



Protecting
the Buyer in a
Business Sale



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Martin J Pezzner has a wealth of experience as a practicing attorney for over twenty-nine years. After graduating Wilkes College with a Bachelor of Science in accounting, he was employed by the Internal Revenue Service in Philadelphia, PA as a Tax Revenue Agent (Field Agent) for five years.

He also worked for one year in the Philadelphia IRS Appeals Office. While employed by the IRS, he became a CPA (1985) in the Commonwealth of Pennsylvania.

Mr. Pezzner received his Juris Doctorate Degree from the University of Dayton School of Law in 1989.



Attorneys at Law

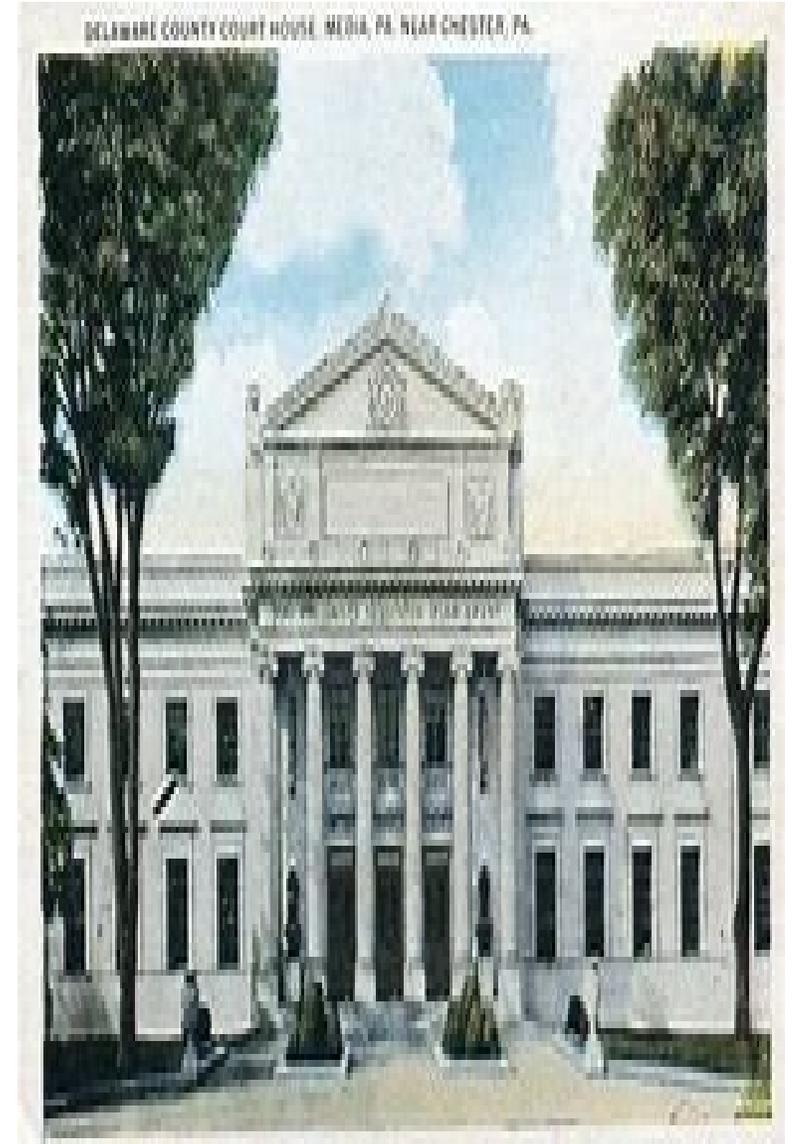
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Protecting
the Buyer in a
Business Sale

Overview

Protecting the Buyer

- In order to protect the Buyer you must first understand the Buyer's objectives in acquiring the Business at hand



Buyer
Objectives are
always to...

Get what you paid
for ...

...without
unanticipated
post-closing cost
or expense or
issues



Different Buyers Different Objectives

Financial Buyer or Strategic Buyer

Strategic Buyer

A strategic buyer is typically after horizontal or vertical expansions, looking for strategic synergies that will improve their operations.

Their primary objective is to identify a business whose products and/or services can be quickly absorbed into their own or existing operations.

Financial Buyer

A financial buyer, on the other hand, is interested in making an investment in a company and realizing considerable returns from it.

Typical financial buyers are Private Equity Firms that use leverage to try and realize large financial returns.

So the main task of a financial buyer is to identify companies with excellent growth potential and, thereby, make good their investment within a period of five to seven years.

Buyer of a Restaurant

- Goodwill
- Name
- Location
- Assets of the On-going Business
- Liquor License
- Franchise



Buyer of a Service Business



- Client List
- Personal Goodwill
- Purchase Price may be based on future income

Buyer of a Business Based on Product Sales and Service Contracts

- Source of Products
- Supplier Agreement
- Client List
- Transferability of Service Contracts
- Stock Agreement
- Key Employees



Product Manufacturer

- Manufacturing facility or source
- Product Protections (patents, trademarks, copyrights)
- Warranty Agreements
- “Product Line” liability
- Key Employees
- Union Agreements



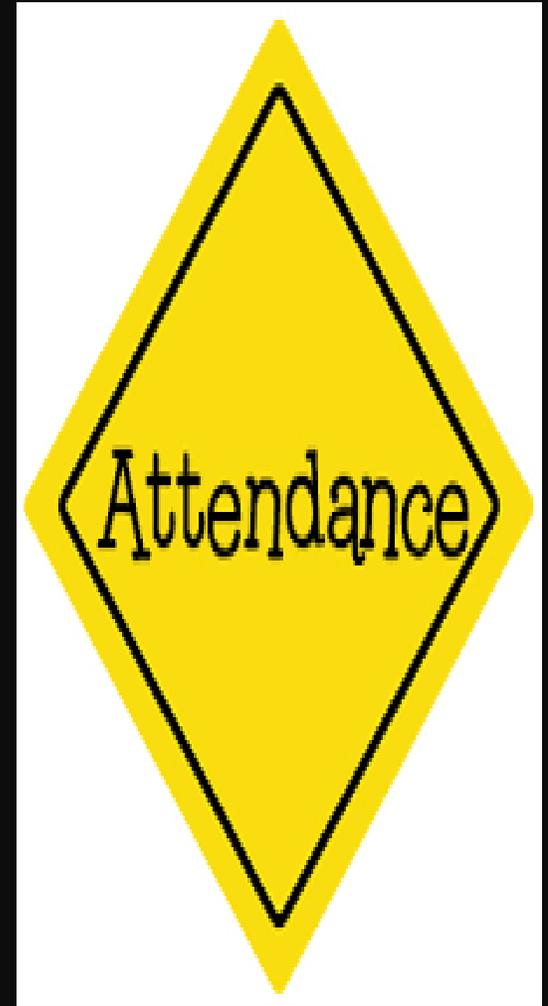
Protections

Protections

- › Form of the Buyer
- › Form of the Agreement
- › Due Diligence
- › Structure of the Purchase Price
- › Reps and Warranties
- › Indemnity/What stands behind the Indemnity
- › Post Closing Covenants and Agreements



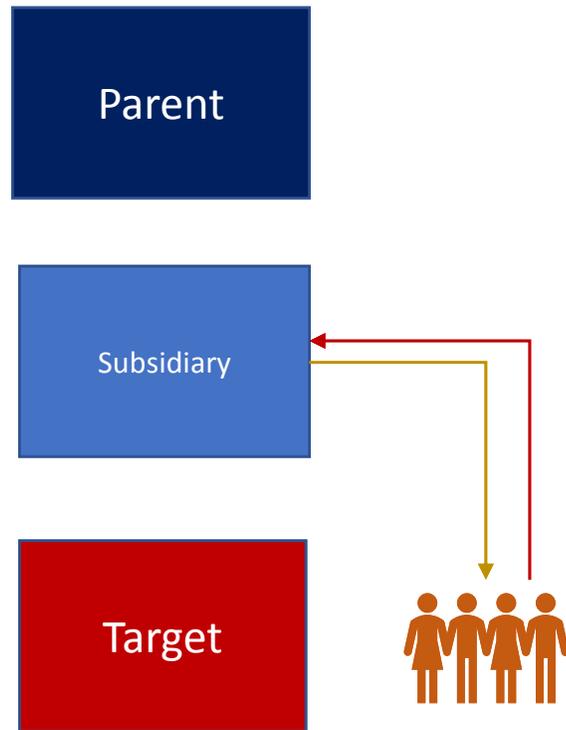
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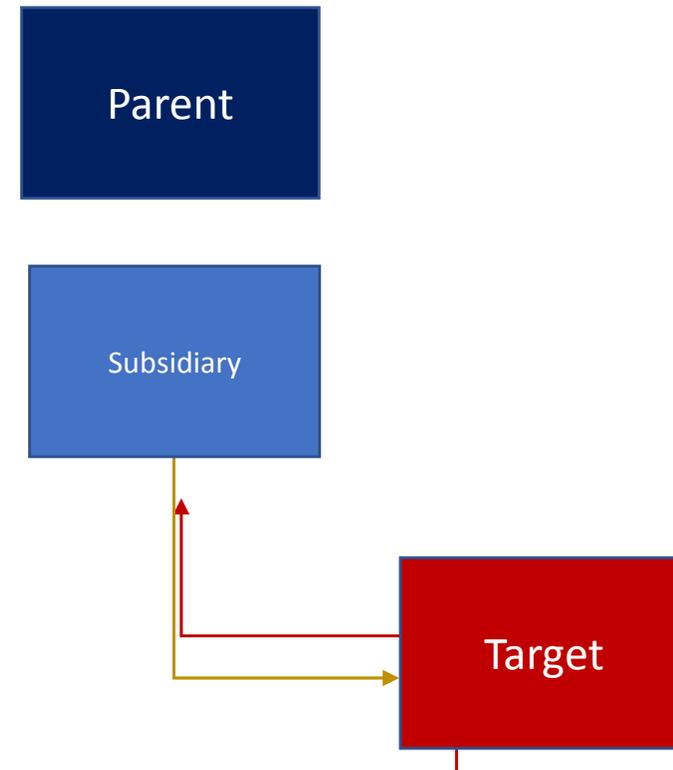
Form of the Buyer

Using Subsidiaries and Single Purpose Entities

Stock Sale



Asset Sale



Form of the Agreement



Form of the Deal - *Stock Sale* *v. Asset Sale*

Seller prefer a Stock sale

- > Lower tax
- > Liabilities are generally assumed

Buyer will prefer an Asset transaction

- > Receives a step-up in basis
- > Can pick and choose
- > More insulated from the liabilities of the Seller.

Buyer Focus – Stock Purchase



- Acquire good title to the Stock
- Also acquire fair and marketable title to Assets free and clear of liens and liabilities
- Liability exposure is greater
- Due Diligence should be more comprehensive
- Reps and Warranties provisions more expansive

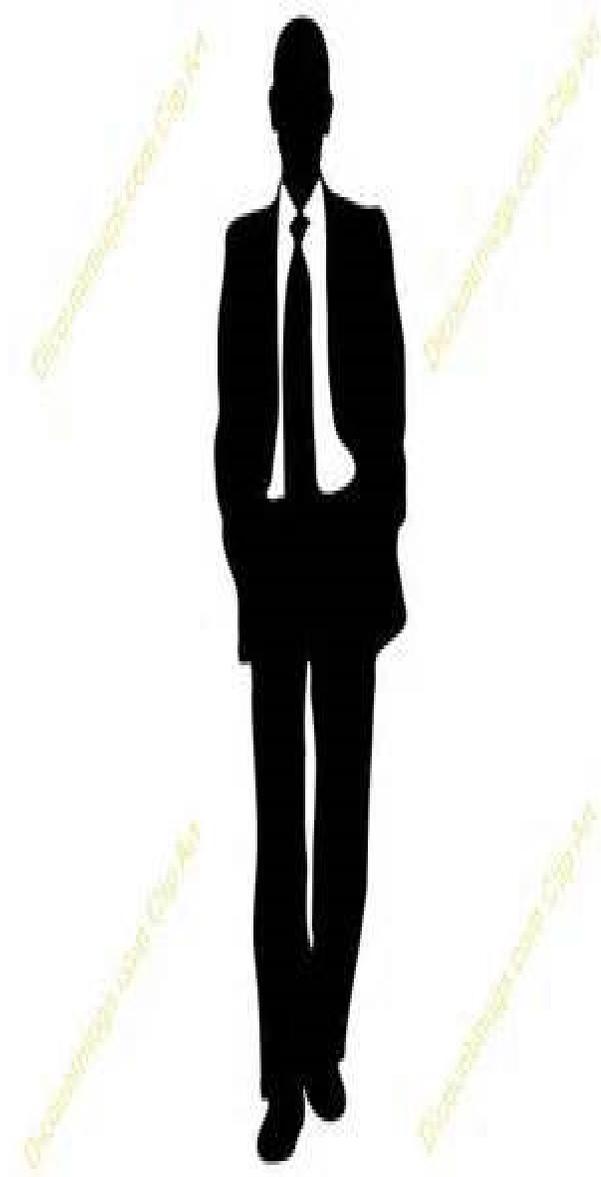
Buyer Focus – Assets Purchase

- Assets to be acquired
- Acquire fair and marketable title to Assets free and clear of liens and liabilities
- Liability exposure still exists but is less than in a Stock Purchase
- Due Diligence should be focused on title and suitability of purchase
- Reps and Warranties provisions can be more streamlined



Buyer's Liability Exposure

- Assets sale transactions are favored by Buyers because of the reduced exposure to the liabilities of the Seller
- There are situations where the Buyer may have liability exposure





- Express or Implied Assumption
- De Facto Merger
- Mere Continuation
- Fraud
- Inadequate Consideration
- The “Product Line” Exception
- Duty to Warn
- Environmental Torts
- Labor Law Liability
- Employee Benefits
- Bulk Sales Compliance
- FIRPTA

Successor Liability for the Seller's Environmental Torts in Asset Acquisitions

Section 107(a)(2) of CERCLA extends liability for response costs to ...

“any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.”



Successor Liability for the Seller's Environmental Torts in Asset Acquisitions

Courts are demonstrating tendency to apply the *continuity of enterprise exception* in the environmental context.



Environmental Representations:

4.13, Seller hereby represents and warrants that:

(a) Condition of Property: As of the Closing, except in compliance with Environmental Laws in a manner that could not reasonably be

expected to subject the Seller to liability, no Hazardous Materials are present on any Business Facility and, to the knowledge of Seller after reasonable

inquiry, no Hazardous Materials are present on any Business Facility currently owned, operated, occupied, controlled or leased by Seller or were present on any other Business Facility at the time it ceased to be owned, operated, occupied, controlled or leased by Seller. Except as set forth in Schedule 4.13, there are no underground storage tanks, asbestos which is friable or likely to become friable or PCBs present on any Business Facility currently owned, operated, occupied, controlled or leased by Seller or as a consequence of the acts of

Seller or its agents.

(b) Hazardous Materials Activities: Seller has conducted all Hazardous Material Activities relating to the Business in compliance in all

material respects with all applicable Environmental Laws. To the knowledge of Seller after reasonable inquiry, the Hazardous Materials Activities of Seller prior to the Closing have not resulted in the exposure of any person to a Hazardous material in a manner which has or will cause an adverse health effect to said person.

(c) Permits: Schedule 4.13 accurately describes all of the Environmental Permits currently held by the Seller and relating to the Business

and the Environmental Permits listed on Schedule 4.13 are all of the Environmental Permits necessary for the continued conduct of any Hazardous Material Activity of Seller relating to the Business as such activities are currently being conducted, except for

Successor Liability Under the Labor Laws

- **IN AN ASSET PURCHASE, THE STATUS OF COLLECTIVE BARGAINING AGREEMENTS WILL DEPEND UPON WHETHER THE BUYER IS A *"SUCCESSOR,"* BASED ON ...**
- ***THE CONTINUITY OF THE BUSINESS AND WORK FORCE, OR***
- ***PROVISIONS OF THE SELLER'S COLLECTIVE BARGAINING AGREEMENT.***



Successor Liability Under the Labor Laws

WHEN A BUYER USES:

- SUBSTANTIALLY THE SAME FACILITIES AND WORK FORCE
- TO PRODUCE THE SAME BASIC PRODUCTS OR TO PROVIDE THE SAME BASIC SERVICES
- FOR ESSENTIALLY THE SAME CUSTOMERS
- IN THE SAME GEOGRAPHIC AREA

...THE BUYER MAY BE REGARDED AS A SUCCESSOR."



Successor Liability Under the Labor Laws

THE KEY FACTOR IN DETERMINING
WHETHER A BUYER HAS A DUTY TO
BARGAIN IS ...

***...WHETHER A MAJORITY OF THE
EMPLOYEES HIRED BY THE BUYER
WERE PREVIOUSLY REPRESENTED
BY THE UNION.***



LABOR MATTERS

4.18. There are no collective bargaining agreements in effect between Seller and labor unions or organizations representing any employees of the Business. Except as and to the extent set forth in Schedule 4.18, (i) to Seller's knowledge, Seller is in compliance with all federal, state and local laws respecting employment and employment practices, terms and conditions of employment and wages and hours, and is not engaged in any unfair labor practice; (ii) there is no unfair labor practice complaint against Seller pending or, to the knowledge of Seller, threatened before the National Labor Relations Board or the United States Department of Labor; (iii) there is no labor strike, dispute, slowdown or stoppage in progress or, to the knowledge of Seller, threatened against or involving Seller; (iv) no question concerning representation has been raised or, to the knowledge of Seller, is threatened respecting the employees of the Business; (v) no grievance or arbitration proceeding is pending and, to the knowledge of Seller, no claim therefor exists; (vi) no private agreement restricts Seller from relocating, closing or terminating any of its operations or facilities; and (vii) Seller has not in the past three years experienced any labor strike, dispute, slowdown, stoppage or other labor difficulty.

ERISA

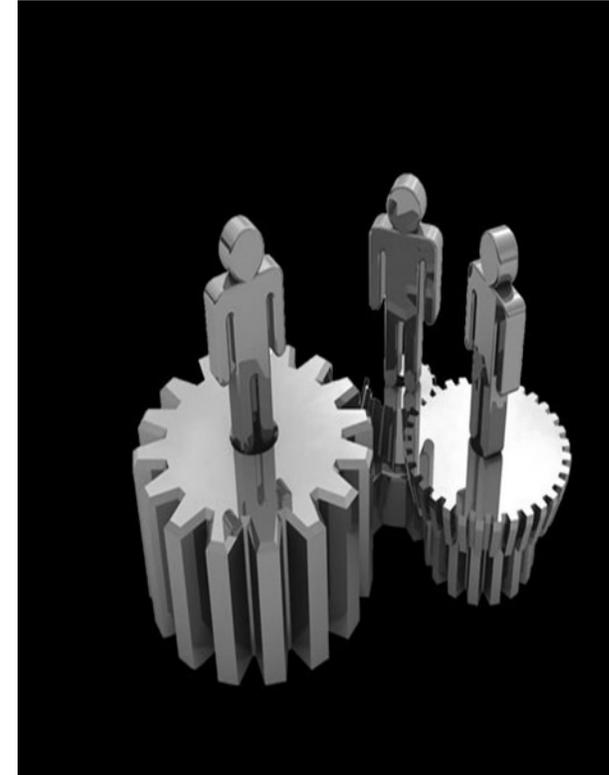


- > In certain situations, the assets purchased by the buyer can be reached to satisfy liabilities of the seller with respect to its employee benefit plans.
- > These risks are usually limited to defined benefit plans and multiemployer plans.

ERISA

The risk of a lien attaching to the acquired assets is greater in the following factual situation:

- The assets are being purchased from a corporation, which distributes the proceeds to individual shareholders;
- And may not otherwise have the funds to satisfy any liability imposed by the IRS or the PBGC; and
- The seller maintains an underfunded pension plan.



Employee Benefit Plans

4.13. Employee Benefit Plans; Employee Relations. Exhibit 4.13 sets forth a true and complete list of all pension, profit-sharing, stock bonus, stock option, employment or severance agreements, deferred compensation plans, health, life, accident or disability plans, and any other agreement, arrangement, commitment or other employee benefit plan (including, but not limited to, “employee benefit plans” within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended and the regulations promulgated thereunder (“ERISA”)) (the “Benefit Plans”) maintained with respect to Seller, or with respect to which Seller has, or may in the future have, any liability with respect to any current or former employee of the Seller or their beneficiaries. No Benefit Plan is a “multiple employer plan,” within the meaning of ERISA, or a “multiemployer plan,” as defined in Section 4001(a)(3) of ERISA, and Seller has not made any contributions to or participated in any multiple employee plan or multiemployer plan since .\

Cobra Obligations

- > The Buyer could be responsible for COBRA
- > When the Buyer is the *“successor employer”*

Bulk Sales Compliance

In some states failure to comply with certain under the Bulk Sales requirements including notification of creditors can result in liability to the Buyer.



Bulk Sales Compliance

The Bulk Sales Law requires that the Pennsylvania Department of Revenue and the Pennsylvania Department of Labor & Industry be notified in writing 10 days prior to the transfer of 51 percent or more of any real estate.

Specifically, the Bulk Sales Law applies to

- (i) All taxpayers subject to Sales and Use Tax;
- (ii) All taxpayers subject to Employer Withholding Tax; and
- (iii) All corporations, joint-stock associations, limited partnerships or companies (including limited liability companies, partnerships and sole proprietorships) subject to any of the taxes administered and enforced by the Pennsylvania Department of Revenue.



FIRPTA

- › THE DISPOSITION OF A U.S. REAL PROPERTY INTEREST BY A FOREIGN PERSON (THE TRANSFEROR) IS SUBJECT TO THE FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT OF 1980 (FIRPTA) INCOME TAX WITHHOLDING.
- › FIRPTA AUTHORIZED THE UNITED STATES TO TAX FOREIGN PERSONS ON DISPOSITIONS OF U.S. REAL PROPERTY INTERESTS.
- › PERSONS PURCHASING U.S. REAL PROPERTY INTERESTS FROM FOREIGN PERSONS ARE REQUIRED TO WITHHOLD 10 PERCENT OF THE AMOUNT REALIZED ON THE DISPOSITION.



FIRPTA

- › THE TRANSFEREE/BUYER MUST DETERMINE OUT IF THE TRANSFEROR IS A FOREIGN PERSON.
- › IF THE TRANSFEROR IS A FOREIGN PERSON AND THE BUYER FAILS TO WITHHOLD, THE BUYER MAY BE HELD LIABLE FOR THE TAX.



FIRPTA.

Target shall, prior to the Closing Date, provide Acquiror with a properly executed Foreign Investment and Real Property Tax Act of 1980 ("FIRPTA") Notification Letter, which shall state that shares of capital stock of Target do not constitute "United States real property interests" under Section 897(c) of the Code, for purposes of satisfying Acquiror's obligations under Treasury Regulation Section 1.1445-2(c)(3). In addition, simultaneously with delivery of such Notification Letter, Target shall have provided to Acquiror, as agent for Target, a form of notice to the Internal Revenue Service in accordance with the requirements of Treasury Regulation Section 1.897-2(h)(2) along with written authorization for Acquiror to deliver such notice form to the Internal Revenue Service on behalf of Target upon the Closing of the Merger.

State Tax

Some states impose by statute successor liability for certain taxes, such as sales taxes, payable by the target in an asset acquisition...



No Brokers

Neither Seller nor the Company has entered into any contract, arrangement or understanding with any person or firm which may result in the obligation of Buyer or the Company to pay any finder's fees, brokerage or agent's commissions, or other like payments in connection with the negotiations leading to this Agreement or the consummation of the transactions contemplated hereby, and neither Seller nor the Company is aware of any claim or basis for any claim for payment of any finder's fees, brokerage or agent's commissions, or other like payments in connection with the negotiations leading to this Agreement or the consummation of the transactions contemplated hereby

Due Diligence



Due Diligence

- > Organization and Good Standing
 - > Financial Information
 - > Physical Assets
 - > Real Estate
 - > Intellectual Property
- > Employee and Employee Benefits

Due Diligence

- > Licenses and Permits
- > Environmental Issues
- > Taxes
- > Material Contracts
- > Product or Services Lines
- > Customer Information
- > Litigation
- > Professionals



Quality of Earnings Audit

In a quality of earnings, the focus is on the economic earnings vs. the balance sheet serving as the focus in an audit

A quality of earnings is a consulting engagement, not an attest service, providing flexibility in the approach and scope; and the materiality is much lower in a quality of earnings study than an audit.





Quality of Earnings Audit

In order for an earnings measure to be considered of high quality, it must reflect free cash flow and it must be sustainable.

Earnings that are “tied up” in accounts receivable, for example, do not have much value because, despite being recognized, they have not yet been realized.

In the same vein, earnings that are not sustainable because of understated expenses due to an unfilled executive position, as an example, would overstate sustainable earnings.

Conditions Precedent

What does the Buyer need to happen...



- Financing
- Due Diligence/Inspection
- Contracts transferred
- Secure the location
- Transfer of specific strategic asset (e.g., liquor license)
- Retention of a Key Employee
- Condition and suitability of the assets acquired
- Third Party consent (e.g., franchise transfer)

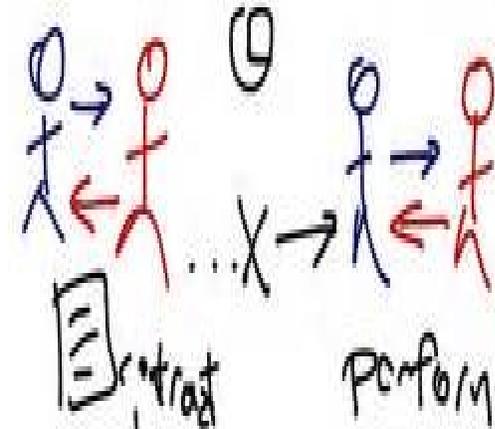
CONDITIONS PRECEDENT
TO THE OBLIGATIONS OF THE BUYER

> BEFORE THE BUYER IS FINALLY LEGALLY BOUND TO COMPLETE THE TRANSACTIONS SHOULD BE CONDITION ON THE FOLLOWING:

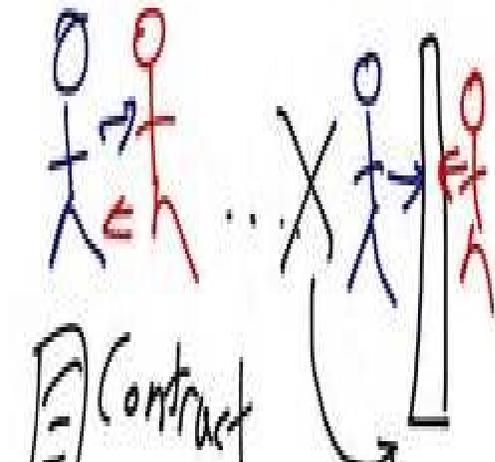
> ALL REQUIRED DOCUMENTS HAVE BEEN DELIVERED;

> THE REPRESENTATION OF THE BUYER ACCURATE AS OF THE CLOSING DATE;

precedent $X = \text{event}$

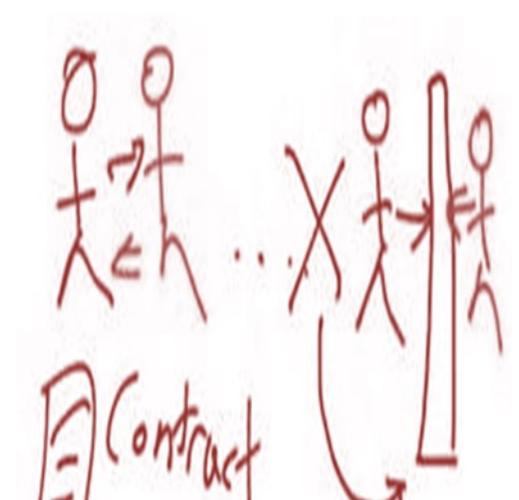
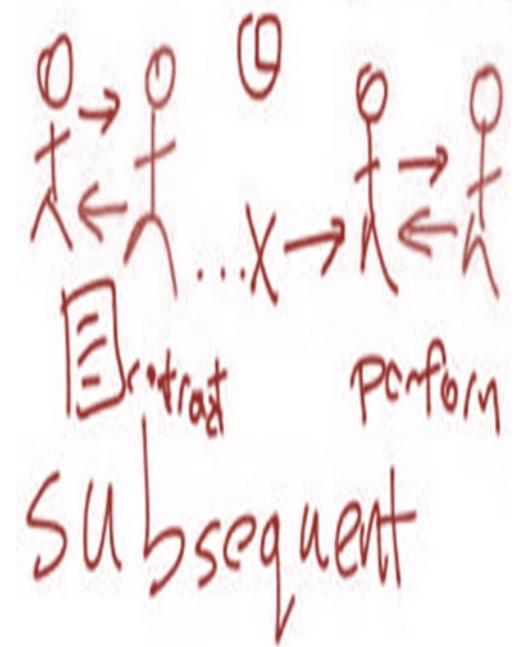


Subsequent



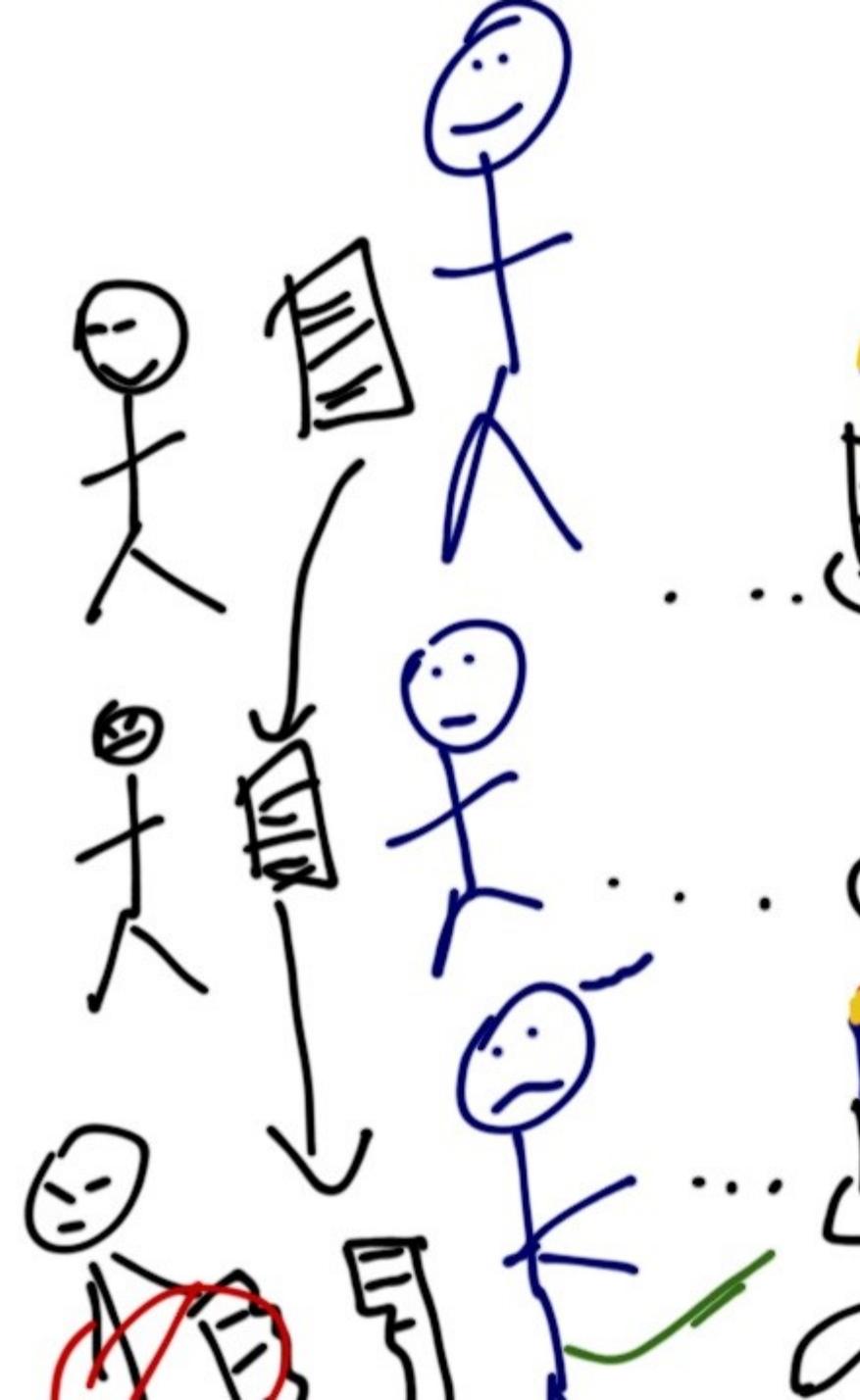
- > ALL COVENANTS HAVE BEEN PERFORMED BY THE SELLER;
- > ALL REQUIRED CONSENTS, INCLUDING CORPORATE AND GOVERNMENTAL CONSENTS HAVE BEEN COMPLIED OBTAINED;
- > THERE IS NOTHING THAT WOULD LEGALLY PROHIBIT THE SALE FROM BEING COMPLETED AS CONTEMPLATED BY THE PARTIES.

precedent | X = event



Waiver

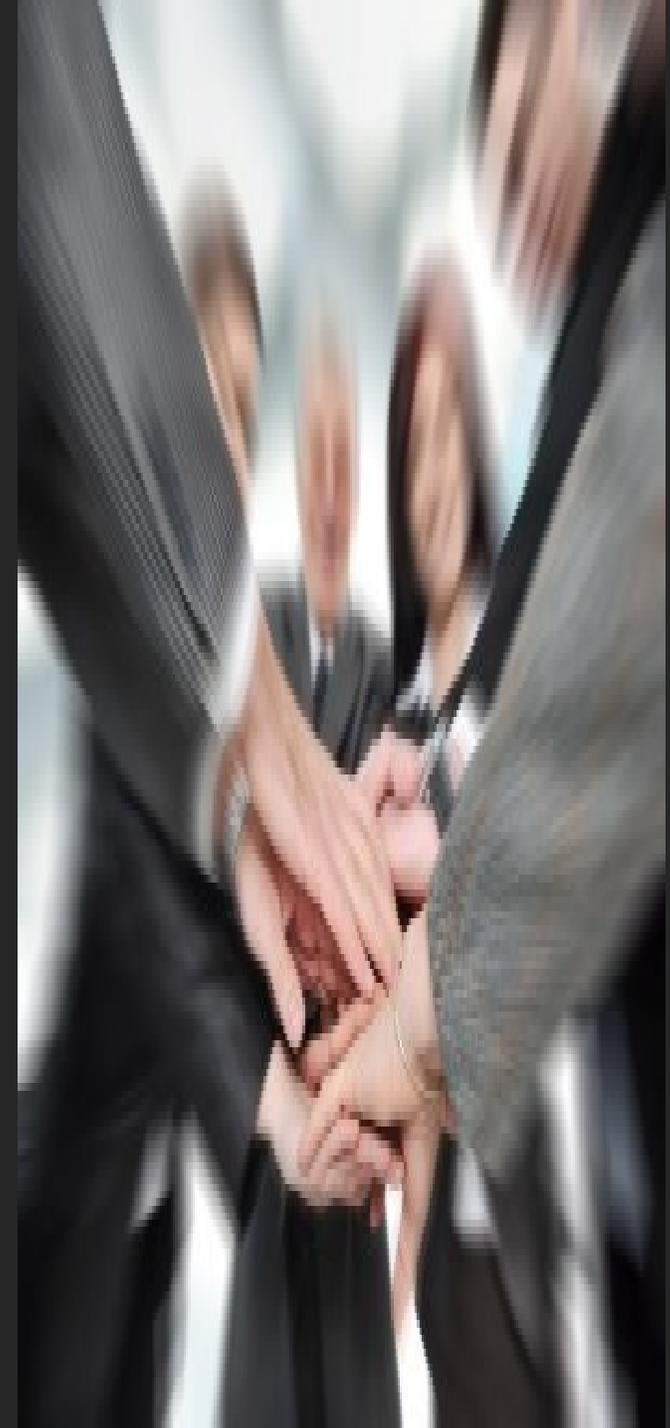
- > ALWAYS INCLUDE A WAIVER CLAUSE WHICH ALLOWS THE COMPLYING PARTY TO WAIVE A CONDITION
- > THIS WILL PREVENT THE NON-COMPLYING PARTY FROM USING THEIR OWN NON-COMPLIANCE AS AN EXCUSE NOT TO COMPLETE THE TRANSACTION.



Representations and Warranties

Representations and Warranties

- > A “representation” is a *“presentation of fact.. made to induce sooner to act”*.
- > A “warranty” implies a guarantee.



Purpose of Reps and Warranties

- > **First**, they act as a supplement to actual due diligence.
- > **Second**, the accuracy of the representations and warranties is generally a condition to closing the transaction
- > **Third**, they provide a basis for indemnification if a representation or warranty is false.

REMEMBER THE SELLER MAY NOT EXIST AFTER
THE SALE IS COMPLETE

Knowledge

- > Many representations and warranties will be qualified by the “knowledge” of the person making the representation.
- > The seller will generally attempt to use knowledge qualifications to limit many of their representations and warranties.



Knowledge

> The agreement should specify just whose knowledge is at issue.

> A clause like the following could be included:

“Phrases such as knowledge mean with respect to the should include phrases known or no knowledge mean with respect either party to this agreement the actual knowledge just such parties executive officers.”

> GENERALLY SPEAKING THE PHRASE "KNOWLEDGE" MEANS THE ACTUAL KNOWLEDGE WITHOUT THE NEED TO MAKE ADDITIONAL INQUIRY.

> THE BUYER MAY WANT TO PUT THE ONUS ON THE SELLER TO INVESTIGATE THE MATTER AT ISSUE.

> CONSIDER ADDING :

"knowledge after reasonable investigation."





Survival

> One of the primary purposes of the representation clauses is to provide a basis for enforcing indemnification provisions.

> Therefore a survival provision is also necessary

Reps and
Warranties

+

Indemnity

+

What Stands
Behind It

=

Protection

Representations and Warranties of the Seller in an Asset Transaction

Representations and Warranties of the Seller

- 4.1. Organization and Good Standing.
- 4.2. Subsidiaries.
- 4.3. Title to Properties.
- 4.4. Tax Matters.
- 4.5. Litigation.
- 4.6. Absence of Undisclosed Liabilities
- 4.7. Financial.
- 4.8. Absence of Debt
- 4.9. Absence of Certain Changes and Events.
- 4.10. Additional Information.
- 4.11. Restrictions.
- 4.12. Compliance With Laws.
- 4.13. Employee Benefit Plans; Employee Relations.
- 4.14. Authorization;
- 4.15. Employees.
- 4.16. Accounts Receivable.
- 4.17. Inventories.
- 4.18. Product Warranties.
- 4.19. Suppliers and Customers
- 4.20. Environmental.
- 4.21. Insurance Coverage.
- 4.22. Disclosure.

Representations and Warranties of the Seller in a Stock Transaction

REPRESENTATIONS AND WARRANTIES REGARDING THE SELLERS

- 2.01 Organization and Authority.
- 2.02 Ownership of Acquired Securities
- 2.03 No Conflicts
- 2.04 Litigation
- 2.05 Brokers
- 2.06 Securities Law Representations

REPRESENTATIONS AND WARRANTIES REGARDING THE COMPANY

- 3.01 Organization, Qualification and Corporate Power
- 3.02 Capitalization
- 3.03 Authority
- 3.04 Brokers
- 3.05 Financial Statements
- 3.06 Absence of Certain Changes
- 3.07 No Undisclosed Liabilities
- 3.08 Title to and Sufficiency of Assets
- 3.09 Tangible Personal Property; Condition of Assets
- 3.10 Real Property
- 3.11 Material Contracts

3.12 Intellectual Property

3.13 Tax

3.14 Legal Compliance; Anti-Corruption Laws; Export Control Laws and Economic Sanctions Laws

3.15 Litigation

3.16 Warranties

3.17 Employees

3.18 Employee Benefits

3.19 Customers and Suppliers

3.20 Transactions with Related Persons

3.21 Insurance

3.22 Privacy and Security

3.23 Bank Accounts

3.24 COVID-19.

Bring Down

- In all cases it is not sufficient that the representations be made at the time of the execution agreement they must also be accurate as of date of closing.
- The requirement that the representations be accurate on the date of closing is referred to as the “bring-down.”



Incumbency Certificate

Purchaser shall have received such certificates or other documentation from Sellers as reasonably requested by Purchaser certifying to the appropriate authorizations for the execution, delivery and performance of this Agreement by, and the incumbency of persons executing this Agreement on behalf of, those Sellers that shall be corporations or trusts or partnerships.

Certificate of Incumbency

I, _____ (Name), _____ (Street)
Secretary or Assistant Secretary) of _____
(Name of the Lender (the "Lender"), a _____ (Street)
National or State banking association, Bank Holding Corporation or other applicable
corporation), certify as follows:

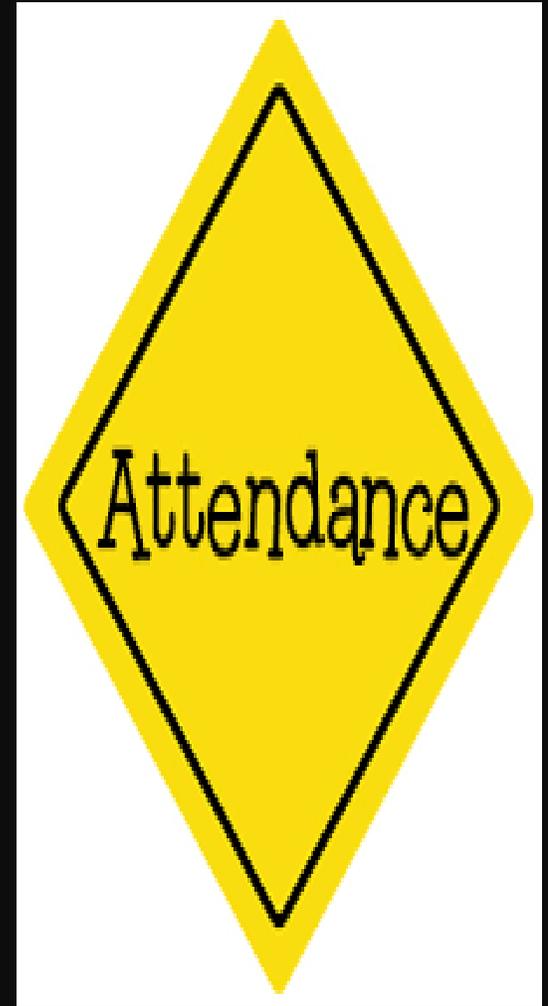
- I am the keeper of the books and records of the Lender and I am knowledgeable as to the matters contained in this Certificate.
- The following persons were duly authorized, as of the date beside their signatures, to execute on behalf of the Lender the Mortgage Purchase Agreement and are duly elected, qualified and acting officers of the Lender, holding the offices set forth after their names. The signatures set forth after their names are specimens of their personal signatures.

Name	Title	Specimen Signature
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

IN WITNESS WHEREOF, I have hereunto set my hand this _____ day of
_____, 20__.

By _____
Title _____

Please Verify your Attendance



Indemnity Provisions

Seller's Indemnity

- Indemnification Clauses are generally intended to provide the Buyer recourse
- In order to insure that Buyer will have recourse negotiate a Hold Back clause
- A deferred payment promissory note can also serve the same purpose
- Also the Agreement should provide that the Seller's representations and warranties survive the Closing



What Stands Behind It



Signatory Parties to the Agreement

- The Target Company
- The Shareholders
- The Parent Company

Escrows

1. IDENTITY OF THE ESCROW AGENT:

The agreement must clearly identify whether the person who is appointed as escrow agent, will be an attorney, a bank or another third party.

2. ESCROW AGENT'S FEES AND EXPENSES:

It should be determined in advance through escrow agreement - Who will bear for the costs of escrow and who shall be responsible for additional expenses in case the escrow agent holds the deposits longer than expected because of the mistake of a party.

3. THE DUTIES AND LIABILITIES OF THE ESCROW AGENT:

The Escrow Agreement must clearly define what the escrow agents should do. This includes under what circumstances the authorized person can release the amount in escrow account.

4. ACCEPTABLE USE OF FUNDS BY ESCROW:

A provision can be included in escrow agreement about how the escrow agent use the money. It includes lending and interest on the deposits, specify whether your escrow agent is able to keep any interest that is generated because it is holding funds on escrow.

5. THE JURISDICTION FOR LEGAL ACTION:

For any dispute about the escrow funds and liabilities of escrow agent, parties should choose a jurisdiction to resolve your legal issues.



Reps and Warranty Insurance

Representations and warranties insurance is an insurance policy used in mergers and acquisitions to protect against losses arising due to the seller's breach of certain of its representations in the acquisition agreement.



Reps and Warranty Insurance

The key points of such insurance policies are as follows:

The insurer will charge a fee (the “premium”) for issuing the policy, typically 2% to 3% of the coverage limits. For example, if the coverage amount of the policy is \$20 million, the premium could be \$400,000 to \$600,000.

Insurers typically charge a minimum premium of \$150,000 to \$200,000.

The premium for such policies has been decreasing as more competitors have jumped into the market.

The insurer will also charge an underwriting fee, which could be as high as \$50,000 for deals over \$50 million. There also might be an insurance broker fee in some situations.



Reps and Warranty Insurance

The policy coverage is typically a dollar amount equal to 10% of the M&A purchase price.

There will be a deductible amount under the policy that is excluded from coverage (the “retention”), typically a minimum of 1% of the M&A purchase price.



Reps and Warranty Insurance

There are “standard” exclusions to coverage; for example, the insurance does not cover covenant breaches by the seller or purchase price adjustments, and there may be specifically tailored exclusions based on the results of the insurance company’s due diligence/underwriting.

Not all representations and warranties of the seller are covered

The buyer or the seller can be the insured party, but 90% of the time the insured is the buyer.

The premium payment is typically a onetime fee paid up front.

The policy term is typically for 3 to 6 years, to be negotiated with the insurer.

Structure of the Purchase Price

Adjustments to the Purchase Price

2.3. Adjustment of the Purchase Price. Within 120 days after the Closing, the Purchaser will prepare a schedule of and compute the Adjusted Purchase Price (hereinafter defined), consistent with generally accepted accounting principles, and the Purchaser shall deliver to the Seller a certificate of its Chief Financial Officer as to the amount of the Adjusted Purchase Price, which certificate shall set forth in reasonable detail the Purchaser's calculation thereof. The Adjusted Purchase Price shall be equal to the Estimated Purchase Price subject to upward or downward adjustment as a result of aggregating the following to determine whether there shall be a decrease in the Cash Portion of the Purchase Price or an increase in the amount of the Note:

- (a) To the extent the accounts receivable on the Closing Date exceed \$20,000, the Note shall be increased by the amount of such excess, and to the extent they are less than \$20,000, the Cash Portion of the Purchase Price shall be reduced by the amount of such shortfall. Further, if the accounts receivable are not collected in full within 120 days after the Closing Date as described in paragraph 11.5 hereof, at the Purchaser's option the Cash Portion of the Purchase Price may be reduced by all or part of such shortfall; and
- (b) The inventory of the Seller shall be valued on the Closing Date by applying the most recent unit price (consistent with prior practices of the Seller and based upon actual purchases), applied to the physical inventory count taken on the Closing Date and observed by representatives of both the Seller and the Purchaser. To the extent that the inventory so valued is greater than \$25,000, the Note shall be increased by the amount of such excess, and to the extent it is less than \$, the Cash Portion of the Purchase Price shall be reduced by the amount of such shortfall; and
- (c) To the extent that more or less of the Fixed Assets listed on Exhibit are owned by the Seller on the Closing Date consistent with the representations and warranties and covenants of the Seller contained in this Agreement, or if any of the items so listed become damaged or destroyed between the date of this Agreement and Closing, the Cash Portion of the Purchase Price shall be equitably adjusted by mutual agreement of the parties; and
- (d) To the extent that the Liabilities on the Closing Date, exclusive of the liabilities described in paragraph 2.2(d) hereof, exceed \$15,000. in the aggregate, the Cash Portion of the Purchase Price shall be reduced by the amount of such excess to the extent actually paid or discharged by the Purchaser within 120 days after the Closing Date. To the extent that such Liabilities assumed and actually paid or discharged within 120 days after the Closing Date are less than \$ in the aggregate, the Note shall be increased by the amount of such difference.

If the Seller disagrees with the Purchaser's calculation of the Adjusted Purchase Price, the Seller shall give written notice thereof within 30 days after receipt of the Purchaser's certificate, specifying the reasons therefor. If the Seller and the Purchaser are unable to agree upon the amount of the Adjusted Purchase Price within 30 days after the Seller's notice, then either party may cause the matter to be submitted to binding arbitration in accordance with paragraph 12.1 hereof (As an alternative, the parties may agree to a procedure to select an accounting firm to make a definitive determination).

Minimum Working Capital Requirement

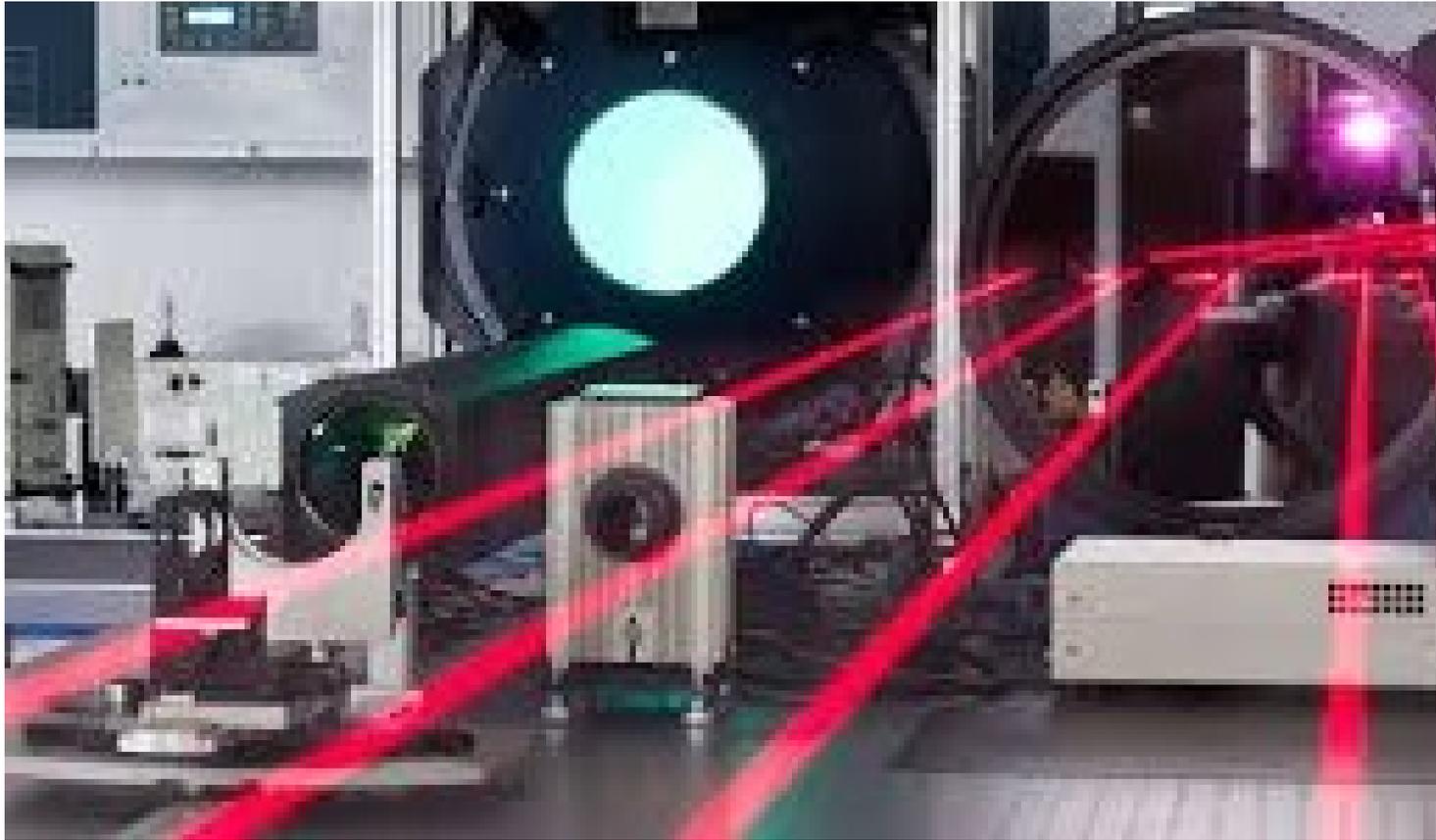
(iii) The “Working Capital Adjustment” shall mean the amount calculated on the Closing Date as follows:

(1) The “Target Working Capital” is One Hundred and Fifty Thousand (\$150,000.00) Dollars.

(2) “Working Capital” is the difference between current assets and current liabilities determined according to Generally Accepted Accounting Principles (“GAAP”).

(3) In the event that the Working Capital of the Company exceeds the Target Working Capital, the Working Capital Adjustment shall be equal to such excess amount.

(4) In the event that Working Capital of the Company is less than the Target Working Capital the Working Capital Adjustment shall be equal to such negative amount.



Earn Out Agreements

An earnout agreement, made between a business's buyer and seller, is paid by the buyer to the seller after meeting certain performance targets after the sale.

This type of agreement, serving as a contingency payment, may be paid in company stock or cash.

Common earnout candidates are companies with new, not-yet-proven products or high-growth businesses.

For service businesses, situations in which the owner's ongoing relationship with customers is important to success might also hold earnout potential.

Buyer's Promissory Notes

In many cases the Seller will be willing to or have to accept the Buyer's promissory note, or other debt instrument, as the consideration.



Set-Off Rights

Buyer may also like the idea of using a promissory note for all or a portion of the purchase price in order to ensure that there are funds available against which it can offset any indemnification claims that it may have against seller.

In order to protect any set-off rights that it may have, the buyer will want to require that the promissory note be non-negotiable.

Getting What You Paid For

Stock

Basic Steps

- Approval of the transaction by the shareholders of the acquiring corporation is not required unless the corporation's articles of incorporation provide for it.
- Reps as to the Title, Authority to Sell, No Restrictions
- Also Reps as to the Capitalization of the Company

5.2. Capitalization.

- (a) The total authorized shares of the Company consists of Seven Hundred and Fifty (750) shares of common stock, no par value, of which the Shares owned by the Sellers are the only shares of common stock of the Company issued and outstanding.
- (b) All of the Shares have been duly and validly authorized and issued and are fully paid, nonassessable and free of preemptive rights with no liability attaching to the ownership thereof.
- (c) None of the Shares has been issued in violation of the preemptive rights of any stockholder of the Company. The Shares were issued in compliance with all applicable Federal and state securities laws and regulations.

5.3. Options.

- (a) There are no existing agreements, subscriptions, options, warrants, calls, commitments, trusts (voting or otherwise), or rights of any kind whatsoever granting to any person or entity any interest in or the right to purchase or otherwise acquire from the Company, at any time, or upon the happening of any stated event, any securities of the Company, whether or not presently issued or outstanding.
- (b) There are no outstanding securities of the Company or any other entity which are convertible into or exchangeable for shares or other securities of the Company.
- (c) There are no agreements, subscriptions, options, warrants, calls, commitments or rights of any kind whatsoever granting to any person or entity any interest in or the right to purchase or otherwise acquire from the Company or any other entity any securities so convertible or exchangeable, nor are there any proxies, agreements or understandings with respect to the voting of the Shares.

5.4. Title to the Shares.

- (a) Each of the Sellers is the lawful record holder of and, except as set forth on Exhibit 1.1.(a) hereto, the beneficial owner of, and each Seller has good and marketable title to, the number of Shares set forth opposite her name on Exhibit 5.4 hereto.
- (b) The Shares are owned by the Sellers free and clear of any and all liens and encumbrances

5.5. Power and Capacity.

- (a) Each Seller has full right, power and capacity to execute, deliver and perform this Agreement, to sell, transfer and deliver the Shares owned by such Seller to Purchaser hereunder and to perform all other transactions contemplated to be performed by such Seller hereunder.

Assets

Basic Steps



- Perform a Lien Search
- Perform a Judgement Search
- Obtain and Review Financial Statement
- Good Standing
- Obtain and Review Tax Returns Statement
- Have Seller provide a list of the Assets to be Sold/Owned updated to the Closing Date
- Reps as to the Title, Authority to Sell, No Restrictions
- Include a “Conduct of Business” and “No Change Rep”
- Get a Bill of Sale at the Closing

4.3. ASSETS. The Assets constitute all the assets owned, leased or used by Seller which are in any way necessary to the continued operation of the Business as now being conducted. Except as set forth in Schedule 4.19 with respect to items of obsolete materials and materials of below standard quality, the Assets are in good condition and working order (ordinary wear and tear excepted) and are suitable for use in the Business in the manner in which they are currently being used. Except as set forth on Schedule 4.3 hereto, all such plants, structures, machinery and equipment which are a part of the Assets conform in all material respects to applicable health, sanitation, fire and related laws and regulations, safety, labor, zoning and building laws and ordinances; and, except as set forth on Schedule 4.3 hereto, Seller has not receive any notification within the last three years of any violation of any applicable ordinance or regulation of building, zoning or other law, in respect of such plants, structures, properties or operations. The Seller Purchase Orders, the Customer Purchase Orders and the Other Contracts are, and upon assumption and assignment to Buyer pursuant to the Order and this Agreement will be, in full force and effect and are valid and binding obligations of the parties thereto, and neither Seller nor, to the knowledge of Seller after reasonable inquiry, any of the other parties thereto is in default under any of the foregoing. The Prepaid Items have been fully paid and no additional payments are required with respect to any of such items for the time period for which they have been paid. Except as set forth in Schedule 4.3 hereto, with respect to deposits comprising part of the Prepaid Items, Seller has taken no action nor do any circumstances exist that would impair the ability of Buyer to recover such deposits at such time as they are due to be refunded.

4.4. TITLE TO PROPERTIES: ENCUMBRANCES. Seller has good, valid and marketable title to, or valid leasehold interests in, all of the Assets constituting real property or tangible personal property and Seller has full right to sell, convey, transfer, assign and deliver any and all of its right, title and interest in and to such Assets, free and clear of any mortgage, pledge, lien, security interest, conditional sale agreement, encumbrance or charge of any kind, except (i) as set forth on Schedule 4.4 hereto, including equipment and other leases set forth on such Schedule, (ii) mechanics', carriers', workmen's, repairmen's and other like liens arising or incurred in the ordinary course of business and which will be satisfied prior to Closing, (iii) liens for taxes and other governmental charges which are not yet due and payable, (iv) other imperfections of title which do not, individually or in the aggregate, materially impair the continued use and operation of the Assets in the Business, as presently conducted and (v) as to real property, (A) easements, covenants, rights-of-way and other similar restrictions of record (B) zoning, building and other similar restrictions and (C) liens encumbrances and similar restrictions placed by any landlord or third party on leased property or property over which Seller has easement rights, which do not materially affect the rights of Seller with respect thereto (all the foregoing, collectively, "Permitted Liens"). With respect to real property, all encumbrances of the nature referred to in clause (v) above shall be set forth

List of Assets

4. Assets to be Owed by the Company at the Closing

(a) The Company owns on the Execution Date and will own at the Closing Date good and marketable title free and clear of any liens and liabilities to the following property interests except for properties and assets sold or otherwise disposed of in the ordinary course of business since the date of the Execution Date and subject only to liens set forth in Exhibit 4(a), hereto (the “Assets”):

- (i) All usable and saleable inventory owned by the Company on the Closing Date) as set forth on Exhibit 4(a)(i);
- (ii) All furniture, fixtures, machinery and equipment owned by the Company on the Closing Date, including without limitation those items specifically as set forth on Exhibit 4(a)(ii) (the “Fixed Assets”);
- (iii) The legal right to use the trade name “Long Business Systems;”
- (iv) The credits due to the Company from suppliers, as set forth on Exhibit 4(b)(iv);
- (v) A list of the customers of the Company (the “Customer List”) as set forth on Exhibit 4(a)(v);



Conduct of the Business

.02 Conduct of Business. At all times during the period commencing upon the date hereof and terminating upon the earlier to occur of the Closing or the termination of this Agreement pursuant to and in accordance with the terms of Section 6.04 hereof, except as expressly provided in this Agreement or a Transaction Document hereto, without the prior consent of the Buyer, the Company shall, and shall cause each of its Subsidiaries to, conduct the operations of the Business in the Ordinary Course and preserve intact the assets, properties and Contracts of the Company and its Subsidiaries (including all leased Real Property and Intellectual Property), the business organization and the goodwill of the Business, the continued services of the employees of the Company and each of its Subsidiaries, and the current relationships of the Company and each of its Subsidiaries with their respective customers, suppliers and others with significant and recurring business dealings with the Business, and without limiting the foregoing shall not:

(a) take any action that would result in a breach of or inaccuracy in any of the representations and warranties contained in Article III hereof, including enter into any new Contract that would constitute a Material Contract if entered into prior to the date hereof or terminate or materially amend any existing Material Contract;

CONSENTS AND APPROVALS

8.5. CONSENTS AND APPROVALS.

Buyer shall have received from Seller executed counterparts of all consents required for the consummation of the transactions contemplated hereby, including without limitation all consents of third parties relating to the Assets or the Assumed Liabilities, all of which consents shall be in form and substance satisfactory to Buyer and its counsel.

Shareholder Approval

Disposition of a corporation's assets other than in the usual and regular course of business or for the purpose of relocation generally requires shareholder approval [15 Pa. Cons. Stat. § 1932(b)(1)].

Terms and Conditions Approved by the BOD - In such a situation, a plan of asset transfer must be drafted that sets forth the terms and conditions of the sale or authorizes the board of directors to fix any of the terms and conditions [15 Pa. Cons. Stat. § 1932(b)(3)].

Submit to the Shareholders - In general, a plan is proposed by the adoption by the board of directors of a resolution approving the plan. The board of directors then directs that the plan be submitted to a vote of the shareholders entitled to vote on it at a regular or special meeting of the shareholders [15 Pa. Cons. Stat. § 1932(b)(3); see 15 Pa. Cons. Stat. § 321(a)].

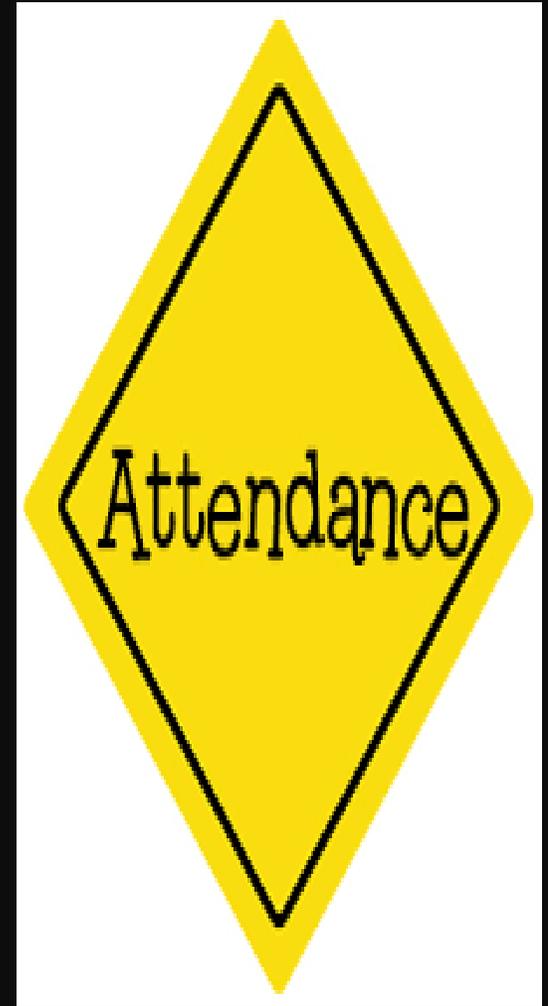
Notice Requirements - Notice in record form of the meeting of shareholders that will act on the proposed plan must be given to each shareholder of record of each domestic business corporation that is a party to the transaction under the plan. The notice must include a copy or summary of the proposed plan and any notice required regarding special treatment of shares held by any shareholder [15 Pa. Cons. Stat. § 321(b); see 15 Pa. Cons. Stat. § 329].

The notice must include information on dissenters' rights, and must state that a copy of the articles of incorporation and bylaws of the resulting corporation as they will be in effect immediately following the transaction will be furnished to any shareholder of the corporation giving the notice on request and without cost [15 Pa. Cons. Stat. § 321(b)].

Tax Allocation Provision

(d) Prior to the Closing the parties shall agree to an allocation of the Purchase Price between the Assets and the Covenants provided in Section 14. The agreed allocation shall be attached hereto as Exhibit 1.3(d), and shall be binding on the parties, and each Sellers and Purchaser shall use such allocation in connection with the filing of all relevant U.S. federal, state and local income Tax Returns.

Please Verify your Attendance



Contracts

Basic Steps

- In an Assets Sale are the Contracts Assignable
- In a Stock Sale are there any Non-Assignability provisions
- Reps as to the Material Contracts (Suppliers and Customers)
- Obtain Estoppel Letters where appropriate



Key Employees

Basic Steps



- In an Assets Sale have the Key Employees enter into New Employment Agreements
- In a Stock Sale are the Employment Agreements subject to a “Change of Control” provisions
- Reps as to Employees
- Obtain Estoppel Letters where appropriate

4.12. EMPLOYEES AND FRINGE BENEFIT PLANS

4.12. EMPLOYEES AND FRINGE BENEFIT PLANS.

(a) Schedule 4.12 identifies all consulting or employment agreements and other agreements with individual consultants or employees of the Business to which Seller is a party and which are either currently effective or will become effective at the Closing Date, as well as any employee handbooks, policy manuals and job application forms used by Seller in the Business. Copies of all such written agreements have been delivered to Buyer.

Also shown on Schedule 4.12 are the names and dates of hire of each regular employee of the Business and each such person's rate of compensation and accrued vacation pay.

Transition Service Agreements

A Transition Service Agreement (TSA) is an agreement between a buyer and seller whereby the seller contracts with the buyer its services and know-how for a specified period of time in order to support and to allow the buyer acclimate to its newly acquired assets, infrastructure, systems, etc.



Protection from Unassumed Liabilities

Basic Steps



- Perform a Lien Search
- Perform a Judgement Search
- Obtain and Review Financial Statement
- Obtain and Review Tax Returns Statement
- Have Seller provide a list of all outstanding debts and liabilities updated to the Closing Date
- Bulk Sale Compliance
- Include “No debts” provision in the Reps and Warranties
- Obtain payoff statements from each debtor
- Provide for a structured payment

NO UNDISCLOSED LIABILITY

4.7. NO UNDISCLOSED LIABILITY. Except as set forth on Schedule 4.7 hereto, Seller does not have any liabilities or obligations of any nature, whether absolute, accrued, contingent or otherwise and whether due or to become due (including, without limitation, liabilities for taxes and interest, penalties and other charges payable with respect thereto) in respect of the Assets or the Business.

Structured Payment

- (e) At the Closing the Purchaser shall pay the Estimated Purchase Price, by wire transfer of immediately available funds into the account or accounts designated by each of the following, as follows:
 - (i) To the Persons entitled thereto, an aggregate amount equal to the estimated Closing Debt (less any amounts included in the estimated Closing Debt which, at Purchaser's option, will not be paid at Closing) as set forth in the Estimated Closing Statement and payoff letters delivered therewith;
 - (ii) To the Persons entitled thereto, an aggregate amount equal to the estimated Transaction Expenses, as set forth in the Estimated Closing Statement
 - (iii) To the Escrow Agent an amount equal to the Escrow Amount.
 - (iv) To the Sellers the balance of the Estimated Purchase Price (the "Estimated Closing Payment"), allocated between the Sellers in accordance with their respective ownership of the Shares.

Tail Policies and D&O Indemnification

Prior to the Closing, the Company shall obtain a fully prepaid liability insurance policy “tail” under the Company’s existing directors’ and officers’ liability insurance policy (the “D&O Tail Policy”) for each individual who served as a director or officer of the Company prior to the Effective Time (“D&O Indemnified Parties”), which has a claims period that covers claims made from the date of issuance of the policy, which date shall be before Closing Date, through the period of six (6) years following the Closing Date, for matters, acts or omissions occurring prior to the Closing Date and contains other coverage terms comparable to those under the Company’s existing directors’ and officers’ liability insurance policy.

Any premiums associated with the D&O Tail Policy shall be considered a Transaction Expense.

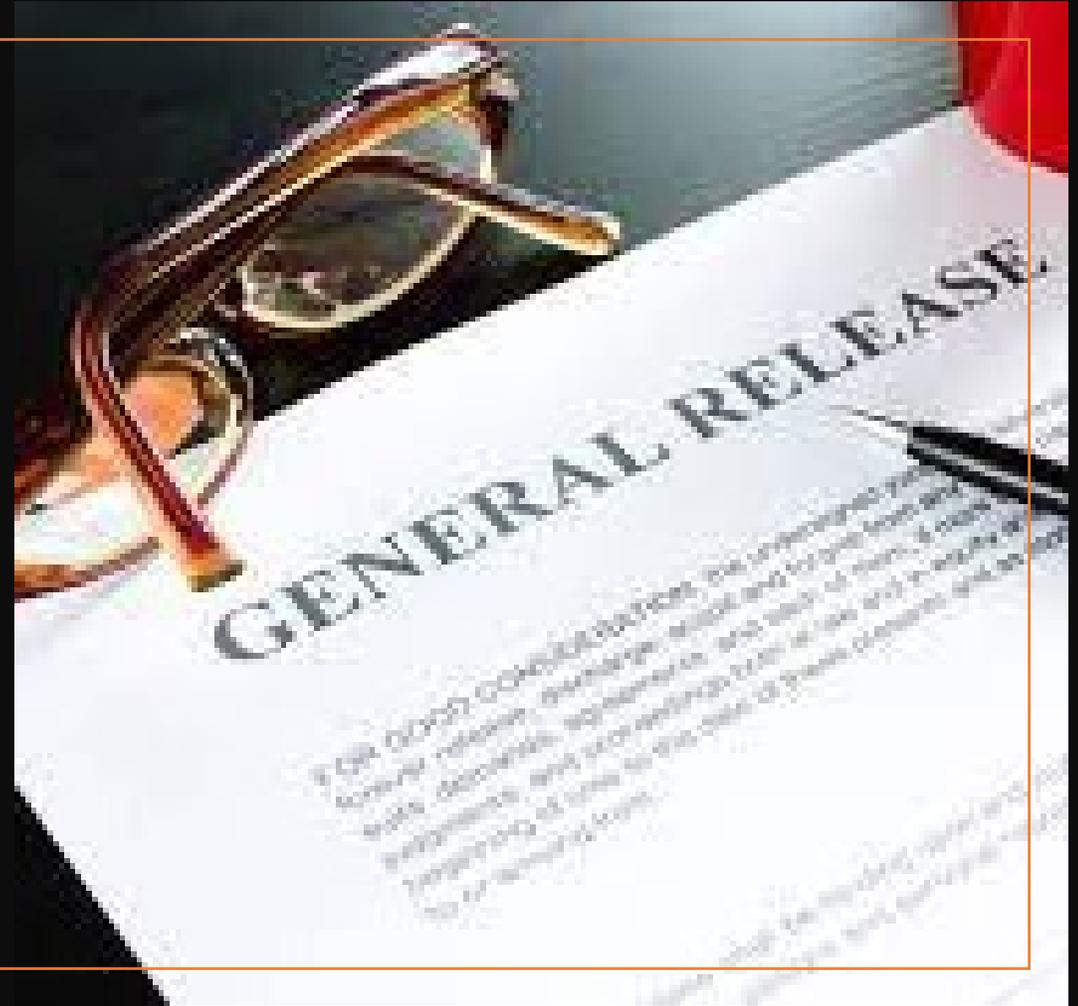
Tail Policies and D&O Indemnification

Following the Closing and for a period of six (6) years, Buyer shall, and shall cause the Company to, maintain the D&O Tail Policy in full force and effect and, subject to any limitations under applicable Law, use commercially reasonable efforts to continue to honor the obligations of the Company with respect to any indemnification provisions under the Organizational Documents of the Company (as in effect on the date of this Agreement) and any indemnification Contracts between the Company, on one hand, and any such directors or officers of the Company, on the other hand, in each case in effect as of the date hereof and only if such Contracts are set forth on Schedule 5.11, with respect to their acts or omissions occurring prior to the Effective Time; **provided, that any Losses of the Company related to such indemnification or enforcement of the D&O Tail Policy shall constitute indemnifiable Losses of the Buyer under Article VIII;**

Release

11.1 Release by the Sellers

The Sellers, jointly and severally hereby absolutely and unconditionally releases and forever discharge the Purchaser and the Company, and any and all participants, parent corporations, subsidiary corporations, affiliated corporations, insurers, indemnitors, successors and assigns thereof, together with all of the present and former directors, officers, agents and employees of any of the foregoing, from any and all claims, demands or causes of action of any kind, nature or description, whether arising in law or equity or upon contract or tort or under any state or federal law or otherwise, which the Sellers had now have or have made claim to have against any such person for or by reason of any act, omission, matter, cause or thing whatsoever arising from the beginning of time to and including the date of this Agreement, whether such claims, demands and causes of action are matured or unmatured or known or unknown.



Specific Accounting for S Corp Tax Year

- (b) The parties consent and agree pursuant to IRC §1377(a)(2) to treat the Company's taxable year 2022 as if it consisted of two taxable years with the first year ending on the date of the Closing, and to file Form 1120S US Income Tax Return and all state and local tax returns on that basis for the taxable year 2022 basis, attaching the Consent, attached hereto as Exhibit 10.3, to be executed by the parties at or before Closing and attached to those returns as appropriate.
- (c) Neither of the Sellers shall be allocated for tax purposes or entitled to receive a share of any income generated by the Company after the date of Closing.
- (d) The Sellers will responsible for all taxes payable by the Company attributable to income received by the Company prior to Closing, and shall indemnify, defend and hold the Purchaser and the Company harmless of and from any cost, liability, and/or loss incurred by the Purchaser and/or the Company as a result of any taxes payable by the Company prior to the date of Closing, and for the preparation and filing of tax returns for tax years through 2021.



Change of Address or Responsible Party on the Closing Date

10.3 Form 8922.

The parties mutually complete and file IRS Form 8822 -B – Change of Address or Responsible Party on the Closing Date.

Other Agreement Provisions

10.2 Tax Returns.

- (a) The Purchaser shall be responsible for the preparation and timely filing of all corporate tax returns and tax reports required for taxable year 2022.
- (b) The parties consent and agree pursuant to IRC §1377(a)(2) to treat the Company's taxable year 2022 as if it consisted of two taxable years with the first year ending on the date of the Closing, and to file Form 1120S US Income Tax Return and all state and local tax returns on that basis for the taxable year 2022 basis, attaching the Consent, attached hereto as Exhibit 10.3, to be executed by the parties at or before Closing and attached to those returns as appropriate.
- (c) Neither of the Sellers shall be allocated for tax purposes or entitled to receive a share of any income generated by the Company after the date of Closing. The Sellers will responsible for all taxes payable by the Company attributable to income received by the Company prior to Closing, and shall indemnify, defend and hold the Purchaser and the Company harmless of and from any cost, liability, and/or loss incurred by the Purchaser and/or the Company as a result of any taxes payable by the Company prior to the date of Closing, and for the preparation and filing of tax returns for tax years through 2021.

10.3 Form 8922.

The parties mutually complete and file IRS Form 8822 -B – Change of Address or Responsible Party on the Closing Date.

Post-closing Cooperation Provision

Section 10. Further Assurances.

10.1 From and after the Closing, Sellers, and Purchaser, agree to execute and deliver such further documents and instruments and to do such other acts and things as Purchaser or Sellers, as the case may be, may reasonably request in order to effectuate the transactions contemplated by this Agreement.

10.2 In the event any party shall be involved in litigation, threatened litigation or government inquiries with respect to a matter involving the Company the other parties shall also make available to such first party, at reasonable times and subject to the reasonable requirements of its or his own business, such of its or his personnel as may have information relevant to the matters provided such first party shall reimburse the providing party for its or his reasonable costs for employee time incurred in connection therewith if more than one business day is required.

10.3 Following the Closing, the parties will cooperate with each other in connection with tax audits and in the defense of any legal proceedings, consistent with the other provisions for defense of claims provided in Section 11, to the extent such cooperation does not cause unreasonable expense, unless such expense is borne by the requesting party.

Arbitration

If any dispute arises under or in connection with this Agreement or the performance or enforcement thereof, it shall be decided finally by three arbitrators in an arbitration proceeding conforming to the Rules of the American Arbitration Association applicable to commercial arbitration. The arbitrators shall be appointed as follows: one by the Seller, one by the Purchaser and the third by the said two arbitrators, or, if they cannot agree, then the third arbitrator shall be appointed by the American Arbitration Association. The third arbitrator shall be chairman of the panel and shall be impartial. The arbitration shall take place in Philadelphia, Pennsylvania. The decision of a majority of the Arbitrators shall be conclusively binding upon the parties, final and nonappealable, and such decision shall be enforceable as a judgment in any court of competent jurisdiction. Each party shall pay the fees and expenses of the arbitrator appointed by it, its counsel and its witnesses. The parties shall share equally the fees and expenses of the impartial arbitrator.

Post Closing Covenants



Covenant Not to Compete

Pennsylvania courts are most likely to enforce post-employment restrictive covenants when

- (1) Ancillary to the employment relationship;
- (2) Supported by adequate consideration;
- (3) Reasonably necessary to protect a legitimate business interest; and
- (4) Limited in both time and territory.

Non-Disclosure Agreement

Non-disclosure agreements, also known as confidentiality agreements, are used to prevent employees from exposing trade secrets and other confidential information obtained during the course of employment to third-parties after the employment relationship ends.

Although Pennsylvania courts agree that employees owe a fiduciary duty to employers to keep sensitive information learned through employment in confidence, *Lorman v. Lieb*, 37 Pa. D. & C.2d 305, 312-313 (Cam.Pa.Com.Pl. 1965), a non-disclosure agreement further informs the court that the employer had an express legitimate business interest in protecting certain information.

Generally, however, an employer will only be able to protect such information that is not easily accessible to the public. Also, employees might be able to defeat a non-disclosure agreement by proving that the trade secret or confidential information was developed or learned prior to the employment relationship.



Non- Raiding Agreement

Finally, non-raiding agreements are drafted to prevent an employee from soliciting other employees to join a rival competitor or newly established business.

Pennsylvania recognizes a tort, intentional interference with contract relations, which may allow for employers to file suit on other companies and/or former employees for "raiding" their talent base.

Adding a non-raiding agreement may strengthen such a cause of action.



SHIL
END

Questions

- If you have any questions during the program, please type them into the chat box and I will try to address them during the program.
- If your question is *not answered* during the program you will receive an ' e-mail response after the program is concluded.
 - If you have questions after the program is concluded please e-mail your question to –

[mp](#)

tedperkins@gibperk.com

610 565 1708 Ext 104



TedPerkinsTax News

COURSE EVALUATION

Thank you for attending our program.

You will shortly receive an email with a link to the replay of today's Course and a link to the Course Evaluation form.

Please complete this form, which helps us comply with the requirements of issuing CPE and CLE in various jurisdictions.