Representing Buyers and Sellers in Acquisitions of Privately Held Companies

By:

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With an extensive background in engineering, business, law and government, Mr. Bosma's practice is concentrated in the areas of complex business and municipal transactions, municipal finance and environmental matters. He chairs the Business and Government Practice Groups of Kroger Gardis & Regas, and serves as general or special counsel to dozens of municipalities and business entities throughout the State of Indiana. An engineering graduate of Purdue University, Mr. Bosma represents both public and private sector clients in real estate and construction projects, public sector joint ventures and Brownfield redevelopment. He has served as lead counsel for more than fifty public and economic development projects ranging from small facilities to major public private utility projects. He is nationally recognized bond counsel and an active member of the Indiana Municipal Lawyers Association and the National Association of Bond Lawyers.

Representative Bosma has served as a member of the Indiana House of Representatives since 1986 in numerous leadership capacities, including currently serving as the Speaker of the House of the 118th General Assembly. Mr. Bosma is a founding director of Bosma Industries for the Blind and serves as the Chairman of the Bosma Visionary Opportunities Foundation.

Mr. Bosma is a frequent author and lecturer on environmental, corporate, construction and municipal matters, and has served for nearly two decades as a lecturer for young lawyers preparing to take the Indiana Bar Exam in the areas of corporations, partnership and agency law.

Author's note: The following is not intended to be a comprehensive treatise on asset or stock purchase sales or procedures, but is designed to convey a working knowledge of typical transactions and issues. The forms provided are merely starting points for drafting documents specific to the transaction at hand.

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I. THE LAWYER'S (REAL OR PERCEIVED) ROLES IN TRANSACTIONAL REPRESENTATION

A. THE TRANSACTIONAL LAWYER'S MANY ROLES

Transactional lawyers are required to fulfill many roles depending on the type of transaction involved, the lawyer's skills, the client's expectations and the complexity of the transaction. Depending on these factors, the lawyer's roles may be filled by a single legal representative, or by a team brought together by a lead attorney. The lines dividing these roles are blurred, and the skilled practitioner can deftly shift from one to the next without conscious effort.

1. Scrivener

Occasionally clients will come to the lawyer with a "done deal" asking the lawyer merely to document the transaction or to "help fill out the form" but to otherwise stay out of the way. While this function is perceived to save the client the expense of serious attorney involvement, it is rife with pitfalls, both for the client and the attorney, when the lawyer's customary role in pre-closing investigation and due diligence is ignored.

2. Negotiator

At the opposite extreme, the client may approach a lawyer at the earliest possible stages seeking active guidance from the outset. In this role the lawyer may be negotiating intricate business-specific details which are outside of the training and expertise of most attorneys. In the extreme case, the client may just ask the lawyer to "take care of this for me" and leave the lawyer with complete discretion, and a great deal of potential liability.

3. Messenger

During the course of any transaction, a lawyer may be used to merely "send a message" to the other side, serving as a high priced delivery service, but usually with a specified purpose.

4. "Bad Cop"

The transactional lawyer is frequently called upon as the source of a client's position, occasionally based on valid legal concerns, but frequently as a means of having someone else serve as the "bad guy" while business people try to maintain good working relations.

While this role may be uncomfortable for some, many clients relish the thought of saying that they would like to give on a certain point, "but my lawyer won't let me." The experienced lawyer serves in this capacity with pride, but must be prepared to explain their opposition to any given point.

5. Facilitator

When personal relations have soured or tensions are high, the lawyers involved in the transaction may be the only participants who can react objectively. When this occurs, an attorney can fill the crucial role of finding common ground, quieting emotions and hurt feelings, and moving forward to meet each party's objectives. Occasionally this role requires brutal honesty with your client so that they can recognize their own obstinacy or unreasonableness.

6. Insurer

In more complex transactions, attorneys may be called upon to change their involvement from legal representative to insurer of the transaction through the issuance of simple or complex legal opinions. While some unsuspecting attorneys have little reluctance to execute complex legal opinions with little thought, the negotiation and investigation required for a legal opinion is substantial, expensive and cannot be ignored. Horror stories (both local and in case law) of lawyers becoming the insurers of transactions should cause every attorney issuing a transactional legal opinion to give serious consideration before assuming this role.

7. Ethicist

Every experienced lawyer knows that the transactional attorney frequently faces situations which require careful consideration of the Rules of Professional Conduct (the "Rules") and one's own moral code. At some point in their careers, transactional lawyers will be asked to disregard information which should rightly be disclosed to the other side, or to take other action which the lawyer will find unsavory, fraudulent and possibly even illegal.[1] A lawyer's willingness to participate in these activities sets the path for both career and conscience, and finds its way into the lawyer's personal reputation in short order.

8. Delegator

A transaction of any size requires the attorney to be skilled in delegation to other lawyers, outside experts, title agents, investigators, surveyors, appraisers, paralegals and secretaries. The lawyer who masters the art of delegation will not only be an efficient client representative, but will also find the key to financial and career success. The best attorneys are frequently the most skilled delegators.

9. Deal Breaker[2]

Some attorneys assume the role of chop-busting, take no prisoners "deal breaker" the moment they are retained as a client representative in any transaction. Even the civil and skilled lawyer will be accused of being a deal breaker when the lengthy documentation and

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[1] *See* Rules of Prof. Conduct, Rule 1.6 and Rule 2.3 Comments 3, 4 and 5 for the requirements regarding disclosure of information adverse to your client.

[2] "Lawyers usually bring to each transaction… a penchant for detail, the ability to scrutinize, and an eagerness to investigate that is not present in other professionals. These are the characteristics that cause lawyers to be called nitpickers, deal busters, and a variety of other names. These characteristics, also, are the reason lawyers are hired." Campbell, *Management of Title Review, Due Diligence and Other Legal Tasks in Large Oil and Gas Transactions*, 31 Rocky Mtn. Min. L. Inst. p. 16-9 (1985).

investigation necessary to adequately protect your client moves forward. While the "perceived" role of deal breaker can be addressed with proper planning with your client and the other side, the real role of deal breaker may also arise when information is discovered which causes a proposed transaction to be ill advised. While the actual role of deal breaker is the least rewarding of legal roles, it is probably the most valuable for clients who avoid unmanageable liabilities.

10. Deal Maker

A skilled transactional lawyer looks for ways to bring people together to accomplish their mutual goals. The lawyer who is able to solve problems quickly, bring opponents together, and successfully address complex issues among highly competing interests is a successful and sought after commodity. Doing all of this while maintaining outstanding relations with your client, the opposition and opposition's legal representatives is one key to professional success. If you conduct yourself in a manner which brings honor to yourself and your profession, you will be surprised at the response from all parties to the transaction. You may even receive future referrals or engagements from the most unusual sources, such as opposing parties and attorneys. Set the role of "deal maker" at the top of your list for every transaction.

B. ROLE PREPARATION

No lawyer is prepared to assume all (or even most) of the above roles directly out of law school. An attorney desiring to become a successful transactional lawyer must seek out significant training to become an excellent draftsman, a skilled negotiator, a reasoned mediator, knowledgeable in diverse areas of the law and skilled at recognizing issues requiring special expertise and assistance. Above all of this, the successful transactional lawyer must adopt a professional demeanor which not only sets a positive tone for future negotiations and discussions, but instills confidence in the client, opposing counsel and the other side in the transaction.

II. SETTING REASONABLE CLIENT EXPECTATIONS

A. INITIAL CLIENT MATTERS

While most lawyers have ongoing transactional clients, many lawyers are contacted only in the extraordinary event of a purchase or sale of a business or major parcel of real estate. The first step in adequately representing your prospective client should occur in the initial client discussions.

1. Exploring and Resolving Conflicts

The first task for the transactional lawyer is to determine whether the engagement may move forward by confirming the absence of real or potential conflicts of interest. To properly examine this area, all parties to the transaction, including business entities and individual principles, must be ascertained. A good transactional lawyer frequently refers to the Rules to resolve representation issues. Remember that lawyers engaged to represent corporations or other business entities represent the entity itself, and not the individual directors, officers or shareholders.[3] If potential areas of conflict arise, written disclosures and possible outside representation may be required. The initial conference is the opportunity to explore these matters before retainers are exchanged, and time and expenses are incurred.

2. Educating Your Client

Depending upon the sophistication of your client, you may need to educate those who are

[3] *See* Rules of Prof. Conduct, Rule 1.13.

unaccustomed to entering into a given type of transaction. A business owner who is ready to retire may desire to close a deal on a hand shake and "whatever closing papers are necessary," and a real estate purchaser may just want to exchange a deed. A discussion of the functions of representations and warranties, future covenants, indemnification and the critical process of pre-closing due diligence is frequently required when the enthusiastic purchaser wants to close a deal and start operating as quickly as possible. By educating your client about the potential liabilities involved (which can frequently outweigh the purchase price invested) and the means of finding and dealing with these potential problems, you can avoid a great deal of conflict and anxiety down the road when your "deal breaking" document is drafted. This discussion will also reveal a great deal about your client's experience, expectations and reasonableness prior to your engagement.

3. Establishing Reasonable Timelines

One of the most frequently misunderstood areas of transaction work is a client's expectations on turnaround time. You will occasionally encounter a client who expects to leave an initial meeting with a document fulfilling their every need, or to receive a document in the next day or two. While the seasoned transactional lawyer will maintain an electronic form file which might make the request a theoretical possibility, virtually every transaction is at least a little bit unique, and will require thoughtful draftsmanship and research. Setting reasonable timelines given the client's needs and desires and your own schedule and abilities will avoid an upset client, or even worse, a lost opportunity. Clearly establishing and communicating reasonable deadlines ("I will have a preliminary draft to you for review by next Wednesday") rather than speaking in ambiguities ("You should have something on your desk in the next several weeks") will cement expectations both for you and your client. Documenting these expectations in writing or by e-mail is always a good practice.

4. Fee and Expense Matters

While virtually all transactional work is performed on an hourly basis, clients will generally seek to obtain an estimate of your fees prior to your engagement. Experience will be the ultimate guide for estimating your fees for both simple and complex work, and the most common mistake is to communicate a fee which is excruciatingly low once the complete transaction details are negotiated. One common practice is to communicate a reasonable estimate and also set a fee cap. The client also customarily pays all expenses incurred by the attorney for copies, long distance charges, postage, courier fees and similar expenses. Costs of title searches, recordation fees, appraisal costs, environmental assessments and all similar outside expenses are also generally paid by the client. To avoid compounding the "bottom line" shown on a billing statement, and to avoid the resultant cash flow crunch, experienced lawyers generally forward the billing for outside services directly to the client rather than adding it to their legal bill.

a. Flat Fee

For simple transactions, such as residential real estate closings, a flat fee for document review and closing attendance is frequently agreed upon.

b. Participation

Recent caselaw has also clarified that lawyers can participate in their client's transactions by receiving a "piece of the action," such as a percentage ownership in commercial real estate or shares of stock in an acquiring company.[4] While this

[4] *See* Rules of Prof. Conduct Rule 1.8(a) regarding the requirements for such arrangements.

arrangement may be legally allowable under proper circumstances, a transactional lawyer should carefully examine the Rules to confirm that the contemplated participation is allowable. In addition, participation may cloud a lawyer's ability to give objective advice as complications arise. This is undoubtedly an area of future litigation and concern for practicing attorneys.

c. Hybrid Agreements

Creative arrangements in which the attorney combines an hourly or flat fee with performance bonuses for obtaining clearly defined desirable results (such as closing the transaction with a reduced purchase price or favorable financing terms) can also be explored and should be utilized under the appropriate circumstances.

d. Retainer

It is a customary and good practice to secure an initial retainer from your new client before beginning the time consuming and expensive process of drafting a definitive agreement. Getting "stung" just once will cause even the most generous attorney to religiously require retainers thereafter.

B. DOCUMENTING YOUR ENGAGEMENT

While a written agreement regarding legal fees is not required by the Rules (with the exception of contingent fee matters)[5] the experienced transactional lawyer knows that adequate initial documentation leads to client satisfaction, organization and professional liability protection. There are a number of items which should be included in your engagement, including your hourly rates, fee and expense arrangement, any fee cap or retainer arrangement, records retention policies, and your right to withdraw with reasonable notice to the client.

III. DRAFTING TRANSACTIONAL DOCUMENTS

A. A CRITICAL SKILL

Drafting a thorough and appropriate transactional document is one of the most crucial functions of the transactional lawyer. Generally, the better the purchase agreement, the more likely the parties will close successfully, or at least avoid litigation. A well drafted agreement that covers the particulars of the specific transaction, including any special requirements and contingencies, forces the parties to deal with and resolve problems initially, and thus avoid later arguments and closing delays.

B. GETTING THE DETAILS

The first step in drafting transaction documents is to obtain as many initial details from your client as possible. In some situations the client will already have detailed documentation for your review, but in many cases your client will have conducted only preliminary discussions and financial reviews before engaging a lawyer. There are a variety of means to clarify the details prior to drafting the final document.

1. Deal Points

One excellent practice is to have your client write down the terms of the agreement in the form of a list, an outline or a narration. Doing this will help the client focus on the details of the transaction and will also help you identify issues which have not been explored.

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[5] Rules of Prof. Conduct Rule 1.5 (*but see* comment 2 which indicates that it is "desireable" to furnish new clients with "at least a simple memorandum" setting forth the basis of charges).

2. Hypotheticals

After major transaction details have been identified by your client, you should engage in a series of "what ifs" to identify the method of handling as many forseeable transaction difficulties as you can identify. An example would be the handling of earnest money in the event a simple transaction fails for one of any variety of reasons. More complex transactions can be "what if'd" to death. This is an important process which is honed with experience.

3. Using Letters of Intent

A well drafted and negotiated Letter of Intent ("LOI") will serve as a blueprint for the purchase agreement and can save much of the time and efforts lawyers waste when they try to draft documents before the parties have agreed on all business points. A signed LOI may also assist the purchaser in convincing a lender to finance the transaction. Parties generally assume that a LOI is only a prelude to a transaction and is not a binding agreement. Notwithstanding this assumption, be advised that a LOI can create unintended legal obligations and must be carefully crafted.

a. Binding or Non-Binding

The first issue to consider is whether an LOI will be a binding agreement or merely set forth a non-binding proposal for consideration by the parties. The parties' intent will control. LOIs frequently contain both binding and non-binding provisions as in the example attached to these materials,[6] which provides that the LOI is nonbinding with the exception of designated provisions.

b. Obligation to Negotiate

If an LOI does not rise to the level of a binding agreement, the LOI may still impose an obligation to negotiate the terms of the proposed contract in good faith if a court finds that the parties so intended.[7] Although the nature and extent of the duty, and the appropriate remedies for any breach are unclear, the obligation to negotiate in good faith could prevent a party from renouncing a deal, abandoning negotiations or insisting on terms that do not conform to the LOI. A worst case scenario – a judge determines your "reasonable" agreement.

c. Include a Disclaimer

Given the uncertain nature of the obligation to negotiate and the possibility that an intended non-binding LOI can be interpreted as binding, the best practice to avoid a possible misinterpretation is to include a clear disclaimer such as the following:

"This letter is not contractually binding on the parties and is only an expression of the basic terms and conditions to be incorporated in a formal written agreement. This letter does not obligate either party to negotiate in good faith or to proceed to the completion of an agreement. The parties shall not be contractually bound unless and until a formal agreement is executed by the parties, which must be in form and content satisfactory to each party and its counsel in their sole discretion. Neither party may rely on this letter as creating any legal obligation of any kind.

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[6] *See* Exhibit "A" attached hereto. Typical "enforceable" provisions include confidentiality of documents, "no shopping" provisions and preservation of business operations.

[7] *See A/S Apothekernes Laboratorium for Special Praeparater v. I.M.C. Chemical Group*, 873 F.2d 155 (7th Cir. 1989).

d. Consider a "No Shop" provision

An exclusivity provision is often included preventing a seller from negotiating with another party while negotiations with a prospective buyer are ongoing. A "no shop" provision in the LOI may prevent a seller from introducing other interested parties to the acquisition to enhance its negotiating position with a buyer.

e. Include a Time Limit

Finally, in order to avoid miscalculation, it is usually prudent to include a reasonable time limit by which the parties will either execute a definitive agreement or the LOI will expire. Parties might then move more quickly to a definitive agreement, and if they do not agree, they will have less time to take actions inconsistent with their intent not to make the LOI binding.

C. CONTROLLING THE DRAFTING PROCESS

Whenever possible, maintain control of the drafting process. The buyer will typically prepare the initial draft of an agreement. This presents a substantial advantage in that the buyer (or whoever creates the first draft) can frame issues in the most favorable manner. The party who volunteers to create the first draft, or does so promptly before the other side has an opportunity, is usually in the best position. In addition, quick turnaround of drafts and revisions will help cement concepts that may otherwise still be under discussion by the parties. Even if first draft provisions do not survive the negotiation process, purchaser's counsel may receive significant information based on seller's reluctance or refusal to make certain representations or agree to pre-closing covenants.

D. PROPER USE OF FORMS

It is important to begin drafting with an appropriate form. There is no standard acquisition agreement applicable to all transactions; however, there are numerous sources of forms including form books (such as West's Legal Forms) as well as treatises, CLE publications and an expanding list of online document services and web sites.[8] Two great sources of forms for all types of business and real estate transactions are *The Practical Lawyer* and *The Practical Real Estate Lawyer*, both published by ALI-ABA. While forms accessed online can save time and avoid errors caused by manual entry, you must carefully assess their applicability to the transaction at hand.

1. Form File

Maintaining a computerized file of successfully drafted agreements and closing documents (both your own and others') is crucial for the practicing transactional lawyer. Start a form directory now and keep it updated constantly. Closing documents are virtually the same in simple and complicated transactions.

2. The Abuse of Forms

While selection of a form is important, abuse of forms is quite common. When using your own forms, be sure to start with the first draft of the form in question, and not the last, which probably includes deal specific terms and negotiated concessions. Most importantly, a form

[8] One great source of more detailed transactional documents is the set of documents published by the American Bar Association Business Law Section Committee on Mergers and Acquisitions. The Committee has published a *Model Stock Purchase Agreement with Commentary*, a *Model Asset Purchase Agreement with Commentary*, a *Private Company Model Merger Agreement* and a volume on *Stock Purchase Agreement Due Diligence* along with ancillary documents. A list of publications of the Mergers and Acquisitions Committee is available at https://www.americanbar.org/groups/business_law/publications/ma.html. The author has relied upon several of these sources for portions of this presentation.

is not a substitute for clear thinking and should serve only as a drafting start point. If you are revising an agreement from another deal, search for jurisdictions, party names and other deal specific terms before sending your first draft out.

3. Short Document vs. Long

The advantages and disadvantages of short versus long transaction agreements should be carefully explained to your client.

a. Cheaper by the Pound

In many respects, acquisition agreements are "cheaper by the pound," as longer documents almost certainly provide clearer coverage. Serious distillation efforts may be more expensive than living with prior verbosity.

b. Client Desires

While clients almost always desire the shortest possible form, they also expect the document to include all necessary protections for whatever unusual contingencies might arise. If you are prudent and lean toward a longer more inclusive document, prepare your client for the inevitable complaint from the other side that the "lawyer is trying to kill the deal."

E. DRAFTING FOR CLARITY

Clear drafting, like clear thinking, comes only with experience and practice. However, a few general rules will help in virtually every transaction.

1. Who (or What) is the Seller or Purchaser

The document should indicate whether the acquisition is being made by an individual, a limited or general partnership, a C or S corporation, an LLC or some other entity. The attorney also needs to consider who or what the seller is and who exactly holds title to the assets being sold. In small business transactions, this may be a larger task than it initially seems. Small (and even medium sized) business owners frequently pay little attention to exactly how they bought the business when it was initially purchased and frequently fail to adequately maintain the corporate or other business entity form.

2. Define Terms

One of the most critical elements of effective draftsmanship is to define terms. Identify parties by a defined name. Identify categories of purchased assets with a clearly defined designation. While complex documents frequently include a section of definitions at the beginning or end of the contract, it is probably easier for the reader to follow in simpler agreements if terms are defined as they first appear in the contract as in the example Asset Purchase Agreement attached to these materials.[9]

3. Create an Outline

Before you begin drafting, outline the contract by writing out section headings in a logical order. Sections should flow in a logical organized fashion, which (if you examine typical documents) follow a generally accepted pattern. The better practice is to group related concepts either in the same paragraph or in adjacent paragraphs. Complete each outlined heading by writing the contract terms that apply to that section. Keep your client's initial outline, the letter of intent and other forms in front of you as you draft, and check off items

[9] *See* Exhibit "B" attached hereto.

as they are included.

4. Be Simple and Concise

You should assume that your reader is a knowledgeable lay person, and not a highly technical or legally trained reader. If a document is so clear that a non-professional can understand it, it is less likely that a judge or jury will have to review it. Contract writing should be clear, direct and precise. Using common words and common meanings to describe complex transactions (as opposed to legal jargon) is a skilled transactional lawyer's best tool in trade. Consistency in the use of words and defined terms is crucial.

5. Keep a Master List

Until you begin compiling a closing checklist, designate a legal pad or notebook and keep it at hand to remember additional clauses and matters to add. As you are drafting, a great number of issues and additional concerns will come to mind which are easily forgotten if not immediately recorded. Jot these items down, and review it frequently as you put your document together.

6. Client Review

Once the document is in satisfactory "first draft" form, let your client read it. Allowing the client to review the document prior to sharing it with opposing counsel assures that your draft is in tune with the client's wishes, and allows you to avoid embarrassing mistakes or unintended concessions. Remember that the first draft of the document establishes the framework for the entire transaction and should be as complete and detailed as possible. It is usually a good idea to watermark "DRAFT" on the face page and across the signature line of drafts to preclude the possibility of an impatient client signing and forwarding a draft rather than waiting for the final version.

7. Revisions and Iterations

With the exception of simple real estate transactions (which are frequently handled by preprinted forms with typed "amendments" attached) transactional documents will usually be revised numerous times prior to closing.

a. Redline

It is now the virtually universal practice to "redline" revised documents to show the actual or proposed document changes. Redlining simplifies review by both legal counsel and clients and reduces the chance of oversight and error. For simple changes, the receiving lawyer can also "mark up" the original draft and return it to opposing counsel for consideration.

b. Save Multiple Drafts

Save the various drafts of a document as separate documents in a "draft directory." If you name the original document "Client Contract", subsequent drafts can be named "Client Contract.Rev1(9.10.17)", "Client Contract.Rev2(9.15.17)" and so on. I usually include a date and/or a revision number in the name for easy identification. A redlined comparison of "Client Contract.Rev1" and "Client Contract.Rev2" can be saved as "Client Contract.Red2-1." Be sure to save the final executed version of the contract with a special designation such as "Client Contract.Final" for future reference.

F. COMMON TRANSACTION PROVISIONS

While transactional documents can range from the very simple to the unbelievably complex, there are common elements contained in virtually every well written agreement.

1. DEFINITION OF PARTIES

The parties to the transaction, along with any ancillary parties such as parent or sister corporations, guarantors or individuals personally bound by employment, non-compete or other agreements are identified by name, role and entity type, and are clearly defined for consistent drafting.

2. RECITALS

While there is no legal requirement that an acquisition agreement contain recitals, recitals can help the participants understand the basic context and structure of the acquisition. Recitals are generally statements of fact that are not binding on the parties unless they are specifically incorporated into the body of the agreement, which is usually a good practice. In the event of disagreement, recitals can give a fact finder critical information which may not otherwise appear in the four corners of the document.[10]

3. ASSETS PURCHASED AND EXCLUDED

A clear statement of the assets to be purchased, and just as importantly, assets and liabilities to be excluded, are generally described and defined in the body of the agreement, with detailed lists of individual assets, inventory and other items included in at least one (and perhaps multiple) incorporated exhibits.

4. PURCHASE PRICE, PAYMENT, DEPOSIT AND ESCROW

The total purchase price, payment details, deposit and pre-closing escrow provisions, along with the anticipated closing date and possession of the purchased assets are described, along with the allocation of the purchase price, generally to be detailed in an exhibit to the agreement prior to closing.

One frequent adjustment to the purchase price is for inventory. A final inventory true-up and discount for elimination of unusual, expired or undesired inventory is frequently included as an option for the buyer with a commensurate adjustment at closing.

5. REPRESENTATIONS AND WARRANTIES

Representations and warranties are one of the most critical elements of a well drafted agreement. The legal differences between representations (promised related to facts as they currently exist) and warranties (representations related to future facts) has been entirely eliminated by caselaw,[11] so their separation is no longer customary.

a. Functions of Representations

It is important to understand the three primary functions served by representations and warranties: (i) to encourage disclosure of information regarding the seller before signing an agreement; (ii) to serve as a condition to closing; and (iii) to serve as a basis for indemnification. In many situations, a disagreement will relate to one of

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[10] *See Stetch v. Panel Mart, Inc.*, 434 N.E.2d 97 (Ct. App. Ind. 1982) (holding where operative portions of stock purchase agreement were ambiguous and ambiguity is erased by recital, recital would be read in conjunction with operative sections and given effect).

[11] *See*, *e.g.*, *Reliance Finance Corp. v. Miller*, 557 F.2d 674, 682 (9th Cir. 1977) (holding that the distinction between representations and warranties is inappropriate when interpreting a stock purchase agreement).

these three areas, rather than all three. Consequently, it is frequently possible to draft solutions by recognizing the different functions served by representations and warranties, and treating each area differently.

b. Extent of Representations

Representations and warranties are included in virtually all acquisition agreements, although their extent will vary from transaction to transaction. In the sale of business context it is customary to receive extensive representations and warranties, even in asset transactions. Due to the liabilities attached to stock transfers, even more extensive representations are generally required. An example Asset Purchase Agreement with sample representations and warranties appears at the end of these materials.[12]

1) Seller's Representations

Seller's representations will generally cover a wide variety of matters including corporate authority, tax matters, compliance with laws, authority to execute and perform agreements, the existence of litigation, employment matters, existing obligations of the seller, title to and condition of purchased assets, seller financial statements, environmental matters and a variety of other possible issues. In stock purchase agreements, more extensive representation regarding employment matters, benefits, insurance, product liability issues and ongoing business details are generally added.

2) Buyer's Representations

Although primary attention is focused on the representations and warranties given by the seller, the buyer also typically makes certain representations and warranties. The buyer's representations and warranties vary greatly with the type of transaction. For cash transactions, buyer's representations and warranties are usually minimal, as in the sample agreement. In stock transactions, the representations and warranties of the buyer may be nearly as extensive as those of the seller.

c. The Materiality Qualification

Seller's counsel usually seeks to introduce materiality exceptions throughout the representations and warranties. The inclusion of a materiality qualifier is customary but introduces significant ambiguity on both sides of the transaction. It is important to remember the three functions of representations and warranties and to be certain that the materiality exception is suitable for each purpose. For example, it may be unlikely that an indemnification claim will be submitted in a particular transaction and the buyer would therefore not object to a materiality qualifier for this purpose. However, the same buyer might not accept a materiality qualifier for purposes of the conditions to closing.

d. The Knowledge Exception

Seller's counsel will also typically try to limit representations and warranties by making them "to the knowledge of seller." The knowledge qualifier is a very significant one, and requires the buyer to prove that the seller in fact knew of the omission, essentially a fraud standard, greatly limiting post-closing remedies.

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[12] *See* Exhibit "B" attached hereto.

Several possible solutions are available.

1) Seller is in the Best Position

Sellers often complain that they cannot possibly be expected to know a particular item. However, the Seller is generally in a better position to know something about his business than the buyer, and, even if the seller could not be expected to know, it may be appropriate to allocate the risk of the unknown to the seller.

2) Unqualified Indemnification

It is sometimes helpful to qualify representations, but then to provide for a condition to closing and indemnification that is not so qualified. In this way the seller is not required to represent something unknown, but does accept the economic risk of the unexpected.

3) Definition of Knowledge

Another approach is to define "knowledge" in a way that requires some investigation on the part of the seller, requiring the seller to make reasonable inquiry of those in possession of the requisite materials or knowledge. In appropriate circumstances knowledge can be defined as the knowledge of a given person, such as the principal manager.

6. CONDITIONS TO CLOSING

A number of things can happen during the period between the effective date of a purchase agreement and the closing of the transaction that may cause a buyer to alter or even abandon the transaction. The buyer may discover material misstatements or omissions in representations and warranties by the seller, litigation may be filed or economic developments could seriously affect the future prospects of the business to be purchased.

a. Conditions Should be Absolute

Even if representations and warranties or indemnifications are limited through the negotiation of "material" or "knowledge" qualifications, the buyer should at least insist upon clearly defined unequivocal conditions prior to the obligation to close. The simplest of conditions might be that the seller has unencumbered title to the assets (and can prove it prior to closing) or that all liens and encumbrances will be released. The list of conditions to closing should include the delivery of all critical documents and materials (including those incorporated in related agreements) and the satisfactory completion of seller's due diligence investigations.

b. "Bring Down" of Reps and Warranties

One of the most important conditions to include is that all representations and warranties contained in the original agreement remain true and correct as of the closing date, subject only to specified written disclosures and alterations acknowledged in writing (preferably in a closing amendment) by both parties.

7. PRE-CLOSING COVENANTS

To protect the buyer from significant pre-closing changes in the assets or business to be acquired, acquisition agreements universally contain covenants in which the parties commit to perform (affirmative covenants) or not to perform (negative covenants) certain acts from

the effective date of the purchase agreement through the closing of the acquisition.

a. Seller's Covenants

Generally, the burden of these covenants falls upon the seller to avoid taking material actions prior to closing which could significantly alter the value or liabilities connected with the purchase. In some cases acts are prohibited, but more frequently, material actions (such as the renewal or termination of a lease) may only occur with the consent of the purchaser, which consent usually cannot be unreasonably delayed or denied. As opposed to failure of a condition to closing, a breach of a covenant under normal contract principles could result in liability by the breaching party for damages. Typical pre-closing covenants of the seller include: reasonable access to the assets to be purchased, tendering of all pertinent records of the business, business conduct in the ordinary course, maintenance of insurance, preservation of employees, suppliers and customers of the business, and collection of accounts in the normal course.

b. Buyer's Covenants

While buyer's covenants are generally less onerous than those attributed to the seller, they frequently include indemnifying the seller from damages that examination of the business might cause, maintaining the confidentiality of all documents and investigations conducted and return of all confidential information in the event the transaction does not close for any reason.

c. Survival of Covenants

A well written agreement provides that all or a portion of the covenants will survive the closing for a given period of time. In such an event, post-closing remedies could include claims for indemnification based on a failure to abide by the covenants prior to the closing.

8. INDEMNIFICATION

In most transactions, each party will typically indemnify the other against numerous liabilities including any liability arising from a breach of their respective representations and warranties and liabilities which relate to circumstances occurring during the party's ownership or control over the assets (generally before or after closing).

a. Buyer's Perspective

Buyers usually insist upon express indemnification in order to expand the class of protected persons (such as shareholders, directors, employees), expand the scope of recoverable losses (such as reasonable attorneys' fees and expenses), provide specific procedures to be followed in the assertion of claims and to provide a cathartic effect upon the seller encouraging full disclosure prior to consummation of the transaction.

b. Seller's Perspective

Sellers frequently seek a "basket" provision that prevents the buyer from making an indemnification claim until damages exceeding the basket have been filled. Sellers also frequently seek an indemnification dollar "cap" to limit their exposure. Sellers also desire a shortened "statute of limitations" for indemnification claims such as six (6) months or one (1) year.

c. Escrow Provisions

Buyers will often insist upon an escrow or "hold back" mechanism to secure the indemnification obligation. An indemnification is only as good as the party making it, and, particularly if seller is dissolving following the transaction, an escrow or other security is frequently provided.

d. Insurance Coverage

Both buyers and sellers should explore available insurance coverage to insure against losses related to indemnification or other contractual liabilities. Contractual coverage, tail coverage and assignment of indemnification rights under leases or other assigned contracts should be explored as a means to further secure both buyers and sellers against unknown liabilities.

9. SURVIVAL

The issue of survival of covenants, representation, warranties and indemnification is one of the most frequently negotiated provisions of acquisition agreements. Without explicit survival, the provision of the agreement may arguably be "merged" into the closing and lost.[13] Consequently, survival provisions must be clearly stated.

10. CLOSING DELIVERIES

A list of each parties' duties and deliveries at closing is critical, and can also serve as your beginning point for a closing checklist of deliveries by all parties. Documents of transfer should either be pre-approved by buyer's counsel (approval not to be unreasonably delayed or denied), or better yet, be attached to the original purchase agreement as exhibits.

11. POST-CLOSING OBLIGATIONS

Post-closing obligations can include escrow obligations, consulting or employment agreements, non-competition covenants and more. One frequent post-closing obligation is the collection of outstanding accounts receivable. The parties should agree on who is responsible for collecting outstanding accounts and often contain an account settlement after a specified period. The agreement must address who is to receive partial payments received for outstanding obligations. In stock purchases or when accounts receivable have been purchased at face value less an offset for doubtful accounts, the seller may be asked to pay any outstanding balance to the buyer after a specified period of time, or to make the buyer whole out of escrowed proceeds.

12. TERMINATION PROCEDURES AND REMEDIES

A well drafted agreement clearly states the termination rights of both the buyer and seller, and what remedies are available in the event of wrongful termination or breach of the agreement.

a. Buyers Perspective

Buyers usually desire an obligation-free "walk away" right during a specified due diligence or investigation period. A typical request is sixty (60), ninety (90), one hundred twenty (120) days or more, considering the purchased assets and the complexity of performing due diligence. Details regarding the return of any earnest

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[13] *See, e.g., Warner v. Estate of Allen* 776 N.E.2d 422 (Ct. App. Ind. 2002) (holding that "in the absence of fraud or mistake, all prior or contemporaneous negotiations or executory agreements, written or oral, leading up to the execution of a deed are merged therein by the grantee's acceptance of the conveyance in performance thereof.")

money deposit should be included in the agreement, or may be separately stated in an escrow agreement deposited with a fiduciary. Buyers typically also desire to have the right of specific performance to force a sale if buyer's obligations and conditions have been fulfilled.

b. Sellers Perspective

Unless the buyer is intimately familiar with the seller's operations, sellers generally will allow a "walk away" investigation, but want to limit (usually unreasonably) the time before any earnest money deposit goes "hard" and becomes nonrefundable. Retention of the earnest money is usually the sole remedy of the seller, and seller's frequently will require stair stepped additional deposits, or require that deposits become nonrefundable after given events like title review.

13. MISCELLANEOUS PROVISIONS

Standard provisions for choice of law, severability, venue, notice provisions and other "boilerplate" language are critical parts of any well drafted agreement. One overlooked provision is specifying that "time is of the essence" in the performance of the agreement. Unless this statement is clear, compliance with time obligations may not be enforced by the courts unless circumstances clearly indicate it was the intent of the parties.[14] A parties' conduct may also negate this critical provision.[15]

IV. DOING DUE DILIGENCE

A. PURPOSE OF DUE DILIGENCE INVESTIGATION

One of the most important of the transactional lawyer's duties is the performance of an adequate due diligence investigation. Due diligence is the systematic process of challenging a seller's principal representations and challenging critical assumptions underlying your client's decision to proceed. The central objectives of a due diligence investigation are to unearth any undisclosed liabilities, to confirm the amount of disclosed liabilities, to confirm that the seller actually has the interest in its assets that it claims, and to ensure the seller has the ability to authorize the transaction.

B. FIRST STEPS IN DUE DILIGENCE

While due diligence efforts will vary widely depending on the type of transaction (with stock purchases requiring significantly more due diligence), the lawyer must be certain that the proper personnel are assembled and a well thought out checklist is drafted.

1. A Team Effort

For more complicated acquisitions, the due diligence task may include specialists in law, operations, finance, accounting and taxation, information technology, human resources, real property rights, the environment, securities matters and other areas. For a less complex transaction, the lawyer and client alone may be sufficient. An accounting professional should generally be part of the transaction team.

2. The Lawyer's Role

After assembling an appropriate team (or concluding that you and your client can do the job), one of the first tasks of buyer's counsel is to prepare a draft due diligence checklist that

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[14] *See Smith v. Potter*, 652 N.E.2d 538 (Ct. App. Ind. 1995) (time is not valued as being of the essence in a contract unless terms make it so).

[15] *Id*.

will ultimately be submitted to the seller. While this checklist will undoubtedly change dramatically depending upon the complexity of the transaction, a good starting point for private company acquisitions appears in *West's Legal Forms* under the title "Due Diligence Questionnaire" (West's Legal Forms, Business Organizations Div. VII §166:8 (3d ed. May 2017)).

3. The Due Diligence Letter Request

Especially for larger transactions, a due diligence letter or lengthy due diligence checklist, which nearly represents a discovery request in litigation, is exchanged between counsel for the buyer and seller. A sample due diligence exchange utilized in the purchase of a larger steel manufacturing facility is included at the end of these materials.[16]

C. CUSTOMARY AREAS OF CONCERN

Typical areas of due diligence concern fall into a number of specific categories:

1. Organizational Authority

Is the selling entity duly organized and are stock or other ownership records in order? Have officers and directors been properly elected and is the organization in good standing? Do the articles, bylaws or operating agreement prohibit or reference conditions precedent to the transaction?

2. Compliance with Laws

Are there any compliance issues which could have a material adverse effect on the seller or its financial condition?

3. Litigation

Are there any pending or threatened lawsuits or claims against seller?

4. Ownership and Condition of Assets

Are the assets of the seller encumbered? What liens need to be released prior to closing? Is insurable title to real estate available? Are operating assets in good operating condition? Are maintenance records in order?

5. Related Party Transactions

Do the owners or family of the seller or other affiliated companies do business with the seller? Are there outstanding loans or other financial connections between the owner or affiliated companies?

6. Financial Statements

Are financial statements audited or merely reviewed? Do the financial statements fairly represent the position of the company over an appropriate period of time?

7. Corporate Debt

Is all outstanding indebtedness reflected in the seller's financial statements? Do existing loan documents allow the contemplated transaction without lender approval?

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[16] *See* Exhibit "D" attached hereto.

8. Employment Matters

Are there existing employment contracts which might obligate the buyer? What employee claims have been threatened or filed? Are seller's employees to become employees of buyer? Are there outstanding employee benefit programs which might have unfunded liabilities? Are there any collective bargaining agreements in place?

9. Taxes

Are there threatened or pending tax liens affecting the purchased assets? Has the seller or its principals failed to file any tax returns or failed to pay amounts due thereunder?

10. Contractual Obligations

What contractual obligations are in existence, and do they affect the contemplated transaction? Are there known defaults or pending claims?

11. Environmental Matters

What potential environmental liabilities affect the real or personal property to be purchased?

12. Intellectual Property

What patents, trademarks, trade names and copyrights are owned by the seller? Are any infringement or potential infringement actions known? What software, inventions and processes are used in the business and how are they protected?

C. ENGAGEMENT OF EXPERTS

In addition to due diligence inquiries by a purchaser and legal counsel, outside experts will undoubtedly be required to investigate the underlying assets being purchased. Typical experts include a surveying firm for real estate assets, an environmental firm to conduct an Environmental Site Assessment in accordance with ASTM Standard 1527-13[17] (required for bona fide purchaser or innocent landowner defenses), an engineer or other structural expert to investigate the condition of buildings and improvements, accounting experts to review financial documents and accounts receivable, and perhaps an information technology expert for complicated IT issues. Consideration should be given to engaging experts through legal counsel to keep findings under the attorney-client privilege.

D. MAINTAINING A DUE DILIGENCE FILE

Most due diligence efforts produce a volume of documents which must be reviewed and analyzed by buyer's counsel. One of the most important steps in this due diligence investigation (both for the client and the lawyer's liability protection) is to maintain all documents produced in the course of due diligence for future reference. It is only through the maintenance and future ability to produce these documents that the transactional lawyer will be able to answer crucial questions for the buyer, the seller, or the lawyer's malpractice carrier. Indexing these documents as part of a closing transcript is advisable.[18]

E. EXPANDED DUE DILIGENCE FOR STOCK PURCHASES

Given the significantly higher exposure to liability in a stock purchase for the prior acts, actions and contracts of the purchased company, due diligence in the stock purchase scenario takes on a

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[17] *See* 42 U.S.C. §9607(r) and 40 C.F.R. pt. 312.

[18] *See* Exhibit "C" attached hereto.

significantly higher profile. Samples of due diligence letters and questionnaires abound, and a more exhaustive example appears as an attachment to these materials.[19]

V. STOCK, ASSETS OR MERGER, THAT IS THE QUESTION

Structuring the purchase or sale of a business or of business assets can be one of the most important and difficult elements of the transaction. This is true not only because of tax and accounting considerations, but also because of liability issues, assignment rights, collateral security and financing considerations. Structuring a transaction can often be as much a part of negotiations as is price. There are essentially three basic forms of business acquisitions: (i) the purchase of assets; (ii) the purchase of shares or membership units; and (iii) statutory business combinations including mergers, consolidations and share exchanges.

A. ASSET PURCHASES

In general terms, asset purchases feature the advantage of specifying only those assets to be acquired and the specific liabilities (if any) to be assumed, and limits exposure to the purchaser of the existing liabilities of the seller. An acquisition might be structured as an asset purchase for a variety of reasons. Buyers generally place a high premium on limiting exposure to existing liabilities. It may also be the only structure available when a non-corporate seller is involved or where only a portion of the seller's assets are being sold along with none or certain of its liabilities.

B. STOCK PURCHASES

On the other hand, stock purchases, while requiring more intensive due diligence, generally require much shorter transactional documents. A purchase of shares or ownership interests of an LLC does not require the extensive transfer documents that a purchase of assets may require, which may include deeds, vendor's affidavits, title policies, bills of sale, assignments of contracts and other intangibles and more. In the purchase of stock, the purchasing entity literally steps into the shoes of the seller, with all of the good, the bad, and the ugly that comes with it. An additional impediment to purchasers is that the underlying assets in a stock purchase generally do not receive a step-up in basis.

C. STATUTORY MERGERS AND CONSOLIDATIONS

All fifty states have adopted some form of merger statute, including Indiana.[20] Merger statutes generally provide that, upon the date of the merger, the surviving corporation assumes all of the rights, privileges, powers and immunities of the non-surviving corporation and is subject to and assumes the prior duties and liabilities of the non-surviving corporation. A merger results in the transfer of the non-surviving corporation's rights and obligations, including title to property and contractual rights, to the surviving corporation by operation of law.[21] Typically, such a transfer does not violate any non-assignment provision in the contract rights of the non-surviving corporation unless the agreement contains a transfer of ownership non-assignment provision.[22]

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[19] *See* Exhibit "D" attached hereto.

[20] *See* Ind. Code 23-1-40 Merger and Share Exchange.

[21] Ind. Code §23-1-40-6.

[22] *See, e.g., Branmar Theatre Company v. Branmar, Inc.*, 264 A.2d 256 (Del. Ch. 1970) (holding that a sale of a company's stock is not an "assignment" of a lease of the company where the lease did not expressly provide for forfeiture in the event the stockholders sold their shares). However, some courts have held that a merger violates a non-assignment clause. *See, e.g., EPG Indus., Inc. v. Guardian Industries Corp.*, 597 F.2d 1090 (6th Cir. 1979).

D. BUYER'S AND SELLER'S STRUCTURE PERSPECTIVE

As a general rule, often it will be in the buyer's best interest to purchase assets but in the seller's best interest to sell stock or merge entities due to tax and ongoing liability considerations. Because of these competing interests, it is important that counsel for both parties be involved at the outset in weighing the various legal and business considerations in an effort to arrive at an acceptable structure. Considerations include:

1. Assets to be Purchased

Asset transactions are typically more time consuming than stock purchases and statutory combinations. In contract to a stock purchase, the buyer in an asset transaction will only acquire the assets specifically described in the agreement. Buyer's counsel typically uses a broad description to include all of the seller's assets leaving it to the seller to describe assets to be excluded.

2. Contract Rights

If contract rights are being transferred to the buyer, careful attention to non-assignment clauses must be given in the asset purchase transaction. One possible means around non-assignment provisions is a stock purchase or merger; however, careful attention must be given to the transfer of ownership interest provisions of the applicable contract.

3. Assumed Liabilities

An important reason for structuring an acquisition as an asset transaction rather than a stock purchase or merger is the desire on the part of a buyer to limit its responsibility for liabilities of the seller, particularly unknown or contingent liabilities. In an asset purchase, the buyer has the opportunity to determine which liabilities of the seller it will contractually assume. The due diligence process discussed above is an important aspect of determining the extent of known liabilities, even if they are not assumed. For unknown liabilities or liabilities that are imposed on the buyer as a matter of law, careful drafting is required. Tax liabilities, fraudulent conveyance statutes, bulk sales laws[23], environmental liabilities, product defects, successor liability for unfair labor practices or discrimination, and the unintended acceptance of successor liability through improper drafting are all concerns.

4. Tax Consequences

The tax consequences for buyers and sellers (and their shareholders or members) are among the most important factors in determining the structure of a transaction. In a taxable asset purchase, the buyer's tax basis of the purchased assets will be equal to the purchase price, which can generally be carefully allocated to the advantage of the buyer on an asset-by-asset basis, often increasing the tax basis from that of the seller. Depreciation and amortization deductions on the "step up" in basis for these assets is an important advantage for the buyer. Of course, tax allocations are significantly impacted if the buyer or seller are structured as a non-pass through entity and may cause the parties to lean toward a stock transfer structure.

5. Employment Issues

How employees of the acquired business are to be handled can also significantly impact structure. In asset sales, sellers are typically required to terminate their employees prior to closing who may then be employed by the buyer if the buyer so desires. Both buyers and sellers run the risk that employee dislocations in transition will result in litigation or at least the ill will of those employees affected. If there is a collective bargaining agreement, it

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[23] Indiana has repealed its Bulk Sales Act formerly codified at Ind. Code 26-1-6.1 *et seq.*

would of course continue after a stock purchase or statutory combination. In an asset purchase, the status of any bargaining agreement will depend upon whether the buyer is a "successor" based on the continuity of the business and workforce or possibly the terms of the agreement itself.

6. Organization Approval Concerns

The sale of all assets of a business outside of the normal course of business requires the approval of a majority (or more) of both directors and shareholders,[24] sales of stock generally do not. Mergers and share exchanges may also require shareholder approval depending on the circumstances.[25]

7. Securities Law Issues

One more concern in stock sales is the application of the anti-fraud provisions of state securities laws. In most circumstances a valid exemption from securities law requirements is available; however, even an exempt securities transaction may be subject to statutory anti-fraud provisions giving sellers an extra level of disclosure concern.

E. BEWARE OF SUCCESSOR LIABILITY

Despite the general rule that courts will abide by the allocation or non-allocation of liabilities in an asset purchase, there are two major exceptions to the rule – the *de facto* merger doctrine and the "mere continuation" doctrine.

1. *De facto* Merger

The *de facto* merger doctrine came about due to parties structuring transactions which purported to be asset purchases but in reality were merely mergers designed to look like an asset purchase to avoid potential liabilities. If a *de facto* merger is found, successor liability may apply to the purchaser. Typical factors reviewed by the courts include continuity of ownership, immediate dissolution of the selling entity, assumption by the purchaser of all liabilities necessary for the uninterrupted continuation of the business, continuity of management, location, general business operations, employees and other factors.[26] Some courts have held that the presence of all of these factors is not necessary to find a *de factor* merger.

2. Mere Continuation

Similar to the *de facto* merger doctrine, the "mere continuation" doctrine applies when there is commonality between the parties to the acquisition. Factors that may be considered include: the adequacy of consideration, identity of officers, directors or owners and continuity of business operations. If the court finds that the sale is a "mere continuation" of the seller's former operations, the court may hold the buyer liable for the acts of the seller despite agreements to the contrary.

VI. ANCILLARY TRANSACTIONAL DOCUMENTS

A. CONFIDENTIALITY AND NONDISCLOSURE AGREEMENTS

A confidentiality and nondisclosure agreement is usually the first document in the acquisition

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[24] Ind. Code §23-1-41-2.

[25] *See* Ind. Code §23-1-40-3.

[26] *See, e.g., Philadelphia Electric Co. v. Hercules, Inc.*, 762 F2d 303 (3rd Cir. 1985).

process, signed by a prospective buyer before the seller provides any confidential material. The confidentiality agreement is often in letter form from the seller to the buyer, and may also be structured as an agreement involving the seller's shareholders or members so that they can benefit from and are subject to the enforcement of the agreement as well. If an LOI and a confidentiality agreement are executed at the same time, the parties can consolidate them into one document. However, because a confidentiality agreement is intended to be enforceable and major portions of the LOI are usually intended to be unenforceable, combining these documents could cause some issues. If a definitive agreement is entered into, it will have to deal with the extent to which a confidentiality agreement (or portions of it) will be superseded by that agreement, particularly in terms of the typical "integration" provisions included in standard documents. Frequently, the definitive agreement contains its own confidentiality covenants which supersede an initial confidentiality agreement.

B. PRE-CLOSING OR POST-CLOSING ESCROW AGREEMENTS

It is common for all but the simplest transactions to deposit earnest money into escrow to secure the purchaser's or seller's obligations, with specified escrow funds return or forfeiture in the agreement.

1. Pre-Closing Escrows

Virtually every acquisition includes an initial deposit or earnest money to secure the obligations of the purchaser to enter into the acquisition, and to assure adequate consideration for the enforcement of the contract. If the acquisition includes real estate of any kind, earnest money is typically deposited with the company that will be ensuring title, usually in accordance with their "standard escrow agreement." While title companies are reluctant to alter their standard agreement, you should closely review its provisions to be sure there is clarity and adequate protection for both parties. Banks and other fiduciaries frequently have more detailed escrow agreements, or will agree to an attorney drafted document, so long as the fiduciary's standard exculpation language is included releasing them from any liability and allowing them to deposit funds with a court of competent jurisdiction if required.

2. Post-Closing Escrows

The buyer may seek to have a fund available to satisfy claims that it may have against the seller following closing, particularly where the satisfaction involves more than one seller or a dissolving entity. Retaining a portion of the purchase price in an escrow account for a specified period following the closing is one common technique to secure post-closing obligations such as operational condition of equipment. The escrow fund provides a source of recovery that is not dependent on the solvency of the seller or the buyer's ability to find them or their assets for purposes of commencing litigation or executing any judgement that may be obtained.

3. Party Perspectives on Post-Closing Escrows

For post-closing escrow accounts, sellers will frequently propose that recourse to the funds held in escrow be the buyer's exclusive post-closing remedy and that seller's liability is therefore "capped" at the amount held in escrow. In addition, buyers must recognize that the existence of an escrow fund does not mean that those funds will be immediately available to the buyer in the event of a claim. Institutional escrow agents are generally unwilling to submit themselves to any risk resulting from conflicting demands by buyers and sellers and provide that the account may "freeze" until conflicting demands are resolved by agreement of the parties or order of a competent court.

4. Selection of Escrow Agent

While most institutional entities will approve a suggested escrow agreement (as long as it contains a complete release of the institution) counsel will normally find that negotiations are expedited by using the escrow agent's preferred version and working from that document. Occasionally a party may propose that its counsel act as an escrow agent, and in most cases, that is a role counsel should avoid. By suggesting their own attorney serve in this role, clients are generally looking to avoid delay and the institutional agents' fees. They may also believe that counsel will perform its function as escrow agent in a manner that favors the client. In most cases, these benefits are illusory. A law firm that is willing to act as escrow agent will normally seek the same protection provisions in the agreement as an institutional escrow agent, including the ability to "freeze" in the face of conflicting demands. This may also result in a conflict situation which needs to be examined closely. If counsel is to act as an escrow agent, it will normally seek to add a provision in which the parties acknowledge its dual role and consent to its continued role as counsel to its client in matters relating to the acquisition and the escrow, including disputes over the disposition of the funds. The time spent negotiating all of this will almost always outweigh the costs of an institutional escrow agent's fees.

C. EMPLOYMENT OR CONSULTING AGREEMENT

Buyers frequently seek to obtain the services of one or more parties involved in the seller, especially if the sellers have special knowledge about the operations, vendors or clients of the business. Employment agreements are also frequently used to alter the purchase price, timing of payments or tax impact of the transaction for both the buyer and the seller. While a buyer may seek to have an employer friendly agreement in place, the employment agreement is frequently circulated at a point where other emotional issues are being addressed, so an even handed approach is usually warranted. Employment and consulting agreements can range from the actual engagement of the seller in the daily affairs of the business to assure a smooth transition, to a mere vehicle for the exchange of funds not allocated to stock or assets. Be aware that agreements falling in the latter category are subject to scrutiny and attack by the Internal Revenue Service.

D. NON-COMPETITION AGREEMENT

Buyers usually are most concerned about principals of a seller competing with the acquiring company after closing. This is generally addressed by means of a restrictive covenant either in the document itself or in a stand alone ancillary agreement which specifically survives the closing. It is important to note that the enforceability of non-competition agreements differs in the context of an employment agreement and in an acquisition transaction. The good news is, non-competition agreements entered into in conjunction with an acquisition are more likely to be enforced, and generally can be for a longer period of time.[27]

E. OPINIONS OF COUNSEL

Depending on the size and structure of an acquisition, the agreement may call for the delivery at closing of one or more legal opinions, in which counsel for a party provides assurances to the other party to the transaction concerning its client and the validity of actions taken in connection with the transaction.

1. Opinions as Condition to Closing

Delivery of any required legal opinion is often a condition to the other party's obligation to close the acquisition. This has the effect of making the underlying matters as to which the

[27] *See, e.g., Mayne v. O'Bannon Publishing Co.*, 36 IER Cases 279 (Ind. Ct. App. 2013) (unpublished opinion upholding five (5) year non-compete covenant in conjunction with business sale)

lawyer is to opine conditions to those obligations as well, typically without the materiality standard that would apply to the same matter if tested under other closing conditions. For example, if closing of the acquisition would result in a default under an agreement to which the seller is a party, that would likely meet the opinion criteria, and seller's counsel could not deliver the opinion in the form required. To avoid unintended consequences, seller's counsel should argue for a materiality qualification in the required form of opinion. An even better approach would be to permit the legal opinion to identify factual exceptions and test those exceptions against the other closing conditions.

2. Facts vs. Legal Conditions

It is customary and appropriate to request that the seller's counsel provide opinions only as to matters that involve legal conclusions based upon matters known to the opining lawyer or that are capable of verification with reasonable diligence (e.g., due incorporation and existence of the seller, authorized and outstanding capital stock of the seller, record ownership of capital stock, validity, binding effect and enforceability of the agreement executed by the seller in connection with the acquisition and similar items) it is not appropriate to request opinions as to matters that counsel cannot know or investigate on a reasonable basis (e.g., compliance by the seller with "all applicable laws"), as to factual matters (e.g., accuracy of all of the sellers' representations and warranties in the acquisition agreement) or that express a certain conclusion as to uncertain legal issues (e.g., compliance with antitrust laws in the acquisition of a company that is a competitor of the buyer). It is also not appropriate to request an opinion that has the effect of imposing some of the business risks of the transaction on the opining lawyer.

3. Using the *Accord*

While requests for legal opinions are not as prevalent in business transactions as they were twenty years ago, they still arise if the transaction is of sufficient size, especially in the stock purchase arena. In 1991, the section of Business Law of the American Bar Association published a Legal Opinion Accord (the "*Accord*") in an effort to provide a consensus framework for third party legal opinion practice.[28] The *Accord* includes both the opinion accord and commentary along with illustrative opinion letters and guidelines regarding opinions and opinion procedures. While incorporation of the *Accord* into third-party opinions is by no means required, it is certainly advisable to consider and puts both the giver and the recipient of the opinion in the same legal framework. Typical matters related to third-party legal opinions include: entity existence and good standing, power of the entity to enter into the transaction, sufficient authorization, proper execution and delivery, no breach or violation of organization documents, applicable law, no governmental approvals required and effective remedies. Many more specific matters are frequently requested and should be closely reviewed in conjunction with the provisions and recommendations of the *Accord*.

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[28] Legal Opinion Project Drafting Comm. Section of Business Law of the ABA, *Third Party Legal Opinion Report, including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 29 Real Prop. Prob & Tr. J. 487 (1994). Numerous articles have been published in the Real Property Probate & Trust Journal discussing nuances in third party legal opinions. Of particular interest is *Third-Party Legal Opinions and Real Estate Transactions: A Clearer Path*, 29 Real Prop. Prob & Tr. J. 461, William B. Dunn. Practitioners should be certain to review the many updates to the *Accord* and to the model opinions provided in *Real Property, Probate & Trust Journal* and *The Business Lawyer*.

4. **Obeying the Golden Rule**

The ABA Opinion Committee Report adopted a "Golden Rule" for third party opinions originally proposed by James J. Fuld in his seminal article on opinion giving.[29] The Golden Rule is that opinion recipients should not seek opinions that they would not give. Customary practice has construed the Golden Rule as applicable to both opinion giver and the opinion recipient's counsel. Consequently, there is a mutual responsibility on an opinion giver not to negotiate for opinion limitations unless the opinion giver has concluded that the limitations are appropriate in the context of the transaction at hand, and would accept those limitations if on the other side.

VII. FINAL TIPS AND TIDBITS FOR TRANSACTIONAL LAWYERS

A. COMMUNICATING WITH YOUR CLIENT

One of the most frequent complaints for transactional lawyers is that the client does not know what is going on. The best way to avoid this concern is to be sure your client receives a copy of every letter you send and document you draft. While the client is paying for the lawyer's time and expertise, the appropriateness of the lawyer's final statement is frequently measured against the height of the stack of paper produced or the number of e-mails generated. While the lawyer certainly does not want to merely strive to bury the client in details, a well informed client is definitely more likely to be a happy client.

B. UTILIZING TRANSACTION CHECKLISTS

An excellent practice tip for transactional lawyers is to create and live by a transaction checklist. A well drafted checklist, which includes documents to be executed by both the buyer and the seller, a list of post-closing items to address (such as the filing of UCC statements or the recording of documents) and also contains a list of "things to do" prior to closing is sure to organize both the experienced and inexperienced attorney. A complete transaction checklist can also serve as a closing checklist and the basis for the closing transcript discussed below. An example Transaction Checklist appears at the end of these materials.

C. PREPARING A CLOSING TRANSCRIPT

The most certain way to resolve future problems, maintain critical documents for the future and impress your client and opposing counsel is to immediately prepare a complete document transcript following the closing. A typical closing transcript will contain a summary sheet, an index of documents, and a copy (or original) of each documents which is important to the transaction arranged in a logical order. If the transcript is prepared immediately following the closing, it will be fresh in the lawyer's mind and simple to assemble. With today's technology, a searchable transcript of scanned documents is easily transmitted to the parties to the transaction and stored for immediate reference. An example Closing Transcript Summary Sheet and Index appears at the end of these materials.[30]

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[29] *See* 28 Bus. Law. 915 (1973).

[30] *See* Exhibit "E" attached hereto.

Exhibit "A"

June 15, 2017

Lucrative Business Corporation
8971 Bay Breeze Lane
Indianapolis, IN 46236

Re: Letter of Intent to Purchase Assets

Ladies and Gentlemen:

This Letter of Intent sets forth the terms upon which KGR Acquisition Company, Inc., or its assigns (the "Purchaser") desires to purchase the assets specified below currently located at the following business locations:

1. 111 Monument Circle, Indianapolis, IN 46204 (the "Monument Circle Location");

2. 8971 Bay Breeze Lane, Indianapolis, IN 46236 (the "Bay Breeze Location").

The Monument Circle Location and the Bay Breeze Location are collectively referred to herein as the "Business Locations."

This letter is meant to demonstrate the intent of Purchaser to purchase the Purchased Assets described below and is subject to the negotiation of a definitive purchase agreement (the "Definitive Agreement") between the Purchaser and Seller. This letter is not intended to be a binding agreement between the parties hereto, with the exception of the final three sections listed below, which shall be binding on the parties hereto upon your execution below. This letter does not obligate either party to negotiate in good faith or to proceed to the completion of an agreement. Neither party may rely on this letter as creating any legal obligation of any kind with the exception of the final three sections.

PURCHASER:	KGR Acquisition Company, Inc.
SELLER:	Lucrative Business Corporation
ASSETS TO BE PURCHASED:	All assets utilized in the Business, including, without limitation, (a) the furniture, fixtures and equipment located at the Business Locations; (b) all customer and vendor records and related information, including, without limitation, all computer or electronically maintained records; (c) all computer software; (d) all office supplies, (e) utility and other security deposits and prepaid expenses; (f) the seller's leasehold interest in the Monument Circle Location (the "Lease"); (g) all practice and tradenames used in the Business, including, without limitation, the name "LBC Sales and Service" and all derivations and abbreviations thereof and rights related thereto, along with all telephone and facsimile numbers to the extent assignable; (h) all inventory used in conjunction with the Business or located at the Business Locations ("Inventory"); and (i) the goodwill and related intangible assets used in the Business (all collectively the

"Purchased Assets").

EXCLUDED ASSETS: All of Seller's cash and cash equivalents, all rights and funds connected in any way with any retirement, employee benefit or similar plans, all claims for refund of taxes or other governmental charges of whatever nature for all periods prior to the Closing, all of Seller's insurance policies, and any other assets located at the Business Locations which are stipulated by Purchaser prior to Closing to be excluded assets.

PURCHASE PRICE: The total purchase price for the Purchased Assets shall be Six Million Seven Hundred Fifty Thousand Dollars ($6,750,000.00) (the "Purchase Price") payable in readily available funds by wire transfer at the Closing of this transaction. A final allocation for all Purchased Assets shall be included in the Definitive Agreement.

ADJUSTMENT OF PURCHASE PRICE: The Definitive Agreement shall provide for an adjustment in the Purchase Price based on the historical cost basis of the Inventory maintained in the Business. The Definitive Agreement shall contain a target historical cost basis value and a final reconciling physical valuation of the Inventory purchased which shall occur immediately prior to the Closing. Taxes, assessments and other charges shall be prorated as provided for in the Definitive Agreement.

METHOD OF PAYMENT AND CLOSING: The Closing on the Purchased Assets shall occur no later than fifteen (15) days after the completion of a due diligence review period not to exceed sixty (60) days following execution of the Definitive Agreement. At the Closing, the Purchase Price, as adjusted, shall be delivered to the Seller in readily available funds by wire transfer.

ASSUMPTION OF LIABILITIES: Purchaser shall assume no liabilities of the Seller of any nature whatsoever, except for the Lease and any assumable or assignable contract rights designated in writing by Purchaser prior to Closing.

REPRESENTATIONS AND WARRANTIES: The Definitive Agreement shall contain customary representations and warranties of title and condition of the Purchased Assets and the authority of Purchaser and Seller to enter into and close the transaction.

INDEMNIFICATION: The Definitive Agreement shall provide for the indemnification of Purchaser from all claims or liabilities arising out of the conduct of Seller's Business or use of the Purchased Assets prior to the closing related thereto and the indemnification of Seller from all claims or liabilities arising due to events occurring or the use of the Purchased Assets after the closing related thereto.

OTHER TERMS AND CONDITIONS:	The Definitive Agreement shall contain such other terms and conditions as are typically included in such agreements, and acceptable to each of the parties.
GOVERNING LAW:	The laws of the State of Indiana.
BINDING PORTION OF AGREEMENT:	**The following three (3) sections of this letter agreement shall be binding on the parties in accordance with their terms:**
CONFIDENTIALITY:	The parties to this letter agreement and their principals, shareholders and advisors shall not disclose the substance of the terms of this letter or the terms of the Definitive Agreement to any other parties or groups other than Purchaser's and Seller's respective advisors, consultants and lenders. In the event the parties are not able to agree upon the terms of a Definitive Agreement or otherwise fail to proceed to Closing of the transaction contemplated hereby within thirty (30) days from the date of this Letter of Intent for any reason, all copies of documents containing confidential or proprietary information, including all executed copies of this letter, shall be returned to the originating party.
OPERATIONS PRIOR TO CLOSING:	From and after the execution of this Letter of Intent through the date of final closing or termination, the Seller shall operate its business in the usual course and with normal inventories, and shall take no extraordinary or material actions with respect to its business, employees or the Purchased Assets (including the Lease) without first obtaining Purchaser's consent, which shall not be unreasonably delayed or withheld. Seller will also use its best efforts to maintain the goodwill of clients, suppliers, customers and employees during such period.
OTHER NEGOTIATIONS:	As long as Purchaser and Seller continue to negotiate in good faith with a view to preparing, executing and consummating a Definitive Agreement, Seller will refrain from all negotiations and transactions which would be inconsistent with the sale of the Purchased Assets to the Purchaser. Either party may terminate the proposed sale and purchase without liability by written notice to the other party at any time if it shall reasonably determine in good faith that the sale and purchase of all Purchased Assets cannot be consummated within ninety (90) days from the date of this letter for any bona fide reason.

If you concur with the foregoing terms, please execute this Letter of Intent and return it to the undersigned by June 30, 2017, at which time this Letter of Intent, if unsigned by Seller, shall automatically terminate. The parties signing for Purchaser and Seller below represent that they are authorized to execute this Agreement on behalf of the party indicated.

ACCEPTED:

Lucrative Business Corporation

By: _____
Joseph Shareholder, President

Very truly yours,

KGR Acquisition Company, Inc.

By: _____
K.G. McDonald, President

Exhibit “B”

ASSET PURCHASE AGREEMENT

This Agreement is entered into as of the date set forth below, by and between **KGR ACQUISITION COMPANY, INC.**, an Indiana corporation (hereinafter the "Purchaser"), **LUCRATIVE BUSINESS CORPORATION**, an Indiana corporation (hereinafter the "Seller"), and **JOSEPH SHAREHOLDER** of Indianapolis, Indiana, the sole shareholder of Seller (“Shareholder”).

W I T N E S S E T H:

WHEREAS, Seller is engaged in the business of owning and operating a widget sales and service business operating under the name “LBC Sales and Service” in two (2) locations, 8971 Bay Breeze Lane, Indianapolis, Indiana (the “Bay Breeze Location”) and 111 Monument Circle, Indianapolis, Indiana (the “Monument Circle Location”) (all collectively the “Business”); and

WHEREAS, Seller desires to sell, and Purchaser desires to purchase, all of the assets of Seller related to its operation of the Business, upon the terms and subject to the conditions set forth in this Agreement; and

WHEREAS, Purchaser desires to enter into a Consulting and Non-Competition Agreement with Shareholder relating to the Business (the "Consulting Agreement");

NOW THEREFORE, in consideration of the mutual promises and agreements contained herein, the parties hereto agree as follows:

1. **Purchase and Sale**. Purchaser hereby agrees to purchase and Seller agrees to sell all of the specified assets of the Seller used in the Business, including, without limitation, the furniture, fixtures and equipment listed on Exhibit "A" attached hereto and made a part hereof; all customer and vendor records and related information, including, without limitation, all computer or electronically maintained records; all computer software; all office supplies; all utility and other security deposits and prepaid expenses; the Seller’s leasehold interest in the Monument Circle Location; all practice and trade names used in the Business, including without limitation, the name "LBC Sales and Service” and all derivations and abbreviations thereof and rights related thereto; all telephone and facsimile numbers to the extent assignable; all inventory and tangible assets used in conjunction with the Business or located at the Bay Breeze Location or the Monument Circle Location (the “Inventory”); and the goodwill and related intangible assets used in the Business (all of the foregoing assets hereinafter referred to as the "Purchased Assets"), subject to the terms and conditions contained herein.

2. **Purchase Price and Payment**. The total purchase price to be paid by the Purchaser to the Seller for the Purchased Assets is Six Million Seven Hundred Fifty Thousand Dollars ($6,750,000.00) (the "Purchase Price") as further adjusted at Closing (as defined below) as provided in this Agreement. The Purchase Price shall be paid as follows:

   2.1 Payment at Closing. The entire Purchase Price shall be paid in readily available funds by wire transfer at the Closing (as defined below).

   2.2 Allocation of Purchase Price. For federal, state, local and other tax purposes, Purchaser and Seller agree that the Purchase Price will be allocated (the "Allocation") among the Purchased

Assets as set forth on Exhibit "B" attached hereto. None of the parties hereto will take any position that is substantially inconsistent with the Allocation in preparing any income or other tax return or report and will each use reasonable efforts to maintain the positions reflected in such returns or reports in determining any tax liabilities. The parties acknowledge that the Allocation is based on and reflects the relative fair market value of the Purchased Assets as of the date hereof. Seller and Purchaser will complete Form 8594, Asset Acquisition Statement under Section 1060 of the Internal Revenue Code, an example form of which is attached as Exhibit "C".

2.3 Adjustment for Inventory. The Purchase Price anticipates that the Inventory to be transferred pursuant to Section 1 shall be valued at the historical cost basis of One Million One Hundred Twenty-One Thousand Two Hundred Forty-Seven Dollars ($1,121,247.00) (the "Inventory Value") based on the amount currently carried on the books of Seller for such Inventory. Immediately prior to the Closing, at a time mutually agreed upon between the parties hereto, the Purchaser and the Seller shall conduct a final reconciling physical inventory of the Inventory purchased pursuant to this Agreement. In the event the book value of the Inventory is greater or less than the Inventory Value, the Purchase Price shall be adjusted accordingly, and the adjustment shall be added or credited to the payment due from Purchaser at Closing.

3. **Certain Assets and all Liabilities Excluded.** All cash and cash equivalents, all accounts receivable, all rights and funds connected in any way with any retirement or employee benefit plan, all claims for refunds of taxes for all periods prior to Closing, all contracts, agreements, leases and other agreements not specifically assumed by Purchaser and all additional assets of Seller listed in Exhibit "D" attached hereto, are specifically excluded from the sale, and shall remain the sole property of Seller. In addition, the Purchased Assets shall be conveyed to Purchaser free and clear of all liabilities, liens, adverse claims and encumbrances of any type or nature except as specifically provided for herein. Anything in this Agreement to the contrary notwithstanding, Purchaser shall not assume, and Seller shall remain responsible for, all of its duties, obligations and liabilities (whether accrued, absolute, fixed, unliquidated, contingent, or otherwise), and Seller shall indemnify and hold Purchaser harmless from any of Purchaser's charges or liabilities of any type, as further provided in Section 9 below.

4. **Closing and Possession**. This transaction shall be closed at a time and place acceptable to the parties hereto (the "Closing") but in no event later than thirty (30) days after the date of acceptance of this Agreement, unless an extension is agreed to in writing by the parties hereto, or otherwise extended as herein provided. At the Closing Seller shall deliver to Purchaser the executed documents provided for in Section 12 below, in a form satisfactory to Purchaser, transferring, assigning and conveying all of Seller's title to the Purchased Assets, free and clear of all liens and encumbrances except as provided for in this Agreement.

5. **Purchaser's Representations and Warranties.** Purchaser hereby represents and warrants to Seller (and shall be deemed to represent and warrant to Seller as of the date of the Closing) that each of the following statements is true:

5.1 Due Incorporation. Purchaser is a corporation duly organized, validly existing and in good standing under the laws of the State of Indiana, and has all power and lawful authority to own its assets and properties and to carry on the Business as now conducted.

5.2 Authority to Execute and Perform Agreements. The Purchaser has the full legal right and all power, authority and approval required to enter into, execute and deliver this Agreement and each and every other agreement to be executed by the Purchaser in connection with the transactions to be consummated in accordance with this Agreement and to perform fully the Purchaser's obligations hereunder and thereunder. This agreement is duly executed and delivered and represents a valid and binding obligation of the Purchaser enforceable in accordance with its terms except as may be limited by bankruptcy, moratorium, insolvency or other similar laws generally affecting the enforcement of creditors' rights. The execution, delivery and performance of the Agreement, and the consummation of the transactions contemplated thereby, will not violate, conflict with or otherwise result in the breach or violation of any of the terms or conditions of the articles of incorporation or bylaws of the Purchaser, any instrument, contract or other agreement to which the Purchaser is a party or by which it is bound, or, to the best knowledge of the Purchaser, any statute or any regulation, order, judgment, injunction, award or decree of any court or governmental or regulatory body which is binding upon the Purchaser.

5.3 No Broker. No broker, finder, agent or similar intermediary has acted for or on behalf of the Purchaser in connection with this Agreement or the Related Agreements, and no broker, finder, agent or similar intermediary is entitled to any broker's, finder's or similar fee or other commission in connection therewith based on any agreement or understanding with the Purchaser or any action taken by the Purchaser.

5.4 Articles and Bylaws. Copies of the founding articles (certified by the Secretary of State) and bylaws (certified by the secretary) of the Purchaser and all amendments to each have been delivered to Seller, and are true, correct and complete.

5.5 General. None of the representations or warranties made by Purchaser in this Agreement, and none of the information contained in the documents required to be furnished by Purchaser to Seller or to any of its representatives pursuant to this Agreement, or in any of the exhibits or schedules attached thereto, is or shall be false or misleading as to any material fact, or omit or shall omit to state a material fact required to be stated therein or necessary in order to make any of the statements made therein, in light of the circumstances under which they were made, not misleading. All of the representations and warranties of Purchaser set forth in this section shall be true and correct as if restated in their entirety on the Closing date and shall survive the Closing.

6. **Seller's Representations and Warranties**. Seller and Shareholder hereby represent and warrant to Purchaser (and shall be deemed to represent and warrant to Purchaser as of the date of Closing) that each of the following statements is true:

6.1 Authority. The Seller has all power and lawful authority to own, lease and operate its assets, properties and business and to carry on the Business as now conducted. The Seller does not own or lease property or conduct business in any jurisdiction other than in the State of Indiana and at the two (2) locations at which the Business is currently located.

6.2. Articles and Bylaws. Copies of the founding articles (certified by the Secretary of State) and bylaws (certified by the secretary) of the Seller and all amendments to each have been delivered to Purchaser, and are true, correct and complete.

6.3 Tax Obligations. The Buyer will not assume or otherwise become liable for any federal or state income, excise, use, gross receipts, franchise, employment, payroll related, property, inventory or any other tax of any sort or any penalty or interest charge relating to the Purchased Assets for any period ending on or prior to the Closing, or arising out of the transactions contemplated by this Agreement. Seller shall pay all sales or use taxes incurred in connection with the sale of the Purchased Assets to Purchaser.

6.4 Compliance With Laws. To the best knowledge of the Seller after reasonable investigation, the Seller is in compliance in all material respects with all federal, state, and local laws, ordinances, regulations, orders, judgments, injunctions, awards or decrees applicable to it or to the Business.

6.5 Authority to Execute and Perform Agreements. The Seller has the full legal right and all power, authority and approval required to enter into, execute and deliver this Agreement, and to perform fully the Seller's obligations hereunder and thereunder. This Agreement is duly executed and delivered and represents a valid and binding obligation of the Seller enforceable in accordance with its terms except as may be limited by bankruptcy, moratorium, insolvency or other similar laws generally affecting the enforcement of creditors' rights. The execution, delivery and performance of the Agreement and the Related Agreements (defined below), and the consummation of the transactions contemplated thereby, will not violate, conflict with or otherwise result in the breach or violation of any of the terms or conditions of the articles of incorporation or bylaws of the Seller, any instrument, contract or other agreement to which the Seller is a party or by which it is bound, or, to the best knowledge of the Seller, any statute or any regulation, order, judgment, injunction, award or decree of any court or governmental or regulatory body which is binding upon the Seller.

6.6 Litigation. Except for those actions set forth in Exhibit "E", there are no outstanding orders, judgments, injunctions, awards or decrees of any court, governmental or regulatory body against or involving the Seller or the Business which could delay the consummation of the transactions contemplated by this Agreement or the Related Agreements or have a material adverse affect upon the transactions contemplated hereby or upon the Purchased Assets or the Business. The Seller is not currently a party to, or threatened with, any litigation or judicial, administrative or arbitration proceeding relating to the Business or which affect in any way the Purchased Assets, this Agreement or the Related Agreements.

6.7 Employment Matters. The Seller has complied in all material respects with all applicable laws, rules and regulations relating to the employment of labor, including, but not limited to, those relating to wages, hours, collective bargaining and the payment and withholding of taxes. The Seller has withheld all amounts required by law or agreement to be withheld from the wages or salaries of its employees and the Seller is not liable for any arrearage of wages or other taxes or penalties for failure to comply with any of the foregoing. There are no controversies pending or threatened between the Seller and any of its employees, and there are no employment contracts with any employee of the Seller which are currently in force, except as disclosed in Exhibit “F" below. Seller shall be responsible for all payments to its employees, including all accrued vacation or other accrued employee benefits, which accrue through the date of the Closing.

6.8 Agreements. Exhibit "F" attached hereto sets forth all of the contracts and other agreements with respect to which the Seller is a party and which relate to the Business, or by which the

Business or the Purchased Assets are currently bound or subject. A copy of all such agreements is attached to Exhibit “F”. All of the original executed contracts and other agreements set forth on the attached exhibit are in full force and effect and binding upon the parties thereto in accordance with their terms. The Seller has paid in full all amounts currently due thereunder, and Seller is not in default under any of the agreements or contracts, and no other party to any such contract or other agreement is in default thereunder.

6.9 Inventory. The inventory of the Seller as set forth in Exhibit "G" attached hereto, is in useable and saleable condition in the ordinary course of business at the amounts carried on the books of the Seller. To the knowledge of the Seller after reasonable investigation, all of such inventory is of at least the standard quality for such items in the industry, and the amounts of the inventory reflected have been determined in accordance with generally accepted accounting principles consistently applied.

6.10 Employee Benefit Plans. Except as set forth in Exhibit "H", the Seller is not a party to, and neither makes nor is required to make employer contributions to, any pension, profit sharing, deferred compensation or other employee benefit plan, agreement, arrangement or understanding maintained for the benefit of the employees of the Seller, and buyer shall not by reason of this Agreement or the Related Agreements incur or otherwise assume any liability under any employee benefit plan.

6.11 Title to and Condition of Tangible Personal Property. Seller has good and marketable title to all of the tangible personal property which constitutes the Purchased Assets free and clear of all liens except for liens for taxes not yet due and payable. All items of the tangible personal property are in good and operable condition and repair as of their delivery to Purchaser at the Closing.

6.12 Additional Tax Matters. All federal, state and other tax returns and reports, domestic or foreign, required to be filed by or on behalf of Seller have been duly filed, and all taxes and other assessments and levies (including all interest and penalties) and all installments of estimated taxes, required to be paid by Seller have been duly paid. Seller has not waived any statute of limitations with respect to any tax or other assessment or levy applicable to the Purchased Assets or the Business and all such taxes and other assessments and levies which Seller is required by law to withhold or to collect have been duly withheld and collected and have been paid over to the proper governmental agencies or segregated and set aside for such payment and, if so segregated and set aside, shall be paid by Seller as required by applicable law. There are no claims or investigations pending or threatened against Seller for past due taxes.

6.13 Financial Statements. All financial statements provided by Seller to Purchaser are, to the best of Seller's knowledge and belief, after diligent review, true, correct and complete copies of financial statements compiled in the ordinary course of Seller's business for the internal management use of Seller. The statements have been compiled substantially in accordance with generally accepted accounting principles, consistently applied. Although no review or audit of such financial statements has been performed by Seller, there are no material errors in the financial statements and the financial statements accurately reflect the financial condition of the Business.

6.14 Electronic Customer and Vendor Records. All electronically recorded customer and vendor records are reasonably complete, and are secure and protected by a reliable data backup system.

6.15 No Broker. No broker, finder, agent or similar intermediary has acted for or on behalf of the Seller in connection with this Agreement or the Related Agreements, and no broker, finder, agent or similar intermediary is entitled to any broker's, finder's or similar fee or other commission in connection therewith based on any agreement or understanding with the Seller or any action taken by the Seller.

6.16 General. None of the representations or warranties made by Seller in this Agreement, and none of the information contained in the documents required to be furnished by Seller to Purchaser or to any of its representatives pursuant to this Agreement or in any of the exhibits or schedules attached thereto or contemplated thereby, is or shall be false or misleading as to any material fact, or omit or shall omit to state a material fact required to be stated therein or necessary in order to make any of the statements made therein, in light of the circumstances under which they were made, not misleading. All of the representations and warranties of Seller set forth in this section shall be true and correct as if restated in their entirety on the Closing date and shall survive the Closing.

7. **Conditions to Closing**. In addition to other provisions of this Agreement, the Purchaser's obligations hereunder are subject to satisfaction of the following conditions prior to Closing, unless waived in whole or in part by Purchaser:

7.1 No Misrepresentation or Breach. There shall have been no material breach by Seller in the performance of any of Seller's covenants or agreements herein, the representations and warranties of Seller contained or referred to in this Agreement shall be true and correct on the Closing date and there shall have been delivered to Purchaser a certificate to that effect, dated as of the Closing, and signed by the duly authorized officer of Seller.

7.2 Conveyancing Documents. All documents of conveyance necessary to effect the transfer of the Purchased Assets, and all other documents required to be delivered to Purchaser pursuant to this Agreement, in a form reasonably acceptable to Purchaser, shall have been delivered to Purchaser.

7.3 No Material Adverse Event. Between the date of this Agreement and the Closing, no action, suit, proceeding or governmental charge, complaint or investigation shall have been commenced or threatened nor shall any casualty or other event have occurred and be continuing which would have a material adverse effect on the Purchased Assets or the operation of the Business, prevent Purchaser from using the Purchased Assets for the purposes for which they are presently used or operated, or prohibit the consummation of the transactions contemplated hereby or seek damages as a result thereof.

7.4 Investigation by Purchaser. The findings and results of the investigation of the Business undertaken by Purchaser pursuant to this Agreement, shall be satisfactory to Purchaser, in its sole discretion, with such investigation to be completed no later than fifteen (15) days prior to the scheduled date of the Closing.

7.5 Consulting Agreement. Shareholder shall have delivered to Purchaser an executed Consulting and Non-Competition Agreement in the form attached hereto as Exhibit “I.”

7.6 Leasehold Assignment. The Purchaser shall have obtained the Landlord's consent to the assignment of Seller's leasehold interest in the Monument Circle Location to Purchaser or Purchaser's assignee.

8. **Covenants and Agreements**. The Purchaser and the Seller hereby covenant and agree as follows:

8.1 Conduct of Business. From the date hereof through the date of the Closing, the Seller shall conduct its business in the ordinary course and, without the prior consent of the Purchaser, shall not dispose of any assets of the Business or undertake any transaction which is not in the ordinary course of the Business.

8.2 Insurance. From the date hereof through the date of the Closing, the Seller shall maintain in force (including necessary renewals thereof) all insurance policies currently in force for the Business, except to the extent that they may be replaced with equivalent policies appropriate to insure the assets, properties and liabilities of the Business to the same extent as currently insured.

8.3 Preservation of Business. From the date hereof through the date of Closing, the Seller shall preserve its business organization intact, keep available the services of its present officers, employees, consultants and agents, maintain its present customers and suppliers and preserve its good will to the best of its ability.

8.4 Examination and Investigations. From the execution of this Agreement and through fifteen (15) days prior to the scheduled date of the Closing, the Purchaser shall be entitled through its employees, agents and representatives, to make such investigation of the assets, properties, business and operations of the Seller and such examinations of the books, records and financial condition of the Seller as the Purchaser wishes. Any such investigation and examination shall be conducted at reasonable times and under reasonable circumstances as are mutually agreeable to the parties. The Seller shall furnish the representatives of the Purchaser during such period with all information and copies of documents concerning the affairs of the Seller as the representatives may reasonably request and shall disclose all material facts affecting the financial condition and business operations of the Seller. If this Agreement terminates, any documents obtained by are on behalf of the Purchaser from the Seller shall be returned to the Seller.

8.5 Collection of Accounts. Seller shall retain and collect all accounts receivable remaining outstanding and payable as of the Closing. Seller shall take no actions out of the ordinary in the collection of outstanding accounts receivable after the Closing, and shall continue to collect such accounts only in accordance with past practices. Purchaser agrees that it shall immediately and without delay transfer or deliver to Seller from time to time on and after the Closing Date any and all cash remittances or other payments or property which Purchaser may receive and which belong to Seller, including any payments on accounts receivable which remain the property of Seller.

8.6 Further Assurances. Each of the parties shall execute such documents and other papers and perform such further acts as may be reasonably required or desirable to carry out the provisions hereof and the transactions contemplated hereby, both prior to and after Closing. Each party shall use its reasonable efforts to fulfill or obtain fulfilment of the conditions to

the Closing, including, but not limited to, the execution and delivery of any documents or other papers, the execution and delivery of which are conditions precedent to the Closing.

8.7 Best Efforts. Each of the parties hereto agrees to use its and their best efforts with due diligence and in good faith to satisfy promptly all conditions to the obligations of the parties herein in order to expedite the consummation of the transactions contemplated by this Agreement.

8.8 Access to Records. After the Closing, Purchaser shall grant Seller all reasonable access to all business and financial records, statements and client records of the Business as may be reasonably requested for the preparation of tax returns or response to audits or inquiries.

8.9 Survival. Notwithstanding any right of the Purchaser to investigate the affairs of the Seller, each of the parties to this Agreement has the right to rely fully upon the representations, warranties, covenants and agreements of the other parties contained in this Agreement. All such representations, warranties, covenants and agreements shall survive the execution, delivery and the Closing of this Agreement and the transactions contemplated thereby for a period of twelve (12) months at which time all such representations, warranties, covenants and agreements shall automatically expire and terminate and shall be of no further force or effect.

9. **Indemnification and Claims**. The parties hereto agree to indemnify each other as follows:

9.1 Indemnification by Seller and Shareholder. Seller and Shareholder agree to jointly and severally indemnify and hold harmless Purchaser from and against any and all liabilities, losses, costs and expenses whatsoever, including but not limited to, reasonable attorneys' fees and disbursements, arising out of or incurred with respect to any breach of any one or more of Seller's representations, warranties, covenants or agreements contained in this Agreement, any misrepresentation by or on behalf of Seller or Shareholder under this Agreement, the breach or nonperformance of any obligation or covenant to be performed by Seller hereunder, any claim or liability arising out of any excluded liability, or for any action taken by or on behalf of Seller prior to the Closing.

9.2 Indemnification by Purchaser. Purchaser agrees to indemnify and hold harmless Seller and Shareholder from and against any and all liabilities, losses, costs and expenses whatsoever, including but not limited to, reasonable attorneys' fees and disbursements, arising out of or incurred with respect to any breach of any one or more of Purchaser's representations, warranties, covenants or agreements contained in this Agreement, any misrepresentation by or on behalf of Purchaser under this Agreement, the breach or nonperformance of any obligation or covenant to be performed by Purchaser hereunder, or for any action taken by or on behalf of Purchaser occurring after the Closing.

9.3 Procedure for Claims. Upon the occurrence of any event that an indemnified party asserts to be an indemnifiable event pursuant to this Agreement, the indemnified party shall promptly notify in writing the other parties to this Agreement. If such event involves the claim of any third person and the indemnifying party confirms in writing its desire to defend or settle such claim, the indemnifying party shall have sole control over, and shall assume all expenses with respect to, the defense or settlement of such claim; provided, however, that an indemnified party shall be entitled to participate in the defense of such claim and to employ counsel at its own expense to assist in the handling of such claim. In the event that the

indemnifying party does not assume sole control over the defense or settlement of such claim as provided in this section, an indemnified party shall have the right to defend and settle the claim in such manner as it or he may deem appropriate at the cost or expense of the indemnifying party and the indemnifying party shall promptly reimburse the indemnified party therefore in accordance with this section.

10. **Attorneys' Fees**. Any party to this Agreement who is the prevailing party in any legal or equitable proceeding against any other party to this Agreement brought under or with relation to the Agreement or the transaction contemplated hereby shall be additionally entitled to recover Court costs and reasonable attorneys' fees from the non-prevailing party.

11. **Duties of Seller at Closing**. Seller shall deliver to Purchaser at Closing, at Seller's sole cost and expense, the following items:

11.1 A bill of sale evidencing the transfer of the Purchased Assets to Purchaser, free and clear of all liens and encumbrances, except for those accepted by the Purchaser, in the form attached hereto as Exhibit “J.”

11.2 An assignment of intangibles in the form attached hereto as Exhibit "K".

11.3 An assignment of trade name in the form attached hereto as Exhibit "L".

11.4 A closing certificate verifying that the representations, warranties, covenants and agreements of the Seller are reasserted and effective as of the date of the Closing in the form attached hereto as Exhibit "M".

11.5 The Consulting and Non-Competition Agreement of Shareholder in the form attached hereto as Exhibit “I”.

11.6 Any releases necessary to transfer the Purchased Assets to the Purchaser free of any lien or encumbrance.

11.7 Evidence of its capacity and authority for the closing of this transaction, as required.

11.8 An acceptance of assignment of Seller’s leasehold interest in the Monument Circle Location, in a form reasonably acceptable to Purchaser, executed by the Landlord of the Monument Circle Location.

12. **Duties of Purchaser at Closing**. Purchaser shall deliver the following, at Purchaser's sole cost and expense at the Closing:

12.1 The remaining cash portion of the Purchase Price by wire transfer to the depository account designated by Seller.

12.2 Evidence of its capacity and authority for the closing of this transaction, as required.

12.3 All other documents necessary to close this transaction.

13. **Binding Effect and Law**. This Agreement shall be binding upon and enure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, successors and assigns. This Agreement and any related agreements constitute the sole and only agreement of

the parties hereto and supersedes any prior understandings or writings or oral agreements between the parties respecting this transaction and cannot be changed, except by their written consent, and shall be construed under and in accordance with the laws of the State of Indiana. Time is of the essence of this Agreement.

14. **Severability and Survivability**. In the event any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein. All rights, duties and obligations of the parties hereto shall survive the passing of title to, or interest in, the Purchased Assets.

15. **Notices**. All notices under this Agreement shall be sufficiently given if in writing and delivered personally or sent by certified mail, postage prepaid, or delivered by a recognized overnight carrier to the address indicated in the signature line below, or to such other address as may be designated from time to time by notice given pursuant to this Agreement.

16. **Assignment.** Purchaser may assign all or any portion of its right, title and interest in this Agreement to any corporation or other entity and such right, title and interest shall inure to the benefit of and be binding upon such successors and assigns.

17. **Incorporation of Recitals.** All of the recitals and representations contained in the preamble of this Agreement are incorporated into and made a materials part of this Agreement.

DATED: July 15, 2017.

PURCHASER:
KGR ACQUISITION COMPANY, INC.

By: _____
K.G. McDonald, President
Address: _____
_____

SELLER:
LUCRATIVE BUSINESS CORPORATION d/b/a LBC SALES AND SERVICE

By: _____
Joseph Shareholder, President
Address: _____
_____

Also executing individually as to Sections 6 and 9 and all sections related to or necessary for the enforcement of Section 9:

_____

Joseph Shareholder

This instrument prepared by Brian C. Bosma, Esq., Kroger, Gardis & Regas, 111 Monument Circle, Suite 900, Indianapolis, Indiana 46204-5175.

List of Exhibits

Exhibit A	-	Furniture Fixtures and Equipment (§ 1)
Exhibit B	-	Allocation of Purchase Price (§ 2.2)
Exhibit C	-	Form 8594 (§ 2.2)
Exhibit D	-	Excluded Assets of Seller (§ 3)
Exhibit E	-	Pending or Threatened Litigation (§ 6.6)
Exhibit F	-	Contracts and Agreements to which Seller is a Party (§ 6.8)
Exhibit G	-	Inventory of Seller (§ 6.9)
Exhibit H	-	Employee Benefit Plans (§ 6.10)
Exhibit I	-	Consulting and Non-Competition Agreement (§ 7.5)
Exhibit J	-	Bill of Sale (§ 12.1)
Exhibit K	-	Assignment of Intangibles (§ 12.2)
Exhibit L	-	Assignment of Trade Name (§ 12.3)
Exhibit M	-	Closing Certificate (§ 12.5)

Exhibit "C"

CLOSING DOCUMENT & DELIVERY CHECKLIST

Purchase of Assets
8971 Bay Breeze Lane, Indianapolis, IN
and
111 Monument Circle, Indianapolis, IN

By KGR Acquisition Company, Inc.

September 25, 2017

Parties:

Seller	Lucrative Business Corporation
Buyer	KGR Acquisition Company, Inc.
Seller's Counsel	Frankie E. Dewey, Dewey & Associates
Buyer's Counsel	Brian C. Bosma, Kroger Gardis & Regas, LLP
Landlord	Big Bank N.A.
Title Company	Hamilton Title

A. DOCUMENTS	**STATUS**	**EXECUTION**
1. Asset Purchase Agreement		☐Buyer ☐Seller
(a) Agreement		☐Buyer ☐Seller
(b) List of Assets Purchased (Exhibit A)		☐Buyer ☐Seller
(c) Allocation of Purchase Price (Exhibit B)		☐Buyer ☐Seller
(d) IRS Form 8594, Assets Acquisition Statement (Exhibit C)		☐Buyer ☐Seller
(e) List of Excluded Assets (Exhibit D)		☐Buyer ☐Seller
(f) List of Pending Litigation (Exhibit E)		☐Buyer ☐Seller
(g) List of Contracts (Exhibit F)		☐Buyer ☐Seller
(h) Inventory of Seller (Exhibit G)		☐Buyer ☐Seller
(i) List of Employee Benefit Plans (Exhibit H)		☐Buyer ☐Seller
2. Bill of Sale – Attach Exhibit A		☐Buyer ☐Seller
3. Assignment of Intangibles		☐Buyer ☐Seller

4. Assignment of Trade Name	☐Buyer ☐Seller
5. Closing Certificates (2)	☐Buyer ☐Seller
6. Assignment and Assumption of Lease	☐Buyer ☐Seller
7. Landlord's Acceptance of Lease Assignment	☐Buyer ☐Seller
8. Consulting and Non Competition Agreement	☐Buyer ☐Seller
9. Other Deliveries and Issues	☐Buyer ☐Landlord
(a) Customer and Vendor Records/Paper and Electronic	☐Buyer ☐Seller
(b) Inspection Reports	☐Buyer ☐Seller
(c) Lien Releases	☐Buyer ☐Seller
(d) Consent to Resolutions - Seller	☐Buyer ☐Seller
(e) Consent to Resolutions - Buyer	☐Buyer ☐Seller
(f) Certificate of Existence - Seller	☐Buyer ☐Seller
(g) Certificate of Existence - Buyer	☐Buyer ☐Seller
(h) Closing Statement	☐Buyer ☐Seller
(i) Wire Transfer Confirmation of Purchase Price	☐Buyer ☐Seller
(j) Keys and Possession	☐Buyer ☐Seller
10. Post Closing – Things To Do	☐Buyer ☐Seller
(a) Record Lien Releases	☐Buyer ☐Seller
(b) Finalize Landlord Assignment of Lease	☐Buyer ☐Seller
(c) File IRS Closing Statement	☐Buyer ☐Seller
(d) Finalize and File Form 8594	☐Buyer ☐Seller
(e) Confirm Recordation of Assignment	☐Buyer ☐Seller
(f) Receive and Approve Final Title Policy	☐Buyer ☐Seller
(g) Post-Closing Lien Search	☐Buyer ☐Seller

Exhibit "D"

PURCHASE OF ASSETS – ANONYMOUS STEEL CORPORATION

INITIAL DUE DILIGENCE CHECKLIST

Please provide copies of the documents indicated below, or provide the information requested, to the extent applicable. This is an initial request; further information may be requested during the course of the contemplated transaction. If any of the requested documents do not exist or are inapplicable, please so indicate on a copy of this list. These responses will be incorporated into the Asset Purchase Agreement dated July 15, 2017 by and among the Acquisition Company, Inc., the Anonymous Steel Corporation and Parent Industries, Inc.

For purposes of this Initial Due Diligence Checklist, the following terms have the following meanings:

"Company" means Anonymous Steel Corporation

"Subsidiary" means any corporation, partnership, joint venture or other business association or entity, if any, in which the Corporation owns, directly or indirectly, an interest.

"Parent" means Parent Industries, Inc., the sole shareholder of the Company.

1. Organization and Basic Corporate Documents

(a) List each corporation, partnership, joint venture or other business association or entity, if any, in which the Company owns, directly or indirectly, an interest or with which the Company is affiliated or otherwise related indicating the nature and extent of such interest or affiliation or relationship.

(b) Provide Articles of Incorporation of the Company and the Subsidiaries, including all amendments.

(c) Provide By-Laws of the Company and the Subsidiaries, including all amendments.

(d) Provide minutes of the Company's organizational meeting, including all documents submitted to or approved at such meeting, including any subscription agreements.

(e) Provide Minutes of all meetings of directors, committees of directors and shareholders of the Company and its Subsidiaries during the past five (5) years, including copies of any written notices (if given) or waivers thereof and any written consents to action without a meeting.

(f) List all states where the Company or its Subsidiaries own or lease property, or where employees or independent sales representatives of the Company and its

Subsidiaries are located, indicating in which states the Company and its Subsidiaries are qualified to do business

(g) List all states where the Company or any Subsidiaries are admitted to do business, and provide a current Certificate of Good Standing and tax clearance certificate for each such jurisdiction for Company and any Subsidiaries.

2. Shareholder Information

(a) Provide all stock record and transfer books and related records for the Company and its Subsidiaries.

(b) Provide copies of stock option or purchase plans and forms of option or purchase agreements which have been or may be used thereunder, and copies of all agreements relating to stock options, warrants or rights for the securities of Company and its Subsidiaries.

(c) Provide all records setting forth issuances or grants of common stock, options, warrants and convertible securities by the Company, listing the names of the issuees or grantees, the amounts issued or granted, the dates of the issuances or grants, the number of shares presently exercisable (if applicable), the expiration dates (if applicable) and the consideration received (or to be received) by the Company in each case.

(d) Provide a current shareholder list including the names and addresses of all shareholders of the Company and the number of shares and class of stock owned by each shareholder.

(e) Provide copies of any voting trust, shareholder, buy-sell or other similar agreements covering the Company's shares.

(f) Provide copies of any agreements pursuant to which the Company has granted piggyback or demand registration rights, preemptive rights or rights of first refusal, or which require the Company to repurchase its shares.

(g) List the declaration of all dividends for Company and any Subsidiaries for the last five years and provide minutes evidencing their declaration and proof of payment.

3. Major Agreements and Documents of the Company and Subsidiaries

(a) Provide copies of all loan credit agreements, security agreements, mortgages, indemnities, guaranties, deeds of trust and other instruments evidencing indebtedness of or to the Company or its Subsidiaries, and of all documents creating encumbrances liens or security interests on any real or personal property of the Company or any Subsidiary, including all loans made to or from the Parent, Subsidiaries, shareholders, officers or employees of the Company or its Subsidiaries or affiliates.

(b) Provide all letters of consent or waivers from any lending institution obtained in the last five years in connection with any bank credit or loan agreement, or other instrument evidencing indebtedness of the Company or its Subsidiaries, whether or not such indebtedness is presently outstanding.

(c) Provide a list of the Company's and each Subsidiary's twenty largest customers ranked by (and including) dollar volume of sales in each of the past three years.

(d) Provide a list of the Company's and each Subsidiary's twenty largest suppliers ranked by (and including) dollar volume of purchases for the past three years.

(e) Provide copies and/or summaries of all oral or written employment consulting, termination, severance and/or non-competition agreements involving or relating to the Company or any Subsidiary with current and former officers, directors or key employees of the Company, or involving the Company or any Subsidiary and the Parent, and all agreements providing for services of independent consultants.

(f) Provide summaries of all insurance policies carried by the Company or any Subsidiary, specifying the insured, the amount of coverage, the type of insurance, the annual premiums and the policy number. Also, describe all claims made under such policies for the past five years and any possible claims to be made under any policy.

(g) Provide copies of the standard customer contracts used by the Company or its Subsidiaries, and any agreements governing pricing.

(h) Provide copies of any pending customer contract(s) expected to represent more than 10% of the Company’s annual revenues.

(i) Provide copies of all material supply agreements or other material agreements regarding goods and services of the Company, including those governing pricing and discounts, to which the Company or its subsidiaries are a party. Include a brief description of any such oral arrangements.

(j) Provide copies of all sales representative, agency, joint venture or franchise agreements, if any, to which the Company or its Subsidiaries are a party. Include a brief description of any such oral arrangements.

(k) Provide the form of employee confidentiality agreement (if any) used by the Company and its Subsidiaries and copies of all agreements with present or former employees addressing confidentiality or non-compete matters.

(l) Provide copies of all agreements to which the Company and its Subsidiaries are a party in which: (i) any officer, director, shareholder or employee of the Company or its Subsidiaries, or (ii) any immediate family member of any of the foregoing has an interest.

(m) Provide copies of any key-man or other life insurance policy and related materials concerning such a policy maintained by the Company and its Subsidiaries.

(n) Provide copies of bailment or consignment agreements in effect currently and during the past three years and copies of related letters of credits.

(o) Provide a description and copies of all management fee agreements or similar agreements, if any, between the Company and any Subsidiary or Parent or any other entity.

(p) Provide a list and copies of those agreements and documents which involve the Company and contain an assignment or change in control or similar provision which require the consent of any party or create a right to terminate the contract or accelerate debt if an assignment or Change of Control of the Company occurs.

(q) Provide copies of each contract or agreement of the Company other than those covered by (a) through (p) inclusive which:

(i) Includes as a party the Parent; or

(ii) Otherwise materially affects the condition, financial or otherwise, of the property, assets, business or prospects of the Company, or its Subsidiaries; or

(iii) Was not made in the ordinary course of business.

(r) Provide copies of all pending contracts, or summaries thereof, which would be covered under categories 3(a) through (q) when they are executed.

4. Financial Matters and Tax - Company and Subsidiaries

(a) Provide copies of statements of income and retained earnings, balance sheets and statements of cash flow (whether audited or unaudited) and all notes thereto covering the last three fiscal years and unaudited interim financial statements covering the current fiscal year through a recent date.

(b) Provide a copy of the most recent accounts payable aging report.

(c) Provide a copy of the most recent accounts receivable aging report.

(d) Provide a description of any contingent liabilities not reflected in the most recent balance sheet.

(e) Provide copies of the federal, state and local income tax returns for the three years ending December 31, 2006, or if the Company's fiscal year does not coincide with the calendar year, ending on the last three fiscal year ends.

5. Labor Relations/Management Information

(a) Provide a summary of any pending or prior (within the last 5 years) employee grievances, claims of unfair labor practices or arbitrations relating to employee matters and copies of documents relating thereto involving the Company or its Subsidiaries.

(b) Provide copies of any material relating to investigations, claims or violations under the Fair Labor Standards Act or under Title 7 of the Civil Rights Act or the Age Discrimination Employment Act, the Occupational Safety and Health Act, the Americans with Disabilities Act or similar related employment statutes, including state law statutes to which the Company or any Subsidiary is a party.

(c) Provide copies of any union and labor contracts and agreements to which the Company or any Subsidiary is a party along with information as to disputes or negotiations pending or foreseeable.

(d) Provide any handbook or manuals issued by the Company or its Subsidiaries for employees and supervisors.

(e) Provide copies of any program of retirement benefits for existing or future retirees.

(f) List all salaried employees and officers of the Company and its Subsidiaries including position held and annual salary and all other benefits received by each of them.

(g) List all hourly employees (full-time and part-time) of the Company and its Subsidiaries including position held and hourly rate and all other benefits received by each of them.

(h) Provide copies of Forms I-9 for each employee of the Company and its Subsidiaries.

6. Employee Benefit Plan Documents and Materials

(a) Provide copies and summaries of all plans or arrangements relating to any employee benefit, retirement plan, stock option, incentive, deferred compensation, stock purchase, profit sharing, golden parachute, bonus, pension, multiemployer, health or other benefit plans that the Company or its Subsidiaries sponsor in which Company or Subsidiary employees participate or to which the Company or any Subsidiary contributes and all amendments to date (collectively, the "Benefit Plans"), including any Benefit Plans that have been terminated.

(b) Provide the most recent summary plan description and summaries of material modifications of each Benefit Plan.

(c) Provide the most recent asset and other financial statements and actuarial reports for each Benefit Plan, if any.

(d) List names and addresses of the administrators, sponsors, trustees and committee members for each Benefit Plan, if any.

(e) Provide copies of Internal Revenue Service determination letters and copies of letters, IRS forms and supporting documents requesting an Internal Revenue Service determination for each Benefit Plan, if any.

(f) If any Benefit Plan is not fully funded or any required contribution or payment is due in respect of any Benefit Plan has not been fully paid, identify the plan, the amount of the deficit and provide details of related facts and circumstances.

(g) Provide copies of IRS Form 5500 for each qualified Benefit Plan for the last three years.

7. Personal Property

(a) List all fixed assets, machinery and equipment and other personal property of the Company and its Subsidiaries (whether owned or leased) giving for each item of personal property: leased or owned, cost, depreciation, reserve, method of depreciation.

(b) Provide copies of all leases of personal property, including equipment leases to which the Company or any Subsidiary is a party and a summary list of all such leases.

(c) Provide copies of any appraisal reports on material personal property.

(d) Provide a description of significant casualty or damage to property or assets of the Company and its Subsidiaries during the past five years.

(e) Provide copies of any warranties applicable to any of the property referred to in (a) above.

8. Real Property Owned or Leased

(a) List all real property owned or leased by the Company and its Subsidiaries indicating whether owned or leased and provide a brief description of such property including a description of all structures and current uses and street locations and legal descriptions.

(b) Provide copies of any real property leases.

(c) Provide copies of notices of special assessments, zoning or building code violations and similar matters, if any, affecting real property.

(d) To the extent not covered by Section 1, list and provide a description of all liens or encumbrances affecting real property of the Company.

(e) Provide all management or service contracts or arrangements for management, maintenance or servicing of real property.

(f) Provide copies of all title insurance policies for real property owned by the Company or Subsidiaries in Illinois.

(g) Provide copies of any real estate appraisal reports for real property owned by the Company or Subsidiaries in Illinois.

(h) Provide copies of any physical surveys conducted for real property owned by the Company or Subsidiaries in Illinois.

(i) Provide copies of all real estate tax statements, assessments, or billings received for real property owned by the Company and any Subsidiaries.

9. Intellectual Property

(a) Provide a list of all of the Company's and its Subsidiaries' patents, trademarks, trade names, and copyrights along with copies of respective applications, registrations and renewals (both foreign and domestic).

(b) Give a brief description of any pending, threatened or past challenge to the Company's or any Subsidiary's ownership of or right to use any of the above, including any such intellectual property used or licensed by the Company or any Subsidiary under agreement.

(c) Give a brief description of any potential or past infringements of any of the above by the Company by any Subsidiary and by any third party and the action taken, if any.

(d) Provide copies of all agreements affecting any intellectual property including, but not limited to, any patent, copyright, trade name, trademark brand name, software, inventions, processes or know-how. Include all material software license agreements.

(e) Give a brief description of the Company's policy, rules or methods regarding the protection of patents and trademarks, the preservation of trade secrets, and the maintenance of copyrights; and any documents relating thereto.

10. Litigation

(a) Provide a summary of all past (since January 1, 2002), currently pending or threatened claims, litigation, government proceedings, or actions against the Company or its Subsidiaries and any of their predecessors, if any, including, but not limited to claims involving alleged violations of Environmental Laws (as hereinafter defined) or laws or regulations for the protection of the health or safety of employees or others.

(b) Provide copies of any settlement agreements relating to any settled suit or action of the Company, any Subsidiary or any of their predecessors since January, 2002.

(c) Provide any decrees, orders or judgments of courts or governmental agencies to which the Company or any Subsidiary is subject or bound.

(d) Provide copies of all audit letter responses issued by all of the Company's (and any Subsidiaries'') attorneys or law firms for the past five fiscal years.

11. Governmental Actions and Compliance

(a) Provide copies of all governmental or regulatory (state and federal) licenses and permits required to be obtained or held by the Company or its Subsidiaries and whether or not such licenses and permits have been obtained or are held.

(b) Provide copies of any notice of violation or correspondence or any other documentation relating to a violation or potential violation of federal, state or local statute, laws, ordinances, rules, regulations or orders.

12. Environmental Matters

(a) Describe any instance in which a Hazardous Substance (as hereinafter defined) has been released, discharged, deposited, emitted, leaked, spilled, poured, emptied, injected, dumped, disposed of or otherwise stored, placed or located on, in or under the properties owned or leased by the Company or any of its Subsidiaries (each, a "Property"). Provide similar information with respect to prior owners and tenants of the Properties and owners and tenants of properties which are adjacent to the Properties. For purposes of this request, "Hazardous Substance" means any "hazardous substance" as that term is defined in 42 U.S.C. 9601, any "extremely hazardous substance" as that term is defined in 42 U.S.C. 11049(3), any "regulated substance" as that term is defined in 42 U.S.C. 6991(2), or any other material regulated under any environmental law, statute, regulation, rule, or any state, or any other government body, authority or agency (collectively, "Environmental Laws").

(b) Describe any instance in which the existing or prior uses of the Properties by a current or former owner or tenant have in fact been, or have been alleged to have been, in violation of any Environmental Law.

(c) Describe any instance in which Hazardous Substances have been removed from and disposed of off the Properties and specifically note if such has been done <u>other</u> than in compliance with all Environmental Laws. Provide copies of any agreement regarding the removal and disposition of Hazardous Substances from any of the Properties.

(d) Describe any obligations, liabilities, claims, judgments, orders, settlements, permits, licenses, authorizations, resolutions of disputes, writs, injunctions or decrees to which the Company or any of its Subsidiaries is subject, relating to the use, generation, treatment, storage, disposal, transportation, presence, release, discharge or emission of any Hazardous Substance. In addition, describe any threatened or pending investigations, citations, suits, actions or other legal proceedings, or notices of violation resulting from or connected with the Properties relating to the use, generation, treatment, storage, disposal,

transportation, presence, release, discharge or emission of any Hazardous Substance.

(e) Describe any facts or circumstances in existence which may give rise to any litigation, proceedings, investigations, orders, citations, violations, notices of violations or liability resulting from or connected with the Properties relating to the use, generation, treatment, storage, disposal, transportation, presence, release, discharge or emission of any Hazardous Substance (including the transportation or disposal, whether or not authorized, of any such Hazardous Substance by any employee of the Company or any of its Subsidiaries).

(f) List all permits, licenses, consents and authorizations necessary for compliance by the Company and its Subsidiaries with all applicable Environmental Laws. Indicate which of such permits, licenses, consents and authorizations have and have not been obtained.

(g) Provide a list and copies of any environmental studies or audits conducted, or reports or surveys rendered, with respect to the Properties.

(h) Provide a list of all prior owners and uses of the Property (including dates of ownership).

(i) Describe any instance in which a current or former owner or tenant of any of the Properties made, or has been required to make, any filing or report with any federal, state or local government or governmental agency with respect to Hazardous Substances on, in or relating to the Properties (include date and location of filing). Furnish a copy of any such filing (if available).

(j) Describe any instance in which a federal, state or local government or governmental agency (or their representatives) inspected the Properties to ascertain whether the Properties and the operations conducted thereon are in compliance with Environmental Laws.

(k) Describe any instance in which lead paint or asbestos insulation has ever been used on the Properties, or in which there has been any storage tank containing petroleum products (such as oil, gasoline or kerosene) located on the Properties.

13. Transactions Outside the Ordinary Course of Business

(a) If the Company has constructed a facility or consummated an acquisition of assets or of a business in the last five years, provide information relating to this transaction, including all contracts or agreements, a description of related financing agreements, performance bonds or guarantees, and, if an entity was acquired, financial statements (audited, if available) for the last three years. Please provide a copy of any letter of intent, acquisition or purchase agreement or other document relating to any such acquisition.

(b) List all other material transactions involving the Company which were outside the ordinary course of business of the Company over the past five years.

(c) Provide copies of any contracts or agreements between personnel and the Company and its Subsidiaries concerning royalties, ownership or compensation for the discovery and development of protectable intellectual property.

14. Miscellaneous

(a) Provide all correspondence or memoranda relating to resignation or discharge of counsel, independent accountants or any director or officer since January 1, 2002 for the Company and its Subsidiaries.

(b) Provide copies of all reports of outside consultants relating to the Company's business, prospects, products, markets, etc.

(c) Provide copies of all press releases by the Company and its Subsidiaries and, to the extent the Company maintains a file, stories published about the Company, its Subsidiaries, its officers or its directors during the past three years.

(d) Provide copies of all material product descriptions, catalogs and similar literature currently in use by the Company and its Subsidiaries.

(e) Provide copies of current business plans, budgets, forecasts and financial projections of the Company.

(f) Provide copies of any additional data on competition, the market and/or industry that is maintained by the Company, including industry studies and newspaper articles, etc. pertinent to a third party’s evaluation of the Company and to competitive positions.

Exhibit "E"

CLOSING TRANSCRIPT

FOR

PURCHASE OF LBC SALES AND SERVICE

BY

KGR ACQUISITION COMPANY, INC.

September 25, 2017

Brian C. Bosma
KROGER, GARDIS & REGAS, L.L.P.
Bank One Center/Circle
111 Monument Circle, Suite 900
P.O. Box 44941
Indianapolis, Indiana 46244-0941
(317) 692-9000

CLOSING TRANSCRIPT
LBC SALES AND SERVICE

SELLER:	Lucrative Business Corporation 8971 Bay Breeze Lane Indianapolis, Indiana 46236
PURCHASER:	KGR Acquisition Company, Inc. 111 Monument Circle Indianapolis, Indiana 46204
LOCATIONS:	111 Monument Circle Indianapolis, Indiana 46204 8971 Bay Breeze Lane Indianapolis, Indiana 46236
PURCHASE PRICE:	$6,750,000.00
LENDER:	Heavy Financial Corporation 1900 Finance Street, Suite 1150 Anywhere, California 94806
AMOUNT OF LOAN:	$5,400,000.00
TIME AND PLACE OF CLOSING:	September 25, 2017 - 2:00 P.M. KROGER, GARDIS & REGAS, L.L.P. Bank One Center/Circle 111 Monument Circle, Suite 900 Indianapolis, Indiana 46204
PERSONS PRESENT:	
Seller:	Joseph Shareholder, President
Purchaser:	K.G. McDonald, President
Attorney for Buyer:	Brian C. Bosma KROGER GARDIS & REGAS, L.L.P. 111 Monument Circle, Suite 900 Indianapolis, Indiana 46204
Attorney for Seller:	Frank E. Dewey Dewey & Associates 90210 Melrose Place Fishers, Indiana 46038

TABLE OF CONTENTS

Document No.

ASSET PURCHASE

OTHER DOCUMENTS