

Adams Extract 1—Before, Annotated

SECURITIES EXCHANGE AGREEMENT AND PLAN OF EXCHANGE¹

THIS SECURITIES EXCHANGE AGREEMENT AND PLAN OF EXCHANGE² (this “Agreement”)³ is entered into⁴ as of⁵ January 26, 2007, by and between⁶ Virgo Corporation⁷ (“Virgo”)⁸, a Nevada corporation, Astro Energy Limited (“Astro”), a Delaware corporation, and Galactrix, Inc. (“Galactrix”) a California corporation.

WITNESSETH:⁹

WHEREAS,¹⁰ Astro owns common stock of Galactrix, which stock constitutes 100% of the outstanding ownership or right to ownership of Galactrix¹¹ (the “Galactrix Shares”), there being no outstanding preferred shares, warrants, or options to purchase shares of Galactrix;¹² and

WHEREAS, Virgo desires to acquire from Astro, and Astro desires to convey to Virgo, all of the Galactrix Shares in exchange for an aggregate of¹³ 30,000,000 shares of common stock of Virgo¹⁴ (the “Virgo Shares”)¹⁵, par value \$0.001, whereby Galactrix will become a wholly-owned¹⁶ subsidiary of Virgo¹⁷.

¹ The title could be more succinct; see ¶ 2.3. (All paragraph-number references are to *A Manual of Style for Contract Drafting*.) State statutes might refer to “plan of exchange,” but that doesn’t mean contracts have to.

² Use all lowercase letters for the introductory clause’s reference to the type of agreement involved; see ¶ 2.8.

³ The defined term *Agreement* is unnecessary; and in references to “this agreement” the word *agreement* shouldn’t have a capital *A*; see ¶ 2.43.

⁴ Using *is dated* would be more concise.

⁵ Use an *as of* date only if one or more parties sign the agreement on a date other than the date stated in the introductory clause. Use of *as of* dates is a casual professional courtesy of little significance; see ¶ 2.17.

⁶ Use only *between*, regardless of the number of parties involved; see ¶ 2.22.

⁷ Stating party names in all capitals in the introductory clause helps them stand out; see ¶ 2.25.

⁸ It would be better to place the defined-term parenthetical after the jurisdiction reference; see ¶ 2.33.

⁹ This is an archaism; see ¶ 2.57.

¹⁰ This, too, is an archaism; see ¶ 2.58.

¹¹ This could be stated more simply. It would also make sense to state here, rather than in the body of the contract, that one thousand Galactrix shares are outstanding.

¹² It would be preferable to make the preceding clause a representation and put it in the body of the contract.

¹³ Omit *an aggregate of*.

¹⁴ It would be more concise to say “shares of Virgo common stock.”

¹⁵ It would be better to place the defined-term parenthetical after the statement of par value; see ¶ 6.23.

¹⁶ When a phrasal adjective begins with an adverb ending in *-ly*, the convention is to drop the hyphen; see *Garner’s Modern American Usage* 67 (2003).

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NOW, THEREFORE, in consideration of the premises and of the mutual representations, warranties and agreements set forth herein, the parties hereto¹⁸ agree as follows:¹⁹

ARTICLE I²⁰
DEFINITIONS AND INTERPRETATION²¹

1.1²² Defined Terms. Unless otherwise specifically²³ defined in this Agreement²⁴ or the context otherwise requires²⁵, capitalized terms used in this Agreement will have²⁶ the following meanings:

1.1.1²⁷ “Affiliate” or “Affiliated” means²⁸, in relation to any party, any company or other commercial entity or person which directly or indirectly controls, is controlled by or is under common control with such²⁹ party or any of such party’s directors, managers, supervisors or management personnel.

[Rest of Article I deleted]

¹⁷ This closing clause would read better as a separate sentence.

¹⁸ The *hereto* is unnecessary.

¹⁹ In addition to being a haven for archaisms, the traditional recital of consideration serves no purpose, as it cannot remedy a lack of consideration; see ¶ 2.64.

²⁰ Use Arabic rather than Roman numerals for article numbers; see ¶ 4.6.

²¹ Instead of using a comprehensive definition section and placing it at the front of the body of the contract, define “on site” (in other words, close to a provision that uses it) any defined term that cannot be understood without referring to its definition. Define other defined terms—those that can be more easily understood—in the definition section, but place it towards the end of the body of the contract. see ¶ 6.41–43.

²² Use a more efficient enumeration scheme; see chapter 4 of *MSCD* and <http://adamsdrafting.com/system/resources/software/>.

²³ This is rhetorical emphasis, and it’s unnecessary; see ¶ 13.37 and “More on Rhetorical Emphasis,” July 13, 2006, AdamsDrafting blog.

²⁴ The preceding conditional clause should be redundant—if a defined term is defined elsewhere, it shouldn’t also be defined in the definition section.

²⁵ It’s always a bad idea to use this phrase; see ““Unless the Context Otherwise Requires,”” June 5, 2007, AdamsDrafting blog.

²⁶ Instead use *have*; see ¶ 3.80.

²⁷ Don’t enumerate the autonomous definitions in a definition section; see ¶ 6.38.

²⁸ *Refers to* would be better; see ¶ 6.18.

²⁹ Don’t use *such* instead of the “pointing words” *the, this, that, there, or those*; see ¶ 9.49.

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ARTICLE II
EXCHANGE OF SHARES

2.1 Exchange. Upon and subject to³⁰ the terms of this Agreement, Virgo hereby agrees³¹ to issue, exchange and deliver the Virgo Shares³², which³³ consist of thirty million (30,000,000)³⁴ shares of common stock, to Astro, on the Closing Date, and Astro hereby agree to exchange, assign, transfer and set over the Galactrix Shares³⁵, which³⁶ consist of one thousand (1,000) common shares, to Virgo on the Closing Date. The Virgo Shares will be issued by Virgo³⁷ pursuant to³⁸ the securities transaction exemptions afforded by Section³⁹ 4(2) of the Securities Act. The shares will be⁴⁰ restricted securities each bearing a restrictive legend.

³⁰ The *upon* is extraneous.

³¹ Use *shall* to express an obligation imposed on the subject of a sentence; see ¶ 3.16. Because in the lead-in the parties state that they agree to what follows, it's unnecessary to state in the body of the contract that any party agrees to any given provision; see ¶ 3.31.

³² To be clearer and avoid redundant synonyms, use instead *issue the Virgo Shares to ... in exchange for*; see ¶ 13.10.

³³ Don't use nonrestrictive clauses; see “‘That’ and ‘Which,’” Feb. 19, 2007, AdamsDrafting blog. Put this information instead in the recitals or in a representation.

³⁴ Other than in sensitive contexts, don't use words and numerals to express numbers; see ¶ 10.1.

³⁵ To be clearer and avoid redundant synonyms, use instead *transfer the Galactrix Shares to ... in exchange for*.

³⁶ Don't use nonrestrictive clauses; see “‘That’ and ‘Which,’” Feb. 19, 2007, AdamsDrafting blog. Put this information instead in the recitals or in a representation.

³⁷ Using *will* makes this seem like language of policy—that it will happen automatically. It would be better to have Astro acknowledge that the parties intend for the sale to fall under the section 4(2) exemption. This acknowledgement would fit better in a separate section entitled “Restricted Securities” that addresses all matters relating to issuance of restricted securities.

³⁸ Don't use the lawyerism *pursuant to*; see ¶ 13.21.

³⁹ Don't use a capital *S* in *section*; see ¶ 13.33.

⁴⁰ Again, using *will* makes this seem like language of policy. It would be better to phrase this too as an acknowledgement by Astro and put it in a section entitled “Restricted Securities.”

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6.2 Indemnity of Virgo.⁴¹ Astro and Galactrix, jointly and severally, agree to⁴² defend⁴³, indemnify and hold harmless⁴⁴ Virgo⁴⁵ from and against, and to reimburse Virgo with respect to⁴⁶, all liabilities, losses, costs and expenses⁴⁷, including, without limitation,⁴⁸ reasonable attorneys' fees and disbursements⁴⁹ ("Virgo Losses")⁵⁰, asserted against or incurred by Virgo by reason of⁵¹, arising out of, or in connection with⁵² any material⁵³ breach⁵⁴ of any representation or warranty⁵⁵ contained in this Agreement⁵⁶ and made by Astro and Galactrix⁵⁷ or in any document or certificate delivered by Astro and Galactrix pursuant to⁵⁸ the provisions of this Agreement or in connection with the transactions contemplated thereby⁵⁹ ⁶⁰; provided, however,⁶¹ that Astro will only be required to

⁴¹ This section and the one following would be easier to read if they were divided into subsections.

⁴² Use *shall* to express an obligation imposed on the subject of a sentence; see ¶ 3.16. Because in the lead-in the parties state that they agree to what follows, it's unnecessary to state in the body of the contract that any party agrees to any given provision; see ¶ 3.31. (All paragraph-number references are to *A Manual of Style for Contract Drafting*.)

⁴³ Omit—defending against claims is addressed in the section dealing with indemnification procedures.

⁴⁴ Use just *indemnify*; see related AdamsDrafting blog posts dated Oct. 21, 2006, Jan. 19, 2007, and Apr. 8, 2007.

⁴⁵ It's commonplace to include affiliates, directors, officers, and others within the scope of indemnification provisions.

⁴⁶ Redundant—indemnifying against losses encompasses reimbursement.

⁴⁷ Use just *expenses* rather than *costs and expenses*; see “Costs and Expenses,” June 19, 2007, AdamsDrafting blog.

⁴⁸ Omit *without limitation*—the marginal protection it affords is outweighed by its nuisance value; see “Including Without Limitation,” Apr. 2, 2007, AdamsDrafting blog.

⁴⁹ Use *expenses* instead of *disbursements*—don't use different words to convey the same meaning; see ¶ 1.2.

⁵⁰ The defined-term parenthetical should go at the end of the definition; see ¶ 6.23.

⁵¹ Delete *by reason of*—it's redundant.

⁵² You could safely omit *in connection with*.

⁵³ *Material* is problematic, in that it's both vague and ambiguous—see “Rethinking ‘Material’ and ‘Material Adverse Change,’” Feb. 26, 2007, AdamsDrafting blog. And it shouldn't feature in indemnification provisions. Instead, handle qualifications relating to significance by means of suitably qualified representations and by using a basket in the indemnification provisions.

⁵⁴ One breaches an obligation, but not a representation. Instead, a representation, like any statement of fact, is either accurate or inaccurate; see ¶ 3.113.

⁵⁵ Use just *representations*; see “Revisiting ‘Representations and Warranties,’” June 28, 2006, AdamsDrafting blog.

⁵⁶ In references to “this agreement,” the word *agreement* shouldn't have a capital *A*; see ¶ 2.43.

⁵⁷ Say instead “any Astro and Galactrix representation in this agreement.”

⁵⁸ Don't use the lawyerism *pursuant to*; see ¶ 13.21.

⁵⁹ It's not clear that any such document would contain any representations.

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defend, indemnify and hold harmless Virgo for the representations and warranties made by Astro⁶². Notwithstanding the foregoing provisions of this Section 6.2,⁶³ no claim for indemnification will be made by Virgo against Astro and Galatrix⁶⁴ unless and until⁶⁵ the aggregate Virgo Losses will exceed⁶⁶ \$25,000^{67 68 69}.

6.3 Indemnification Procedure. A party (an “Indemnified Party”)^{70 71} seeking indemnification will give⁷² prompt notice to the other party (the “Indemnifying Party”) of any claim for indemnification arising under this Article VI.⁷³ The Indemnifying Party will have the right to⁷⁴ assume and to control⁷⁵ the defense of any such claim with counsel reasonably acceptable to such⁷⁶ Indemnified Party, at the Indemnifying Party’s own cost and

⁶⁰ What about breach by Astro or Galatrix of any of their obligations under this agreement?

⁶¹ *Provided, however, that* is an imprecise way to signal the relationship between two adjoined contract provisions; see ¶ 9.40. In this case, *except that* would be preferable.

⁶² This exception has the effect of cutting a big chunk out of the preceding provision. It might be clearer to structure that provision and the exception as two separate provisions.

⁶³ There’s always a clearer and more succinct alternative to *notwithstanding*. Here, it could safely be omitted.

⁶⁴ Instead of language of policy (as suggested by use of *will*) or an obligation imposed on Virgo, this should be language of prohibition using *is not entitled to ... until*; see ¶ 3.73.

⁶⁵ Use just *until*; see ¶ 13.10.

⁶⁶ Use the simple present tense in conditional clauses; see ¶ 3.89.

⁶⁷ It’s not clear whether this is a “threshold” or “deductible” basket.

⁶⁸ Because Astro and Galatrix are jointly and severally liable for some indemnification obligations and Galatrix is solely liable for others, it would be awkward to have one basket apply to both sets of indemnification obligations.

⁶⁹ Because section 6.1 (“Indemnity of Astro”) includes an identical basket provision, the basket provisions in sections 6.1 and 6.2 could be replaced with one generic basket provision.

⁷⁰ It can be more economical to use as defined terms *Indemnitor* and *Indemnitee* rather than *Indemnifying Party* and *Indemnified Party*. Using paired defined terms that differ only in one syllable is not ideal, but in this case no easy alternative presents itself; see ¶ 2.38.

⁷¹ The defined-term parenthetical should go at the end of the definition; see ¶ 6.23.

⁷² Use of *will* suggests that this is language of policy, which it definitely isn’t. It would be preferable to state it as a condition and to make clear what the consequences of delay are. Stating it as an obligation would be problematic. Regarding how conditions differ from language of obligation, see ¶ 3.101 and “How a Court Determines Whether Something Is an Obligation or a Condition,” Jan. 4, 2007, AdamsDrafting blog.

⁷³ This section relates to non-party claims, but the first sentence would seem to pertain to party claims for indemnification, something that should be addressed in a separate section.

⁷⁴ Use instead *may*; see ¶ 3.54.

⁷⁵ *Control* is sufficient.

⁷⁶ Don’t use *such* instead of the “pointing words” *the, this, that, there, or those*; see ¶ 9.49.

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expense⁷⁷, including the cost and expense⁷⁸ of reasonable attorneys' fees and disbursements in connection with such defense, in which event⁷⁹ the Indemnifying Party will not be obligated to pay the fees and disbursements of separate counsel for such in such action⁸⁰. In the event, however, that⁸¹ such⁷⁶ Indemnified Party's legal counsel will determine⁸² that defenses may be⁸³ available to such Indemnified Party that are different from or in addition to those available to the Indemnifying Party, in that there could reasonably be expected to be a conflict of interest if such Indemnifying Party and the Indemnified Party have common counsel in any such proceeding⁸⁴, or if the Indemnified Party has not assumed the defense of the action or proceedings⁸⁵, then such Indemnifying Party may employ separate counsel to represent or defend⁸⁶ such Indemnified Party, and the Indemnifying Party will pay⁸⁷ the reasonable fees and disbursements⁸⁸ of counsel for such Indemnified Party. No settlement of any such claim or payment in connection with any such settlement will be made⁸⁹ without the prior written consent of the Indemnifying Party which consent will not be unreasonably withheld^{90 91}.

⁷⁷ It would be better to address expenses in a separate sentence and to do so by more clearly imposing an obligation on the Indemnifying Party.

⁷⁸ In this context, *cost and expense* is redundant.

⁷⁹ *In which event* doesn't accurately reflect the relationship between the two provisions.

⁸⁰ "For such in such action" is awkward.

⁸¹ *In the event that* is a wordy lawyerism; see ¶ 13.21. Generally *if* is a better choice, but in this case it would be best to overhaul the entire provision.

⁸² Use the simple present tense in conditional clauses; see ¶ 3.89.

⁸³ Use instead *are*; see ¶ 3.59.

⁸⁴ Wordy and awkward.

⁸⁵ Either *action* or *proceeding* would be sufficient.

⁸⁶ Use just *defend*, and make it clear that it's with respect to that claim.

⁸⁷ Use *shall* to express an obligation imposed on the subject of a sentence; see ¶ 3.16.

⁸⁸ Use *expenses* instead of *disbursements*—don't use different words to convey the same meaning; see ¶ 1.2.

⁸⁹ Use the active voice and *shall not* to make it clear that this is language of prohibition; see ¶ 3.70.

⁹⁰ Use the active voice and *shall not* to make it clear that this is language of prohibition; see ¶ 3.70.

⁹¹ These provisions don't address exclusivity and party claims (as opposed to non-party claims). A subsequent article addresses "survival" of representations, but it would be clearer to address that topic in this article in a section entitled "Time Limitations"; see "Survival," July 6, 2006, AdamsDrafting blog.