Occupational Safety and Health Act (29 U.S.C. Sections 651 et seq.), the Endangered Species Act (16 U.S.C. Sections 1531 et seq.), the Migratory Bird Treaty Act (16 U.S.C. Sections 703 et seq.), the Bald and Golden Eagle Protection Act (16 U.S.C. Sections 668 et seq.) and state laws analogous to any of the above.

***Exchange Act*** means the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder.

***Exchange Agent*** means a bank or trust company appointed by Danaher as exchange agent and which is reasonably acceptable to NetScout as exchange agent.

***Exchange Offer*** means the consummation of the Distribution through an offer to exchange Newco Common Units for outstanding shares of Danaher Common Stock.

***Excluded Assets*** has the meaning set forth in Section 1.05(b).

***Excluded Liabilities*** has the meaning set forth in Section 1.06(b).

***FINRA*** has the meaning set forth in Section 3.01.

***First Merger*** has the meaning set forth in the recitals.

***Guaranteed Obligations*** has the meaning set for in Section 7.03.

***Governmental Approvals*** means any notices, reports or other filings to be made, or any Consents, registrations, permits or authorizations to be obtained from, any Governmental Authority.

***Governmental Authority*** means any federal, state, local, foreign or international court, government, department, commission, board, bureau, agency, official or other regulatory, administrative or governmental authority or self-regulatory organization.

***Group*** means the Danaher Group or the Newco Group, as the context requires.

***Hazardous Materials*** means (a) any petrochemical or petroleum products, oil or coal ash, radioactive materials, radon gas, asbestos in any form that is or could become friable, urea formaldehyde foam insulation and transformers or other equipment that contain dielectric fluid which contains any polychlorinated biphenyls; (b) any chemicals, materials or

substances defined as or included in the definition of hazardous substances, hazardous wastes, hazardous materials, hazardous constituents, restricted hazardous materials, extremely hazardous substances, toxic substances, contaminants, pollutants, toxic pollutants or words of similar meaning and regulatory effect under any applicable Law and (c) any other chemical, material or substance, exposure to which is prohibited, limited or regulated by, or that may result in liability under, any applicable Law.

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**Indebtedness** means, with respect to any Person: (i) any indebtedness for borrowed money, including any such obligations evidenced by bonds, debentures, notes or similar obligations; (ii) all guarantee obligations of such Person in respect of obligations of the kind referred to in clause (i) above; (iii) all obligations under any interest rate cap, swap, collar or similar transactions or currency-hedging transactions; (iv) all related accrued and unpaid interest, premiums, penalties, charges, fees, expenses and other amounts due in connection with the payment and satisfaction in full of the obligations described in the foregoing clauses (i) through (iii) of this definition, in each case, as incurred by such Person prior to the Separation Time or required to be paid in order to discharge fully all such obligations at the Separation Time; and (v) all obligations of the kind referred to in clauses (i) through (iv) above secured by (or for which the holder of such obligation has an existing right, contingent or otherwise, to be secured by) any Security Interest on property (including accounts and contract rights) of such Person, whether or not such Person has assumed or become liable for the payment of such obligation, in each case, owed by such Person.

**Indemnifying Party** has the meaning set forth in Section 4.06(b).

**Indemnitee** has the meaning set forth in Section 4.06(b).

**Indemnity Payment** has the meaning set forth in Section 4.07(a).

**Information** means information in written, oral, electronic or other tangible or intangible forms, stored in any medium, including studies, reports, records, books, Contracts, instruments, surveys, discoveries, ideas, concepts, know-how, techniques, designs, specifications, drawings, blueprints, diagrams, models, prototypes, samples, flow charts, data, computer data, disks, diskettes, tapes, computer programs or other software, marketing plans, customer names, communications by or to attorneys (including attorney-client privileged communications), memos and other materials prepared by attorneys or under their direction (including attorney work product), and other technical, financial, employee or business information or data, but in any case excluding back-up tapes.

**Intellectual Property Rights** means all worldwide intellectual property and industrial property rights, including all rights in or arising out of any of the following: (a) inventions, technology, processes and designs, (b) trademarks, trade names, service marks, domain names, logos, trade dress, and other source indicators (whether registered, common law, or otherwise) and applications therefor, and all goodwill symbolized thereby ( **Trademarks** ), (c) copyrights, works of authorship, computer software and systems, and other copyrightable works ( **Copyrights** ), (d) trade secrets, know-how, and tangible and intangible proprietary information and materials ( **Trade Secrets** ), and (e) any patent, patent applications, invention disclosures, renewals, foreign counterparts, extensions, continuations, continuations-in-part, re-examinations, reissues, and divisionals of the foregoing ( **Patents** ) and (f) all other intellectual property, industrial or similar rights to any of the foregoing.

**Intercompany Account** means any receivable, payable or loan between any member of the Danaher Group, on the one hand, and any member of the Newco Group, on the other hand, that exists prior to the Distribution Date except for any such receivable, payable or loan that arises pursuant to this Agreement, the Merger Agreement or any Ancillary Agreement.

**Internal Distributions** has the meaning set forth in the Merger Agreement.

**Internal Restructuring** has the meaning set forth in Section 1.01.

**IRS** means the U.S. Internal Revenue Service.

**Law** means any statute, law (including common law), ordinance, regulation, rule, code or other legally enforceable requirement of, or Order issued by, a Governmental Authority.

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**Liabilities** means all debts, liabilities (including liabilities for Taxes), guarantees, assurances, commitments and obligations, whether fixed, contingent or absolute, asserted or unasserted, matured or unmatured, liquidated or unliquidated, accrued or not accrued, known or unknown, due or to become due, whenever or however arising (including whether arising out of any Contract or tort based on negligence, strict liability or relating to Taxes payable by a Person in connection with compensatory payments to employees or independent contractors) and whether or not the same would be required by generally accepted principles and accounting policies to be reflected in financial statements or disclosed in the notes thereto.

**Losses** means Liabilities, damages, penalties, judgments, assessments, losses, costs and expenses (including reasonable attorneys' fees and expenses) in any case, whether arising under strict liability or otherwise; provided, however, that **Losses** shall not include any (A) punitive, exemplary or special damages or (B) any unforeseeable or speculative damages, in each case, except to the extent awarded by a court of competent jurisdiction in connection with a Third-Party Claim.

**Mergers** has the meaning set forth in the recitals.

**Merger Agreement** has the meaning set forth in the recitals.

**Merger Sub** has the meaning set forth in the recitals.

**Merger Sub II** has the meaning set forth in the recitals.

**NetScout** has the meaning set forth in the recitals.

**Newco** has the meaning set forth in the preamble.

**Newco Balance Sheet** means the combined balance sheets of the Communications Business as of December 31, 2013 as included in the Audited Financial Statements (as such term is defined in the Merger Agreement).

**Newco Books and Records** has the meaning set forth in Section 1.05(a)(x).

**Newco Common Units** has the meaning set forth in the recitals.

**Newco Contracts** has the meaning set forth in Section 1.05(a)(ix).

**Newco Employees** has the meaning set forth in the Employee Matters Agreement.

**Newco Group** means Newco, and each of the Newco Subs.

**Newco Indemnitees** means Newco, each member of the Newco Group, NetScout (from and after the Separation Time), and each of their respective successors and assigns, and all Persons who are or have been stockholders, directors, partners, managers, managing members, officers, agents or employees of any member of the Newco Group (in each case, in their respective capacities as such), and their respective heirs, executors, administrators, successors and assigns.

**Newco Information** has the meaning set forth in Section 5.03(b).

***Newco IP*** means Intellectual Property Rights owned by, or purported to be owned by, Danaher or its Affiliates (including Newco and the Newco Subs), and exclusively used in the Communications Business as of the Separation Time, including with regard to any Patents included in the foregoing, the applicable Patent Family thereof to the extent exclusively used in the Communications Business as of the Separation Time, and including the Newco Patents and the Trademarks listed on Schedule 10.01.

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***Newco Patents*** shall mean all Patents listed on Schedule 10.01, together with: (x) any Patent that claims (or is entitled to claim) priority from any of the foregoing Patents; (y) any Patent that is a continuation, continuation in part, divisional or reissue, of any of the foregoing Patents, or that is linked to any of the foregoing Patents by a terminal disclaimer; and (z) any foreign counterpart of any of the foregoing Patents ((x), (y) and (z) collectively, ***Patent Family*** ).

***Newco Registration Statement*** has the meaning set forth in Section 3.03(a).

***Newco Shared Contract*** has the meaning set forth in Section 1.05(a)(ix).

***Newco Subs*** has the meaning set forth in Section 1.05(a)(ii).

***Newco Transfer*** means: (i) the transfer of the Communications Assets and the Communications Liabilities as set forth in Section 1.01 and Section 1.02, and the Excluded Assets and Excluded Liabilities in Section 1.03, and (ii) each of the transactions contemplated by Section 1.07.

***Object Code*** shall mean one or more computer instructions in machine readable form (whether or not packaged in directly executable form), including any such instructions that are readable in a virtual machine, whether or not derived from Source Code, together with any partially compiled or intermediate code that may result from the compilation, assembly or interpretation of any Source Code. Object Code includes firmware, compiled or interpreted programmable logic, libraries, objects, routines, modules, bytecode, machine code, and middleware.

***Order*** means any: (i) order, judgment, injunction, edict, decree, ruling, pronouncement, determination, decision, opinion, verdict, sentence, subpoena, writ or award issued, made, entered, rendered or otherwise put into effect by or under the authority of any court, administrative agency or other Governmental Authority or any arbitrator or arbitration panel; or (ii) Contract with any Governmental Authority entered into in connection with any Action.

***Party*** or ***Parties*** has the meaning set forth in the preamble.

***Permits*** means all franchises, permits, certifications, licenses, easements, servitudes, variances, authorizations, rights, exemptions, approvals, consents, waivers, registrations or other authorization of Governmental Authorities issued under or with respect to applicable Laws or Orders and used or held by Danaher primarily for the operation of Communications Business.

***Permitted Encumbrances*** means: (i) any lien for current taxes not yet due and payable; (ii) minor liens that have arisen in the ordinary course of business and that do not (in any case or in the aggregate) materially detract from the value of the assets subject thereto or materially impair the operations of any member of the Newco Group; (iii) licenses to Intellectual Property Rights; and (iv) liens described in Part 2.6(a) of the Danaher Disclosure Letter (as defined in the Merger Agreement).

***Person*** means an individual, a partnership, a corporation, a limited liability company, an association, a joint stock company, a trust, a joint venture, an unincorporated organization or a Governmental Authority.

***Plan of Reorganization*** has the meaning set forth in Section 1.01(b).

***Post-Closing Claims*** has the meaning set forth in Section 6.04(c).

***Pre-Closing Occurrence Based Policies*** has the meaning set forth in Section 6.04(c).

***Preliminary Plan*** has the meaning set forth in Section 1.01(a).

***Privileged Information*** has the meaning set forth in Section 5.03(a).

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***Privileges*** has the meaning set forth in Section 5.03(a).

***Real Property Interests*** means all interests in real property of whatever nature, including easements and servitudes, whether as owner or holder of a Security Interest, lessor, sublessor, lessee, sublessee or otherwise.

***Record Date*** means the close of business on the date to be determined by the Danaher Board as the record date for determining stockholders of Danaher entitled to receive Newco Common Units in the Distribution.

***Record Holders*** means the holders of record of Danaher Common Stock as of the close of business on the Record Date.

***Related Party Agreements*** has the meaning set forth in Section 1.07(a).

***Release*** means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into surface water, groundwater, land surface or subsurface strata or ambient air (including the abandonment or discarding of barrels, containers and other closed receptacles containing any hazardous substance or pollutant or contaminant).

***Representatives*** means with respect to any Person, such Person's officers, employees, accountants, consultants, legal counsel, financial advisors, agents, directors and other representatives.

***Ruling*** means a private letter ruling from the IRS addressing the tax consequences of certain aspects of the Internal Distributions, the Distribution and/or the related transactions that were discussed in the pre-submission memorandum dated September 11, 2014 submitted by Ernst & Young LLP on behalf of Danaher.

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

***Security Interest*** means any lien, pledge, hypothecation, charge, mortgage, easement, encroachment, imperfection of title, title exception, title defect, right of possession, lease, tenancy license, security interest, encumbrance, claim, interference, option, right of first refusal, preemptive right, community property interest or restriction of any nature (including any restriction on the voting of any security, any restriction on the transfer of any security or other asset, any restriction on the receipt of any income derived from any asset, any restriction on the use of any asset and any restriction on the possession, exercise or transfer of any other attribute of ownership of any asset).

***Separation*** means the Newco Transfer and the other transactions contemplated by this Agreement to transfer the Communications Business to Newco.

***Separation Date*** has the meaning set forth in Section 2.01.

***Separation Time*** has the meaning set forth in Section 2.01.

***Software*** shall mean computer software, programs, data and databases in any form, including Source Code, Object Code, operating systems and specifications, database management code, firmware, utilities, interfaces, menus, images, icons, forms and software engines, software implementations of algorithms, models, methodologies, APIs, software development kits, and all related documentation, developer notes, comments and annotations.

***Source Code*** shall mean one or more statements in human readable form, including comments, definitions and annotations, which are generally formed and organized to the syntax of a computer or programmable logic

programming language (including such statements in batch or scripting languages and including hardware definition languages), together with any and all text, data and data structures, diagrams, graphs, charts, presentations, manuals, instructions, commands, procedures, schematics, flow-charts and other work product or information that describe the foregoing.

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***Specified Items*** shall mean: (i) all contingent or deferred obligations to provide consideration in connection with any previously completed acquisitions of any Communications Asset or Newco Sub, in each case with respect to periods ending on or before December 31, 2014; (ii) all contingent or deferred obligations to provide consideration in connection with any new acquisitions of any Communications Asset completed after the date of this Agreement and before the Separation Time; (iii) any retention payment obligations (whether accrued or unaccrued) implemented by Danaher in accordance with item 2 of Part 4.2(b)(2) of the Danaher Disclosure Letter to the Merger Agreement; (iv) any accrued but unpaid bonus obligations as of the Closing Date; and (v) any liabilities that Danaher is responsible for under Part 4.2(b)(1) of the Danaher Disclosure Letter to the Merger Agreement.

***Spin-Off*** means the consummation of the Distribution through a dividend of Newco Common Units to Danaher shareholders on a pro rata basis.

***Subsidiary*** means, with respect to any Person, any corporation or other entity (including partnerships and other business associations and joint ventures) of which at least a majority of the voting power represented by the outstanding capital stock or other voting securities or interests having voting power under ordinary circumstances to elect directors or similar members of the governing body of such corporation or entity (or, if there are no such voting interests, fifty percent (50%) or more of the equity interests in such corporation or entity) shall at the time be held, directly or indirectly, by such Person.

***Tax*** or ***Taxes*** means: (i) all taxes, charges, fees, duties, levies, imposts, or other similar assessments, imposed by any U.S. federal, state or local or foreign governmental authority, including, but not limited to, net income, gross income, gross receipts, excise, real property, personal property, sales, use, service, service use, license, lease, capital stock, transfer, recording, franchise, business organization, occupation, premium, environmental, windfall profits, profits, customs, duties, payroll, wage, withholding, social security, employment, unemployment, insurance, severance, workers compensation, excise, stamp, alternative minimum, estimated, value added, ad valorem and other taxes, charges, fees, duties, levies, imposts, or other similar assessments; (ii) any interest, penalties or additions attributable thereto; and (iii) all liabilities in respect of any items described in clauses (i) or (ii) payable by reason of assumption, transferee or successor liability, operation of Law or Treasury Regulation Section 1.1502-6(a) (or any predecessor or successor thereof or any analogous or similar provision under Law).

***Tax Matters Agreement*** has the meaning set forth in Section 2.02(a)(ii).

***Tax Return*** means any return, report, information return, declaration, claim for refund or other document (including any schedule or related or supporting information) supplied or required to be supplied to any Governmental Authority with respect to Taxes, including amendments thereto.

***Technology*** shall mean any or all of the following: (i) works of authorship, including computer programs in any form, including but not limited to Source Code and Object Code, whether embodied in Software, firmware or otherwise, development tools, documentation, designs, files, records, data and all media on which any of the foregoing is recorded; (ii) technology; (iii) databases, data compilations and collections, and technical data; (iv) tools, methods and processes; and (v) all instantiations and tangible embodiments of the foregoing in any form and embodied in any media, and all documentation related to the foregoing; provided, however, that Technology shall not include any Intellectual Property Rights.

***Third-Party Claim*** has the meaning set forth in Section 4.06(b).

***Third-Party Proceeds*** has the meaning set forth in Section 4.07(a).

***Trademark License Agreement*** has the meaning set forth in Section 2.02(a)(v).

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***Transactions*** means the Internal Restructuring, the Newco Transfer, the Distribution, the Mergers and the other transactions contemplated by this Agreement, the Merger Agreement and the Ancillary Agreements.

***Transfer Documents*** has the meaning set forth in Section 2.05.

***Transferable Permits*** has the meaning set forth in Section 1.05(a)(iv).

***Transition Services Agreement*** has the meaning set forth in Section 2.02(a)(iii).

[Signature Page Follows]

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IN WITNESS WHEREOF, each of the Parties has caused this Agreement to be executed on its behalf by its officers hereunto duly authorized on the day and year first above written.

**DANAHER CORPORATION**

By: /s/ Daniel L. Comas  
Name: Daniel L. Comas  
Title: Executive Vice President and Chief  
Financial Officer

**POTOMAC HOLDING LLC**

By: /s/ Frank T. McFaden  
Name: Frank T. McFaden  
Title: Vice President and Treasurer

**NETSCOUT SYSTEMS, INC.**

By: /s/ Anil K. Singhal  
Name: Anil K. Singhal  
Title: President and Chief Executive  
Officer

**[SIGNATURE PAGE TO SEPARATION AND DISTRIBUTION AGREEMENT]**

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THE FOLLOWING EXHIBITS AND SCHEDULES TO THE SEPARATION AND DISTRIBUTION AGREEMENT HAVE BEEN OMITTED IN ACCORDANCE WITH ITEM 601(B)(2) OF REGULATION S-K.

Exhibits

- Exhibit A: Form of Tax Matters Agreement
- Exhibit B: Form of Transition Services Agreement
- Exhibit C: Form of Employee Matters Agreement
- Exhibit D: Form of Trademark License Agreement
- Exhibit E: Form of DBS License Agreement
- Exhibit F: Form of Commercial Lease Agreement
- Exhibit G: Form of Intellectual Property Cross-License Agreement

Schedules

- Schedule 1.01(a) Preliminary Plan and Internal Restructuring
- Schedule 1.05 Communications Assets; Excluded Assets
- Schedule 1.06 Communications Liabilities; Excluded Liabilities
- Schedule 10.01 Newco Patents and the Trademarks

NetScout Systems, Inc. will furnish supplementally a copy of any omitted schedule to the Securities and Exchange Commission upon request, provided however that NetScout Systems, Inc. may request confidential treatment pursuant to Rule 24b-2 of the Securities and Exchange Act of 1934, as amended for any schedule so furnished.

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**Annex C**

[LETTERHEAD OF RBC CAPITAL MARKETS, LLC]

October 12, 2014

The Board of Directors

NetScout Systems, Inc.

310 Littleton Road

Westford, Massachusetts 01886

The Board of Directors:

You have requested our opinion as to the fairness, from a financial point of view, to NetScout Systems, Inc., a Delaware corporation ( NetScout ), of the Merger Consideration (defined below) to be paid by NetScout pursuant to the terms and subject to the conditions set forth in an Agreement and Plan of Merger and Reorganization (the Merger Agreement ) proposed to be entered into among Danaher Corporation, a Delaware corporation ( Danaher ), Potomac Holding LLC, a Delaware limited liability company and wholly owned subsidiary of Danaher ( Newco ), NetScout, RS Merger Sub I, Inc., a Delaware corporation and wholly owned subsidiary of NetScout ( Merger Sub ), and RS Merger Sub II, LLC, a Delaware limited liability company and wholly owned subsidiary of NetScout ( Merger Sub II ). As more fully described in the Merger Agreement and after giving effect to the Related Transactions (defined below), NetScout and Danaher will effect a business combination of Danaher's Communications Business (as defined below) and NetScout (the Transaction ) in which Merger Sub will be merged with and into Newco (the First Merger ) and, immediately following the First Merger and as part of a single integrated transaction, NetScout will cause Newco, as the surviving limited liability company in the First Merger, to be merged with and into Merger Sub II (the Second Merger ), with Merger Sub II as the surviving limited liability company in the Second Merger. The Merger Agreement provides, among other things, that pursuant to the First Merger, each outstanding common unit representing limited liability company membership interests of Newco ( Newco Common Units ) will be converted into the right to receive that number of shares of the common stock, \$0.001 par value per share, of NetScout ( NetScout Common Stock ) equal to the quotient of (i) 62.5 million shares of NetScout Common Stock plus the product of (A) 1.46 multiplied by the number of shares of NetScout Common Stock issued in any acquisition effected pursuant to the terms of the Merger Agreement divided by (ii) the aggregate number of Newco Common Units outstanding immediately prior to the effective time of the First Merger. We have been directed by the management of NetScout to assume, for purposes of our analyses and opinion, that no shares of NetScout Common Stock will be issued in connection with any acquisition pursuant to clause (A) above and, accordingly, we have evaluated the aggregate number of shares of NetScout Common Stock issuable in the First Merger on the basis of 62.5 million shares (such aggregate number of shares of NetScout Common Stock so issuable in the First Merger, the Merger Consideration ).

We have been advised that, prior (and as a condition) to consummation of the Transaction and pursuant to the Merger Agreement and a Separation and Distribution Agreement (the Separation Agreement and, together with the Merger Agreement, the Agreements ) proposed to be entered into among Danaher, Newco and NetScout, (i) Danaher will effect an internal reorganization pursuant to which, among other things, certain assets (including the outstanding capital stock of, or other equity interests in, certain subsidiaries of Danaher) and liabilities related to Danaher's communications group business conducted under the Arbor Networks, Fluke Networks and Tektronix brands, excluding Danaher's data communications cable installation business and communication service provider (field and

test tool systems) business, will be consolidated and transferred to Newco or one or more its subsidiaries (such consolidated and transferred communications group businesses, collectively, the Communications Business ) and (ii) Danaher will distribute to holders of the common stock, \$0.01 par value per share, of Danaher all Newco Common Units held by Danaher through a split-off, followed by a clean-up spin-off, if necessary, or through a spin-off (such distribution, together with the transactions described in clause

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(i) above and the other transactions contemplated by the Agreements, the Related Transactions ). We also have been advised that, in connection with the Transaction, NetScout, Danaher and certain of their respective affiliates, as applicable, will enter into certain related agreements (such as the Agreements, the Related Agreements ). The terms and conditions of the Transaction and the Related Transactions are set forth more fully in the Agreements.

RBC Capital Markets, LLC ( RBCCM ), as part of our investment banking services, is regularly engaged in the valuation of businesses and their securities in connection with mergers and acquisitions, corporate restructurings, underwritings, secondary distributions of listed and unlisted securities, private placements, and valuations for corporate and other purposes. In the ordinary course of business, RBCCM or one or more of our affiliates may act as a market maker and broker in the publicly traded securities of NetScout, Danaher and/or any other company that may be involved in the Transaction and the Related Transactions or their respective affiliates and receive customary compensation in connection therewith, and may also actively trade securities of NetScout, Danaher and/or any other company that may be involved in the Transaction and the Related Transactions or their respective affiliates for our or our affiliates own account and the accounts of our or our affiliates customers and, accordingly, RBCCM and our affiliates may hold a long or short position in such securities.

We are acting as financial advisor to NetScout in connection with the Transaction and the Related Transactions and we will receive a fee for our services, a portion of which is payable upon delivery of this opinion and the principal portion of which is contingent upon consummation of the Transaction. NetScout also has agreed to indemnify us for certain liabilities that may arise out of our engagement and to reimburse us for expenses reasonably incurred in connection with our services. RBCCM and its affiliates have not provided investment banking or financial advisory services during the past two years to NetScout or Danaher for which compensation has been received. RBCCM and certain of our affiliates in the future may provide investment banking and financial advisory services to NetScout and Danaher, for which services RBCCM and such affiliates may receive compensation.

For the purposes of rendering our opinion, we have undertaken such review, inquiries and analyses as we deemed necessary or appropriate under the circumstances, including the following: (i) we reviewed the financial terms of drafts, each dated October 12, 2014, of the Agreements; (ii) we reviewed certain publicly available financial and other information, and certain historical operating data, with respect to NetScout made available to us from published sources and internal records of NetScout; (iii) we reviewed certain publicly available financial and other information, and certain historical operating data, with respect to the Communications Business made available to us from published sources and internal records of Danaher; (iv) we reviewed publicly available financial projections and other estimates and data relating to NetScout for the fiscal years ended March 31, 2015 and March 31, 2016 as extrapolated thereafter by the management of NetScout and financial projections and other estimates and data relating to the Communications Business prepared by the management of Danaher for the fiscal year ended December 31, 2014 as adjusted and extrapolated thereafter by the management of NetScout, in each case which we were directed to utilize for purposes of our analyses; (v) we conducted discussions with members of the senior managements of NetScout and Danaher with respect to the respective business prospects and financial outlook of NetScout and the Communications

Business and also held discussions with senior management of NetScout regarding the strategic rationale and potential cost savings and other benefits expected by such management to be realized in the Transaction and the Related Transactions (collectively, the Cost Savings ); (vi) we reviewed the reported prices and trading activity for NetScout Common Stock; (vii) we compared certain financial metrics of NetScout and the Communications Business with those of selected publicly traded companies; (viii) we reviewed the potential pro forma financial impact of the Transaction on the future financial performance of NetScout after taking into account potential Cost Savings; and (ix) we considered other

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information and performed other studies and analyses as we deemed appropriate. We have not compared the financial terms of the Transaction to financial terms of other transactions given, in our view, the limited comparability of such other transactions to the Transaction.

In arriving at our opinion, we employed several analytical methodologies and no one method of analysis should be regarded as critical to the overall conclusion we have reached. Each analytical technique has inherent strengths and weaknesses, and the nature of the available information may further affect the value of particular techniques. The overall conclusion we have reached is based on all analyses and factors presented, taken as a whole, and also on application of our own experience and judgment. Such conclusion may involve significant elements of subjective judgment and qualitative analysis. We therefore give no opinion as to the value or merit standing alone of any one or more portions of such analyses or factors.

In rendering our opinion, we have assumed and relied upon the accuracy and completeness of all information that was reviewed by us, including all of the financial, legal, tax, accounting, operating and other information provided to or discussed with us by or on behalf of NetScout or Danaher (including, without limitation, financial statements and related notes), and upon the assurances of the managements of NetScout and Danaher that they are not aware of any relevant information that has been omitted or that remains undisclosed to us. We have not assumed responsibility for independently verifying and have not independently verified such information. We have assumed that the publicly available financial projections and other estimates and data relating to NetScout (as extrapolated by the management of NetScout) and the financial projections and other estimates and data relating to the Communications Business (as adjusted and extrapolated by the management of NetScout) which we have been directed to utilize in our analyses were reasonably prepared on bases reflecting the best currently available estimates and good faith judgments as to the future financial performance of NetScout and the Communications Business and the other matters covered thereby and that the financial results reflected therein will be realized in the amounts and at the times projected. We also have been advised that there currently are no audited financial statements relating to the Communications Business and we have assumed that such audited financial statements, when delivered to NetScout in connection with the Transaction, will not reflect any information that would be meaningful to our analyses or opinion. We express no opinion as to any such financial projections and other estimates and data or the assumptions upon which they were based. We have relied upon the assessments of the managements of NetScout and Danaher as to (i) the Related Transactions, including with respect to the timing thereof and assets, liabilities and financial and other terms involved, (ii) the potential impact on NetScout and the Communications Business of market and other trends and prospects for the technology industry, (iii) the products, technology and intellectual property of NetScout and the Communications Business, including the validity of, and risks associated with, such products, technology and intellectual property, (iv) the existing and future relationships, agreements and arrangements with, and NetScout's ability to retain, key employees and customers of NetScout and the Communications Business, and (v) NetScout's ability to integrate the Communications Business with the businesses and operations of NetScout. We have assumed that there will be no developments with respect to any such matters that would have an adverse effect on NetScout, the Communications Business, Newco, the Transaction or the Related Transactions (including the contemplated benefits thereof) or that would otherwise be meaningful in

any respect to our analyses or opinion. We also have relied on estimates of the management of NetScout as to the capitalization of NetScout and Newco, including as to the number of fully diluted shares of NetScout Common Stock and Newco Common Units, as of the effective time of the First Merger and we have assumed that such number of shares or units, as the case may be, will not vary in any respect that would be meaningful to our analyses or opinion.

In rendering our opinion, we have not assumed any responsibility to perform, and have not performed, an independent evaluation or appraisal of any of the assets or liabilities (contingent or otherwise) of NetScout, the

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Communications Business or any other entity (including Newco) or business, and we have not been furnished with any such valuations or appraisals. We have not assumed any obligation to conduct, and have not conducted, any physical inspection of the property or facilities of NetScout, the Communications Business or any other entity or business. We have assumed that the Transaction and the Related Transactions will be consummated in accordance with the terms of the Agreements and all applicable laws and other requirements, without waiver, modification or amendment of any material term, condition or agreement and that, in the course of obtaining the necessary regulatory or third party approvals, consents and releases for the Transaction and the Related Transactions, no delay, limitation, restriction or condition will be imposed, including any divestiture or other requirements, that would have an adverse effect on NetScout, the Communications Business, Newco, the Transaction or the Related Transactions (including the contemplated benefits thereof). We also have assumed that the Transaction and the Related Transactions will have the tax treatment as set forth in the Agreements, including that the First Merger and the Second Merger will be treated as a single integrated transaction and will together qualify as a tax-free reorganization within the meaning of Section 368 of the Internal Revenue Code of 1986, as amended. We further have assumed that Newco will retain or acquire all assets, properties and rights necessary for the operations of the Communications Business, that appropriate reserves, indemnification arrangements or other provisions have been made with respect to the liabilities of or relating to the Communications Business and that NetScout will not directly or indirectly assume or incur any liabilities that are contemplated to be excluded as a result of the Transaction, the Related Transactions or otherwise. In addition, we have assumed that the final executed Agreements will not differ, in any respect meaningful to our analyses or opinion, from the drafts of the Agreements we reviewed.

Our opinion speaks only as of the date hereof, is based on conditions as they exist and information which we have been supplied as of the date hereof, and is without regard to any market, economic, financial, legal or other circumstances or event of any kind or nature which may exist or occur after such date. We have not undertaken to reaffirm or revise this opinion or otherwise comment upon events occurring after the date hereof and do not have an obligation to update, revise or reaffirm this opinion. Our opinion, as set forth herein, relates to the relative values of NetScout and the Communications Business. We do not express any opinion as to what the value of NetScout Common Stock actually will be when issued in connection with the Transaction or the prices or range of prices at which NetScout Common Stock may trade or otherwise be transferable at any time, whether prior to or following the Transaction and the Related Transactions.

The advice (written or oral) of RBCCM and our opinion expressed herein is provided for the benefit, information and assistance of the Board of Directors of NetScout (in its capacity as such) in connection with its evaluation of the Transaction. We express no opinion and make no recommendation to any stockholder as to how such stockholder should vote or act with respect to any proposal to be voted upon in connection with the Transaction or any Related Transactions.

Our opinion addresses only the fairness, from a financial point of view and as of the date hereof, of the Merger Consideration (to the extent expressly specified herein) to NetScout. Our opinion does not in any way address any

other terms, conditions, implications or other aspects of the Transaction, the Related Transactions, the Agreements or any Related Agreements, or any adjustment payment or other agreement, arrangement or understanding to be entered into in connection with or contemplated by the Transaction, the Related Transactions or otherwise. Our opinion also does not address the underlying business decision of NetScout to engage in the Transaction or any Related Transactions or the relative merits of the Transaction or any Related Transactions compared to any alternative business strategy or transaction that may be available to NetScout or in which NetScout might engage. We have not evaluated the solvency or fair value of NetScout, Danaher, the Communications Business or any other entity (including Newco) or business under any state, federal or other

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laws relating to bankruptcy, insolvency or similar matters. We do not express any opinion as to any legal, regulatory, tax or accounting matters, as to which we understand that NetScout has obtained such advice as it deemed necessary from qualified professionals. Further, in rendering our opinion, we do not express any view on, and our opinion does not address, the fairness of the amount or nature of the compensation (if any) to any officers, directors or employees of any party, or class of such persons, relative to the Merger Consideration or otherwise.

The issuance of our opinion has been approved by RBCCM's Fairness Opinion Committee.

Based on our experience as investment bankers and subject to the foregoing, including the various assumptions and limitations set forth herein, it is our opinion that, as of the date hereof, the Merger Consideration to be paid by NetScout in the First Merger is fair, from a financial point of view, to NetScout.

Very truly yours,

/s/ RBC Capital Markets, LLC

RBC CAPITAL MARKETS, LLC

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**FORM OF  
EMPLOYEE MATTERS AGREEMENT**

**by and among**

**DANAHER CORPORATION,**

**POTOMAC HOLDING LLC**

**and**

**NETSCOUT SYSTEMS, INC.**

**dated as of**

**[ ], 201[ ]**

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**FORM OF EMPLOYEE MATTERS AGREEMENT**

This Employee Matters Agreement (this Agreement ) is dated as of [ ], 201[ ], by and among Danaher Corporation, a Delaware corporation ( Danaher ), Potomac Holdings LLC, a Delaware limited liability company and presently a wholly owned Subsidiary of Danaher ( Newco ), and NetScout Systems, Inc., a Delaware corporation ( NetScout ) (each a Party and together, the Parties ).

**RECITALS:**

WHEREAS, Danaher is engaged, directly or indirectly, in the Communications Business;

WHEREAS, the Board of Directors of Danaher has determined that it is advisable and in the best interests of Danaher and Danaher's stockholders to separate the Communications Business from the other businesses of Danaher and to divest the Communications Business in the manner contemplated by the Separation and Distribution Agreement, dated as of October 12, 2014 (the Distribution Agreement ), by and among Danaher, Newco and NetScout, and the Merger Agreement, dated as of October 12, 2014 (the Merger Agreement ), by and among Danaher, Newco, NetScout, RS Merger Sub, Inc., a Delaware corporation and a direct wholly owned Subsidiary of NetScout ( Merger Sub ), and RS Merger Sub II, LLC, a Delaware limited liability company and a direct wholly owned Subsidiary of NetScout ( Merger Sub II );

WHEREAS, Danaher currently indirectly owns all of the common units representing limited liability company membership interests of Newco (the Newco Common Units );

WHEREAS, the Parties contemplate that, pursuant to the Merger Agreement, immediately after the Distribution and at the Effective Time, Merger Sub shall be merged (the First Merger ) with and into Newco, with Newco surviving the First Merger as a wholly owned subsidiary of NetScout, and the Newco Common Units shall be converted into the right to receive shares of common stock of NetScout on the terms and subject to the conditions of the Merger Agreement and in accordance with the Delaware General Corporation Law and the Delaware Limited Liability Company Act;

WHEREAS, immediately following the First Merger, Newco will merge with and into Merger Sub II, with Merger Sub II surviving the merger (together with the First Merger, the Mergers ) in the manner contemplated by the Merger Agreement on the terms and subject to the conditions of the Merger Agreement and in accordance with the Delaware Limited Liability Company Act; and

WHEREAS, pursuant to the Distribution Agreement, Danaher and Newco have agreed to enter into this Agreement for the purpose of allocating assets, Liabilities and responsibilities with respect to certain employee matters and employee compensation and benefit plans and programs between them and to address certain other employment-related matters.

NOW, THEREFORE, in consideration of the foregoing and the representations, warranties and covenants and agreements contained herein, and intending to be legally bound hereby, the Parties agree as follows:

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**ARTICLE I**

**DEFINITIONS AND INTERPRETATION**

Section 1.1 Definitions. Capitalized terms used but not defined herein shall have the meanings assigned to such terms in the Distribution Agreement, and the following terms shall have the following meanings:

Action means any demand, charge, claim, action, suit, counter suit, arbitration, mediation, hearing, inquiry, proceeding, audit, review, complaint, litigation or investigation, or proceeding of any nature whether administrative, civil, criminal, regulatory or otherwise, by or before any federal, state, local, foreign or international Governmental Authority or any arbitration or mediation tribunal.

Affiliate means, with respect to any Person, any other Person directly or indirectly controlling, controlled by, or under common control with such other Person as of the date on which, or at any time during the period for which, the determination of affiliation is being made. For purposes of this definition, the term control (including, with correlative meanings, the terms controlled by and under common control with ), as used with respect to any Person means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities, by Contract or otherwise.

Agreement has the meaning set forth in the preamble.

Automatic Transfer Employees shall mean any Newco Employee, where local employment Laws, including but not limited to the Transfer Regulations, provide for an automatic transfer of such employees to Newco by operation of Law upon the transfer of a business as a going concern and such business transfer occurs as a result of the transactions contemplated by the Separation Agreement.

Benefit Arrangement means each Benefit Plan and Benefit Policy.

Benefit Plan means, with respect to an entity, each compensation or employee benefit plan, program, policy, agreement or other arrangement, whether or not employee benefit plans (within the meaning of Section 3(3) of ERISA, whether or not subject to ERISA), including any benefit plan, program, policy, agreement or arrangement providing cash- or equity-based compensation or incentives, health, medical, dental, vision, disability, accident or life insurance benefits or vacation, severance, retention, change in control, termination, deferred compensation, individual employment or consulting, retirement, pension or savings benefits, supplemental income, retiree benefit, relocation or other fringe benefit (whether or not taxable), or employee loans, that are sponsored or maintained by such entity (or to which such entity contributes or is required to contribute or in which it participates), and excluding workers compensation plans, policies, programs and arrangements.

Benefit Policy means, with respect to an entity, each plan, program, arrangement, agreement or commitment that is a vacation pay or other paid or unpaid leave policy or practice sponsored or maintained by such entity (or to which such entity contributes or is required to contribute) or in which it participates.

Business Day means any day that is not a Saturday, a Sunday or other day that is a statutory holiday under the federal Laws of the United States. In the event that any action is required or permitted to be taken under this Agreement on or by a date that is not a Business Day, such action may be taken on or by the Business Day immediately following such date.



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Cancelled Danaher Equity Award Value means, with respect to each Newco Employee who is a holder of Cancelled Danaher Equity Awards, a dollar value equal to the sum of (i) the Cancelled Danaher Option Value in respect of the Cancelled Danaher Options held by such Newco Employee and (ii) the Cancelled Danaher Restricted Stock Unit Value in respect of the Cancelled Danaher Restricted Stock Units held by such Newco Employee.

Cancelled Danaher Equity Awards has the meaning set forth in Section 7.2.

Cancelled Danaher Option Conversion Ratio means the quotient of (i) the total number of shares of Danaher Common Stock subject to a Cancelled Danaher Option as of immediately prior to the Closing Date, divided by (ii) 2.5.

Cancelled Danaher Option Value means, with respect to each Cancelled Danaher Option, an amount equal to the greater of (i) the product of (x) the total number of shares of Danaher Common Stock subject to such Cancelled Danaher Option as of immediately before the Closing Date and (y) the excess of (1) the Danaher Closing Trading Price over (2) the exercise price per share of such Cancelled Danaher Option; and (ii) the product of (x) the Cancelled Danaher Option Conversion Ratio, multiplied by (y) the Danaher Closing Trading Price.

Cancelled Danaher Options has the meaning set forth in Section 7.2.

Cancelled Danaher Restricted Stock Unit Value means, with respect to each Cancelled Danaher Restricted Stock Unit, an amount equal to the Danaher Closing Trading Price.

Cancelled Danaher Restricted Stock Units has the meaning set forth in Section 7.2.

Closing has the meaning given to such term in the Merger Agreement.

Closing Date has the meaning given to such term in the Merger Agreement.

Code means the United States Internal Revenue Code of 1986 (or any successor statute), as amended from time to time.

Collective Bargaining Agreement means all agreements with the collective bargaining representatives, employee representative, trade union, labor or management organization, group of employees, or works councils or similar representative bodies of Newco Employees including all national or sector specific collective agreements which are applicable to Newco Employees, in each case in effect immediately prior to the Separation Time that set forth terms and conditions of employment of Newco Employees, and all modifications of, or amendments to, such agreements and any rules, procedures, awards or decisions of competent jurisdiction interpreting or applying such agreements.

Communications Business has the meaning set forth in the Distribution Agreement.

Consents means any consents, waivers or approvals from, or notification requirements to, or authorizations by, any third parties.

Contract means any legally binding written or oral agreement, contract, subcontract, lease, understanding, instrument, note, option, warranty, sales order, purchase order, license, sublicense, insurance policy, benefit plan or commitment or undertaking of any nature, excluding any Permit.

Danaher has the meaning given to such term in the preamble.

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Danaher Benefit Arrangement means any Benefit Arrangement sponsored, maintained or contributed to by any member of the Danaher Group or any ERISA Affiliate thereof.

Danaher Closing Trading Price means the per share closing trading price of Danaher Common Stock trading on the regular way basis on the New York Stock Exchange on the day before the Distribution Date.

Danaher Common Stock means the issued and outstanding shares of common stock, par value \$0.01 per share, of Danaher.

Danaher Group means Danaher and each of its Subsidiaries or Affiliates, but excluding any member of the Newco Group.

Danaher Indemnitees means Danaher, each member of the Danaher Group, and all Persons who are or have been shareholders, directors, partners, managers, managing members, officers, agents or employees of any member of the Danaher Group (in each case, in their respective capacities as such) (excluding any shareholder of Danaher), together with their respective heirs, executors, administrators, successors and assigns.

Danaher Non-U.S. Retirement Plan means the Danaher Benefit Arrangements set forth on Schedule A, which Schedule A may be supplemented from time to time for sixty (60) days following the date hereof.

Danaher Non-U.S. Savings Plan means the Danaher Benefit Arrangements set forth on Schedule B, which Schedule B may be supplemented from time to time for sixty (60) days following the date hereof.

Danaher NODC Plan means the Amended & Restated Danaher Corporation & Subsidiaries Executive Deferred Compensation Plan.

Danaher Option means an option to purchase shares of Danaher Common Stock granted pursuant to one of the Danaher Stock Plans and held by a Newco Employee as of immediately before the Closing Date.

Danaher Restricted Stock Unit means a unit granted by Danaher pursuant to one of the Danaher Stock Plans representing a general unsecured promise by Danaher to deliver a share of Danaher Common Stock upon the satisfaction of a vesting requirement and held by a Newco Employee as of immediately before the Closing Date.

Danaher Stock Plans means, collectively, (i) the Danaher Corporation 2007 Stock Incentive Plan, as amended, and (ii) the Danaher Corporation Amended and Restated 1998 Stock Option Plan.

Danaher U.S. Retirement Plan means the Danaher Corporation & Subsidiaries Pension Plan.

Danaher U.S. Savings Plan means Danaher Corporation & Subsidiaries Retirement & Savings Plan.

Danaher Welfare Plans means any employee welfare benefit plan within the meaning of Section 3(1) of ERISA (whether or not subject to ERISA) maintained by Danaher or any member of the Danaher Group and in which Newco Employees participate immediately prior to the Separation Time.

Delayed Transfer Date means the date on which it is determined in accordance with Section 2.10 of this Agreement that a Delayed Transfer Newco Employee is eligible to return to active service. A Delayed Transfer Newco Employee will become a Newco Employee only if and when such Delayed Transfer Newco Employee returns to active service for any member of the Danaher Group within six (6) months following the Effective Time or such longer period as

required by Law or otherwise agreed to by the Parties.

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Delayed Transfer Newco Employee means each Newco Employee who is not actively at work as of the Separation Date as a result of (i) disability (either long-term or short term, in either case as defined in the applicable program or arrangement maintained or sponsored by Danaher or another member of the Danaher Group) or (ii) approved leave of absence; provided that in no event shall any Newco Employee whose employment transfers to Newco as of or prior to the Separation Date pursuant to applicable Law be deemed to be a Delayed Transfer Newco Employee.

Designated Person has the meaning set forth in Section 2.10(b).

Distribution has the meaning given to such term in the Merger Agreement.

Distribution Agreement has the meaning set forth in the recitals.

Distribution Date has the meaning given to such term in the Distribution Agreement.

Effective Time has the meaning given to such term in the Merger Agreement.

Employee Representative means any works council, employee representative, trade union, labor or management organization, group of employees or similar representative body for Newco Employees.

Employment Tax Return means any return, report, certificate, form or similar statement or document (including any related or supporting information or schedule attached thereto and any information return, amended tax return, claim for refund or declaration of estimated Employment Tax) required to be supplied to, or filed with, a Tax authority in connection with the determination, assessment or collection of any Employment Tax or the administration of any laws, regulations or administrative requirements relating to any Employment Tax (whether or not a payment is required to be made with respect to such filing).

Employment Taxes means any federal, state, local or foreign Taxes, charges, fees, duties, levies, imposts, rates, social security contributions or other assessments or obligations imposed on, due or asserted to be due from (i) employees or deemed employees of the Danaher Group or employees or deemed employees of the Newco Group or (ii) the Danaher Group or the Newco Group as employers or deemed employers of such employees, including employers' and employees' portions of Federal Insurance Contributions Act (FICA) Taxes, employers' Federal Unemployment Tax Act (FUTA) taxes and state and local unemployment insurance taxes (SUTA), and employers' withholding, reporting and remitting obligations with respect to any such Taxes or employees' federal, state and local income taxes that are imposed on or due from employees or deemed employees of the Danaher Group or the Newco Group.

ERISA means the Employee Retirement Income Security Act of 1974, as amended.

ERISA Affiliate means with respect to any Person, each business or entity which is a member of a controlled group of corporations, under common control or a member of an affiliated service group with such Person within the meaning of Sections 414(b), (c) or (m) of the Code, or required to be aggregated with such Person under Section 414(o) of the Code, or under common control with such Person within the meaning of Section 4001(a)(14) of ERISA.

ESPP has the meaning set forth in Section 8.5.

First Merger has the meaning set forth in the recitals.

Governmental Authority means any federal, state, local, foreign or international court, government, department, commission, board, bureau, agency, official or other regulatory, administrative or governmental authority or

self-regulatory organization.

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HIPAA means the Health Insurance Portability and Accountability Act of 1996, as amended.

Indemnifying Party has the meaning set forth in Section 9.2(b).

Indemnitee means each Danaher Indemnitee, Newco Indemnitee or NetScout Indemnitee.

Indemnity Payment has the meaning set forth in Section 9.3(a).

Information means information in written, oral, electronic or other tangible or intangible forms, stored in any medium, including studies, reports, records, books, Contracts, instruments, surveys, discoveries, ideas, concepts, know-how, techniques, designs, specifications, drawings, blueprints, diagrams, models, prototypes, samples, flow charts, data, computer data, disks, diskettes, tapes, computer programs or other software, marketing plans, customer names, communications by or to attorneys (including attorney-client privileged communications), memos and other materials prepared by attorneys or under their direction (including attorney work product), and other technical, financial, employee or business information or data but in any case excluding back-up tapes.

Integration Team has the meaning set forth in Section 2.10(b).

IRS means the U.S. Internal Revenue Service.

Law means any statute, law (including common law), ordinance, regulation, rule, code or other legally enforceable requirement of, or Order issued by, a Governmental Authority.

Liabilities means all debts, liabilities (including liabilities for Employment Taxes), guarantees, assurances, commitments and obligations, whether fixed, contingent or absolute, asserted or unasserted, matured or unmatured, liquidated or unliquidated, accrued or not accrued, known or unknown, due or to become due, whenever or however arising (including whether arising out of any Contract or tort based on negligence, strict liability or relating to Employment Taxes payable by a Person in connection with compensatory payments to employees or independent contractors) and whether or not the same would be required by generally accepted principles and accounting policies to be reflected in financial statements or disclosed in the notes thereto.

Losses has the meaning given to such term in the Distribution Agreement.

Merger Agreement has the meaning set forth in the recitals.

Merger Sub has the meaning set forth in the recitals.

Merger Sub II has the meaning set forth in the recitals.

NetScout has the meaning set forth in the preamble.

NetScout Benefit Arrangement means any Benefit Arrangement sponsored, maintained or contributed to by any member of the NetScout Group or any ERISA Affiliate thereof immediately following the Effective Time.

NetScout Closing Trading Price means the per share closing trading price of NetScout Common Stock trading on the regular way basis on the NASDAQ Global Market on the Closing Date.

NetScout Group means NetScout and each of its Affiliates, including after the Closing, the Newco Group.

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NetScout Indemnitees means NetScout, each member of the NetScout Group, and all Persons who are or have been shareholders, directors, partners, managers, managing members, officers, agents or employees of any member of the NetScout Group (in each case, in their respective capacities as such) (excluding any shareholder of NetScout), together with their respective heirs, executors, administrators, successors and assigns.

NetScout Non-U.S. Retirement Plan has the meaning set forth in Section 3.2(b).

NetScout Non-U.S. Savings Plan has the meaning set forth in Section 4.2(b).

NetScout Restricted Stock Unit means a unit issued by NetScout representing a general unsecured promise by NetScout to deliver a share of NetScout Common Stock upon the satisfaction of a vesting requirement, which unit is issued pursuant to Section 7 hereof under a stock plan maintained by NetScout.

NetScout U.S. Savings Plans has the meaning set forth in Section 4.1(b).

NetScout Welfare Plans means any employee welfare benefit plan within the meaning of Section 3(1) of ERISA (whether or not subject to ERISA) maintained by NetScout or any member of the NetScout Group and in which Newco Employees participate following the Effective Time.

Newco has the meaning set forth in the preamble.

Newco Benefit Arrangement means any Benefit Arrangement sponsored, maintained or contributed to exclusively by one or more members of the Newco Group.

Newco Employee means, as of the Separation Date (i) each employee of Danaher's Tektronix Communications business, (ii) each employee of Danaher's Arbor Networks business and (iii) each other employee of any member of the Danaher Group who is determined in accordance with Section 2.10 hereof to be either (A) primarily dedicated to the Communications Business in the ordinary course or (B) required for the ongoing operation of the Communications Business, and in all cases regardless of whether any such employee is actively at work as of the Separation Date or is not actively at work as of Separation Date as a result of disability or illness, an approved leave of absence (including military leave with reemployment rights under federal law and leave under the Family and Medical Leave Act of 1993), vacation, personal day or similar short- or long-term absence.

Newco Group means Newco and each of the Newco Subs. Each of the Newco Subs shall be deemed to be members of the Newco Group as of the Separation Time and at all times thereafter up to the Effective Time.

Newco Indemnitees means Newco, each member of the Newco Group, NetScout (from and after the Separation Time), and each of their respective successors and assigns, and all Persons who are or have been shareholders, directors, partners, managers, managing members, officers, agents or employees of any member of the Newco Group (in each case, in their respective capacities as such), and their respective heirs, executors, administrators, successors and assigns.

Newco Independent Contractors means (i) each independent contractor who provides services to Danaher's Tektronix Communications business, (ii) each independent contractor who provides services to Danaher's Arbor Networks business and (iii) each other independent contractor of any member of the Danaher Group who is determined in accordance with Section 2.10 hereof to be either (A) primarily dedicated to the Communications Business in the ordinary course or (B) required for the ongoing operation of the Communications Business.

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Newco Subs has the meaning set forth in the Distribution Agreement.

Non-Automatic Transfer Employees shall mean any Newco Employee who is not an Automatic Transfer Employee.

Non-Designated Person has the meaning set forth in Section 2.10(b).

NQDC Plan means a plan providing for the deferral of compensation that are not tax qualified within the meaning of the Section 401(a) of the Code.

Order means any: (i) order, judgment, injunction, edict, decree, ruling, pronouncement, determination, decision, opinion, verdict, sentence, subpoena, writ or award issued, made, entered, rendered or otherwise put into effect by or under the authority of any court, administrative agency or other Governmental Authority or any arbitrator or arbitration panel or (ii) Contract with any Governmental Authority entered into in connection with any Action.

Participating Company means Danaher or any Person (other than an individual) participating in a Danaher Benefit Arrangement.

Party or Parties has the meaning set forth in the preamble.

Pension Transfers has the meaning set forth in Section 3.2(b).

Person means an individual, a partnership, a corporation, a limited liability company, an association, a joint stock company, a trust, a joint venture, an unincorporated organization or a Governmental Authority.

Potential Transferees has the meaning set forth in Section 2.10(b).

Separation Date has the meaning set forth in the Distribution Agreement.

Separation Time has the meaning set forth in the Distribution Agreement.

Subsidiary means, with respect to any Person, any corporation or other entity (including partnerships and other business associations and joint ventures) of which at least a majority of the voting power represented by the outstanding capital stock or other voting securities or interests having voting power under ordinary circumstances to elect directors or similar members of the governing body of such corporation or entity (or, if there are no such voting interests, fifty percent (50%) or more of the equity interests in such corporation or entity) shall at the time be held, directly or indirectly, by such Person.

Tax or Taxes means all taxes, charges, fees, levies, penalties or other assessments imposed by any federal, state, local, provincial or foreign taxing authority, including income, gross receipts, excise, real or personal property, sales, use, transfer, customs, duties, franchise, receipts, license, stamp, occupation, Employment Taxes or other taxes, including any interest, penalties or additions attributable thereto, and any payments to any state, local, provincial or foreign taxing authorities in lieu of any such taxes, charges, fees, levies or assessments.

Tax Benefit Amount has the meaning set forth in Section 7.3(a).

Third-Party Claim has the meaning set forth in Section 9.2(b).

Third-Party Proceeds has the meaning set forth in Section 9.3(a).

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Transfer Objection has the meaning set forth in Section 2.9(e).

Transfer Regulations means (i) all laws of any EU Member State implementing the EU Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (the Acquired Rights Directive ) and legislation and regulations of any EU Member State implementing such Acquired Rights Directive, and (ii) any similar laws in any jurisdiction providing for an automatic transfer, by operation of law, of employment in the event of a transfer of business.

Section 1.2 References; Interpretation. Unless the context otherwise requires:

(a) references in this Agreement to Articles, Sections, Exhibits and Schedules shall be deemed references to Articles and Sections of, and Exhibits and Schedules to, this Agreement;

(b) references in this Agreement to any time shall be to the then prevailing New York City, New York time unless otherwise expressly provided herein; and

(c) references to an individual as an Employee are descriptive only and are not necessarily intended to mean that an individual is in fact an employee of any Party.

Section 1.3 Relation to Other Documents. To the extent there is any inconsistency between this Agreement and the terms of another agreement pertaining to the Separation or Mergers (other than any Collective Bargaining Agreement) that is the subject of this Agreement and such inconsistency (i) arises in connection with or as a result of employment with or the performance of services before or after the Separation for any member of the Danaher Group, Newco Group or NetScout Group and (ii) relates to the allocation of Liabilities attributable to the employment, service, termination of employment or termination of service of all present or former Danaher employees or Newco Employees or any of their dependents and beneficiaries (and any alternate payees in respect thereof) and other service providers (including any individual who is, or was or is determined to be an independent contractor, temporary employee, temporary service worker, consultant, freelancer, agency employee, leased employee, on-call worker, incidental worker, or non-payroll worker or in any other employment, non-employment, or retainer arrangement, or relationship with any member of the Danaher Group or the Newco Group), the terms of this Agreement shall prevail.

## ARTICLE II

### **GENERAL PRINCIPLES**

Section 2.1 Assumption and Retention of Liabilities; Related Assets.

(a) Effective as of the Separation Time, except as otherwise expressly provided for in this Agreement, Danaher shall, or shall cause one or more members of the Danaher Group to, assume or retain, as applicable, and pay, perform, fulfill and discharge, in due course in full, (i) all Liabilities under all Danaher Benefit Arrangements, except for any such Liabilities relating to Newco Employees, whenever incurred; (ii) subject to Section 2.1(b), all Liabilities with respect to the employment, service, termination of employment or termination of service of all employees and independent contractors (other than Newco Employees and Newco Independent Contractors) of any member of the Danaher Group and their dependents and beneficiaries (and any alternate payees in respect thereof); (iii) all Liabilities relating to the transfer of Newco Employees from the Danaher Group to the Newco Group that arise in respect of any applicable notice and/or severance obligations or obligations to notify and/or consult in compliance with a Collective Bargaining Agreement or applicable Law, including but not limited to the Transfer Regulations; provided that any such Liabilities

do not arise because of a failure of any member of the Newco Group or NetScout, as applicable, to offer or provide compensation or employee benefits as required by this Agreement, other than Liabilities to the extent caused by an action, or failure to act, by Danaher which in any case constitutes a breach of this Agreement; and (iv) any other Liabilities or obligations expressly assigned to Danaher or any of its Affiliates under this Agreement.

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(b) Effective as of the Separation Time, except as otherwise expressly provided for in this Agreement but notwithstanding the provisions of Section 2.1(a), Newco shall, or shall cause one or more members of the Newco Group to, assume or retain, as applicable, and pay, perform, fulfill and discharge, in due course in full, (i) all Liabilities under all Danaher Benefit Arrangements relating to Newco Employees, whenever incurred, and all Liabilities under Newco Benefit Arrangements; (ii) all Liabilities with respect to the employment, service, termination of employment or termination of service of all Newco Employees and Newco Independent Contractors and their dependents and beneficiaries (and any alternate payees in respect thereof); (iii) all Liabilities with respect to the employment, service, termination of employment or termination of service of all individuals who are not Newco Employees or Newco Independent Contractors but where (and to the extent) the act or omission giving rise to such Liability arose while such individual was employed in or providing substantial services to the Communications Business; and (iv) any other Liabilities or obligations expressly assigned to Newco or any of its Affiliates under this Agreement.

(c) From time to time after the Separation Time, the Parties shall promptly reimburse one another, upon reasonable request of the Party requesting reimbursement and the presentation by such Party of such substantiating documentation as the other Party shall reasonably request, for the cost of any obligations or Liabilities satisfied or assumed by the Party requesting reimbursement or its Affiliates that are, or that have been made pursuant to this Agreement, the responsibility of the other Party or any of its Affiliates. Any such reimbursement shall be equal to the cost actually incurred by the Party requesting reimbursement and shall be submitted to the other Party within 30 days of the payment by the Party requesting reimbursement.

(d) Subject to applicable Law and the Tax Matters Agreement, Danaher shall retain responsibility for all employee-related regulatory filings for reporting periods ending at or prior to the Effective Time, except for Equal Employment Opportunity Commission EEO-1 reports and affirmative action program (AAP) reports and responses to Office of Federal Contract Compliance Programs (OFCCP) submissions, for which Danaher shall provide data and information (to the extent permitted by applicable Laws and consistent with Section 10.1) to Newco, which shall be responsible for making such filings in respect of Newco Employees.

(e) Danaher shall be the responsible party for preparing and timely filing or causing to be prepared and timely filed all Employment Tax Returns of any member of the Danaher Group. Danaher shall be liable for all Employment Taxes due on any such Employment Tax Return. Danaher, at its sole expense, shall have exclusive control over the conduct and resolution of any audit, litigation, contest, dispute, or other proceeding relating to Employment Taxes of any member of the Danaher Group. Newco shall be the responsible party for preparing and timely filing or causing to be prepared and timely filed all Employment Tax Returns of any member of the Newco Group with respect to periods (or portions thereof) following the Distribution Date. Newco shall be liable for all Employment Taxes due on any such Employment Tax Return. Newco, at its sole expense, shall have exclusive control over the conduct and resolution of any audit, litigation, context, dispute, or other proceeding relating to Employment Taxes of the Newco Group.

(f) Notwithstanding anything set forth in this Agreement to the contrary, to the extent that any provision of this Agreement would require any member of the Newco Group or the NetScout Group to assume any Liability or otherwise perform any obligation in respect of a Delayed Transfer Newco Employee, such assumption or performance shall not occur or otherwise become effective until the Delayed Transfer Date applicable to such Delayed Transfer Newco Employee.

**Section 2.2 Treatment of Compensation and Benefit Arrangements.**

(a) Unless otherwise required by a Collective Bargaining Agreement and except as otherwise expressly provided for in this Agreement, and subject to the Newco Group's obligations in relation to employees who transfer to the Newco

Group at the Separation Time pursuant to the Transfer Regulations, (i) for a period of twelve (12) months following the Closing Date (or such shorter period as any such Newco Employee is employed by NetScout or one of its Affiliates), NetScout will provide or cause to be provided to each Newco

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Employee (A) a base salary or hourly wage rate, as applicable, that is at least equal to the base salary or hourly wage rate provided to such Newco Employee immediately prior to the Separation Time and (B) a target annual cash bonus opportunity no less favorable than the target annual cash bonus opportunity in effect for such Newco Employee, if any, immediately prior to the Separation Time, and (ii) for a period beginning within a reasonable period of time following the Closing Date and ending on December 31 of the calendar year in which the Closing Date occurs (or such shorter period as any such Newco Employee is employed by NetScout or one of its Affiliates), NetScout will use its reasonable best efforts to provide or cause to be provided to each Newco Employee health and welfare and retirement benefits that are no less favorable than those provided by NetScout to similarly situated employees of NetScout in the applicable jurisdiction as of the date hereof (which for U.S. Newco Employees shall be determined by reference to the benefits as described in the NetScout 2014 Summary of Benefits as may be amended for all NetScout U.S. employees).

(b) Without limiting Section 2.2(a) and subject to the Newco Group's obligations in relation to employees who transfer to the Newco Group as of the Separation Time pursuant to the Transfer Regulations and applicable Law, for a period of twelve (12) months following the Effective Time, NetScout shall provide or cause to be provided to each Newco Employee not covered by Collective Bargaining Agreements severance benefits calculated in a manner no less favorable than those such Newco Employee would have received upon a termination of employment or service immediately prior to the Separation Time.

Section 2.3 Establishment of Newco Benefit Arrangements and Participation in Danaher Benefit Arrangements. Prior to the Effective Time, any member of the Newco Group may establish or maintain Newco Benefit Arrangements in accordance with the provisions of Section 2.10 of this Agreement. Except as otherwise expressly provided for in this Agreement or as otherwise expressly agreed to in writing between the Parties, effective as of the Effective Time, (i) Newco and each member of the Newco Group, to the extent applicable, shall cease to be a Participating Company in any Danaher Benefit Arrangement and (ii) each Newco Employee shall cease to participate in, be covered by, accrue benefits under, be eligible to contribute to or have any rights under any Danaher Benefit Arrangement (except to the extent of obligations that accrued before the Effective Time and that remain a Liability of any member of the Danaher Group pursuant to this Agreement), and Danaher and Newco shall take all necessary action to effectuate each such cessation. Notwithstanding the above, and in the event it is not administratively feasible or practicable to provide coverage to Newco Employees immediately as of the Effective Time under NetScout Benefit Arrangements (as determined by NetScout), Danaher will confer with NetScout regarding the provision of continued coverage for Newco Employees in Danaher Benefits Arrangements after the Effective Time on terms and conditions satisfactory to Danaher.

Section 2.4 Service Recognition. Effective as of the Effective Time, and in addition to any applicable obligations under the Transfer Regulations or other applicable Law, NetScout shall, and shall cause each member of the NetScout Group to, give each Newco Employee full credit for purposes of eligibility, vesting, and determination of level of benefits under any NetScout Benefit Arrangement for such Newco Employee's service with any member of the Danaher Group or Newco Group or any predecessor thereto prior to the Effective Time, to the same extent such service was recognized by the applicable Danaher Benefit Arrangement immediately prior to the Effective Time; provided, that, such service shall not be recognized to the extent such recognition would result in the duplication of benefits. In addition, and without limiting the generality of the foregoing provisions of this Section 2.4, (i) NetScout shall use reasonable efforts to cause each Newco Employee to be immediately eligible to participate, without any waiting time, in any and all NetScout Benefit Arrangements to the extent coverage under the NetScout Benefit Arrangement is provided by NetScout to similarly situated employees in the applicable jurisdiction as of the Effective Time, (ii) for purposes of each NetScout Benefit Arrangement that is a medical, dental or vision benefit plan, NetScout shall use reasonable efforts to cause all pre-existing condition exclusions and actively-at-work requirements of such NetScout Benefit Arrangement to be waived for such employee and his or her covered dependents, and

(iii) NetScout shall use reasonable efforts to cause any eligible expenses incurred by such employee and his or her covered dependents during the portion of the plan year of the Danaher Benefit Arrangement ending on the date such employee's participation in the corresponding NetScout Benefit Arrangement begins to be taken into account under such NetScout Benefit

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Arrangement for purposes of satisfying all deductible, coinsurance and maximum out-of pocket requirements applicable to such employee and his or her covered dependents for the applicable plan year as if such amounts had been paid in accordance with the NetScout Benefit Arrangement.

Section 2.5 Collective Bargaining Agreements. Notwithstanding anything in this Agreement to the contrary, prior to the Effective Time, Danaher and Newco shall, to the extent required by applicable Law, take or cause to be taken all actions that are necessary (if any) for Newco or a member of the Newco Group to continue to maintain or to assume and honor any Collective Bargaining Agreements and any pre-existing collective bargaining relationships (in each case including obligations that arise in respect of the period both before and after the date of employment by the Newco Group) in respect of any Newco Employees and any Employee Representatives. As of the Effective Time, NetScout shall, or shall cause Newco or a member of the Newco Group to continue to maintain or to assume and honor, to the extent required by applicable Law, all Collective Bargaining Agreements and pre-existing collective bargaining relationships (in each case including obligations that arise in respect of the period both before and after the date of a Newco Employee's employment by the Newco Group) applicable to any Newco Employee immediately before the Effective Time. Nothing in this Agreement is intended to alter the provisions of any Collective Bargaining Agreement or modify in any way the obligations of the Danaher Group or the Newco Group to any Employee Representative or any other Person as described in such agreement.

Section 2.6 No Acceleration of Benefits. Except as otherwise provided in this Agreement, no provision of this Agreement shall be construed to create any right, or accelerate vesting or entitlement, to any compensation or benefit whatsoever on the part of any Newco Employee or other former, current or future employee of the Danaher Group or Newco Group under any Benefit Arrangement of the Danaher Group or Newco Group.

Section 2.7 Amendment Authority. Except as otherwise provided in this Agreement, nothing in this Agreement is intended to prohibit any member of the Danaher Group, Newco Group or NetScout Group from amending or terminating any employee benefit plans, policies or compensation programs at any time on or after the Separation Date.

Section 2.8 No Commitment to Employment or Benefits. Nothing contained in this Agreement shall be construed as a commitment or agreement on the part of any individual to continue employment with the Danaher Group, Newco Group or NetScout Group or, except as otherwise provided in this Agreement, as a commitment on the part of the Danaher Group, Newco Group or NetScout Group to continue the employment, compensation, or benefits of any individual for any period or to provide any recall or similar rights to an individual on layoff or any type of leave of absence. This Agreement is solely for the benefit of the Danaher Group, Newco Group and NetScout Group and, except to the extent otherwise expressly provided herein, nothing in this Agreement, express or implied, is intended to confer any rights, benefits, remedies, obligations or Liabilities under this Agreement upon any Person, including any Newco Employee or other current or former employee, officer, director or contractor of the Danaher Group, Newco Group or NetScout Group, other than the Parties and their respective successors and assigns.

Section 2.9 Certain Employment Transfers.

(a) Danaher shall use reasonable best efforts to cause each Newco Employee to be employed by a member of the Newco Group at the Separation Time in accordance with applicable Law. Danaher Group and Newco Group agree to execute, and to seek to have the applicable Newco Employees execute, such documentation, if any, as may be necessary to reflect the transfer of employment described in this Section 2.9. NetScout shall provide the information, within reason, as requested by Danaher and its Affiliates in sufficient time to enable Danaher and its Affiliates to meet their information and consultation requirements pursuant to the Transfer Regulations, any Collective Bargaining Agreement or otherwise, provided that any such requests are timely received.

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(b) Automatic Transfer Employees shall not be terminated upon the Separation Time, but rather the rights, powers, duties, liabilities and obligations of Danaher (or the appropriate member of the Danaher Group) to such employees with respect to their material terms of employment in force immediately before the Separation Date shall be transferred to the appropriate member of the Newco Group, but only to the extent required by, and only then in accordance with, applicable Law.

(c) For Non-Automatic Transfer Employees outside of the United States where the transfer of employment is by way of termination/resignation and re-hire, the appropriate member of the Newco Group shall offer employment to each such employee effective on the Separation Date. Each such offer will be at such employee's same location and same base salary as is in effect immediately before the Separation Date and otherwise on substantially the same terms and conditions of employment in the aggregate as was provided by the appropriate member of the Danaher Group immediately before the Separation Date, and which shall comply with the requirements of Section 2.2 to the extent permitted by Law. For Non-Automatic Transfer Employees outside of the United States where the transfer of employment is by way of employer substitution, the appropriate member of the Danaher Group shall effectuate an employer substitution on the Separation Date with respect to the employees, in accordance with applicable Law, pursuant to which each appropriate member of the Newco Group will employ the employees, and will acknowledge and accept all rights, obligations, duties, and responsibilities with respect to such employees as of the Separation Date. Such employer substitution shall comply with the requirements of Section 2.2, the extent permitted by Law.

(d) Notwithstanding anything set forth in this Agreement to the contrary, the provisions of this Section 2.9 will not apply to any Delayed Transfer Newco Employee until the Delayed Transfer Date applicable to such Delayed Transfer Newco Employee, unless otherwise required by Law.

(e) To the extent a Newco Employee objects, rejects or refuses to transfer to Newco Group (a Transfer Objection), such employee shall remain employed by Danaher, or the appropriate member of the Danaher Group, to the extent permitted by Law. To the extent a Newco Employee transfers to Newco Group despite such employee's Transfer Objection, provided that the Transfer Objection is not due to NetScout's failure to comply with any of its obligations under this Agreement, Danaher shall reimburse and otherwise fully indemnify NetScout for any Liabilities arising out of the subsequent termination or separation of employment of such Newco Employee, including the costs of notice and severance, arising or resulting from such employee's objection, rejection or refusal to transfer. NetScout shall take all reasonable steps to minimize such Liabilities including giving Danaher the opportunity to re-employ such individual.

**Section 2.10 Identification of Newco Employees and Independent Contractors.**

(a) Each employee of, or independent contractor providing services to, Danaher's Arbor Networks business or Danaher's Tektronix Communications business immediately prior to the Separation Time shall automatically be treated as a Newco Employee or Newco Independent Contractor hereunder, respectively.

(b) With respect to identifying which employees and independent contractors of Danaher's Fluke Network's business who are not fully dedicated to the Communications Business should be treated as a Newco Employee or Newco Independent Contractor, respectively, (the Potential Transferees), the Parties agree to establish a human resources integration team (Integration Team) not later than one (1) month following the date of this Agreement consisting from time to time of eight (8) individuals (or such other number as agreed by the Parties), one-half of whom are employees of Danaher as designated by the vice president of human resources of Danaher and one half of whom are employees of NetScout as designated by the vice president of human resources of NetScout or other designee as determined by NetScout. Such integration team shall work in good faith to identify and resolve any dispute regarding whether a Potential Transferee should be designated as a Newco Employee or Newco Independent Contractor (a Designated

Person ) or as a Danaher employee not designated as a Newco Employee or Newco Independent Contractor (a Non-Designated Person ), with a goal of providing the Newco Group with sufficient operational and management employees and service providers to

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operate and manage the Communications Business on a reasonable basis in the opinion of Danaher based upon its experience of operating the Communications Business. To the extent such human resources integration team is unable to agree on the identity of Newco Employees and/or Newco Independent Contractors not later than two (2) months prior to the contemplated Separation Time, the respective chief human resources officers of Danaher and NetScout shall act in good faith to resolve such disagreement not later than the Closing Date. If such disagreement cannot be resolved in good faith, then the vice president of human resources of Danaher shall make the final determination. Notwithstanding the foregoing provisions of this Section 2.10 or the definition of Newco Employee or Newco Independent Contractor to the contrary, the identification of Newco Employees and Newco Independent Contractors shall be made subject to and in accordance with the provisions of any applicable collective bargaining obligation and Collective Bargaining Agreement and otherwise in accordance with applicable Law. Additionally, to the extent any member of the Newco Group desires to adopt or maintain a Newco Benefit Arrangement on behalf of Newco Employees prior to the Effective Time, the terms and conditions of any such Newco Benefit Arrangement must be approved and authorized by the Integration Team. If the Integration team is unable to agree on the establishment or terms and conditions of a Newco Benefit Arrangement, the respective chief human resources officers of Danaher and NetScout shall act in good faith to resolve such disagreement as soon as practicable.

Section 2.11 Information and Consultation.

(a) Following entry into this Agreement, Danaher shall and shall cause its Subsidiaries and each member of the Newco Group that is to employ any Newco Employee to comply with all requirements and obligations to inform, consult or otherwise notify any Newco Employees or Employee Representatives in relation to the Separation, Distribution, Mergers and any other consequence of the transactions contemplated by Distribution Agreement and the Merger Agreement, whether required pursuant to any Collective Bargaining Agreement, the Transfer Regulations or other applicable Law.

(b) NetScout shall and shall cause its Subsidiaries and Merger Sub to comply with all requirements and obligations to inform, consult or otherwise notify any NetScout Group employees or any representatives of them in relation to the Merger and any other consequence of the transactions contemplated by this Agreement and the Merger Agreement whether required pursuant to any collective bargaining agreement applicable to NetScout employees, the Transfer Regulations or other applicable Law.

Section 2.12 Certain Requirements. Notwithstanding anything in this Agreement to the contrary, if the terms of a Collective Bargaining Agreement or applicable Law require that any assets or Liabilities be retained by the Danaher Group or transferred to or assumed by the Newco Group or NetScout in a manner that is different from that set forth in this Agreement, such retention, transfer or assumption shall be made in accordance with the terms of such Collective Bargaining Agreement or applicable Law and shall not be made as otherwise set forth in this Agreement.

Section 2.13 Sharing of Information. On and after the date hereof and in each case to the extent permitted by applicable Law, Danaher shall, and shall cause each member of the Danaher Group to use reasonable efforts to (i) share any materials and documents with Newco and NetScout that are reasonably determined to be necessary to permit Newco and NetScout to effectuate the provisions of this Agreement and (ii) make available any Newco Employees to Newco and NetScout for purposes of making any communications to such Newco Employees relating to the provisions of this Agreement; provided that Danaher shall be permitted to have a representative present at any meeting between Newco or NetScout and a Newco Employee that occurs prior to the Effective Time.

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**ARTICLE III**

**DEFINED BENEFIT PLANS**

Section 3.1 U.S. Retirement Plan Participation. Danaher shall retain all assets and Liabilities relating to the Danaher U.S. Retirement Plan, including Liabilities in respect of pension benefits accrued thereunder by Newco Employees through the Effective Time. No assets or Liabilities of a Danaher U.S. Retirement Plan shall be transferred to a retirement plan maintained by Newco, NetScout or any of their respective Affiliates following the Effective Time. No Newco Employee will accrue benefits under the Danaher U.S. Retirement Plan after the Effective Time.

Section 3.2 Non-U.S. Retirement Plan Participation.

(a) Subject to any Collective Bargaining Agreement and applicable Law, effective as of the Effective Time, the participation of each Newco Employee who is a participant in a Danaher Non-U.S. Retirement Plan shall automatically cease and no Newco Employee shall thereafter accrue any benefits under any such Danaher Non-U.S. Retirement Plan.

(b) To the extent required by applicable Law, NetScout shall, or shall cause a member of the NetScout Group to, use its reasonable efforts to establish or maintain one or more defined benefit retirement plans (such defined benefit plan or plans, the NetScout Non-U.S. Retirement Plans ) in which each Newco Employee who participated in a Danaher Non-U.S. Retirement Plan immediately prior to the Separation Time will be eligible to participate as soon as practicable following the Effective Time, with terms substantially similar to the terms of the applicable Danaher Non-U.S. Retirement Plan as in effect immediately prior to the Separation Time. To the extent required by Law, Danaher shall cause the Danaher Non-U.S. Retirement Plans to transfer (and NetScout shall cause the NetScout Non-U.S. Retirement Plans to accept a transfer of) Liabilities in respect of the obligations to or otherwise in respect of Newco Employees under the Danaher Non-U.S. Retirement Plans and Danaher shall cause the Danaher Non-U.S. Retirement Plans to transfer (and NetScout shall cause the NetScout Non-U.S. Retirement Plans to accept a transfer of) assets in an amount equal to the Liabilities so transferred (such transfers, the Pension Transfers ). In the event that a Danaher Non-U.S. Retirement Plan is unable to transfer assets in an amount equal to the Liabilities transferred in connection with the Pension Transfers, Danaher shall transfer to NetScout an amount of cash equal to the difference between the Liabilities transferred under the Pension Transfers and the assets transferred under the Pension Transfers. The Pension Transfers shall be effected in accordance with applicable Law and local custom and practice; provided that if the mechanism for transfer of such assets and Liabilities is not mandated by applicable Law, then the assets and Liabilities relating to Newco Employees in respect of any applicable Danaher Non-U.S. Retirement Plan in such jurisdiction will be transferred on a projected benefit obligation basis as determined in accordance with U.S. Generally Accepted Accounting Principles and based on the applicable discount rates used in the most recent financial statements relating to the applicable Danaher Non-U.S. Retirement Plan (updated as of the Effective Time). Danaher shall use commercially reasonable efforts to provide that all assets transferred in accordance with this subsection (b) shall be transferred in the form of cash, insurance contracts or marketable securities unless otherwise required by applicable Law. NetScout shall be responsible for any and all Liabilities (including Liability for funding) and other obligations with respect to the NetScout Non-U.S. Retirement Plans.

(c) To the extent required by applicable Law, and subject to any Collective Bargaining Agreement, effective as of the Effective Time, NetScout or NetScout Group member shall assume sponsorship of, and shall retain or assume all assets and benefit Liabilities relating to, any Danaher Non-U.S. Retirement Plan in which all participants immediately prior to the Effective Time are Newco Employees or Newco Benefit Arrangement that is a defined benefit retirement plan. If the assets held by any Danaher Non-U.S. Retirement Plan or Newco Benefit Arrangement assumed or retained under this Section 3.2(c) are less than the Liabilities accrued under such Danaher Non-U.S. Retirement Plan or Newco

Benefit Arrangement (determined on a projected benefit obligation basis), Danaher shall transfer to NetScout an amount of cash equal to the difference between the assets

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held by such Danaher Non-U.S. Retirement Plan or Newco Benefit Arrangement and such Liabilities. Danaher shall indemnify, defend and hold harmless the NetScout Indemnitees and the Newco Indemnitees for any Losses or Liabilities (other than Liabilities for benefit payments) related to or arising under any Danaher Non-U.S. Retirement Plan or Newco Benefit Arrangement assumed or retained under this Section 3.2(c) which are related to any act or omission or operation of such Danaher Non-U.S. Retirement Plan or Newco Benefit Arrangement occurring prior to the Effective Time.

(d) Except as specifically provided in this Section 3.2, no member of the NetScout Group shall have any Liability with respect to any Danaher Non-U.S. Retirement Plan or other Danaher Benefit Arrangement that is a defined benefit retirement plan (including for the avoidance of doubt any Section 75 debt arising from any Danaher Benefit Arrangement that is a United Kingdom retirement plan).

**ARTICLE IV**

**DEFINED CONTRIBUTION PLANS**

Section 4.1 U.S. Savings Plan Participation.

(a) Effective as of the Effective Time, (i) the participation of each Newco Employee who is a participant in a Danaher U.S. Savings Plan shall automatically cease and (ii) Danaher shall cause each such Newco Employee to become fully vested in such Newco Employee's account balances under such Danaher U.S. Savings Plan.

(b) Effective no later than the Effective Time, NetScout shall, or shall cause a member of the NetScout Group to, use its reasonable effort to establish or maintain one or more defined contribution savings plans and related trusts that satisfy the requirements of Sections 401(a) and 401(k) of the Code (such defined contribution savings plan or plans, the NetScout U.S. Savings Plans ) in which each Newco Employee who participated in a Danaher U.S. Savings Plan immediately prior to the Separation Time will be eligible to participate as of the Effective Time, with terms that are fully equivalent to those provided by NetScout to similarly situated employees of NetScout as of the Effective Time.

(c) NetScout shall use reasonable efforts, or shall cause a member of the NetScout Group to use reasonable efforts, to take all necessary actions to cause the applicable NetScout U.S. Savings Plan in which a Newco Employee is eligible to participate to permit each such Newco Employee to make rollover contributions of eligible rollover distributions (within the meaning of Section 401(a)(31) of the Code and inclusive of any loans), in the form of cash, notes or shares of Danaher Common Stock, as applicable, in an amount equal to the full account balance distributed to such Newco Employee from the Danaher U.S. Savings Plan to the applicable NetScout U.S. Savings Plan.

(d) NetScout shall cause the NetScout U.S. Savings Plan to provide that all shares of Danaher Common Stock transferred into the NetScout U.S. Savings Plan in connection with Section 4.1(c) shall, to the extent still held under the NetScout U.S. Savings Plan, be maintained under the NetScout U.S. Savings Plan in compliance with all requirements of ERISA and applicable Laws; provided that NetScout shall not be required to permit the investment of contributions made after the Closing Date into Danaher Common Stock, but will be required to permit Newco Employees who participate in the NetScout U.S. Savings Plan to continue to hold shares of Danaher Common Stock transferred into the NetScout U.S. Savings Plan in connection with Section 4.1(c) through a self-directed brokerage account under the NetScout U.S. Savings Plan.

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Section 4.2 Non-U.S. Savings Plan Participation.

(a) Subject to any Collective Bargaining Agreement and applicable Law, effective as of the Effective Time, the participation of each Newco Employee who is a participant in a Danaher Non-U.S. Savings Plan shall automatically cease and no Newco Employee shall thereafter accrue any benefits under any such Danaher Non-U.S. Savings Plan.

(b) To the extent required by applicable Law, NetScout shall, or shall cause a member of the NetScout Group to, establish or maintain one or more plans in which each Newco Employee who participated in a Danaher Non-U.S. Savings Plan immediately prior to the Separation Time will be eligible to participate as of the Effective Time, with terms (excluding employer contributions) no less favorable than the terms of the applicable Danaher Non-U.S. Savings Plan as in effect immediately prior to the Separation Time (such plan or plans, the NetScout Non-U.S. Savings Plans ). To the extent required by Law, Danaher shall cause the Danaher Non-U.S. Savings Plans to transfer (and NetScout shall cause the NetScout Non-U.S. Savings Plans to accept a transfer of) Liabilities in respect of the obligations to or otherwise in respect of Newco Employees under the Danaher Non-U.S. Savings Plans and Danaher shall cause the Danaher Non-U.S. Savings Plans to transfer (and NetScout shall cause the NetScout Non-U.S. Savings Plans to accept a transfer of) assets in an amount equal to the Liabilities so transferred (such transfers, the Savings Transfers ). In the event that a Danaher Non-U.S. Savings Plan is unable to transfer assets in an amount equal to the Liabilities transferred in connection with the Savings Transfers, Danaher shall transfer to NetScout an amount of cash equal to the difference between the Liabilities transferred under the Savings Transfers and the assets transferred under the Savings Transfers. Except as otherwise agreed by the Parties after the date hereof, such transfer shall be effected in accordance with applicable Law and local custom and practice. NetScout shall be responsible for any and all Liabilities (including Liability for funding) and other obligations with respect to the NetScout Non-U.S. Savings Plans.

(c) To the extent required by applicable Law, and subject to any Collective Bargaining Agreement, effective as of the Effective Time, NetScout shall assume sponsorship of, and shall retain or assume all assets and benefit Liabilities relating to any Danaher Non-U.S. Savings Plan in which all participants immediately prior to the Effective Time are Newco Employees or Newco Benefit Arrangement that is a defined contribution plan. Danaher shall indemnify, defend and hold harmless the NetScout Indemnitees and the Newco Indemnitees for any Losses or Liabilities (other than Liabilities for benefit payments) related to or arising under any Danaher Non-U.S. Savings Plan or Newco Benefit Arrangement assumed or retained under this Section 4.2(c) which are related to any act or omission or operation of such Danaher Non-U.S. Savings Plan or Newco Benefit Arrangement occurring prior to the Effective Time.

(d) Except as specifically provided in this Section 4.2, no member of the NetScout Group shall have any Liability with respect to any Danaher Non-U.S. Savings Plan or other Danaher Benefit Arrangement that is a retirement plan.

**ARTICLE V**

**HEALTH AND WELFARE PLANS**

Section 5.1 Health and Welfare Plan Participation. Subject and in addition to the Newco Group's obligations in relation to employees who transfer to Newco Group at the Separation Time pursuant to the Transfer Regulations, effective no later than the Effective Time, NetScout shall or shall cause a member of the NetScout Group to use reasonable efforts to establish or maintain health and welfare plans (which term shall be limited to medical, dental, vision, disability and life insurance coverage) for the benefit of each Newco Employee with terms that are fully equivalent to those provided by NetScout to similarly situated employees of NetScout in the applicable jurisdiction as of the Effective Time (which for U.S. Newco Employees shall be determined by reference to the benefits as described in the NetScout 2014

Summary of Benefits as may be amended for all NetScout U.S. employees).

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Section 5.2 Certain Liabilities.

(a) With respect to employee welfare and fringe benefits, (i) Danaher shall fully perform, pay and discharge, under the Danaher Welfare Plans, all claims of Newco Employees that are incurred but not paid prior to the Effective Time and (ii) NetScout shall fully perform, pay and discharge, under the NetScout Welfare Plans, from and after the Effective Time, all claims of Newco Employees that are incurred from and after the Effective Time under the applicable Newco Benefit Arrangement.

(b) For purposes of this Section 5.2, a claim or Liability is deemed to be incurred (i) with respect to medical, dental, vision and/or prescription drug benefits, upon the rendering of health services giving rise to such claim or Liability, (ii) with respect to life insurance, accidental death and dismemberment and business travel accident insurance, upon the occurrence of the event giving rise to such claim or Liability and (iii) with respect to disability benefits, upon the date of an individual's disability, as determined by the disability benefit insurance carrier or claim administrator, giving rise to such claim or Liability.

Section 5.3 Time-Off Benefits. Unless otherwise required in a Collective Bargaining Agreement or by applicable Laws, (i) Newco shall credit each Newco Employee as of the Separation Time with the amount of accrued but unused vacation time, paid time off and other time-off benefits as such Newco Employee had with Danaher Group as of immediately before the Separation Time, (ii) NetScout shall cause each Newco Employee to be eligible to use on or before December 31 of the year following the Effective Time any accrued but unused vacation time, paid time off and other time-off benefits as such Newco Employee had with Danaher as of immediately before the Effective Time to the extent in excess of the amount that would have been available to the Newco Employee had the Newco Employee's service with Newco been treated as service with NetScout, (iii) NetScout may cause each Newco Employee to forfeit any excess amount not used in accordance with the foregoing clause (ii), and (iv) as of the Effective Time, each Newco Employee shall be subject to NetScout's vacation policy (pro-rated as of the Effective Time) for the year in which the Closing occurs; provided, however, that NetScout shall provide Newco Employees with credit for employment service with Danaher for purposes of determining each Newco Employee's eligibility for and future accruals of vacation days under the NetScout vacation policy. Time-off benefits for Newco Employees will be fully equivalent to those provided by NetScout to similarly situated employees of NetScout in the applicable jurisdiction as of the date hereof (which for U.S. Newco Employees shall be determined by reference to the benefits as described in the NetScout 2014 Summary of Benefits as may be amended for all NetScout U.S. employees).

**ARTICLE VI**

**EXECUTIVE BENEFIT PLANS**

Section 6.1 Non-Qualified Deferred Compensation Plans. Effective as of the Effective Time, the active participation of each Newco Employee who is a Participant in a Danaher NQDC Plan shall cease. NetScout shall have no obligation to establish and maintain a NQDC Plan for the benefit of Newco Employees and Danaher shall retain all assets and Liabilities in respect of the Danaher NQDC Plan.

**ARTICLE VII**

**TREATMENT OF DANAHER EQUITY AWARDS**

Section 7.1 Retained Danaher Equity Awards.

(a) Treatment of Vested Danaher Options. Each Danaher Option that is vested and exercisable as of immediately before the Effective Time shall remain exercisable for a period of ninety (90) days commencing on the day immediately following the Closing Date, or, in the case of a Danaher Option held by a Delayed Transfer Newco Employee, for ninety (90) days after the date such individual becomes a Newco Employee, provided that

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in no event shall any such Danaher Option remain exercisable after the expiration of its term. Any such Danaher Option that remains unexercised as of the end of such ninety (90) day period shall terminate and be forfeited without the payment of any consideration to the holder thereof.

(b) Treatment of Unvested Danaher Options Scheduled to Vest Prior to August 4, 2015. If the Closing Date occurs before August 4, 2015, each Danaher Option that is scheduled to vest in accordance with its terms on or after the Closing Date but on or before August 4, 2015, shall continue to vest in accordance with its terms and shall remain exercisable for a period of ninety (90) days commencing on the day immediately following the vesting date of such Danaher Option, or, in the case of a Danaher Option held by a Delayed Transfer Newco Employee, ninety (90) days after such individual becomes a Newco Employee, provided that in no event shall any such Danaher Option remain exercisable after the expiration of its term. Any such Danaher Option that remains unexercised as of the end of such ninety (90) day period shall terminate and be forfeited without the payment of any consideration to the holder thereof.

(c) Treatment of Unvested Danaher Restricted Stock Units Scheduled to Vest Prior to August 4, 2015. If the Closing Date occurs before August 4, 2015, each Danaher Restricted Stock Unit that is scheduled to vest in accordance with its terms on or after the Closing Date but on or before August 4, 2015, shall continue to vest and shall be settled in accordance with its terms.

(d) Tax and Regulatory Compliance for Retained Danaher Equity Awards. To the extent any member of the Newco Group is subject to Tax withholding, reporting, remitting or payment obligations or any regulatory filing obligation in connection with the Retained Danaher Equity Awards, the Parties agree to cooperate to ensure that such obligations are met and that any Employment Taxes payable by any member of the Newco Group in connection with such Retained Danaher Equity Award shall be paid by Danaher.

Section 7.2 Cancelled Danaher Equity Awards. Each (i) Danaher Option that is unvested as of immediately before the Effective Time, or, in the case of a Danaher Option held by a Delayed Transfer Newco Employee that is unvested as of the date such individual becomes a Newco Employee, (other than with respect to any such Danaher Option that is subject to Section 7.1(b) hereof) (together, the Cancelled Danaher Options ) and (ii) Danaher Restricted Stock Unit that is unvested as of immediately before the Effective Time, or in the case of a Danaher Restricted Stock Unit held by a Delayed Transfer Newco Employee that is unvested as of the date such individual becomes a Newco Employee (other than with respect to any such Danaher Option that is subject to Section 7.1(c) hereof) (together, the Cancelled Danaher Restricted Stock Units and together with the Cancelled Danaher Options, the Cancelled Danaher Equity Awards ) shall, effective as of immediately before the Effective Time or as of the date a Delayed Transfer Newco Employee becomes a Newco Employee, as applicable, be cancelled by Danaher without the payment by Danaher of any consideration to the holder thereof.

Section 7.3 NetScout Retention Awards. NetScout will, as soon as practicable following the Closing Date, and in any event within thirty (30) days after the Closing Date, or, in the case of a Delayed Transfer Newco Employee who becomes a Newco Employee after the Closing Date, within thirty (30) days after such individual becomes a Newco Employee, provide the following to each Newco Employee who is a holder of a Cancelled Danaher Equity Award:

(a) A cash retention award with a value equal to one-half of such Newco Employee's Cancelled Danaher Equity Award Value, payable on the later of (i) the first anniversary of the Closing Date and (ii) August 4, 2016, in each case subject to the Newco Employee's continued employment with Newco, NetScout or a member of the NetScout Group through the applicable date and payable no later than ten (10) Business Days thereafter. Danaher shall, within twenty (20) Business Days following the date on which NetScout provides it with written evidence of the making of such cash retention payments, pay to NetScout or the applicable member of the NetScout Group an amount equal to (i) the sum of such cash retention

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payments and any Employment Taxes payable by NetScout or the applicable member of the NetScout Group in connection therewith, less (ii) the value of any item of loss, deduction or credit or any other item which decreases Taxes paid or payable or increases Tax basis realizable by NetScout and any member of the NetScout Group as a result of the payment of the such cash retention payments and any related Employment Taxes (the Tax Benefit Amount ). The amount of such Employment Taxes and the Tax Benefit Amount shall be reasonably determined in good faith by NetScout in consultation with Danaher; and

(b) A number of NetScout Restricted Stock Units (rounded up to the nearest whole share) equal to the quotient of (i) no less than one-half of such Newco Employee's Cancelled Danaher Equity Award Value and (ii) the NetScout Closing Trading Price; provided, however, that notwithstanding the above, the maximum aggregate value of the NetScout Restricted Stock Units that will be awarded under this Section 7.3(b) will not exceed \$15 million (RSU Cap ), where the value of a NetScout Restricted Stock Unit for this purpose is equal to the NetScout Closing Trading Price. The NetScout Restricted Stock Units granted in accordance with this Section 7.3(b) shall be subject to the terms and conditions of the applicable stock plan maintained by NetScout pursuant to which they are granted and an award agreement provided by NetScout thereunder. If the RSU Cap applies, the reduction to the number of NetScout Restricted Stock Units awarded with respect to each Cancelled Danaher Equity Award will occur on a pro rata basis.

Section 7.4 Necessary Actions. The Parties shall, as soon as practicable after the date hereof and in no event later than the Business Day prior to the Closing Date, take all actions as may be necessary to implement the provisions of this Section 7, including adopting any necessary resolutions and making any required plan amendments and award modifications and obtaining any required consents from Newco Employees.

Section 7.5 Adjustments. Each Danaher Option and Danaher Restricted Stock Unit shall at all times remain subject to adjustment in accordance with the terms and conditions of the applicable Danaher Stock Plan and award agreement.

Section 7.6 SEC Registration. All shares of common stock of NetScout to be issued in respect of the NetScout Restricted Stock Units shall be subject to an effective registration statement on Form S-8 (or another appropriate form) maintained by NetScout. NetScout shall use reasonable best efforts to keep such registration statement effective (and maintain the current status of the prospectus required thereby) for so long as any such NetScout Restricted Stock Units remain outstanding.

Section 7.7 Compliance. In the event that the treatment specified in this Section 7 hereof does not comply with applicable Law or results in adverse Tax consequences to the Parties or any Newco Employees (or if it would be onerous, as determined by NetScout, to comply with applicable Law in order to provide such treatment), the Parties agree to negotiate in good faith alternative treatment that complies with applicable Law and does not result in adverse Tax consequences to the Parties or any Newco Employees.

**ARTICLE VIII**

**ADDITIONAL COMPENSATION MATTERS**

Section 8.1 Workers' Compensation Liabilities. Effective as of the Effective Time, NetScout shall assume all Liabilities (other than any Liabilities related to medical or other similar services performed, or compensation in respect of lost work for periods, prior to the Effective Time) for Newco Employees related to any and all workers compensation claims and coverage, whether arising under any law of any state, territory, or possession of the U.S. or the District of Columbia, and arising at or after the Effective Time, and NetScout shall be fully responsible for the administration of all such claims. If NetScout is unable to assume any such Liability or the administration of any such claim because of the operation of applicable state law or for any other reason, Danaher shall retain such Liabilities and

NetScout shall reimburse and otherwise fully indemnify Danaher for all such Liabilities, including the costs of administering the plans, programs or arrangements under which any such Liabilities have accrued or otherwise arisen. Danaher shall retain all Liabilities for workers compensation claims to the extent arising prior to the Effective Time.

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Section 8.2 Code Sections 162(m)/409A. Notwithstanding anything in this Agreement to the contrary, the Parties agree to negotiate in good faith regarding the need for any treatment different from that otherwise provided herein with respect to the payment of compensation to ensure that (i) a federal income Tax deduction for the payment of such compensation is not limited by reason of Section 162(m) of the Code, and (ii) the treatment of such compensation does not cause the imposition of a Tax under Section 409A of the Code. In no event, however, will any Party be liable to another in respect of any Taxes imposed under, or any other costs or Liabilities relating to, Section 409A of the Code or the denial of any Tax deduction by reason of Section 162(m) of the Code.

Section 8.3 Certain Payroll and Bonus Matters.

(a) Post-Distribution Payroll for Pre-Distribution Service. In the case of each Newco Employee, the employer of such individual as of immediately before the Closing Date shall be responsible for paying (and the W-2 and other payroll reporting obligations for) the payroll amount due to such individual for the payroll period (or portion thereof) ending on the Closing Date, unless otherwise agreed to by Danaher and NetScout.

(b) Annual Bonus Programs. As soon as practicable following the Effective Time, Danaher shall for each Newco Employee either (i) pay to NetScout or Newco who shall apply for the benefit of the relevant Newco Employee; or (ii) reimburse NetScout or Newco, in either case an amount equal to (A) for the fiscal year ending immediately prior to the Effective Time, any accrued but unpaid bonus for an Newco Employee and (B) for the fiscal year in which the Effective Time occurs, the product of (1) the annual cash incentive bonus (if any) the Newco Employee could have earned for the year during which the Effective Time occurs based on projected actual performance for the full year as determined by Danaher in good faith as of the Effective Time and (2) a fraction, the numerator of which is the number of days elapsed in the applicable bonus period through the Effective Time and the denominator of which is 365.

Section 8.4 Danaher Retention Plan. Danaher may, in its sole discretion, implement and adopt a cash retention plan for certain Newco Employees as set forth on Annex A hereto.

Section 8.5 Employee Stock Purchase Plan. Each Newco Employee (other than any Newco Employees outside of the United States or who are otherwise ineligible to participate under the applicable terms) will be immediately eligible to participate in the NetScout Systems, Inc. Amended and Restated 2011 Employee Stock Purchase Plan or a successor plan (the ESPP ) on the same basis as similarly situated NetScout employees as of the first offering date thereunder on or after the Closing Date.

## ARTICLE IX

### INDEMNIFICATION

Section 9.1 Indemnification by the Parties. Except as otherwise specifically set forth in any provision of this Agreement (including Section 2.1(c)), (i) Danaher shall indemnify, defend and hold harmless the NetScout Indemnitees and Newco Indemnitees from and against, and shall reimburse such Indemnitees with respect to, any and all Losses that result from, relate to or arise, whether prior to or following the Distribution, any breach by any member of the Danaher Group of any provision of this Agreement and (ii) NetScout and Newco shall, on a joint and several basis, indemnify, defend and hold harmless the Danaher Indemnitees from and against, and shall reimburse such Danaher Indemnitees with respect to, any and all Losses that proximately result from, relate to or arise, whether prior to, at or following the Separation Time, any breach by any member of the NetScout Group or Newco Group of any provision of this Agreement.

Section 9.2 Procedures for Indemnification.

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(a) An Indemnitee shall give the Indemnifying Party notice of any matter that an Indemnitee has determined has given or would reasonably be expected to give rise to a right of indemnification under this Agreement (other than a Third-Party Claim which shall be governed by Section 9.2(b)), within twenty (20) Business Days of such determination, stating the amount of the Loss claimed, if known, and method of computation thereof, and containing a reference to the provisions of this Agreement in respect of which such right of indemnification is claimed by such Indemnitee or arises; provided, that the failure to provide such notice shall not release the Indemnifying Party from any of its obligations except and solely to the extent the Indemnifying Party shall have been materially prejudiced as a result of such failure.

(b) If a claim or demand is made against an Indemnitee by any Person who is not a party to this Agreement or an Affiliate of a Party (a Third-Party Claim ) as to which such Indemnitee is or reasonably expects to be entitled to indemnification pursuant to this Agreement, such Indemnitee shall notify the Party that is or may be required pursuant to this Article IX to make such indemnification (the Indemnifying Party ) in writing, and in reasonable detail, of the Third-Party Claim promptly (and in any event within thirty (30) calendar days) after receipt by such Indemnitee of written notice of the Third-Party Claim; provided, that the failure to provide notice of any such Third-Party Claim pursuant to this sentence shall not release the Indemnifying Party from any of its obligations except and solely to the extent the Indemnifying Party shall have been materially prejudiced as a result of such failure (except that the Indemnifying Party or Parties shall not be liable for any expenses incurred by the Indemnitee in defending such Third-Party Claim during the period in which the Indemnitee failed to give such notice). Thereafter, the Indemnitee shall deliver to the Indemnifying Party, promptly (and in any event within ten (10) Business Days) after the Indemnitee's receipt thereof, copies of all notices and documents (including court papers) received by the Indemnitee relating to the Third-Party Claim.

(c) An Indemnifying Party shall be entitled (but shall not be required) to assume, control the defense of, and settle any Third-Party Claim, at such Indemnifying Party's own cost and expense and by such Indemnifying Party's own counsel, which counsel must be reasonably acceptable to the applicable Indemnitees, if it gives written notice of its intention to do so and agreement that the Indemnitee is entitled to indemnification under this Article IX to the applicable Indemnitees within thirty (30) calendar days of the receipt of notice from such Indemnitees of the Third-Party Claim. After such notice from an Indemnifying Party to an Indemnitee of its election to assume the defense of a Third-Party Claim, such Indemnitee shall have the right to employ separate counsel and to participate in (but not control) the defense, compromise or settlement thereof, at its own expense and, in any event, shall reasonably cooperate with the Indemnifying Party in such defense and make available to the Indemnifying Party all witnesses, pertinent and material Information and materials in such Indemnitee's possession or under such Indemnitee's control relating thereto as are reasonably required by the Indemnifying Party; provided, that such access shall not require the Indemnitee to disclose any information the disclosure of which would, in the reasonable judgment of the Indemnitee, result in the loss of any existing attorney-client privilege with respect to such information or violate any applicable Law.

(d) Notwithstanding anything to the contrary in this Section 9.2, in the event that (i) an Indemnifying Party elects not to assume responsibility for defending a Third-Party Claim, (ii) there exists a conflict of interest or potential conflict of interest between the Indemnifying Party and the applicable Indemnitee(s), (iii) any Third-Party Claim seeks an order, injunction or other equitable relief or relief for other than money damages against the Indemnitee, (iv) the Indemnifying Party shall not have employed counsel to represent the Indemnitee within thirty (30) calendar days after notice from the Indemnitee of such Third-Party Claim or (v) the party making such Third-Party Claim is a Governmental Authority with regulatory authority over the Indemnitee or any of its material assets, such Indemnitee(s) shall be entitled to assume the defense of such Third-Party Claim, at the Indemnifying Party's expense, with counsel of such Indemnitee's choosing. If the Indemnitee is conducting the defense against any such Third-Party Claim, the Indemnifying Party shall reasonably cooperate with the Indemnitee in such defense and make available to the Indemnitee all witnesses, pertinent and material Information and materials in such Indemnifying Party's possession

or under such Indemnifying Party's control relating thereto as are reasonably required by the Indemnitee pursuant to a joint defense agreement to be entered into by Indemnitee and the Indemnifying Party; provided, that such access shall not require the Indemnifying

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Party to disclose any information the disclosure of which would, in the reasonable judgment of the Indemnifying Party, result in the loss of any existing attorney-client privilege with respect to such information or violate any applicable Law.

(e) No Indemnitee may settle or compromise any Third-Party Claim without the consent of the Indemnifying Party, which consent shall not be unreasonably withheld, conditioned or delayed. If an Indemnifying Party has failed to assume the defense of the Third-Party Claim, it shall not be a defense to any obligation to pay any amount in respect of such Third-Party Claim that the Indemnifying Party was not consulted in the defense thereof, that such Indemnifying Party's views or opinions as to the conduct of such defense were not accepted or adopted, that such Indemnifying Party does not approve of the quality or manner of the defense thereof or that such Third-Party Claim was incurred by reason of a settlement rather than by a judgment or other determination of liability.

(f) In the case of a Third-Party Claim, no Indemnifying Party shall consent to entry of any judgment or enter into any settlement of the Third-Party Claim without the consent (not to be unreasonably withheld, conditioned or delayed) of the Indemnitee if the effect thereof is to permit any injunction, declaratory judgment, other order or other non-monetary relief to be entered, directly or indirectly, against any Indemnitee, does not release the Indemnitee from all liabilities and obligations with respect to such Third-Party Claim or includes an admission of guilt or liability on behalf of the Indemnitee.

(g) Except as otherwise provided in Section 11.3, the indemnification provisions of this Article IX shall be the sole and exclusive remedy of an Indemnitee for any monetary or compensatory damages or Losses resulting from any breach of this Agreement, and each Indemnitee expressly waives and relinquishes any and all rights, claims or remedies such Person may have with respect to the foregoing other than under this Article IX against any Indemnifying Party.

**Section 9.3 Indemnification Obligations Net of Proceeds Received from Third Parties.**

(a) Any Liability subject to indemnification or contribution pursuant to this Article IX will be net of any proceeds received by the Indemnitee from any third party (net of any deductible or retention amount or any other third party costs or expenses incurred by the Indemnifying Party in obtaining such recovery, including any increased insurance premiums) for indemnification for such Liability that actually reduce the amount of the Liability ( Third-Party Proceeds ). Accordingly, the amount which any Indemnifying Party is required to pay pursuant to this Article IX to any Indemnitee pursuant to this Article IX will be reduced by Third-Party Proceeds theretofore actually recovered by or on behalf of the Indemnitee in respect of the related Liability. If an Indemnitee receives a payment required by this Agreement from an Indemnifying Party in respect of any Liability (an Indemnity Payment ) and subsequently receives Third-Party Proceeds, then the Indemnitee will pay to the Indemnifying Party an amount equal to the excess of the Indemnity Payment received over the amount of the Indemnity Payment that would have been due if the Third-Party Proceeds had been received, realized or recovered before the Indemnity Payment was made.

(b) The Indemnitee shall use commercially reasonable efforts to seek to collect or recover any Third-Party Proceeds to which the Indemnitee is entitled in connection with any Liability for which the Indemnitee seeks contribution or indemnification pursuant to this Article IX; provided, that the Indemnitee's inability to collect or recover any such Third-Party Proceeds shall not limit the Indemnifying Party's obligations hereunder.

**Section 9.4 Certain Actions; Substitution; Subrogation.**

(a) Certain Actions. Notwithstanding anything to the contrary set forth in Section 9.2, Danaher may elect to have exclusive authority and control over the investigation, prosecution, defense and appeal of any and all Actions pending

at the Separation Time which otherwise would be subject to this Article IX and as to which a member of the Danaher Group (other than Newco and the Newco Subs) is also named as a target or defendant

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thereunder; provided, however, that (i) Danaher and Newco shall investigate, prosecute, defend and/or appeal such Actions in good faith, (ii) Danaher shall reasonably consult with Newco on a regular basis with respect to strategy and developments with respect to any such Action, (iii) Newco shall have the right to participate in (but not control) and employ separate counsel in connection with the defense, compromise or settlement of such Action at its own cost and expense and (iv) Danaher must obtain the written consent of Newco, such consent not to be unreasonably withheld, conditioned or delayed, to settle or compromise or consent to the entry of judgment with respect to such Action if such settlement, consent or judgment would require Newco (or any of its Affiliates) to admit any guilt or fault or incur any Liability, does not release such Party (or any of its Affiliates) completely in connection with such Action, or imposes injunctive or other equitable relief against Newco (or any of its Affiliates). After any such compromise, settlement, consent to entry of judgment or entry of judgment, Danaher and Newco shall agree upon a reasonable allocation to Newco of, and Newco shall be responsible for or receive, as the case may be, Newco's proportionate share of any such compromise, settlement, consent or judgment attributable to Newco, including its proportionate share of the reasonable costs and expenses associated with defending the same.

(b) Substitution. In the event of an Action that involves solely matters that are indemnifiable and in which the Indemnifying Party is not a named defendant, if either the Indemnitee or the Indemnifying Party so requests, the Parties shall use commercially reasonable efforts to substitute the Indemnifying Party for the named but not liable defendant to be removed from such Action and such defendants shall not be required to make any payments or contribution in connection therewith (regardless if such removal is successful or not). If such substitution or addition cannot be achieved for any reason or is not requested, the rights and obligations of the Parties regarding indemnification and the management of the defense of claims as set forth in this Article IX shall not be affected.

(c) Subrogation. In the event of payment by or on behalf of any Indemnifying Party to or on behalf of any Indemnitee in connection with any Third-Party Claim, such Indemnifying Party shall be subrogated to and shall stand in the place of such Indemnitee, in whole or in part based upon and in proportion to the amount of the Indemnitee's Liability that the Indemnifying Party has paid, as to any events or circumstances in respect of which such Indemnitee may have any right, defense or claim relating to such Third-Party Claim against any claimant or plaintiff asserting such Third-Party Claim or against any other Person. Such Indemnitee shall cooperate with such Indemnifying Party in a reasonable manner, and at the cost and expense of such Indemnifying Party, in prosecuting any subrogated right, defense or claim.

Section 9.5 Payments. Indemnification required by this Article IX shall be made by periodic payments of the amount thereof during the course of the investigation or defense, as and when bills are received or a Loss or Liability incurred.

**ARTICLE X**

**GENERAL AND ADMINISTRATIVE**

Section 10.1 Sharing of Information. To the extent permitted by applicable Law, Danaher, Newco and NetScout shall provide to each other and their respective agents and vendors all Information (other than attorney-client privileged Information or attorney work product) as the other may reasonably request to enable the requesting Party to defend or prosecute claims, administer efficiently and accurately each of its Benefit Arrangements (including in connection with audits or other proceedings maintained by any Governmental Authority), to timely and accurately comply with and report under Section 14 of the Securities Exchange Act of 1934, as amended and the Code, to determine the scope of, as well as fulfill, its obligations under this Agreement, and otherwise to comply with provisions of applicable Law. Danaher shall comply with all applicable data privacy Laws and requirements when collecting, processing, sharing and/or transferring information relating to an individual or which on its own or with other information may identify or be used to

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identify an individual. Such Information shall, to the extent reasonably practicable, be provided in the format and at the times and places requested, but in no event shall the Party providing such Information be obligated to incur any out-of-pocket expenses not reimbursed by the Party making such request or make such Information available outside of its normal business hours and premises. Any Information shared or exchanged pursuant to this Agreement shall be subject to the confidentiality requirements set forth in Article VII of the Distribution Agreement; provided, that, notwithstanding anything in such Article VII and without otherwise limiting the provisions of such Article VII, each of the Parties shall comply with any requirement of applicable Law in regard to the confidentiality of the Information (whether relating to employee records or otherwise) that is shared with another Party in accordance with this Section 10.1. The Parties also hereby agree to enter into any business associate agreements that may be required for the sharing of any Information pursuant to this Agreement to comply with the requirements of HIPAA. The Parties shall use their best efforts to secure Consents from employees, former employees and their respective dependents to the extent required by Law or otherwise to permit the Parties to share Information as contemplated in this Section 10.1.

Section 10.2 Reasonable Efforts/Cooperation. (i) Each of the Parties shall use reasonable best efforts (subject to, and in accordance with applicable Law) to take promptly, or cause to be taken promptly, all actions, and to do promptly, or cause to be done promptly, and to assist and cooperate with the other Parties in doing, all things reasonably necessary, proper or advisable to consummate and make effective the transactions contemplated by and carry out the intent and purposes of this Agreement, including adopting plans or plan amendments and using reasonable best efforts to obtain satisfaction of the conditions precedent to each Party's obligations hereunder within its reasonable control and to perform all covenants and agreements herein applicable to such Party and (ii) none of the Parties will, without the prior written consent of any other applicable Party, take any action which would reasonably be expected to prevent or materially impede, interfere with or delay the transactions contemplated by this Agreement. Without limiting the generality of the foregoing, where the cooperation of third parties, such as insurers or trustees, would be necessary in order for a Party to completely fulfill its obligations under this Agreement, such Party shall use reasonable best efforts to cause such third parties to provide such cooperation. Without limiting the foregoing provisions of this Section 10.2, each of the Parties shall cooperate fully on any issue relating to the transactions contemplated by this Agreement for which the other Party seeks a determination letter or private letter ruling from the IRS, an advisory opinion from the Department of Labor or any other filing, consent or approval with respect to or by a Governmental Authority.

Section 10.3 Employer Rights. Without limiting Section 2.8 and except as otherwise expressly provided in this Agreement (including Section 2.2), nothing in this Agreement shall prohibit any Party or any of their respective Affiliates from amending, modifying or terminating any of their respective Benefit Arrangements at any time within their sole discretion.

Section 10.4 Effect on Employment. Without limiting Section 2.3 or Section 2.4, except as expressly provided in this Agreement, the mere occurrence of the Separation, Distribution or Mergers shall not cause any employee to be deemed to have incurred a termination of employment which entitles such individual to the commencement of benefits under any of the Danaher Benefit Arrangements (provided that Newco Employees may become eligible for a distribution from the Danaher U.S. Savings Plan, a Danaher Non-U.S. Savings Plan or the Danaher NQDC Plan, in each case in accordance with the terms of the applicable plan).

Section 10.5 Consent of Third Parties. If any provision of this Agreement is dependent on the Consent of any third party and such Consent is withheld, the Parties hereto shall use their reasonable best efforts to implement the applicable provisions of this Agreement to the fullest extent practicable. If any provision of this Agreement cannot be implemented due to the failure of such third party to consent, the Parties hereto shall negotiate in good faith to implement the provision (as applicable) in a mutually satisfactory manner.

Section 10.6 Access to Employees. On and after the Effective Time, Danaher, Newco and NetScout shall, and shall cause each of their respective Affiliates to, use their reasonable efforts to make available to each other those of their employees who may reasonably be needed in order to defend or prosecute any legal or

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administrative Action (other than a legal action between or among any of the Parties) to which any employee, director or Benefit Arrangement of the Danaher Group, Newco Group or NetScout Group is a party and which relates in any way to their respective employment or to their respective Benefit Arrangements prior to the Effective Time. The Party to whom an employee is made available in accordance with this Section 10.6 shall pay or reimburse the other Party for all reasonable expenses which may be incurred by such employee in connection therewith, including all reasonable travel, lodging, and meal expenses.

Section 10.7 Beneficiary Designation/Release of Information/Right to Reimbursement. To the extent permitted by applicable Law and except as otherwise provided for in this Agreement, all beneficiary designations, authorizations for the release of Information and rights to reimbursement made by or relating to Newco Employees under Danaher Benefit Arrangements shall be transferred to and be in full force and effect under the corresponding NetScout Benefit Arrangements until such beneficiary designations, authorizations or rights are replaced or revoked by, or no longer apply, to the relevant Newco Employee.

**ARTICLE XI**

**MISCELLANEOUS**

Section 11.1 Entire Agreement. This Agreement, the Confidentiality Agreement, the Merger Agreement, the Distribution Agreement and the other Ancillary Agreements, including any related annexes, schedules and exhibits, as well as any other agreements and documents referred to herein and therein, shall together constitute the entire agreement between the Parties with respect to the subject matter hereof and thereof and shall supersede all prior negotiations, agreements and understandings of the Parties of any nature, whether oral or written, with respect to such subject matter.

Section 11.2 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, without giving effect to any choice or conflict of law provision or rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of Delaware.

Section 11.3 Specific Performance; Jurisdiction. The Parties understand and agree that the covenants and agreements on each of their parts herein contained are uniquely related to the desire of the Parties and their respective Affiliates to consummate the Transactions, that the Transactions are a unique business opportunity at a unique time for each of Danaher, NetScout and Newco and their respective Affiliates, and further agree that irreparable damage would occur in the event that any provision of this Agreement were not performed in accordance with its specific terms, and further agree that, although monetary damages may be available for the breach of such covenants and agreements, monetary damages would be an inadequate remedy therefor. It is accordingly agreed that, in addition to any other remedy that may be available to it, including monetary damages, each of the Parties (including NetScout for so long as the Merger Agreement has not been terminated in accordance with its terms) shall be entitled to an injunction or injunctions to prevent breaches of this Agreement and to enforce specifically the terms and provisions of this Agreement exclusively in the Delaware Court of Chancery and any state appellate court therefrom within the State of Delaware (or, if the Delaware Court of Chancery declines to accept jurisdiction over a particular matter, any state or federal court within the State of Delaware). Each of the Parties (including NetScout for so long as the Merger Agreement has not been terminated in accordance with its terms) further agrees that no Party shall be required to obtain, furnish or post any bond or similar instrument in connection with or as a condition to obtaining any remedy referred to in this Section 11.3 and each Party waives any objection to the imposition of such relief or any right it may have to require the obtaining, furnishing or posting of any such bond or similar instrument. In addition, each of the Parties (including NetScout for so long as the Merger Agreement has not been terminated in accordance with its terms) irrevocably

agrees that any legal action or proceeding with respect to this Agreement and the rights and obligations arising hereunder, or for recognition and enforcement of any judgment in respect of this Agreement and the rights and

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obligations arising hereunder brought by any Party or its successors or assigns, shall be brought and determined exclusively in the Delaware Court of Chancery and any state appellate court therefrom within the State of Delaware (or, if the Delaware Court of Chancery declines to accept jurisdiction over a particular matter, any state or federal court within the State of Delaware). Each of the Parties (including NetScout for so long as the Merger Agreement has not been terminated in accordance with its terms) hereby irrevocably submits with regard to any such action or proceeding for itself and in respect of its property, generally and unconditionally, to the personal jurisdiction of the aforesaid courts and agrees that it will not bring any action relating to this Agreement or any of the transactions contemplated by this Agreement in any court other than the aforesaid courts. Each of the Parties (including NetScout for so long as the Merger Agreement has not been terminated in accordance with its terms) hereby irrevocably waives, and agrees not to assert, by way of motion, as a defense, counterclaim or otherwise, in any action or proceeding with respect to this Agreement, (a) any claim that it is not personally subject to the jurisdiction of the above named courts for any reason other than the failure to serve in accordance with this Section 11.3, (b) any claim that it or its property is exempt or immune from jurisdiction of any such court or from any legal process commenced in such courts (whether through service of notice, attachment prior to judgment, attachment in aid of execution of judgment, execution of judgment or otherwise) and (c) to the fullest extent permitted by the applicable Law, any claim that (i) the suit, action or proceeding in such court is brought in an inconvenient forum, (ii) the venue of such suit, action or proceeding is improper or (iii) this Agreement, or the subject matter hereof, may not be enforced in or by such courts.

**Section 11.4 Waiver of Jury Trial. EACH OF THE PARTIES IRREVOCABLY WAIVES ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY ACTION ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.**

**Section 11.5 Notices.** All notices, requests, permissions, waivers and other communications hereunder shall be in writing and shall be deemed to have been duly given (a) five (5) Business Days following sending by registered or certified mail, postage prepaid, (b) when sent, if sent by facsimile, provided, that the facsimile transmission is promptly confirmed and any facsimile transmission received after 5:00 p.m. Eastern time shall be deemed received at 9:00 a.m. Eastern time on the following Business Day, (c) when delivered, if delivered personally to the intended recipient and (d) one (1) Business Day following sending by overnight delivery via a national courier service and, in each case, addressed to a Party at the following address for such Party:

- (a) If to NetScout or Newco:

NetScout Systems, Inc.

310 Littleton Road

Westford, Massachusetts 01886

Attn: Anil K. Singhal, CEO

Email: Anil.Singhal@netscout.com

Facsimile: (978) 614-4004

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

Cooley LLP

Edgar Filing: PHOENIX FOOTWEAR GROUP INC - Form 8-K/A

500 Boylston Street, 14th Floor  
Boston, MA 02116

Attn:

Miguel J. Vega

Barbara Borden

Facsimile:

(617) 937-2400

and with a copy to (which shall not constitute notice):

Baker & McKenzie LLP

660 Hansen Way

Palo Alto, CA 94304

Attn: Matthew Gemello

Facsimile: (650) 856-9299

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(b) If to Danaher:

c/o Danaher Corporation  
2200 Pennsylvania Ave., NW - Suite 800W  
Washington, DC 20037-1701

Attn:

Email:

Facsimile:

Attn:

Email:

Attila Bodi

attila.bodi@danaher.com

(202) 419-7676

Jonathan Schwarz

jonathan.schwarz@danaher.com