# NEGOTIATING THE SALE OF A BUSINESS – KEY CONCEPTS AND LEGAL ISSUES

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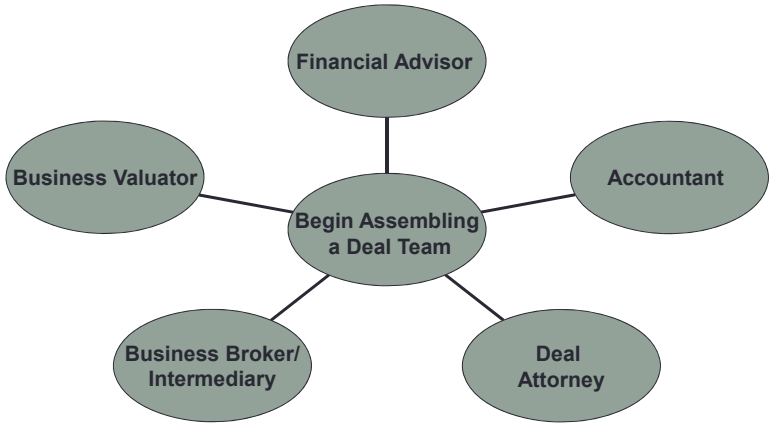
# The Deal Team

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# Sale Process

- Broker Agreement
- Market Business
- Confidentiality Agreement
- Letter of Intent
- Due Diligence
- Purchase Agreement
- Closing

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## Sale Process

AVOID SURPRISES!

- Disclose, Disclose, Disclose
- Breach of Trust Kills Deals
- Better up Front than Later
- But not too Early

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## Letter of Intent / Term Sheet

- Initial Draft by Buyer Usually
- Sets the Terms of the Deal
- Get Attorney Involved in Negotiating
  - Deal Killer if Change Terms Later for no Good Reason
- Psychology of the LOI

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## Letter of Intent

- Should be Non-Binding Except Certain Items
- Takes Business off the Market
- Allows Due Diligence
  - Make sure you get what you think you are getting
  - Adjustments to Deal
  - Seller's Due Diligence on the Buyer

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## Purchase Agreement Structure

- Identify the Parties
- Identify What is Being Sold and for How Much
- Representations and Warranties
- Covenants Prior to Closing
- Closing
- Termination of Agreement
- Post Closing Covenants
- Miscellaneous and Definitions

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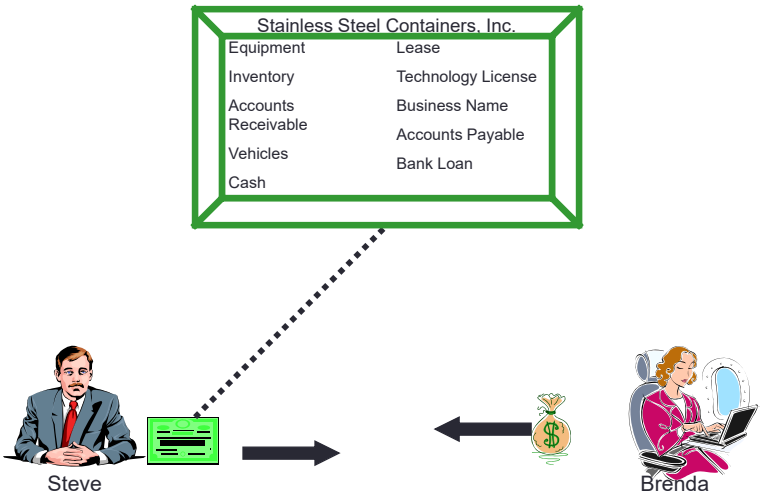
# Deal Structure

- Sale of Stock
- Sale of Assets
- Merger

## Method # 1 for Buying a Business: Purchase of Stock



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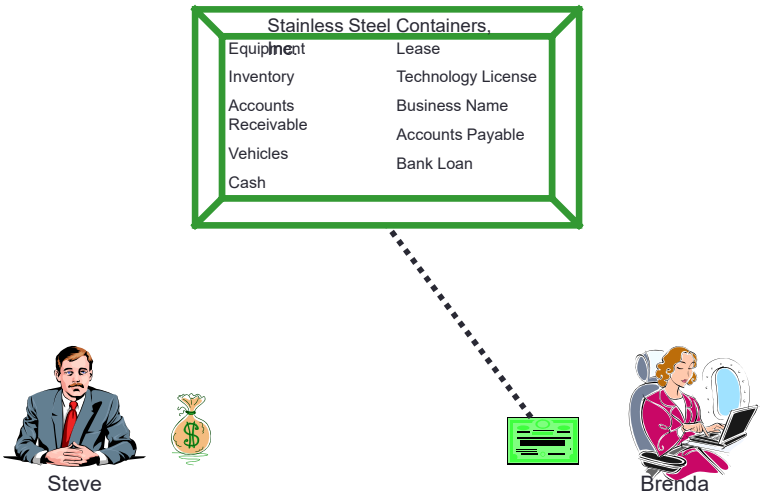


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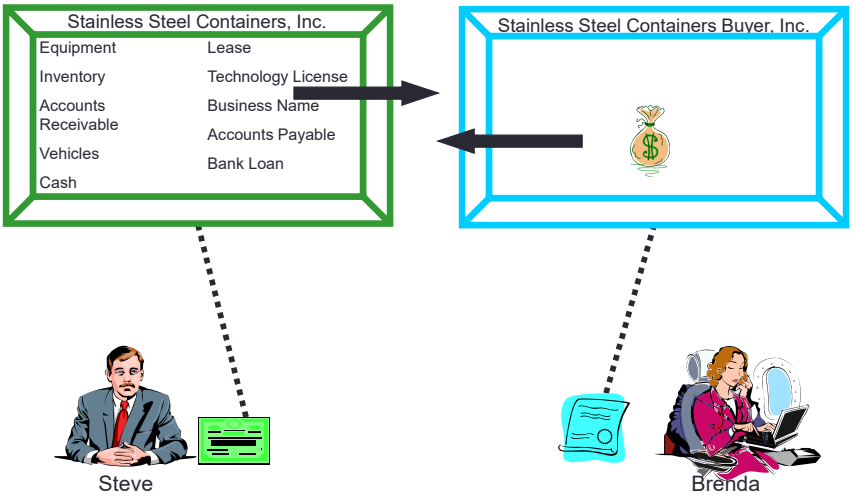
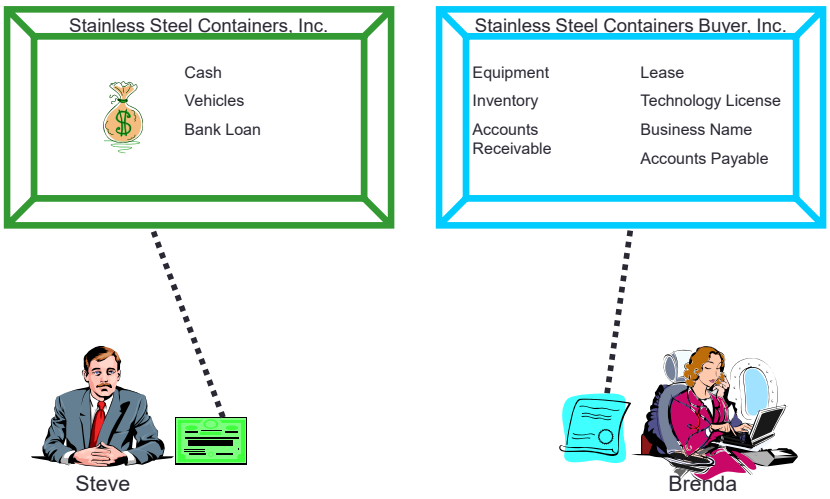
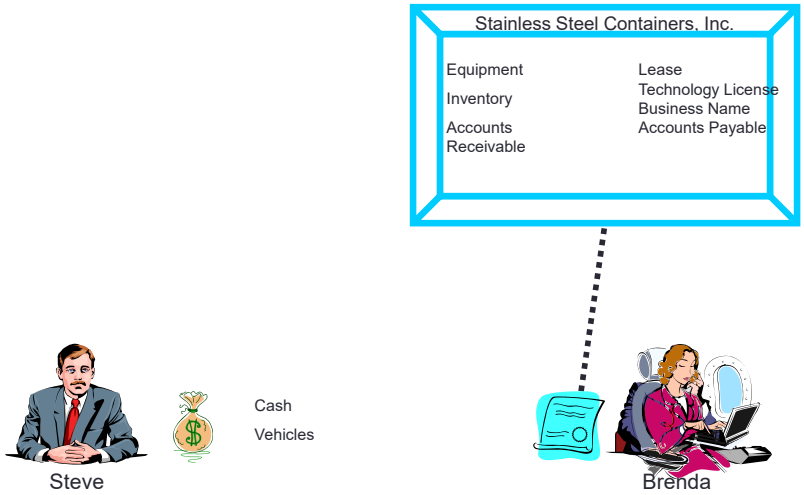
# Method # 2 for Buying a Business: Purchase of Assets



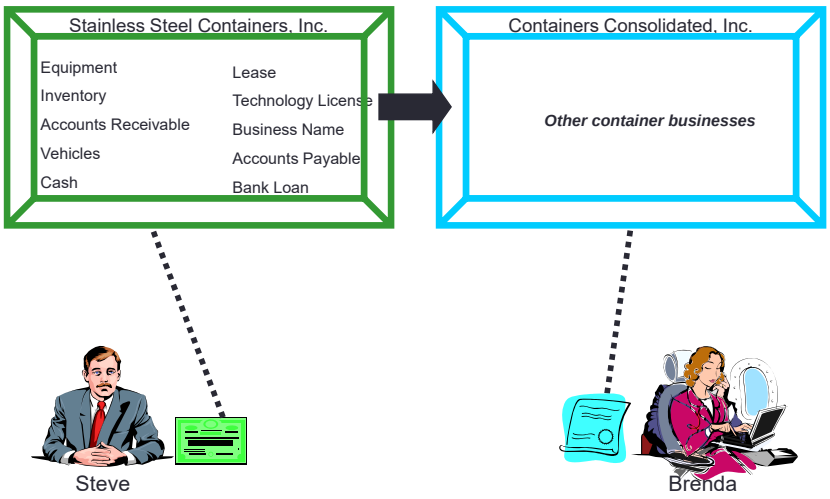
## Method # 2 for Buying a Business: Purchase of Assets




## Method # 2 for Buying a Business: Purchase of Assets



## Method # 3 for Buying a Business: Merger

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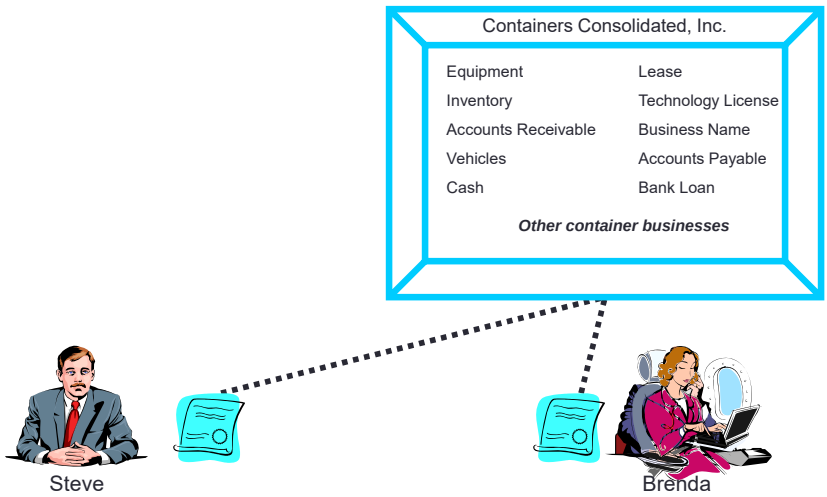

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## Purchase of Stock v. Purchase of Assets

- Seller Perspective
- Tax
- Liabilities
- Simplicity – Contracts

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## Purchase of Stock v. Purchase of Assets

- Buyer Perspective
- Tax
- Pick and Choose Assets and Liabilities
  - ✓Examples of liabilities the buyer wants to avoid.
  - ✓Exception: some liabilities may be transferred to the buyer, even in a purchase of assets.
  - ✓Examples of assets the buyer may not want to take.
- But……

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## Purchase of Stock v. Purchase of Assets

- Sometimes the Business Dictates the Structure
  - Contracts
  - Leases
  - Licenses
  - Permits

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## Purchase Price and Adjustments

- Purchase price is usually based upon most recent available financial statements of the target company
- Common Purchase price methods:
  - Multiple of EBITDA/Cash flow
  - Percentage of sales
  - Adjusted book value

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# Purchase Price and Adjustments

- Purchase Price Adjustments protect the parties against any deviation in value from the date the purchase price is negotiated and the closing date.
- Adjustments based upon working capital of target company are the most common adjustments
  - Often transactions are “cash free” debt free”
    - Seller retains cash, but is responsible for paying any debt (other than working capital liabilities).
- What is working capital?
  - General Definition: current assets less current liabilities
    - Current assets are assets that can be converted to cash within one year
      - Cash and Cash Equivalents
      - Accounts Receivable
      - Inventories
      - Prepaid Expenses
    - Current Liabilities are those liabilities which are due within a period of one year:
      - Short term debt
      - Accounts payable
      - Accrued liabilities

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# Purchase Price and Adjustments

- Calculating a Working Capital Target
  - Parties determine a normal level of working capital for the as of date of the closing
    - May be based upon historical averages
    - Should reflect seasonality of target’s business
  - Example of Working Capital Adjustment:
    - As promptly as reasonably practicable after the Closing, but no later than ninety (90) days after the Closing Date, Buyer shall cause to be prepared and delivered to Seller a statement (the "Purchase Price Adjustment Statement") setting forth and certifying Buyer's calculation of the Final Net Working Capital as of the Closing Date, calculated in accordance with Schedule 2 (the "Closing Net Working Capital").
    - More extensive Purchase Price Adjustment clause attached.

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# Purchase Price and Adjustments

- Important Issues to Consider in Working Capital Calculation
  - Define the accounting terms and standards used in calculating working capital
  - Consistent with Seller's historical accounting practices or GAAP
    - Use a reference balance sheet
    - Clearly delineate what is and is not included in the definition of working capital
    - Identify who will decide any dispute over the working capital adjustment
      - Consider appointing an accounting firm and clearly delineate what the accounting firm can determine relative to the arbiter of any other dispute in the Acquisition Agreement
    - Consider the relationship between the purchase price adjustment section and other sections of the Acquisition Agreement
      - Avoid/minimize "double dip" from Buyer
        - Buyer asserts (or fails to assert) purchase price adjustment and then later asserts claim for breach of financial statement representations and warranties that in substance is a purchase price adjustment

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# Allocation of Purchase Price
# Buyer and Seller Competing Objectives

- Seller Objectives
  - Maximize purchase price eligible for capital gain rather than ordinary income treatment
    - Intangibles
    - Goodwill
- Buyer Objectives
  - Maximize percentage of purchase price eligible for accelerated depreciation/immediate expensing
    - Machinery and equipment
    - Inventory
    - Property plant and equipment
- **Buyer and Seller should always review purchase price on an after tax basis to determine the net return**

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# Allocation of Purchase Price

## Allocation of Purchase Price

- Code Section 1060 applies to "applicable asset acquisition"
  - (i) any transfer, whether directly or indirectly, of assets which constitute a trade in business; and (ii) with respect to which the transferee's basis in such assets is determined wholly by reference to the consideration paid for such assets
    - apply to asset acquisitions and stock acquisitions for which there is a Section 338(h)(10) or 336(e) election in effect

    Note that allocation of purchase price is also important if an "S" corporation sells assets or the parties elect to treat the transaction as an asset purchase for tax purposes.

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# Allocation of Purchase Price

## Seven Asset Classes

- Class 1 assets are cash and cash equivalents;
- Class 2 assets are actively traded personal property;
- Class 3 assets are certain debt instruments;
- Class 4 assets are stock in trade of the taxpayer or other property that would be included in the taxpayer's inventory;
- Class 5 assets include equipment all assets not included in the other classes of assets, including machinery and equipment, land and buildings;
- Class 6 assets are all Section 197 intangibles, except goodwill and going concern value; and
- Class 7 assets are goodwill and going concern value, regardless of whether they otherwise qualify.

## Reporting Allocation of Purchase Price

- IRS Form 8594
- Attached to P and T tax returns for the year in which sale occurs

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# Allocation of Purchase Price

Purchase of Target Assets (cont'd)

## Tax Consequences of Taxable Asset Purchase

- Purchaser
  - Purchase price is the basis to be allocated among T assets
    - Any T liabilities assumed by P will also be included in the basis to be allocated among the T assets
    - P does not inherit T tax attributes
      - Net Operating Loss Carryforwards
      - Accounting Methods

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# Allocation of Purchase Price

Purchase of Target Assets (cont'd)

## Tax Consequences of Taxable Asset Purchase

- Target
  - Recognizes gain or loss on the sale of assets
  - T recognizes ordinary income or capital gain/loss depending upon nature of asset, and the amount of purchase price allocated to the assets
    - Ordinary Income items
      - Depreciation recapture
      - Accounts receivable
      - Inventory
      - LIFO Inventory recapture
      - Sales of depreciable property to related parties.

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## Allocation of Purchase Price
## New Tax Code Provision

- Code Sections Designed to Boost Capital Expenditures
- Temporary 100% expensing for Certain Business Assets
- Permits 100% expensing of "qualified property" (generally plant and equipment) placed in service after September 27, 2017 and prior to January 1, 2023
  - "Applicable Percentage" declines ratably after December 31, 2022
    - 1/1/23 – 80-%
    - 1/1/24 – 60-%
    - 1/1/25 – 40-%
    - 1/1/26 – 20-%
- **2018 Planning Note: The Code as revised by the 2017 Tax Act appears to permit full expensing of assets constituting qualified property and acquired in a taxable asset purchase transaction, conferring a valuable tax benefit upon the purchaser, which should affect the pricing of the transaction.**

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## Payment of Purchase Price

- Cash
  - May be include escrows to protect Buyer
    - Purchase price escrow
    - Indemnification escrow
- Seller Financing
  - Seller acts as the "bank" to finance a portion of the purchase price:
    - Due to financial wherewithal of the Buyer
    - Bridge to meet Seller purchase price demands
    - Seller can recognize gain on installment basis as payments on seller note are received.

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# Payment of Purchase Price

- Perform due diligence on buyer's financial ability to service note
- Seller notes are often subordinated to Buyer's existing credit facilities
- Negotiation over whether seller notes can amortize so long as senior credit facilities are not in default
  - Seller note terms:
    - Financial and affirmative and negative covenants
    - May include offset language permitting Buyer to offset payments on the note by the amount of any indemnification claims arising under the Acquisition Agreement
    - Should accelerate upon sale of Buyer or target company.
- Securing Seller Note
  - Personal guaranty
  - Security interest in target company assets or equity.
  - Buyer's bank may object to filing financing statement

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# Payment of Purchase Price
# Earn Outs

- What is an Earn Out?
  - An Earn Out is a mechanism that the Buyer and Seller use providing that at least part of the purchase price is calculated based upon the performance of the target company or business over a period of time after the closing.
  - An Earn Out is typically structured as one or more contingent payments of purchase price after the closing, which are payable when certain specified targets (such as minimum (EBITDA) or sales targets are achieved within specified periods following the closing date. If the target company fails to achieve the earn out targets, the Buyer is not obligated to pay part or all of the earn out.

***See Exhibits for example of Earn Out Agreement.***

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# Payment of Purchase Price Earn Outs

- Why Use an Earn Out?
  - Seller:
    - Little operating history but significant growth potential
    - New product or technology that may increase its profitability or value
    - Experienced a drop in earnings that may be temporary
    - Is operating in a volatile economy or industry that can adversely affect the target company's profitability or cause its value to fluctuate widely
  - Buyer:
    - Has limited access to funds because debt financing from banks or other sources is not available
    - Does not agree with the seller's valuation of the target company

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# Pros and Cons of Earn Outs

- Seller Pros:
  - Opportunity to get a higher purchase price for the target company than it would have otherwise received
  - May achieve synergies with Buyer and its business, which will enhance earnings and profitability
- Seller Cons:
  - Prevents Seller from walking away -- Seller must remain involved on some level because they will be invested in the target company's success
  - Vulnerable to the Buyer's actions -- unless Seller continues to operate the target company (which itself may be limited by buyer), it must rely upon Buyer to achieve the earn-out targets
  - Buyer may seek to offset indemnification claims in acquisition agreement against the Seller

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## Pros and Cons of Earn Outs

- Buyer Pros:
  - Protects the buyer from overpaying for the target company
  - Motivates key personnel to remain with the target company post-closing to better ensure success of target company
  - Allocates risk between buyer and seller
  - Defers payment of part of the purchase price
- Buyer Cons:
  - Restricts its control of the target company. Seller may seek to limit the buyer's ability to make significant changes to the target company's business. This may restrict the buyers' ability to direct the business strategy of the target company and to integrate the target company with the rest of its business.
  - Seller may manage the target company to the short term/earn-out period, which may have an adverse effect on the long-term performance of the target company.

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## Key Agreement Provisions

- Representations and Warranties
- Indemnification
- Post Closing Covenants

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# Representations and Warranties

- What is a "Representation"?
  - An assertion of fact true on the date that the party makes the representation
- What is a "Warranty?"
  - A promise of indemnity if the representation is inaccurate

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# Representations and Warranties
# A Non-exhaustive List

- ✓ Organization and Good Standing
- ✓ Enforceability; Authority; No Conflict
- ✓ Capitalization
- ✓ Financial Statements
- ✓ Books and Records
- ✓ Sufficiency of Assets
- ✓ Description of Owned Real Property
- ✓ Description of Leased Real Property
- ✓ Title to Assets; Encumbrances
- ✓ Condition of Facilities
- ✓ Accounts Receivable
- ✓ Inventories
- ✓ No Undisclosed Liabilities
- ✓ Taxes
- ✓ No Material Adverse Change
- ✓ Employee Benefits
- ✓ Compliance with Legal Requirements; Governmental Authorizations
- ✓ Legal Proceedings; Orders
- ✓ Contracts; No Defaults
- ✓ Insurance
- ✓ Environmental Matters
- ✓ Employees
- ✓ Labor Disputes; Compliance
- ✓ Intellectual Property Assets
- ✓ Relationships with Related Persons
- ✓ Brokers or Finders
- ✓ Securities Law Matters
- ✓ Cybersecurity and Privacy
- ✓ Solvency
- ✓ Disclosure

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## Representations and Warranties

- Likely comprise the largest part of the acquisition agreement.
- Purpose of Representations and Warranties:
  - allocate risk between Buyer and Seller
  - disclose material information about the parties, the stock or assets
  - serve as the basis for an indemnification claim
  - affect a party's obligation to close the transaction or terminate the acquisition agreement

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## Representations and Warranties

- Is there a Difference Between a Representation and a Warranty?
  - Technically, a representation is a statement about a historical fact
  - Warranty is a promise to do something in future
  - Some have suggested that a representation supports a tort cause of action, independent of the contract-based action supported by the breach of a warranty

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## Representations and Warranties

- Buyer and Seller Competing Objectives
  - Buyer wants comprehensive representations and warranties that are not qualified by knowledge or materiality
  - Seller wants to narrow the scope of its representations and warranties and qualify by:
    - ***Materiality***: qualifying the representation or warranty by materiality or what might cause a material adverse affect
    - ***Knowledge***: limiting the representation or warranty to the knowledge of certain individuals of Seller
    - ***Disclosure***: Qualifying a representation or warranty with information disclosed on a disclosure schedule

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## Representations and Warranties What is Material? Materiality?

- Private companies not subject to SEC regulation of financial statements
  - Financial Reporting Standards
  - Audited financial statement requirement
  - Content of audited financial statements, including footnotes
  - NYSE and NASDAQ provide guidance on material events that require disclosure by reporting entities

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# Representations and Warranties Materiality

- ***Define Material when possible to avoid disputes of what is "material"***

  Section __ of the Disclosure Schedules lists each of the following Contracts (x) by which any of the Purchased Assets are bound or affected or (y) to which Seller is a party or by which it is bound in connection with the Business or the Purchased Assets (together with all Leases listed in Section __ of the Disclosure Schedules and all Intellectual Property Agreements listed in Section __ of the Disclosure Schedules, collectively, the "Material Contracts"):

  1) all Contracts involving aggregate consideration in excess of $[AMOUNT] or requiring performance by any party more than one year from the date hereof, which, in each case, cannot be cancelled without penalty or without more than [180/[NUMBER]] days' notice;
  2) all Contracts that relate to the sale of any of the Purchased Assets, other than in the ordinary course of business, for consideration in excess of $[AMOUNT];
  3) all Contracts that relate to the acquisition of any business, a material amount of stock or assets of any other Person or any real property (whether by merger, sale of stock, sale of assets or otherwise), in each case involving amounts in excess of $[AMOUNT];
  4) except for agreements relating to trade receivables, all Contracts relating to indebtedness (including, without limitation, guarantees), in each case having an outstanding principal amount in excess of $[AMOUNT];
  5) all Contracts between or among the Seller on the one hand and any Affiliate of Seller on the other hand;
  6) all collective bargaining agreements or Contracts with any labor organization, union or association.

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# Representations and Warranties Materiality

- <u>Additional Examples of Defining Materiality</u>:
  - Section __ of the Company Disclosure Schedules sets forth (i) each customer who has paid aggregate consideration to Company for goods or services rendered in an amount greater than or equal to $100,000 for each of the two most recent fiscal years (collectively, the "Material Customers"); and (ii) the amount of consideration paid by each Material Customer during such periods. Company has not received any notice, and has no reason to believe, that any of its Material Customers has ceased, or intends to cease after the Closing, to use its goods or services or to otherwise terminate or materially reduce its relationship with Company.
  - Section __ of the Company Disclosure Schedules sets forth (i) each supplier to whom Company has paid consideration for goods or services rendered in an amount greater than or equal to $100,000 for each of the two most recent fiscal years (collectively, the "Material Suppliers"); and (ii) the amount of purchases from each Material Supplier during such periods. The Company has not received any notice, and has no reason to believe, that any of its Material Suppliers has ceased, or intends to cease, to supply goods or services to Company or to otherwise terminate or materially reduce its relationship with Company.

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# Representations and Warranties Materiality

- ***Buyer Favorable***:
  - Each Material Contract is valid and binding on Seller in accordance with its terms and is in full force and effect. None of Seller or, to Seller's Knowledge, any other party thereto is in breach of or default under (or is alleged to be in breach of or default under) or has provided or received any notice of any intention to terminate, any Material Contract. No event or circumstance has occurred that, with notice or lapse of time or both, would constitute an event of default under any Material Contract or result in a termination thereof or would cause or permit the acceleration or other changes of any right or obligation or the loss of any benefit thereunder. Complete and correct copies of each Material Contract (including all modifications, amendments and supplements thereto and waivers thereunder) have been made available to Buyer. There are no material disputes pending or threatened under any Contract included in the Purchased Assets.
- ***Seller Favorable***:
  - Except as set forth on Section ___ of the Disclosure Schedules, Seller is not in breach of, or default under, any Material Contract, except for such breaches or defaults that would not have a Material Adverse Effect.

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# Representations and Warranties Knowledge Qualifiers

- **Definition of "Knowledge"**
  - Knowledge qualifiers can reduce the scope of a Seller's representation and warranty. The Acquisition agreement should properly define knowledge.
    - Seller prefers to:
      - Limit the number of individuals that will be attributed with knowledge
      - Limit the knowledge standard to actual knowledge without any duty of inquiry
    - Buyer prefers to:
      - Expand the number of individuals that will be attributed with knowledge or just use the term "Seller"
      - Require that the individuals charged with knowledge conduct appropriate inquiry or investigation of various definitions of Knowledge

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# Representations and Warranties Knowledge Qualifiers

- **Definition of "Knowledge" (cont'd)**
  - ***Seller Favorable***:
    - "Knowledge of Sellers" means, as to a particular matter, the actual knowledge of the individuals listed on Schedule __.
    - "Knowledge of the Company" and "the Company's knowledge" mean the knowledge after reasonable inquiry of the Chief Executive Officer and Chief Financial Officer of the Company, as of the applicable date.
    - "Knowledge of the Sellers" and words of similar import means the actual knowledge (after reasonable internal inquiry of Company Employees) of any Seller.
    - "**Knowledge of Sellers or Sellers' Knowledge**" or any other similar knowledge qualification, means the actual or constructive knowledge of any director or officer of Sellers, after due inquiry.
      - Any representation or warranty qualified "to the knowledge of Seller" or "to Seller's knowledge" or with any similar knowledge qualification is limited to matters within the actual knowledge of the officers of Seller and the employees of Seller with supervisory duties related to the Assets.

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# Representations and Warranties Definition of "Knowledge"

- **Definition of "Knowledge" (cont'd)**
  - ***Buyer Favorable***:
    - "Knowledge" means, with respect to an individual, such individual is actually aware of the particular fact, matter, circumstance or other item, or should be aware of the particular fact, matter, circumstance or other item after reasonable inquiry of such person's direct reports and, with respect to any other Person (other than an individual), any individual who is serving, or who has at any time served, as a director, officer, partner, member, shareholder, executor or trustee of such Person (or in any similar capacity) has, or at anytime had, Knowledge of such fact, matter, circumstance or other item.
    - The Seller is not in material breach or default, and to the Seller's knowledge, no event has occurred which with notice or lapse of time would constitute a material breach or default, or permit termination, modification, or acceleration, under the Contractual Obligation (***"knowledge" not defined***).

      ***Who knows which this favors***?
      - Certain of the representations and warranties of Seller are made "to Seller's knowledge" or refer to what is "known" to Seller or of what Seller is "aware." The parties hereto agree that the meaning of such expressions shall with respect to Seller in all cases be understood as comprising the actual knowledge ***and belief*** of the corporate officers of Seller without any type of additional investigation thereof.

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## Representations and Warranties Disclosure Schedules

- Disclosure Schedules provide additional information to the Buyer about the Seller's business
- Seller uses disclosure schedules for exceptions to representations and warranties
- Disclosure Schedules shift risk to the Buyer
  - limit the Seller's exposure to an indemnification claim
  - Prevent Buyer from terminating the transaction
  - Sellers generally desire broad disclosure to insulate against a later indemnification claim

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## Representations and Warranties Disclosure Schedules

- Updating Disclosure Schedules
  - Seller will often want the opportunity to update disclosure schedules
  - Buyer may restrict Seller's ability to update the disclosure schedules or limit updates to specified schedules
  - Updates and changes to the disclosure schedules may affect other terms of the transaction (purchase price, indemnification baskets and caps, termination rights of Buyer)

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## Representations and Warranties Disclosure Schedules

- Buyer strategy for dealing with Seller disclosure exceptions to representations and warranties:
  - Accept the disclosure; it may not be insignificant to the business
  - Investigate further
  - Adjust the purchase price, basket, or indemnification cap
  - Require the Seller to resolve the issue prior to closing
  - Terminate transaction

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## Representations and Warranties Disclaimers of Reps and Warranties

- Seller desires Buyer to confirm that Seller representations and warranties are confined to the Acquisition Agreement
  - Disclaimers seek to bar any Buyer claims outside of those claims arising from the Acquisition Agreement
  - Disclaimers should be drafted with precision to address what is disclaimed
  - Some disclaimers may be invalid
    - Delaware law requires explicit disclaimers in order for Buyer to waive fraud claims

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# Representations and Warranties
# Disclaimer of Warranties

- **Comprehensive Disclaimer Statement:**

Disclaimer. NEITHER SELLER NOR ANY OF ITS AFFILIATES, REPRESENTATIVES OR ADVISORS HAS MADE, OR SHALL BE DEEMED TO HAVE MADE, ANY REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, AT LAW OR IN EQUITY, IN RESPECT OF SELLER,, THE BUSINESS, THE ACQUIRED ENTITIES' ASSETS, LIABILITIES OR OPERATIONS, THE ACQUIRED ASSETS OR THE ASSUMED LIABILITIES, OTHER THAN THOSE EXPRESSLY MADE BY SELLER IN THISARTICLE II. NO REPRESENTATION OR WARRANTY HAS BEEN MADE OR IS BEING MADE HEREIN (A) AS TO MERCHANTABILITY, SUITABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR QUALITY, WITH RESPECT TO ANY OF THE ASSETS BEING SO TRANSFERRED, OR AS TO THE CONDITION OR WORKMANSHIP THEREOF OR THE ABSENCE OF ANY DEFECTS THEREIN, WHETHER LATENT OR PATENT (OR ANY OTHER REPRESENTATION OR WARRANTY REFERRED TO IN SECTION 2-312 OF THE UNIFORM COMMERCIAL CODE OF ANY APPLICABLE JURISDICTION), (B) WITH RESPECT TO ANY PROJECTIONS, ESTIMATES OR BUDGETS DELIVERED TO OR MADE AVAILABLE TO BUYER OR ITS AFFILIATES, REPRESENTATIVES OR ADVISORS OR (C) WITH RESPECT TO ANY OTHER INFORMATION OR DOCUMENTS MADE AVAILABLE TO BUYER OR ITS AFFILIATES, REPRESENTATIVES OR ADVISORS EXCEPT, IN THE CASE OF THIS CLAUSE (C) ONLY, AS EXPRESSLY COVERED BY A REPRESENTATION OR WARRANTY CONTAINED IN THIS ARTICLE II. NEITHER BUYER NOR ANY OF ITS AFFILIATES IS ENTITLED TO RELY ON ANY STATEMENT, REPRESENTATION OR WARRANTY, ORAL OR WRITTEN, EXPRESS OR IMPLIED, AT LAW OR IN EQUITY, OTHER THAN THOSE EXPRESSLY SET FORTH IN THISARTICLE II. NOTWITHSTANDING THE FOREGOING, NOTHING CONTAINED IN THIS DISCLAIMER SHALL AFFECT ANY CLAIM BY BUYER FOR FRAUD.

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# Representations and Warranties
# No Other Representations or Warranties

- **No Other Representations or Warranties**
  - NOTWITHSTANDING ANY PROVISION OF THIS AGREEMENT TO THE CONTRARY, EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES EXPRESSLY MADE BY THE COMPANY IN THIS ARTICLE (INCLUDING THE DISCLOSURE SCHEDULES THERETO) OR BY THE REPRESENTATIVE IN SECTION __, OR BY THE COMPANY IN THE CERTIFICATES TO BE DELIVERED TO PARENT PURSUANT TO SECTION __, NO GROUP, COMPANY OR AFFILIATE THEREOF NOR ANY OTHER PERSON MAKES ANY REPRESENTATION OR WARRANTY WITH RESPECT TO THE GROUP COMPANIES OR THEIR RESPECTIVE BUSINESSES, OPERATIONS, ASSETS, LIABILITIES, CONDITION (FINANCIAL OR OTHERWISE) OR PROSPECTS, NOTWITHSTANDING THE DELIVERY OR DISCLOSURE TO PARENT, MERGER SUB OR ANY OF THEIR RESPECTIVE AFFILIATES OR REPRESENTATIVES OF ANY DOCUMENTATION, FORECASTS, PROJECTIONS OR OTHER INFORMATION WITH RESPECT TO ANY ONE OR MORE OF THE FOREGOING.

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# Representations and Warranties
# No Undisclosed Liabilities

- Buyer Objectives:
  - All liabilities, contingent or otherwise, of Seller are disclosed on:
    - Balance sheet
    - Disclosure schedule
    - Ordinary course liabilities incurred since date of most recent balance sheet

      Seller Objectives:
      - limit disclosure to what is required to be disclosed under GAAP
      - may not require disclosure of contingent liability if it does not meet GAAP reporting threshold.

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# Representations and Warranties
# No Undisclosed Liabilities

- Buyer-Favorable Undisclosed Liabilities Representation:
  - Except as set forth in the Balance Sheet or referred to in the footnotes thereto, the Company does not have any liabilities other than: (a) liabilities specifically disclosed on Schedule __ hereto; (b) liabilities under Contracts of the type required to be disclosed by the Sellers on any schedule hereto and so disclosed or which because of the dollar amount or other qualifications are not required to be listed on such schedule, in each case, excluding liabilities relating to a breach of any such Contract; and (c) immaterial liabilities incurred since the Balance Sheet Date in the ordinary course of business and consistent with past practice not involving borrowings by the Company. Schedule __ sets forth a list of all current arrangements of the Company for borrowed money and all outstanding balances as of immediately prior to the Closing Date with respect thereto, which outstanding balances will be paid in full on the Closing Date. The Company is not in default in respect of the terms or conditions of any borrowings.

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# Representations and Warranties No Undisclosed Liabilities

- Seller-Favorable No Undisclosed Liabilities Representation:
  - Neither the Company nor any Subsidiary has any Liabilities required to be reflected in financial statements prepared in accordance with GAAP other than(i) those set forth or adequately provided for in a consolidated balance sheet of the Company and its Subsidiaries included in the Financial Statements as of July 31, 2015 (such date, the "***Company Balance Sheet Date***" and such balance sheet, the "***Company Balance Sheet***"), (ii) those incurred in the conduct of the Company's and any Subsidiary's business since the Company Balance Sheet Date in the ordinary course consistent with past practice, if such past practice is in accordance with GAAP, and do not result from any breach of Contract, warranty, infringement, tort or violation of Applicable Law, (iii) those that are not in excess of $100,000 individually or $500,000 in the aggregate and (iv) those incurred by the Company in connection with the execution of this Agreement. Except for Liabilities reflected in the Financial Statements, neither the Company nor any Subsidiary has any off-balance sheet Liability of any nature to, or any financial interest in, any third parties or entities, the purpose or effect of which is to defer, postpone, reduce or otherwise avoid or adjust the recording of expenses incurred by the Company any Subsidiary. All reserves that are set forth in or reflected in the Company Balance Sheet have been established in accordance with GAAP consistently applied and are adequate. Without limiting the generality of the foregoing, neither the Company nor any Subsidiary has ever guaranteed any debt or other obligation of any other Person.

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# Indemnification Provisions

- Contractual remedy for losses incurred after the closing
- Losses usually result from breaches of representations, warranties, covenants or agreements in the acquisition agreement
- Buyer wants broad indemnification rights because it will likely bear the claim or loss after the closing date
- Seller desires to limit indemnification as much as possible
- Security for indemnification claims
  - Indemnification Escrow
  - Representation and Warranty Insurance

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## Indemnification Provisions Sandbagging

- "Sandbagging" is a term used to describe the Buyer's right to pursue an indemnification claim against Seller after the closing of a transaction for facts, events or circumstances that, although known to the Buyer, are not disclosed on the disclosure schedules of Seller, and as a result render the Seller's representation and warranty inaccurate.
- Illinois is a pro-sandbagging state. This allows the indemnified party to sandbag absent an anti-sandbagging provision even if it knows the representation was inaccurate before entering the agreement. Illinois state courts do not require a party's reliance on the representations or statements to make a claim for indemnification.

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## Indemnification Provisions Sandbagging

- Effect of Investigation.
  - The representations, warranties and covenants of the Indemnifying Party, and the Indemnified Party's right to indemnification with respect thereto, ***shall not be affected or deemed waived by reason of any investigation made by or on behalf of the Indemnified Party*** (including by any of its Representatives) or by reason of the fact that the Indemnified Party or any of its Representatives knew or should have known that any such representation or warranty is, was or might be inaccurate or by reason of the Indemnified Party's waiver of any condition set forth in Section __.

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## Indemnification Provisions Sandbagging

- **BENEFIT OF THE BARGAIN/ PRO-SANDBAGGING**
  - The right to indemnification, payment, reimbursement, or other remedy based upon any such representation, warranty, covenant, or obligation ***will not be affected by … any investigation conducted or any Knowledge acquired at any time***, whether before or after the execution and delivery of this Agreement or the Closing Date, with respect to the accuracy or inaccuracy of, or compliance with, such representation, warranty, covenant, or obligation.

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## Indemnification Provisions Sandbagging

- **ANTI-SANDBAGGING PROVISION**
- ***No party shall be liable*** under this Article for any Losses resulting from or relating to any inaccuracy in or breach of any representation or warranty in this Agreement ***if the party seeking indemnification for such Losses had Knowledge of such Breach before Closing***

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# Indemnification Survival Period

- Representations and Warranties need to survive closing to form the basis of a claim post-closing
  - Length of Survival Period
    - Pro Seller: 6 to 12 months
    - Pro Buyer: 24-36 months.
  - Exceptions to general survival period
  - Fundamental Representations and Warranties
- Fundamental corporate matters
  - Organization, authority, and capitalization
  - Title to stock or assets
  - Taxes
    - Usually tied to statute of limitations
- Environmental matters
- ERISA
- Intellectual Property

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# Indemnification Limits/Baskets

- Baskets act as a deductible so that losses need to reach a certain level before there is a claim
  - Thresholds (also known as "dollar one" or "tipping" baskets), where the indemnifying party is liable for the total amount of losses once the minimum amount is exceeded
  - Deductibles (also known as "excess liability" baskets), where the indemnifying party is only liable for losses over the minimum amount
  - Hybrids
    - True Deductible up to certain dollar level, tipping basket if second threshold is reached
      - Example: Losses up to $50,000 are true deductible. Amounts $50,000 - $100,000 are Seller responsibility. Amounts over $100,000 are tipping basket so that Seller is responsible from Dollar One.

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# Indemnification Limits-Caps/ Exclusive Remedy

- Caps limit a party's maximum total recovery
  - Stated dollar amount
  - Indemnification Escrow amount
  - Percentage of purchase price
- Seller perspective
  - Limit escrow amount and confine cap to specified (low) percentage of purchase price
  - Apply cap to all indemnification claims
  - Indemnification is exclusive remedy
- Buyer Perspective
  - Liability not limited to escrow amount
  - Cap at entire purchase price
    - -More likely to occur in smaller transactions
  - Carve out certain representations and warranties from cap
    - -Environmental liabilities
  - Indemnification is not exclusive remedy
    - Fraud
    - Specific performance/equitable relief
    - Willful misconduct

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# Survival Period

- 11.1 SURVIVAL …
- All representations, warranties, covenants, and obligations in this Agreement, the Disclosure Letter, the supplements to the Disclosure Letter, and any certificate, document, or other writing delivered pursuant to this Agreement will survive the Closing and the consummation and performance of the Contemplated Transactions.
- 11.5 TIME LIMITATIONS
- If the Closing occurs, Sellers shall have liability under Section 11.2(a) with respect to any Breach of a representation or warranty (other than those in Sections…, as to which a claim may be made at any time), only if on or before the date that is ___ years after the Closing Date, Buyer notifies [Target's representative] of a claim, specifying the factual basis of the claim in reasonable detail to the extent known by Buyer.

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## Post Closing Covenants

- Non-disclosure
- Non-competition
  - Sale of business non-compete vs. employment based
  - Duration
  - Scope
- Employment/Independent Contractor Agreement
  - Taxes, Benefits and Termination Implications
  - Non-competition

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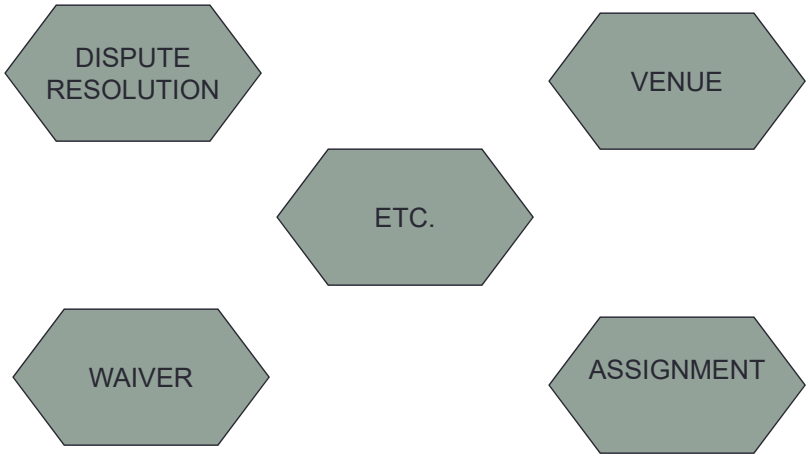
## Miscellaneous Provisions



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## Ancillary Documents

- Employment Agreements - Key Employees
- Non-Compete
- Promissory Note
- Security Agreement
- Escrow Agreement
- Etc.

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## Necessary Transfer Documents

- Asset Sale
  - Bill of Sale and Assignment
  - Assignment and Assumption Agreement
- Stock Sale
  - Stock Certificate or
  - Assignment Separate from Certificate – Stock Power

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## Attachments

- Sample Clauses and Agreements
  - Letter of Intent (Simple)
  - Letter of Intent (Complex)
  - Fully Negotiated Indemnification Clause
  - Working Capital Adjustment Section
  - Earn Out Agreement
  - Indemnification Clause (simple)

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# QUESTIONS ??

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# Kenneth W. Clingen, Esq.

Ken Clingen is the managing member of Clingen Callow & McLean, a business law firm with offices in Lisle and Geneva. Ken concentrates his practice in counselling closely owned and family owned businesses and their owners. Ken devotes the majority of his practice to ongoing daily counseling matters for these clients, and is specifically involved in assisting clients in choice of entity, mergers and acquisitions, and business succession transactions. As a CPA, Ken uses his knowledge of financial and accounting concepts in tandem with his legal and tax knowledge help his clients deal with their business and legal issues. Ken has presented a number of seminars on mergers and acquisitions, choice of entity and business succession to the DuPage and Kane County Bar Association, and on behalf of the National Business Institute and Strafford Seminars.

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# Markus May, Esq.

Markus May is a business transactions attorney with knowledge in a broad range of industries. He represents clients who are starting, operating, buying and selling businesses and has spoken to numerous professional and business organizations on related topics. Mr. May is a prior Chairman of the: DuPage County Bar Association Business Law Section Council, ISBA Business & Securities Law Section Council, Chicago Bar Association Business Law Committee, and CBA Mergers and Acquisitions Committee. He helps draft business laws with the Institute of Illinois Business Law (including the recent LLC Act) and is a member of the Midwest Business Brokers and Intermediaries and Exit Planning Exchange industry associations focused on helping owners buy and sell their businesses.

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# EARN OUT AGREEMENT

**THIS EARN OUT AGREEMENT** (the "***Agreement***"), is entered into this 14th day of December, 2010 by and between ENERGY STEEL ACQUISITION CORP., a Delaware corporation ("***ESAC***"), Graham Corporation, a Delaware corporation ("***Graham***" in its capacity of Guarantor under Section 2.3 and otherwise as expressly provided herein as a direct party to this Agreement), and LISA D. RICE, individually and as the Trustee of the Lisa D. Rice Revocable Trust dated June 5, 2003 ("***Seller***"). Capitalized terms not otherwise defined in this Agreement shall have the meaning ascribed to them in that certain Stock Purchase Agreement by and among Graham, ESAC, Energy Steel & Supply Co., a Michigan corporation ("***Energy Steel***") and the Seller dated on even date herewith (the "***Stock Purchase Agreement***").

**WHEREAS**, the Seller beneficially owns all of the outstanding shares of capital stock of Energy Steel, which is engaged in the manufacture and supply of products and raw materials to the nuclear power generation industry (the "***Energy Steel Business***");

**WHEREAS**, simultaneously with the execution of this Agreement, ESAC is acquiring Energy Steel pursuant to and subject to the conditions set forth in the Stock Purchase Agreement; and

**WHEREAS**, as a condition to the consummation of the transactions set forth in the Stock Purchase Agreement, the Stock Purchase Agreement provides that this Agreement shall be entered into by the parties, pursuant to which Seller shall be eligible to receive certain performance-based payments from ESAC if certain performance conditions are satisfied (the "***Earn Out Consideration***") with respect to the Energy Steel Business.

**NOW**, **THEREFORE**, in consideration of the foregoing recitals and of the mutual covenants and conditions contained herein and such other consideration the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

## ARTICLE I.

## EARN OUT CONSIDERATION

**Section 1.1 Defined Terms**.

"***2011 EBITDA Thresholds***" and "***2012 EBITDA Thresholds***" mean those EBITDA thresholds set forth in the following tables:

| **2011 EBITDA Thresholds** | **Amount of First Year Payment** |
|---|---|
| [3] $3,625,000 | $250,000 |
| [3] $3,750,000 | $500,000 |

| | |
|---|---|
| ³ $3,875,000 | $750,000 |
| ³ $4,000,000 | $1,000,000 |

| **2012 EBITDA Thresholds** | **Amount of Second Year Payment** |
|---|---|
| ³ $3,625,000 | $250,000 |
| ³ $3,750,000 | $500,000 |
| ³ $3,875,000 | $750,000 |
| ³ $4,000,000 | $1,000,000 |

"***Catch-Up EBITDA Threshold***" means, subject to the satisfaction of conditions set forth in Sections 1.3 and 1.4, an aggregate EBITDA of Energy Steel for Fiscal Year 2011 and Fiscal Year 2012 of $7,250,000.

***"EBITDA"*** means, for any period, Energy Steel's net income from continuing operations for such period on a stand alone basis, plus Energy Steel's (i) provisions for taxes based on income for such period, (ii) interest expenses for such period, and (iii) depreciation and amortization of tangible and intangible assets of Energy Steel for such period as determined in accordance with GAAP and subject to the GAAP Exceptions. Further, EBITDA shall be adjusted as described in the last sentence of this definition, and by excluding the effects of, or otherwise taking into account, any and all of the following accounting principles to the extent otherwise included in the determination of earnings from operations:

(a) gains, losses or profits realized by Energy Steel from the sale of assets other than in the ordinary course of business and any "extraordinary items" of gain or loss (as determined in accordance with GAAP and subject to the GAAP Exceptions);

(b) any management fees, general overhead expenses, or other intercompany charges, of whatever kind or nature, charged by ESAC, Graham or any other Affiliates to the Energy Steel Business, except to the extent they offset expenses that would otherwise be incurred by Energy Steel (e.g., blanket insurance coverage);

(c) any legal or accounting fees and expenses incurred in connection with this Agreement or the Stock Purchase Agreement.

(d) material modifications to staffing levels and compensation packages during the earn out period will require the reasonable agreement of the Seller prior to the implementation of such strategy. If the Seller disagrees with the addition, we would partition out both the costs and corresponding benefits of such addition to be excluded from the EBITDA calculation.

(e) Items deemed to be outside the course of normal operations of the Energy Steel Business which are non-recurring or non-operational shall be an adjustment for purposes of the earn out calculation.

(f) For purposes of the earn out calculation, material variances in the use of estimates, accounting methodologies, prepaid and accrued expense treatment, and application of GAAP shall be adjustments.

(g) As of the date of closing, Graham has simultaneously entered into a real estate lease for the premises on which Energy Steel conducts its business. The provisions of the lease also grant Graham on option to purchase the real estate. To the extent that Graham exercises its option to purchase the real estate, adjustments will be made to the earn out EBITDA such that the expenses reflect those which would have occurred under the terms of the lease had the option not been exercised.

In determining earnings from operations, the purchase and sales prices of goods and services sold by Energy Steel (or ESAC) to Graham or its Affiliates, or purchased by the Energy Steel (or ESAC) from Graham or its Affiliates, or payment of royalties, shall be adjusted to reflect the amounts that Energy Steel (or ESAC) would have received or paid if dealing with an independent party in an arm's-length commercial transaction.

***"First Year Payment***" means the amount(s) specified in the chart included in the definition of 2011 EBITDA Thresholds and 2012 EBITDA Thresholds above.

***"Fiscal Year 2011***" means Energy Steel's year ending December 31, 2011.

***"Fiscal Year 2012***" means Energy Steel's year ending December 31, 2012.

***"Fiscal Year 2011 EBITDA***" means the EBITDA of Energy Steel for the Fiscal Year 2011, based on the audited financial statements of Energy Steel, as determined by Graham's independent auditors in their reasonable discretion.

***"Fiscal Year 2012 EBITDA***" means the EBITDA of Energy Steel for the Fiscal Year 2012 as determined by Graham's independent auditors in their reasonable discretion.

***"Second Year Payment***" means the amount(s) specified in the chart included in the definition of 2011 EBITDA Thresholds and 2012 EBITDA Thresholds above.

**Section 1.2 Generally**.

(a) On the terms and subject to the conditions set forth in this Agreement, the Seller shall be eligible to receive the Earn Out Consideration (as more particularly defined below). Subject to the satisfaction of the conditions set forth herein, the Earn Out Consideration may consist of two cash payments. The first payment shall be for and measured against the performance of the Energy Steel Business during the Fiscal Year 2011, and it shall be known as the "***First Year Payment***." The second payment shall be for and measured against the performance of the Energy Steel Business during the Fiscal Year 2012, and it shall be known as the "***Second Year Payment***" (collectively, the First Year Payment and the Second Year Payment shall comprise the "***Earn Out***

***Consideration***"). Except as set forth in Section 1.4 below, each payment is intended to be separate from and independent of the other payment. Thus, the Seller need not receive the First Year Payment in order to be eligible to receive the Second Year Payment (and vice versa). The amount of each payment shall be determined in accordance with Section 1.5 hereof, and no payment shall be made unless the associated conditions to payment are satisfied in accordance with Sections 1.3 and 1.4 hereof.

(b) ESAC shall pay to the Seller (i) the First Year Payment that corresponds to the 2011 EBITDA Threshold attained by Energy Steel as set forth in the table above, and (ii) the Second Year Payment that corresponds to the 2012 EBITDA Threshold attained by Energy Steel as set forth in the table above.

**Section 1.3 Conditions to First Year Payment, Second Year Payment and Catch-Up Payment**.

(a) ESAC shall pay to the Seller the First Year Payment if, and only if, the Energy Steel Business as operated by ESAC (or an affiliate thereof), generates EBITDA equal to or in excess of $3,625,000 during the Fiscal Year 2011.

(b) ESAC shall pay to the Seller the Second Year Payment if, and only if, the Energy Steel Business as operated by ESAC (or an affiliate thereof), generates EBITDA equal to or in excess of $3,625,000 during the Fiscal Year 2012.

(c) ESAC shall pay the Seller the Catch-Up Payment if, and only if, the Energy Steel Business as operated by ESAC (or an affiliate thereof), generates EBITDA equal to or in excess of the Catch-Up EBITDA Threshold set forth in the table below.

**Section 1.4 Catch-Up Payment**.

(a) In the event that no First Year Payment is made during Fiscal Year 2011 as a result of Energy Steel's failure to meet the minimum EBITDA threshold of $3,625,000, the Seller will be entitled to receive a catch-up payment in the amount of up to $1,000,000 (the "***Catch-Up Payment***"), if Energy Steel's Fiscal Year 2011 EBITDA plus Energy Steel's Fiscal Year 2012 EBITDA exceeds the Catch-Up EBITDA Thresholds, as set forth below:

| **Catch-Up Payment Thresholds** | **Amount of Catch-Up Payment** |
|---|---|
| ³ $7,250,000 | $250,000 |
| ³ $7,500,000 | $500,000 |
| ³ $7,750,000 | $750,000 |
| ³ $8,000,000 | $1,000,000 |

By way of examples: (i) if the Fiscal Year 2011 EBITDA is $3,500,000 (an event in which the First Year Payment would not be earned) and the Fiscal Year 2012 EBITDA is $4,500,000, ESAC shall make pay Seller the Second Year Payment of $1,000,000 plus a Catch-Up Payment in the

amount of $1,000,000; and (ii) if the Fiscal Year 2011 EBITDA is $3,500,000 (an event in which the First Year Payment would not be earned) and the Fiscal Year 2012 EBITDA is $4,000,000, ESAC shall pay Seller a Catch-Up Payment in the amount of $500,000.

(b) Notwithstanding the aforementioned subsection (a), Seller's right to receive the Catch-Up Payment is conditioned upon Energy Steel's Fiscal Year 2011 EBITDA being in excess of $3,000,000. For example, if the Fiscal Year 2011 EBITDA is $2,900,000 (an event in which the First Year Payment would not be earned) no Catch-Up Payment would be made regardless of the Fiscal Year 2012 EBITDA attained.

**Section 1.5 Calculation and Payment of Earn Out Consideration**.

(a) Within a period of ten (10) calendar days following ESAC's receipt of final financial statements for Energy Steel for Fiscal Year 2011 and Fiscal Year 2012 (which shall be prepared not more than one hundred twenty (120) days following the end of such fiscal year), ESAC will deliver to Seller (i) a calculation of the EBITDA for each such year, and (ii) a statement as to whether the Seller is entitled to the First Year Payment, Second Year Payment or Catch-Up Payment, as applicable. If ESAC determines that any payment is due hereunder, each such payment shall be made within ten (10) business days of the delivery of the calculation of such payment to the Seller. When payments are due hereunder, in each case, ESAC shall make the payment to the Seller by issuing a check in the payment amount. If any payment date hereunder falls on a day that is a Saturday, Sunday or holiday on which ESAC is closed, such payment shall be due on the next day on which ESAC is open for business.

(b) The parties agree that any dispute as to whether Earn Out Consideration is earned hereunder shall be resolved in accordance with the procedures set forth in Section 2.2 of the Stock Purchase Agreement.

## ARTICLE II.

## ADDITIONAL COVENANTS AND ACKNOWLEDGMENTS

**Section 2.1 Commercially Reasonable Efforts**. In consideration of the opportunity pursuant to this Agreement to earn the Earn Out Consideration, Seller agrees to use her commercially reasonable efforts to promote the interests of Graham, ESAC and the Energy Steel Business during the periods of time covered by this Agreement. ESAC and Graham agree that they will use commercially reasonable efforts to promote the interests and EBITDA of the Energy Steel Business and in carrying out its obligations under this Agreement. In this regard, Graham and ESAC shall ensure that the Energy Steel Business has adequate working capital and other resources necessary to carry on the business and affairs consistent with past practice in the ordinary course of business throughout Fiscal Year 2011 and 2012.

**Section 2.2 Right of Setoff**. The Seller acknowledges and agrees that any and all amounts of Earn Out Consideration owed to her pursuant to this Agreement shall be subject to the right of setoff in favor of Graham and ESAC contained in the Stock Purchase Agreement.

**Section 2.3 Guarantee of Graham.** Graham hereby unconditionally and irrevocably guarantees each and every obligation of ESAC under this Agreement as if Graham was the direct

party obligated for all payments due hereunder to Seller, as Graham will benefit directly and indirectly from the transactions contemplated by this Agreement and the Stock Purchase Agreement. Graham hereby waives all defenses afforded a guarantor or surety under applicable Laws. Graham's obligations hereunder shall be binding upon its successors and assigns and shall not be extinguished by any bankruptcy or reorganization of ESAC.

**Section 2.4 Covenants of ESAC as to Operation During Earn Out Periods.**

(a) ESAC and Graham will maintain the Energy Steel Business as a separate enterprise within their corporate structure;

(b) ESAC and Graham will provide sufficient working capital for operation of the Energy Steel Business throughout Fiscal Years 2011 and 2012;

(c) ESAC shall utilize reasonable commercial efforts to maintain Key Employees of Energy Steel throughout the Fiscal Years 2011 and 2012;

(d) ESAC shall operate and market the Energy Steel Business using the name "Energy Steel" (or any derivative thereof deemed appropriate by Graham) throughout Fiscal Years 2011 and 2012; and

(e) ESAC and Graham shall direct all new orders in the same product line as the Energy Steel Business to Energy Steel and shall not otherwise divert opportunities of Energy Steel to its Affiliates.

**Section 2.5 Acceleration and Early Termination.** The payment obligations of ESAC and Graham hereunder shall be subject to acceleration upon the occurrence of any one (1) of the following events:

(a) ESAC determines in its discretion to terminate this Agreement for its business purposes;

(b) The sale (subsequent to the date hereof) of all or substantially all of the assets of Energy Steel, ESAC and/or Graham;

(c) A change in control of Energy Steel, ESAC and/or Graham occurs; or

(d) ESAC and/or Graham have committed a material breach of any of their payment obligations, covenants, or agreements under this Agreement; provided Seller has notified Graham and ESAC of the breach, and the breach has continued without cure for a period of thirty (30) days after the written notice of breach.

In the event of an acceleration under this Section 2.5, Seller shall be entitled to immediate payment of the maximum payments available for each Fiscal Year. Seller acknowledges that the maximum payments hereunder shall not exceed $2,000,000 in the aggregate.

## ARTICLE III.

## GENERAL PROVISIONS

**Section 3.1 Amendment and Waiver**. Only a writing executed by each of the parties hereto may amend this Agreement. No waiver of compliance with any provision or condition hereof, and no consent provided for herein, will be effective unless evidenced by an instrument in writing duly executed by the party sought to be charged therewith. No failure on the part of any party to exercise, and no delay in exercising, any of its rights hereunder will operate as a waiver thereof, nor will any single or partial exercise by any party of any right preclude any other or future exercise thereof or the exercise of any other right.

**Section 3.2 Assignment**. No party will assign or attempt to assign any of its rights or obligations under this Agreement without the prior written consent of each of the other parties hereto and any attempted assignment will be null and void; provided, however, that without such consent, but upon notice to Seller, ESAC may assign all of its rights and obligations hereunder to any subsidiary of Graham so designated by Graham, it being agreed that such assignment will not relieve ESAC from its obligations hereunder.

**Section 3.3 Notices, Etc**. Each notice, report, demand, waiver, consent and other communication required or permitted to be given hereunder will be in writing and will be sent in accordance with Section 9.2 of the Stock Purchase Agreement.

**Section 3.4 Binding Effect**. Subject to the provisions of Section 3.2, this Agreement will be binding upon and will inure to the benefit of the parties and their respective successors and assigns. This Agreement creates no rights of any nature in any Person not a party hereto.

**Section 3.5 Governing Law**. This Agreement will be governed by and construed in accordance with the Laws of the State of New York without regard to its principles of conflicts of laws. The parties agree that the sole and exclusive forum for any Claim related to this Agreement, the interpretation or construction hereof and the transactions contemplated hereby will be the Supreme Court of and for the County of Monroe, State of New York. Each party unconditionally and irrevocably agrees not to bring any Claim in any other forum and not to plead or otherwise attempt to defeat the trial of such a matter in such court whether by asserting that such court is an inconvenient forum, lacks jurisdiction (personal or other) or otherwise. Each party hereby waives the right to a trial by jury.

**Section 3.6 Entire Agreement**. This Agreement sets forth the entire understanding of the parties, and supersedes any and all prior agreements, arrangements and understandings, written or oral, relating to the subject matter hereof.

**Section 3.7 Headings; Counterparts**. The headings of this Agreement are for convenience of reference only and do not form a part hereof and do not in any way modify, interpret or construe the intention of the parties. This Agreement may be executed in one or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument. The parties agree that facsimile copies of signatures will be deemed originals for all purposes hereof and that a party may produce such copies, without the need to

produce original signatures, to prove the existence of this Agreement in any proceeding brought hereunder.

**Section 3.8 Independent Counsel; Seller Taxes.** The parties state that they have carefully read this Agreement, know its contents, and freely and voluntarily agree to all of its terms and conditions. Each party acknowledges that it has been represented by independent legal counsel of its choice throughout all the negotiations that preceded the execution of this Agreement, and this Agreement has been executed with the consent and upon the advice of such independent legal counsel. Each party shall bear its own legal fees incurred as a result of the preparation, review and negotiation of this Agreement. Seller shall be responsible for all taxes incurred by Seller as a result of this Agreement and neither ESAC nor Graham shall be required to withhold any payments made hereunder except as may be required by law.

[**SIGNATURE PAGE FOLLOWS**]

IN WITNESS WHEREOF, the parties have duly executed this Agreement on the date first written above.

**ESAC:**

ENERGY STEEL ACQUISITION CORP.,
a Delaware corporation

By:_____
[Name]
[Title]

**GRAHAM:**

GRAHAM CORPORATION,
a Delaware corporation

By:_____
[Name]
[Title]

**SELLER:**

By:_____
LISA D. RICE, individually and as the Trustee of the Lisa D. Rice Revocable Trust dated June 5, 2003

## Indemnification Clause Version 1 – Pro Buyer

**10. Indemnification.**

**10.1 Seller Indemnification.** Seller jointly and severally with Seller's Shareholders shall indemnify, defend and hold harmless Buyer and Buyer's owners, managers, directors, officers, affiliates, employees, attorneys, agents, successors and assigns (collectively, "Buyer's Indemnified Persons") from and against any and all loss, damages, consequential damages, incidental damages, expense (including interest, penalties and attorneys' fees, costs and expenses), suit, proceeding, action, judgment, recovery, deficiency, claim, demand, liability, or obligation ("Losses") related to, or caused by, or arising from (i) any misrepresentation or omission, breach of warranty, or failure to fulfill any covenant or agreement contained herein by Seller or Seller's Shareholder; or (ii) any liability, obligation or commitment of any nature relating to the Assets or the Business based on events occurring prior to the Closing Date, or related to the operation of the Business prior to the Closing Date, other than Assumed Liabilities.

**10.2 Buyer Indemnification.** Buyer shall indemnify, defend and hold harmless Seller and Seller's owner, managers, directors, officers, affiliates, employees, attorneys, agents, successors and assigns (collectively, "Seller's Indemnified Persons") from and against any and all Losses related to, or caused by, or arising from (i) any misrepresentation or omission, breach of warranty, or failure to fulfill any covenant or agreement contained herein by Buyer; or (ii) any liability, obligation or commitment of any nature relating to the Assets or the Business based on events occurring after the Closing Date and not related to the operation of the Business prior to the Closing Date.

**10.3 Other Indemnification Matters.** A party's right to indemnification will not be affected by any investigation conducted with respect to any representation, warranty, covenant or agreement in this Agreement. THE INDEMNIFICATION PROVISIONS IN THIS ARTICLE WILL BE ENFORCEABLE REGARDLESS OF WHETHER ANY PERSON ALLEGES OR PROVES THE SOLE, CONCURRENT, CONTRIBUTORY OR COMPARATIVE NEGLIGENCE OF THE PERSON SEEKING INDEMNIFICATION OR ITS AFFILIATES, OR THE SOLE OR CONCURRENT STRICT LIABILITY IMPOSED ON THE PERSON SEEKING INDEMNIFICATION OR ITS AFFILIATES. The waiver of any condition based on the accuracy of any representation or warranty, or on the performance of or compliance with any covenant or agreement, will not affect the right to indemnification, payment of damages, or other remedy based on any such representation, warranty, covenant or agreement.

## Indemnification Clause Version 2 – Negotiated Clause

**6.** INDEMNIFICATION; REMEDIES.

6.1 Survival. All representations, warranties, covenants and obligations in this Agreement and the Disclosure Schedulesand any other certificate or document delivered pursuant to this Agreement shall survive the Closing and the consummation of the Contemplated Transactions, subject to Section 6.6.

6.2 Indemnification and Reimbursement by Seller.

(a) Subject to Section 6.4, Seller shall indemnify and hold harmless Buyer and its owners, Affiliates and Representatives (collectively, the "***Buyer Indemnified Persons"),*** and will reimburse the Buyer Indemnified Persons, for any loss, liability, claim, damage and expense (including costs of investigation and defense and reasonable attorneys' fees and expenses), whether or not involving a Third-Party Claim (collectively, "***Damages***"), arising from or in connection with:

(i) any breach of any representation or warranty made by Seller in this Agreement, the Disclosure Schedules, or any certificate, document, or instrument delivered by Seller pursuant to this Agreement;

(ii) any breach of any covenant or obligation of Seller in this Agreement or in any certificate, document, or instrument delivered by Seller pursuant to this Agreement;

(iii) any Liability arising out of the ownership or operation of the Acquired Assets or Business prior to the Effective Time other than the Assumed Liabilities;

(iv) any Retained Liabilities;

(v) any Excluded Assets; or

(vi) any Consent Contract or Retained Contract, to the extent such Damages do not arise as a result of Buyer's material breach, as Seller's agent, under any such Consent Contract or Retained Contract after the Effective Time.

(b) All Damages payable by Seller shall be first, off set and deducted equally against any amounts owing under both Seller Notes (with ½ being allocated to each Seller Note), and then, paid directly from the Seller in accordance with this Agreement.

6.3 Indemnification and Reimbursement by Buyer. Subject to Section 6.5, Buyer shall indemnify and hold harmless Seller and its Affiliates and Representatives (collectively, the "***Seller Indemnified Persons***") and will reimburse Seller Indemnified Persons, for any Damages arising from or in connection with:

(a) any breach of any representation or warranty made by Buyer in this Agreement or in any certificate, document, or instrument delivered by Buyer pursuant to this Agreement;

(b) any breach of any covenant or obligation of Buyer in this Agreement or in any other certificate, document, or instrument delivered by Buyer pursuant to this Agreement;

(c) any claim by any Person for brokerage or finder's fees or commissions or similar payments based upon any agreement or understanding alleged to have been made by such Person with Buyer (or any Person acting on Buyer's behalf) in connection with any of the Contemplated Transactions;

(d) any Assumed Liabilities;

(e) any Consent Contract or Retained Contract, to the extent such Damages arise as a result of Buyer's material breach, as Seller's agent, under any such Consent Contract or Retained Contract after the Effective Time; or

(f) any Liability arising out of the ownership or operation of the Acquired Assets or Business after the Effective Time.

6.4 Limitations on Amount – Seller. From and after the Closing, Seller shall have no liability (for indemnification or otherwise) with respect to claims under Section 6.2(a)(i) until the total of all Damages with respect to such matters exceeds $147,150 (the "***Deductible***") and then only for the amount by which such Damages exceed the Deductible up to an amount equal to $2,943,000 (the "***Cap***"). However, the Deductible and Cap limitations in this Section 6.4 will not apply to claims under or to

matters arising in respect of Sections 3.1 (only as to Organization), 3.2(a) (Enforceability; Authority), 3.3 (Ownership of Seller), 3.9 (Title to Assets; Encumbrances), or 7.15(b) (Guarantor Representations) (collectively, the "***Fundamental Representations***"), Sections 3.13 (Taxes), 3.15 (Employee Benefits) and 3.21 (Environmental Matters) (collectively, the "***Compliance Representations***"); provided, however, that in no event shall Seller's total liability for Damages related to breaches of this Agreement exceed the Base Purchase Price.

6.5 Limitations on Amount – Buyer. From and after the Closing, Buyer shall have no liability (for indemnification or otherwise) with respect to claims under Section 6.3(a) until the total of all Damages with respect to such matters exceeds the Deductible and then only for the amount by which such Damages exceed the Deductible. However, the Deductible shall not apply to claims under or to matters arising in respect to Sections 4.1 (only as to Organization) or Section 4.2(a) (Authority); provided, however, in no event shall Buyer's total liability for Damages related to breaches of this Agreement exceed the Purchase Price.

6.6 Time Limitations.

(a) No claim under Section 6.2(a)(i) or Section 6.3(a) shall be brought after the date that is eighteen (18) months following the Effective Time, except for (i) claims arising out of the Fundamental Representations or the Compliance Representations, all of which claims shall survive until 30 days following the expiration of the statute of limitations period (including all extensions thereof) applicable to the underlying subject matter being represented, and (ii) claims of which Seller has been notified with reasonable specificity by Buyer, or claims of which Buyer has been notified with reasonable specificity by Seller, within the aforesaid survival period applicable to the underlying claim (as applicable, the "***Survival Period***") in which case the Survival Period shall be extended an additional 6 months for the parties to negotiate to resolve the issues. If the issues are not resolved between the parties within the Survival Period, suit must be brought prior to the expiration of the Survival Period for a party to pursue any applicable claim. The parties expressly intend by the foregoing sentence to contractually shorten the applicable statute of limitations.

(b) No party shall have any claim or right of recovery for any breach of a representation, warranty, covenant or agreement unless (i) written notice is given in good faith by that party to the other party of the breach of the representation, warranty, covenant or agreement pursuant to which the claim is made or right of recovery is sought setting forth in reasonable detail the basis for the purported breach, the amount or nature of the claim being made, if then ascertainable, and the general basis therefor and (ii) such notice is given prior to the expiration of the Survival Period applicable to the underlying claim.

6.7 Third-Party Claims.

(a) If any Person that is or may be entitled to indemnification under this Agreement (an "***Indemnified Person***") either receives notice of the assertion of any claim, issuance of any Order or the commencement of any action or proceeding or otherwise learns of an assertion of a potential claim, Order or action by any Third Party (a "***Third-Party Claim***"), against such Indemnified Person, against which a Party to this Agreement is or may be required to provide indemnification under this Agreement (an "***Indemnifying Person***"), the Indemnified Person shall, as promptly as practicable, give written notice thereof together with a statement of any available information that the Indemnified Person has regarding such claim to the Indemnifying Person including to the extent known the basis for such claim, the facts pertaining thereto and, if known and quantifiable, the amount thereof; provided, however, that the failure to notify the Indemnifying Person will not relieve the Indemnifying Person of any liability that it may have to any Indemnified Person, except to the extent that the Indemnifying Person demonstrates that the

defense of such claim, order or action is prejudiced by the Indemnified Person's failure to give such notice.

(b) If any Third-Party Claim referred to in this Section 6 is brought against an Indemnified Person and such Indemnified Person gives notice to the Indemnifying Person of the commencement of such Third-Party Claim, the Indemnifying Person will be entitled to participate in the defense of such Third-Party Claim and, to the extent that it wishes (unless (i) the Indemnifying Person is also a party to such Third-Party Claim and the Indemnified Person determines in good faith that joint representation would be inappropriate, or (ii) the Indemnifying Person fails to provide, upon request, reasonable assurance to the Indemnified Person of its financial capacity to defend such Third-Party Claim and provide indemnification with respect to such Third-Party Claim), to assume the defense of such Third-Party Claim with counsel reasonably satisfactory to the Indemnified Person and, after written notice (a "Control Notice") from the Indemnifying Person to the Indemnified Person of its election to assume the defense of such Third-Party Claim, the Indemnifying Person will not, as long as it diligently conducts such defense, be liable to the Indemnified Person under this Section 6 for any fees of other counsel or any other expenses with respect to the defense of such Third-Party Claim, in each case subsequently incurred by the Indemnified Person in connection with the defense of such Third-Party Claim, other than reasonable costs of investigation. The Indemnifying Person will have ten (10) business days from receipt of a notice of a Third-Party Claim from an Indemnified Person pursuant to Section 6.7(a) to assume the defense thereof. If the Indemnifying Person does not, or is not pursuant to the preceding two sentences permitted to, assume the defense of a proceeding, the Indemnified Person shall have the right to assume the defense and employ separate counsel to represent such Indemnified Person and, subject to the limitations set forth in this Section 6, the reasonable fees and expenses of such separate counsel shall be paid by such Indemnifying Person. If the Indemnifying Person assumes the defense of a Third-Party Claim, (i) it will be conclusively established for purposes of this Agreement that the claims made in that Third-Party Claim are within the scope of and subject to indemnification under this Section 6; (ii) no compromise or settlement of such claims may be effected by the Indemnifying Person without the Indemnified Person's consent unless (A) there is no finding or admission of any violation of Laws by or any violation of the rights of any Person and no effect on any other claims that may be made against the Indemnified Person, and (B) the sole relief provided is monetary damages that are paid in full by the Indemnifying Person; and (iii) the Indemnified Person will have no liability with respect to any compromise or settlement of such claims effected without its consent. If notice is given to an Indemnifying Person of the commencement of any Third-Party Claim and the Indemnifying Person does not, within ten (10) business days after the Indemnified Person's notice is given, deliver a Control Notice to the Indemnified Person of its election to assume the defense of such Third-Party Claim, the Indemnifying Person will, subject to the limitations set forth in this Section 6, be bound by any reasonable determination made in such Third-Party Claim or any reasonable compromise or settlement effected by the Indemnified Person.

(c) Notwithstanding the foregoing, if an Indemnified Person determines in good faith that there is a reasonable probability that a Third-Party Claim may adversely affect it or its respective Buyer Indemnified Persons or Seller Indemnified Persons, other than as a result of monetary damages for which it would be entitled to indemnification under this Agreement, the Indemnified Person may, by notice to the Indemnifying Person, assume the exclusive right to defend, compromise, or settle such Third-Party Claim, but the Indemnifying Person will not be bound by any compromise or settlement effected without its consent (which may not be unreasonably withheld).

6.8 Procedures for Direct Claims. If any Indemnified Person should have a claim for indemnity against any Indemnifying Person that does not involve a Third Party Claim, the Indemnified Person shall deliver notice of such claim with reasonable promptness to the Indemnifying Person with the information provided in Section 6.6(b). The failure by any Indemnified Person to so notify the

Indemnifying Person shall not relieve the Indemnifying Person from any liability that it may have to such Indemnified Person (except to the extent that the Indemnifying Person demonstrates that the defense of such claim, order or action is prejudiced by the Indemnified Person's failure to give such notice) with respect to any claim made pursuant to Sections 6.2 or 6.3 and in accordance with this Section 6.8, it being understood that notices for claims in respect of a breach of a representation or warranty must be delivered prior to the expiration of the survival period under Section 6.6. If the Indemnifying Person does not notify the Indemnified Person within 60 calendar days following its receipt of such notice that the Indemnifying Person disputes its liability to the Indemnified Person under this Section 6, or the amount thereof, the claim specified by the Indemnified Person in such notice shall be conclusively deemed a liability of the Indemnifying Person under this Section 6 up to the amount specified in the notice, and the Indemnifying Person shall pay the amount of such liability to the Indemnified Person on demand or, in the case of any notice in which the amount of the claim (or any portion of the claim) is estimated, on such later date when the amount of such claim (or such portion of such claim) becomes finally determined; provided the amount cannot exceed the amount of the estimate in the notice. After providing the initial notice of claim, the Indemnified Person may revise such notice to include additional discovered information, including a revised estimate of damages in which event the Indemnifying Person shall have the opportunity to further accept or dispute the claim based on the new information within 60 calendar days of receipt of the new information. If the Indemnifying Person has timely disputed its liability with respect to such claim as provided above, or the amount thereof, the Indemnifying Person and the Indemnified Person shall resolve such dispute first by negotiation among Representatives of Buyer and Seller and then by litigation, to the extent such dispute is not so resolved.

6.9 Calculation of Damages; Treatment of Indemnity Payments.

(a) The amount of any Damages payable under this Section 6 by the Indemnifying Person shall be net of any amounts actually received by the Indemnified Person under applicable insurance policies or from any other Person alleged to be responsible therefore or pursuant to any indemnity, contribution or other similar payment by any Person with respect thereto, net of any expenses reasonably incurred in connection with the collection thereof, including deductibles and self-insured retentions. If the Indemnified Person receives any amounts under applicable insurance policies, or from any other Person alleged to be responsible for any Damages, subsequent to an indemnification payment by the Indemnifying Person, then such Indemnified Person shall promptly reimburse the Indemnifying Person for any payment made or expense incurred by such Indemnifying Person in connection with providing such indemnification payment up to the amount received by the Indemnified Person, net of any expenses reasonably incurred by such Indemnified Person in collecting such amount (including deductibles and self-insured retentions). The Indemnified Person shall use reasonable efforts to collect any amounts available under such insurance coverage or from such other Person alleged to have responsibility therefor; provided, however, that (i) doing so is commercially reasonable and (ii) such obligation shall not be a condition to, or a limitation on, indemnification rights hereunder prior to making any claim for indemnification under this Section 6.

(b) The Indemnifying Person shall not be liable under this Section 6 for any (i) Damages to the extent that the amount thereof, if any, was reflected in the calculation of the Adjustment Amount, as finally determined pursuant to Section 2.8, or (ii) Damages that are for special, punitive, exemplary or consequential damages, except in the case of intentional fraud or criminal misconduct and except to the extent such Damages were actually awarded, paid or incurred in a Third Party Claim.

(c) Solely for purposes of calculating the amount of Damages incurred arising out of or relating to any breach of a representation or warranty (and not for purposes of determining whether or not a breach has occurred), the references to "material" or "Material Adverse Effect" shall be disregarded.

(d) The Indemnified Person shall take, and shall cause its respective Buyer Indemnified Persons or Seller Indemnified Persons to take, all reasonable steps to mitigate and otherwise minimize their Damages to the maximum extent reasonably possible upon and after becoming aware of any event which would reasonably be expected to give rise to any Damages and an Indemnifying Person shall not be liable for any Damages to the extent that such Damages are attributable to the Indemnified Person's failure to mitigate.

(e) If the Indemnified Person receives any payment from an Indemnifying Person in respect of any Damages and the Indemnified Person could have recovered all or a part of such Damages from a third party based on the underlying claim asserted against the Indemnified Person, the Indemnified Person shall assign such of its rights to proceed against such third party as are necessary to permit the Indemnifying Person to recover from such third party the amount of such indemnification payment.

(f) The Parties agree to treat any indemnity payment under this Agreement as an adjustment to the Purchase Price to the extent permitted by applicable Legal Requirement.

6.10 No Double Recovery. Notwithstanding the fact that any party may have the right to assert claims for indemnification under or in respect of more than one provision of this Agreement or another agreement entered into in connection herewith in respect of any fact, event, condition or circumstance, no Indemnified Person shall be entitled to recover the amount of any Damages suffered by such Indemnified Person more than once under all such agreements in respect of such fact, event, condition or circumstance, and an Indemnifying Person shall not be liable for indemnification to the extent the Indemnified Person has otherwise been fully compensated on a dollar-for-dollar basis for such Damages pursuant to any Purchase Price adjustments hereunder.

6.11 Exclusion of Other Remedies. The Parties agree that, from and after the Closing, the sole and exclusive remedies of the Parties for any Damages based upon, arising out of or otherwise in respect of the matters set forth in this Agreement (including representations, warranties, covenants and agreements) and the Contemplated Transactions, whether based in contract or tort, are the indemnification and reimbursement obligations of the Parties set forth in this Section 6. The provisions of this Section 6.11 shall not, however, prevent or limit a cause of action hereunder (a) with respect to intentional fraud or criminal misconduct or (b) to obtain an injunction or injunctions to prevent breaches of this Agreement, to enforce specifically the terms and provisions hereof or to obtain other equitable remedies with respect hereto.

6.12 Duty to Mitigate. Each Indemnified Person shall take, and cause its Affiliates to take, all reasonable steps to mitigate any Damages upon becoming aware of any event or circumstance that would be reasonably expected to, or does, give rise thereto, including incurring costs only to the minimum extent necessary to remedy the breach that gives rise to such Damages.

6.13 Knowledge of Incorrect Representation or Warranty. Anything contained herein to the contrary notwithstanding, no Party shall have any Liability for any inaccuracy in, or breach of any representation or warranty by such Party, if the other Party had Knowledge on or before the Effective Time of the actual facts as a result of which such representation or warranty was inaccurate or breached.

6.14 Set Off. Buyer has various rights hereunder to set off amounts owed to Buyer Indemnified Parties or to Crosstown Town Group, LLC against the Seller Notes. Buyer shall first set off and deduct any amount to which it is entitled to under this Section 6 against any amounts owing equally under both Seller Notes (with ½ being allocated to each Seller Note), then set off and deduct against any other amounts otherwise payable to Seller after the Closing provided however, that Buyer's right of set off may only be exercised after (i) there is no dispute as to a claim and the Indemnifying Person has

agreed to the claim and the amount thereof, (ii) the Indemnifying Person and the Indemnified Person have resolved all disputes as to the applicable claim, or (iii) the entry of a final court order.

# *Letter of Intent*

February 3, 2018

Buzz Lightyear
Disney World
Orlando, Florida

Dear Mr. Lightyear:

It was a pleasure meeting you in person in Orlando on Sunday, and I particularly enjoyed the lunch at Sleeping Beauty's Castle. You have built a wonderful business with a strong reputation built on trust and excellence in client service, and I commend you for that. The passion and commitment to excellence that you and your company exhibit is something I would want to continue if I acquire Space Walkers, Inc. and would work with you to further build the business. While I have met and spoken to you only briefly, I have a good feeling about my ability to work with you and vice versa.

The remainder of this letter sets forth the principal terms of a proposed transaction by which I, not individually, but through a company owned by me ("Purchaser"), would acquire substantially all of the assets used in the business of Space Walkers, Inc. ("Seller"). In this letter, (1) you as the sole stockholder of the Seller are sometimes called the "Stockholder"; (2) the Purchaser, the Seller, and the Stockholder are sometimes collectively called the "Parties" and individually a "Party"; and (3) the Purchaser's possible acquisition of the assets of the Seller is sometimes called the "Possible Transaction." The terms of the Possible Transaction are set forth below, with the due diligence structure and other binding provisions of this letter of intent following thereafter.

## POSSIBLE TRANSACTION

It is anticipated the Possible Transaction would close within thirty days, assuming we are given reasonable access to complete due diligence during that period. I want to point out that the purchase would not be subject to any financing. The purchase funds would be wired directly from our bank account to Seller's account at Closing. This has the advantage of not subjecting the transaction to financing risk or third party requirements and limitations, and more importantly for you, does not saddle the company, which you will have an economic interest in seeing succeed, with the weight of significant third party liabilities.

As promptly as possible after the execution of this Letter of Intent, the Parties will work towards the preparation and execution of a definitive asset purchase agreement ("Purchase

Agreement") covering the following terms, types of representations, warranties, covenants, conditions and provisions, together with ancillary documents necessary to accomplish the Possible Transaction and appropriate exhibits disclosing requested information, all of which must be, as to form and substance, mutually satisfactory and acceptable to the Parties hereto.

To facilitate the negotiation of a Purchase Agreement, the Parties will request Purchaser's counsel to prepare an initial draft. The execution of such a Purchase Agreement will be subject to the satisfactory completion of Purchaser's due diligence investigation of the Seller and the business and the conditions noted below.

Based on the information currently known to Purchaser, it is proposed that the Purchase Agreement include the following terms:

Assets to be Purchased: All assets owned and/or related to Space Walkers, Inc. and related affiliates ("the Company") including its licenses, name and goodwill, other than cash and accounts receivable.

Consideration: Approximate total consideration of $4,000,000 which would be comprised of the following components:

1) Cash at Closing: $2,900,000 paid in cash at Closing (not subject to any third party financing) ("Purchase Price").

2) Consulting Payments: The Company would retain the Stockholder on a full time basis for 24 months after Closing. Stockholder would be hired as an independent consultant and be paid a minimum of $300,000 over that period. Any additional consulting arrangement beyond the 24 month period will be mutually agreed by both Purchaser and Stockholder. Full time would be defined as working a minimum of 25 hours/week with 3 weeks of vacation/year. The Company would also pay the monthly car lease payments for the Stockholder's Mercedes automobile through its remaining term, and monthly payments for the Stockholder's mobile phone for two years from the date of Closing. The Company would provide the Stockholder with health insurance, so long as such insurance is available under Seller's plan, at Purchaser's cost but Seller's expense for up to 24 months after Closing. Seller's responsibilities as a consultant would include, but not be limited to, operating the business, teaching Purchaser all aspects of the business, and helping maintain clients, pursue new clients, hire and manage staff, etc. I would envision the Stockholder becoming Chairman of a newly created Board of Advisors for the Company. The Consulting Agreement would contain an 18 month non-competition/non-solicitation clause.

3) Earnout Payments Over Three Years Un-Capped: In each successive twelve month period following the Closing for a period of three years, Seller shall receive 12.5% of the revenues received by the business exceeding $2,500,000 in that twelve month period ("Earnout"). Calculation and payment of the Earnout payments will be made following the end of each twelve month period. There will be no limit or cap on the amount of Earnout Seller can receive during this three-year period.

4) Additional Bonus Payments: If total revenues of the Company for the first 12 month period following the Closing exceed $4,000,000, Seller shall receive a $75,000 bonus above and beyond any Earnout payments. If total revenues of the Company for the second consecutive 12 month period following the Closing exceed $4,250,000, then Seller shall receive a $75,000 bonus above and beyond any Earnout payments.

5) Additionally, if Purchaser sells the business within 3 years from the Closing Date:

   a) if Seller received at least $4,000,000 in total compensation from the total of all payments under 1), 2), 3), and 4), then the net sales proceeds would be distributed first to Purchaser until it has received a total return of capital of $3,000,000, and thereafter, distributed 90% to Purchaser and 10% to Seller.

   b) if Seller received less than $4,000,000 in total compensation from the total of all payments under 1), 2), 3), and 4), then net sales proceeds would be distributed as follows:

      i) if Purchaser has not received a total return of capital of $3,000,000, then first to Purchaser until it has received a total return of capital of $3,000,000; any remaining amounts then distributed equally 50% to Seller and 50% to Purchaser until Seller has received total compensation of $4,000,000; and any amounts thereafter, split 90% to Purchaser and 10% to Seller; or
      ii) if Purchaser has received a total return of $3,000,000 in capital, then distributed equally 50% to Seller and 50% to Purchaser until Seller has received total compensation of $4,000,000; and any amounts

| | |
|---|---|
| | thereafter, distributed 90% to Purchaser and 10% to Seller. |
| Right of Set Off: | Purchaser would have a right of set off against the above consideration to guarantee Seller's representations, warranties and obligations under the Purchase Agreement. |
| Closing Date: | Sixty days from the effective date of this Letter of Intent, but in no event later than April 30, 2018. Upon signing of a Letter of Intent, the Parties will have 30 days to complete due diligence and finalize a Purchase Agreement. |
| Taxes: | Any taxes levied on the transaction will be paid by Seller. |
| Warranties: | The Seller and Stockholder shall warrant to Purchaser that on the Closing Date, Seller shall be the legal and beneficial owner of all the assets of the Company and all such assets shall be free and clear of any and all mortgages, liens, encumbrances, charges, or overdue and unpaid claims which could give rise to any liens against the assets and any encumbrances whatsoever. Seller and Stockholder shall also provide other customary representations and warranties related to the business. |
| General Indemnity: | Seller shall indemnify Purchaser for any and all claims, charges, suits, taxes or liabilities of any nature for the period prior to the Closing Date, and Purchaser shall grant a corresponding indemnity for the period commencing on the Closing Date. |
| Non-Compete: | Seller will execute a Noncompetition Agreement with respect to similar businesses for a term of 5 years from the Closing for the territory in which the Company does business. This Noncompetition Agreement will include a non-solicitation clause that applies to employees, consultants, subcontractors or clients of the business. |
| Accounts Payable/ Receivable and Liabilities: | All accounts payables, including but not limited to, ordinary accounts payables and sales tax payables and receivables as of the Closing Date will be for Seller's account. Purchaser shall assume no liabilities of any kind of Seller; provided, however, that Purchaser, at its sole option, may pay any known trade payables of Seller at Closing and correspondingly receive a credit, on a dollar-for-dollar basis, against the payment of the Purchase Price at Closing. |

Prorations: All transfer taxes, insurance, licenses, rents, utilities, and other customarily prorated items, shall be prorated as of the Closing Date as an adjustment to the Purchase Price.

Lease: Purchaser shall enter into a lease with the current landlord on terms similar to the Seller's current lease.

Closing Conditions: The obligation of Purchaser to consummate the Purchase Agreement shall be subject to the following types of conditions existing on the Closing Date:

1) Due Diligence. Purchaser or its agents shall have conducted due diligence of the books and records and operations of Seller to Purchaser's complete satisfaction.

2) Entry into Collateral Agreements. Purchaser and Seller shall enter into agreements such as the Consulting Agreement, the lease, the Noncompetition Agreement and other agreements contemplated by this Letter of Intent, on terms as described herein and containing such other terms and conditions as are mutually acceptable to the Parties.

3) Allocation of Purchase Price. Purchaser and Seller shall have agreed on the allocation of the Purchase Price among the purchased assets and collateral agreements subject to the Parties' accountants' and attorneys' approval.

4) No Adverse Change; Representations; Covenants. No material adverse change shall have occurred in the Purchased Assets, or in the business, affairs, prospects or financial condition of Seller; the representations and warranties in the Purchase Agreement shall be true at and as of the Closing Date; and all covenants to be performed at the Closing shall have been performed.

5) Consents and Approvals. All requisite filings shall have been made with, and all consents and approvals shall have been obtained from, all applicable, regulatory and other governmental authorities and third parties, including any consents deemed necessary or appropriate by Purchaser from Parties to licenses or contracts to be assigned to Purchaser or otherwise requiring consent.

6) Closing. The closing of the transaction ("Closing") shall have taken place on or before May 31, 2018.

7) No Liens; Encumbrances. The purchased assets shall be delivered to Purchaser free and clear of all liens and encumbrances.

8) Employment Agreements. Purchaser entering into employment agreements or otherwise hiring employees or independent contractors of the Seller which it desires to retain.

9) Other. Such other conditions as the Parties may mutually agree upon.

## AGREEMENTS AMONG THE PARTIES

The following Sections of this Letter of Intent ("Binding Provisions") are the legally binding and enforceable agreements of the Parties:

Purchaser's Inspection: After signing this Letter of Intent, Seller shall furnish to Purchaser all requested information concerning the business, assets and properties of Seller for the purpose of making such accounting review, legal and audit investigation or examination deemed desirable by Purchaser and Purchaser shall be permitted to conduct standard due diligence, including, but not limited to inspection of the books and records of the Company to verify their condition and contents, and a detailed inspection of the office and tangible assets of the Company, including verification of financial information via independent auditor certification, legal due diligence, review of any material contracts, commitments and agreements, key client reviews and interviews, employee and contractor interviews, etc.

Exclusive Dealing. The Seller and Stockholder represent and warrant to Purchaser that there is no existing agreement, understanding, letter of intent, or other commitment or arrangement of any kind between the Seller or the Stockholder and any other person, corporation, or other entity concerning the sale or other disposition of (a) assets of the Seller or (b) any capital stock of the Seller. Until the date this Letter of Intent terminates:

1) Neither the Seller nor the Stockholder will, directly or indirectly, through any representative or otherwise, solicit or entertain offers from, negotiate with, or in any manner encourage, discuss, accept, or consider any proposal of any other person relating to the acquisition of the Seller, its assets, or its business, in whole or in part, whether directly or indirectly, through purchase, merger, consolidation, or otherwise (other than sales of inventory and obsolete equipment in the ordinary course of business).

2) Either the Seller or Stockholder will, as the case may be, notify Purchaser within 24 hours regarding any contact between

the Seller, Stockholder, or their respective representatives and any other person regarding any such offer or proposal or any related inquiry.

3) Seller and Stockholder jointly and severally represent and warrant that (i) Seller and Stockholder, and their agents, including without limitation, [_____insert name of broker and delete this language] shall immediately cease and cause to be terminated any existing marketing of the Seller's stock, assets (other than in the ordinary course of Seller's business) or business.

4) Seller and Stockholder shall jointly and severally indemnify and hold Purchaser and its affiliates harmless against any third party who claims that the proposed purchase of the assets of Seller set forth above by Purchaser wrongfully interferes with its right to acquire Seller or any of its assets or business.

Disclosure:

Except as and to the extent required by law, without the prior written consent of the other Party, none of the Purchaser, the Seller, or Stockholder will make (and each will direct their representatives not to make), directly or indirectly, to the public or to any third party (other than a Party's agents as necessary to help consummate the Possible Transaction), any comment, statement, or communication with respect to, or otherwise disclose or permit the disclosure of the existence of discussions regarding, a Possible Transaction between the Parties or any of the terms, conditions, or other aspects of the transaction proposed in this Letter of Intent. If a Party is required by law to make any such disclosure, it must first provide to the other Party the content of the proposed disclosure, the reasons that such disclosure is required by law, and the time and place that the disclosure will be made.

Operation of the Business Prior to Closing:

Seller and Stockholder hereby agree, from the date of execution of this Letter Agreement to the date of Closing or termination of negotiations between the Parties, to carry on the business activities and operations of the business diligently and in substantially the same manner as has been customary in the past, and shall not remove any item or information that is material to the business or Purchaser's investigation of the business.

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| Expenses: | Each Party shall bear its own costs and expenses in the preparation and negotiation of the Letter of Intent and subsequent Purchase Agreement and ancillary documents. None of Seller's expenses shall be charged against or paid out of the purchased assets by Seller. |
| Brokers: | [Broker Company], represented by [individual broker name], is acknowledged as being the only broker in this transaction and has been retained by Seller. Seller shall be responsible for payment of all amounts owed to the Broker and no such amounts shall be charged against or paid out of the purchased assets by Seller. |
| Confidentiality: | Except as and to the extent required by law, each Party will not disclose or use, and will direct its representatives not to disclose or use, to the detriment of a disclosing Party any Confidential Information (as defined below) with respect to the disclosing Party furnished, or to be furnished, by the disclosing Party or its respective representatives at any time or in any manner other than in connection with its evaluation of the Possible Transaction. For purposes of this Section, the term "Confidential Information" means any written, oral, or other information about the disclosing Party obtained in confidence in connection with the Possible Transaction or the negotiation of the Purchase Agreement unless (a) such information is already known to the receiving Party or to others not bound by a duty of confidentiality or such information becomes publicly available through no fault of such person or persons; (b) the use of such information is necessary or appropriate in making any filing or obtaining any consent or approval required for the consummation of the Possible Transaction; or (c) the furnishing or use of such information is required or appropriate in connection with legal proceedings. |
| Governing Law: | This Letter of Intent shall be construed under and be governed by the laws of Illinois without giving effect to any choice of law or conflict of law provision or rule (whether of the state of Illinois or any other jurisdiction) that would require the application of any other law. Venue for any disputes related to this Letter of Intent shall be in Cook County. The prevailing Party in any litigation will be entitled to reimbursement of litigation expenses including attorneys' fees from the losing Party. |
| Assignability: | Purchaser may assign its interest herein to a third party which is controlled by, or under common control with, Purchaser. |

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| Entire Agreement: | The Binding Provisions constitute the entire agreement between the Parties and supersede all prior oral or written agreements, understandings, representations, warranties, and courses of conduct and dealing between the Parties on the subject matter hereof. Except as otherwise provided herein, the Binding Provisions may be amended or modified only by a writing executed by all of the Parties. |
| Termination: | Except as set forth below, the Binding Provisions will automatically terminate on May 31, 2018 or at the Closing, whichever occurs earlier, unless extended in writing, and may be terminated earlier upon written notice by Seller if Purchaser is not proceeding expeditiously in good faith or by Purchaser for any reason or for no reason, with or without cause, at any time; provided, however, that the termination of the Binding Provisions will not affect the liability of a Party for breach of any of the Binding Provisions prior to the termination. Upon termination of the Binding Provisions, the Parties will have no further obligations hereunder except as stated in the Sections entitled Disclosure, Expenses, Brokers, Confidentiality, Governing Law, Assignability, Entire Agreement, Counterparts, and No Liability of the Binding Provisions, which will survive any such termination. |
| Counterparts: | This letter may be executed in one or more counterparts, each of which will be deemed to be an original copy hereof, and all of which, when taken together, will be deemed to constitute one and the same agreement (as to the Binding Provisions). The exchange of copies of this letter and of signature pages by facsimile or other electronic transmission shall constitute effective execution and delivery hereof as to the Parties and may be used in lieu of the original letter for all purposes. Signatures of the Parties transmitted by facsimile or other electronic transmission shall be deemed to be their original signatures for all purposes. |
| No Liability: | The provisions of this Letter of Intent, other than the Binding Provisions, including all provisions under "POSSIBLE TRANSACTION" of this Letter of Intent are intended only as an expression of intent on behalf of Purchaser; are not intended to be legally binding on Purchaser, the Seller, or the Stockholder; and are expressly subject to the execution of an appropriate Purchase Agreement. Moreover, except as expressly provided under "AGREEMENTS AMONG THE PARTIES" (or as expressly provided in any binding written agreement the |

Parties may enter into in the future), no past or future action, or failure to act relating to the Possible Transaction or relating to the negotiation of the terms of the Possible Transaction or any definitive Purchase Agreement, will give rise to or serve as a basis for any obligation or other liability on the part of Purchaser, the Seller, or the Stockholder.

Limited Review; Approval: The Parties acknowledge and agree that Purchaser has conducted only a very limited review of some financial information about the Seller to date, and that the foregoing is subject to Purchaser being satisfied with the full legal, accounting, and financial due diligence investigation to be performed by it and its agents and representatives.

If you are in agreement with the foregoing, please sign and return one copy of this letter agreement to Buyer prior to February 10, 2018 at 5:00 p.m. Chicago time, which will then constitute our agreement.

**Woody**
**on behalf of Purchaser**

_____

Executed and agreed as to the
Binding Provisions on _____, 2018:

**Seller**

_____
By: Buzz Lightyear, President

**Stockholder**

_____
Buzz Lightyear

February 3, 2018

Owner

Dear Owner:

RE: MEMORANDUM OF INTENT

This memorandum sets forth the intention of the undersigned, _____ ("Buyer") to enter into an agreement to purchase _____ (“Seller”) business being conducted under the trade name, _____, in Chicago, Illinois, under the following terms and conditions until a formal asset purchase agreement can be executed:

1. The purchase price would be $2,220,000.00 payable at the closing.
2. The sale would be through a sale of all assets of the Seller other than cash, bank accounts, investments, accounts payable and accounts receivable, utility deposits, insurance policies, personal belongings, and any vehicles.
3. The assets are to be sold free and clear of all claims, debts, liens or other liabilities.
4. At a minimum the agreement would provide:
    a. That Buyer receives financing suitable to Buyer for the purchase of the business.
    b. Buyer obtains satisfactory leasehold rights for the premises.
    c. Seller enters into a non-competition agreement in which the Seller agrees not to compete with the Buyer in the area of _____ services for a period of two years within ____ miles of Seller's location.
    d. Buyer being satisfied with its due diligence of Seller’s business in Buyer’s sole discretion.
    e. Buyer’s receipt of “consents and approvals” which may be required for the Seller to convey the assets to the Buyer as provided herein without any violation of law or breach of contract.
    f. Seller providing training and guidance in all aspects of the business to the Buyer for a period of one month, immediately after closing at no charge to the buyer. In addition, Seller agrees to remain a consultant, reasonably accessible by phone for a period of 3 months from the closing date for no additional charge.

5. The Seller shall not accept any other offers for the purchase of any of the assets contemplated by this transaction for a period of forty five (45) days from the execution of this memorandum of intent by Buyer and Seller.
6. Unless and until the Closing. Buyer agrees that Buyer shall maintain the confidentiality of all trade secrets and other confidential information relating to Seller or the assets, except for (i) disclosure to Buyer's accountants, attorneys, and inspectors; (ii) disclosure, which, in the opinion of Buyer's counsel is required by law and (iii) disclosure to prospective lenders by Buyer. If the proposed transaction contemplated hereby shall be abandoned or terminated, then at Seller's request Buyer shall return to Seller all documents supplied to Buyer by Seller, including all copies thereof.
7. Except as set forth in Paragraphs 5, 6, 7 and 8 herein, this Memorandum of Intent is

not binding upon Seller or Buyer in any way. This Memorandum of Intent is solely intended to serve as an expression of the parties' good faith desire to negotiate a mutually satisfactory definitive written agreement for the purchase and sale of the assets, and the obligations of Seller and Buyer to proceed with such a transaction are expressly conditioned upon execution of such a definitive written agreement.

8. This MEMORANDUM OF INTENT will become void if not signed by both parties by: 5:00p.m. Central Time, February 10, 2018.

ACCEPTANCE AND SIGNATURES:

| **BUYER** | **SELLER** |
| --- | --- |
| ABC, CO | XYZ, LLC |
| _____ | _____ |
| Date: _____ | Date: _____ |

# FORM OF PURCHASE PRICE ADJUSTMENT CLAUSE

## ARTICLE I

## DEFINITIONS

"**Closing Working Capital**" means (a) the Current Assets of the Company, less (b) the Current Liabilities of the Company, determined as of the [open/close] of business on the Closing Date.

"**Closing Working Capital Statement**" has the meaning set forth in Section [2.01(b)(i)].

"**Current Assets**" means cash and cash equivalents, accounts receivable, inventory and prepaid expenses, but excluding (a) the portion of any prepaid expense of which Buyer will not receive the benefit following the Closing; (b) deferred Tax assets; and (c) receivables from any of the Company's Affiliates, directors, employees, officers or stockholders and any of their respective Affiliates, determined in accordance with GAAP applied using the same accounting methods, practices, principles, policies and procedures, with consistent classifications, judgments and valuation and estimation methodologies that were used in the preparation of the Audited Financial Statements for the most recent fiscal year end as if such accounts were being prepared and audited as of a fiscal year end.

"**Current Liabilities**" means accounts payable, accrued Taxes and accrued expenses, but excluding payables to any of the Company's Affiliates, directors, employees, officers or stockholders and any of their respective Affiliates, deferred Tax liabilities and the current portion of long term debt, determined in accordance with GAAP applied using the same accounting methods, practices, principles, policies and procedures, with consistent classifications, judgments and valuation and estimation methodologies that were used in the preparation of the Audited Financial Statements for the most recent fiscal year end as if such accounts were being prepared and audited as of a fiscal year end.

"**Disputed Amounts**" has the meaning set forth in Section [2.01(c)(iii)].

"**Estimated Closing Working Capital**" has the meaning set forth in Section [2.01(a)(i)].

"**Estimated Closing Working Capital Statement**" has the meaning set forth in Section [2.01(a)(i)].

"**GAAP**" means United States generally accepted accounting principles in effect from time to time.

"**Independent Accountants**" has the meaning set forth in Section [2.01(c)(iii)].

"**Post-Closing Adjustment**" has the meaning set forth in Section [2.01(b)(ii)].

"**Statement of Objections**" has the meaning set forth in Section [2.01(c)(ii)].

"**Target Working Capital**" has the meaning set forth in Section [2.01(a)(ii)].

"**Undisputed Amounts**" has the meaning set forth in Section [2.01(c)(iii)].

## ARTICLE II

## PURCHASE AND SALE

**Section 2.01 Purchase Price Adjustment.**

(a) Closing Adjustment.

(i) At least [three] Business Days before the Closing, Seller shall prepare and deliver to Buyer a statement setting forth its good faith estimate of Closing Working Capital (the "**Estimated Closing Working Capital**"), which statement shall contain an estimated balance sheet of the Company as of the Closing Date (without giving effect to the transactions contemplated herein), a calculation of Estimated Closing Working Capital (the "**Estimated Closing Working Capital Statement**"), and a certificate of the [Chief Financial Officer of Seller] that the Estimated Closing Working Capital Statement was prepared in accordance with GAAP applied using the same accounting methods, practices, principles, policies and procedures, with consistent classifications, judgments and valuation and estimation methodologies that were used in the preparation of the Audited Financial Statements for the most recent fiscal year end as if such Estimated Closing Working Capital Statement was being prepared and audited as of a fiscal year end.

(ii) The "**Closing Adjustment**" shall be an amount equal to the Estimated Closing Working Capital minus $[AMOUNT] (the "**Target Working Capital**"). If the Closing Adjustment is a positive number, the Purchase Price shall be increased by the amount of the Closing Adjustment. If the Closing Adjustment is a negative number, the Purchase Price shall be reduced by the amount of the Closing Adjustment.

(b) Post-Closing Adjustment.

(i) Within [60/[NUMBER]] days after the Closing Date, Buyer shall prepare and deliver to Seller a statement setting forth its calculation of Closing Working Capital, which statement shall contain an audited balance sheet of the Company as of the Closing Date (without giving effect to the transactions contemplated herein), a calculation of Closing Working Capital (the "**Closing Working Capital Statement**") and a certificate of the [Chief Financial Officer of Buyer] that the Closing Working Capital Statement was prepared in accordance with GAAP applied using the same accounting methods, practices, principles, policies and procedures, with consistent classifications, judgments and valuation and estimation methodologies that were used in the preparation of the Audited Financial Statements for the most recent fiscal year end as if such Closing Working Capital Statement was being prepared and audited as of a fiscal year end.

(ii) The post-closing adjustment shall be an amount equal to the Closing Working Capital minus the Estimated Closing Working Capital (the "**Post-Closing Adjustment**"). If the Post-Closing Adjustment is a positive number, Buyer shall pay to Seller an amount equal to

the Post-Closing Adjustment. If the Post-Closing Adjustment is a negative number, Seller shall pay to Buyer an amount equal to the Post-Closing Adjustment.

(c) Examination and Review.

(i) Examination. After receipt of the Closing Working Capital Statement, Seller shall have [30/[NUMBER]] days (the "**Review Period**") to review the Closing Working Capital Statement. During the Review Period, Seller and Seller's Accountants shall have full access to the books and records of the Company, the personnel of, and work papers prepared by, Buyer and/or Buyer's Accountants to the extent that they relate to the Closing Working Capital Statement and to such historical financial information (to the extent in Buyer's possession) relating to the Closing Working Capital Statement as Seller may reasonably request for the purpose of reviewing the Closing Working Capital Statement and to prepare a Statement of Objections (defined below), *provided, that* such access shall be in a manner that does not interfere with the normal business operations of Buyer or the Company.

(ii) Objection. On or prior to the last day of the Review Period, Seller may object to the Closing Working Capital Statement by delivering to Buyer a written statement setting forth Seller's objections in reasonable detail, indicating each disputed item or amount and the basis for Seller's disagreement therewith (the "**Statement of Objections**"). If Seller fails to deliver the Statement of Objections before the expiration of the Review Period, the Closing Working Capital Statement and the Post-Closing Adjustment, as the case may be, reflected in the Closing Working Capital Statement shall be deemed to have been accepted by Seller. If Seller delivers the Statement of Objections before the expiration of the Review Period, Buyer and Seller shall negotiate in good faith to resolve such objections within [30/[NUMBER]] days after the delivery of the Statement of Objections (the "**Resolution Period**"), and, if the same are so resolved within the Resolution Period, the Post-Closing Adjustment and the Closing Working Capital Statement with such changes as may have been previously agreed in writing by Buyer and Seller, shall be final and binding.

(iii) Resolution of Disputes. If Seller and Buyer fail to reach an agreement with respect to all of the matters set forth in the Statement of Objections before expiration of the Resolution Period, then any amounts remaining in dispute ("**Disputed Amounts**" and any amounts not so disputed, the "**Undisputed Amounts**") shall be submitted for resolution to the office of [NAME OF INDEPENDENT ACCOUNTANT] or, if [NAME OF INDEPENDENT ACCOUNTANT] is unable to serve, Buyer and Seller shall appoint by mutual agreement the office of an impartial nationally recognized firm of independent certified public accountants other than Seller's Accountants or Buyer's Accountants (the "**Independent Accountants**") who, acting as experts and not arbitrators, shall resolve the Disputed Amounts only and make any adjustments to the Post-Closing Adjustment, as the case may be, and the Closing Working Capital Statement. The parties hereto agree that all adjustments shall be made without regard to materiality. The Independent Accountants shall only decide the specific items under dispute by the parties and their decision for each Disputed Amount must be within the range of values assigned to each such item in the Closing Working Capital Statement and the Statement of Objections, respectively.

(iv) Fees of the Independent Accountants. The fees and expenses of the Independent Accountant shall be paid by Seller, on the one hand, and by Buyer, on the other hand, based upon the percentage that the amount actually contested but not awarded to Seller or Buyer, respectively, bears to the aggregate amount actually contested by Seller and Buyer.

(v) Determination by Independent Accountants. The Independent Accountants shall make a determination as soon as practicable within [30/[NUMBER]] days (or such other time as the parties hereto shall agree in writing) after their engagement, and their resolution of the Disputed Amounts and their adjustments to the Closing Working Capital Statement and/or the Post-Closing Adjustment shall be conclusive and binding upon the parties hereto.

(vi) Payments of Post-Closing Adjustment. Except as otherwise provided herein, any payment of the Post-Closing Adjustment, together with interest calculated as set forth below, shall (A) be due (x) within [five] Business Days of acceptance of the applicable Closing Working Capital Statement or (y) if there are Disputed Amounts, then within [five] Business Days of the resolution described in clause (v) above; and (B) be paid by wire transfer of immediately available funds to such account as is directed by Buyer or Seller, as the case may be. The amount of any Post-Closing Adjustment shall bear interest from and including the Closing Date to [but excluding/and including] the date of payment at a rate per annum equal to [SPECIFY INTEREST RATE TO BE USED]. Such interest shall be calculated daily on the basis of a [365] day year and the actual number of days elapsed, [without compounding].

(d) Adjustments for Tax Purposes. Any payments made pursuant to Section [2.01] shall be treated as an adjustment to the Purchase Price by the parties for Tax purposes, unless otherwise required by Law.