

# Buyer and Seller Beware: Navigating Business Purchase Agreements

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# Anatomy of an Asset Purchase Agreement

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## Objectives of Buyer and Seller

- **Buyer's Objectives**
  - “Look Under the Hood” → obtain information about the Seller's history and operations
    - Due diligence process
    - Representations and Warranties
  - Maintain flexibility to walk away (conditions to closing)
  - Indemnification for pre-closing actions
  - Tax efficiency
- **Seller's Objectives**
  - Minimize risk transaction will not close
  - Limit indemnification and post-closing obligations
  - Tax efficiency
  - Minimize Earnout component of consideration

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## Framework of Review

- Is there a Letter of Intent?
  - Involve tax advisors in negotiating letter of intent
- Integration of Provisions
  - No “tax provision” → CPA must review and analyze entire agreement
  - When reviewing purchase agreement, CPA should consider how all provisions work together and impact one another to obtain client's objectives
  - For example, Seller's representation regarding payment of taxes will impact tax indemnity provision and could factor into NWC calculation if unpaid
    - Seller will want to make sure the tax indemnity is reduced by the NWC adjustment to avoid bearing the economic burden of the tax twice

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## Definitions Section of APA

- Who is the **“Seller”**?
  - Does it include the shareholders for purposes of representations and warranties and indemnification?
  - How is the **“Business”** defined?
    - Will impact restrictive covenants
- **“EBITDA”** means for any fiscal year of Purchaser, the net income of Purchaser, determined in accordance with the Company’s historical method of accounting consistently applied: plus (i) interest expenses of Purchaser for such fiscal year, plus (ii) federal and state income taxes of Purchaser for such fiscal year, plus (iii) all depreciation and amortization of capitalized costs of Purchaser for such fiscal year.
  - Could come into play with an Earnout
  - limit compensation of Purchaser’s principals

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## Definitions Section of APA

- **“Net Working Capital”**
  - Advisable to include an example as an exhibit
- **“Knowledge”** means, (a) actual knowledge [or (b) knowledge that would be expected to be obtained in the course of diligently performing the applicable Person’s duties. Company is deemed to have Knowledge of a matter if the Shareholder has, or at any prior time had, Knowledge of such matter.]
  - Who is the “knowledge group” of Seller?

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## Definitions Section of APA

- **“Material Adverse Effect”** means any event, occurrence, fact, condition or change that is materially adverse to (a) the business, results of operations, financial condition or assets of the Business, taken as a whole, or (b) the ability of Company to consummate the transactions contemplated hereby; *[provided, however, that “Material Adverse Effect” shall not include any event, occurrence, fact, condition or change, directly or indirectly, arising out of or attributable to: (i) general economic or political conditions; (ii) conditions generally affecting the industries in which the Business operates; (iii) any changes in financial, banking or securities markets in general, including any disruption thereof and any decline in the price of any security or any market index or any change in prevailing interest rates; (iv) acts of war (whether or not declared), armed hostilities or terrorism, or the escalation or worsening thereof; (v) any action required or permitted by this Agreement or any action taken (or omitted to be taken) with the written consent of or at the written request of Purchaser; (vi) any changes in applicable Laws or accounting rules (including GAAP), or the enforcement, implementation, or interpretation thereof; (vii) the announcement, pendency or completion of the transactions contemplated by this Agreement, including losses or threatened losses of employees, customers, suppliers, distributors or others having relationships with the Seller and the Business; or (viii) any natural or man-made disaster or acts of God.]*

## Definitions Section of APA

- **“Tax”** means any federal, state, local, provincial, municipal or foreign income, gross receipts, license, payroll, employment, excise, severance, stamp, occupation, premium, windfall profits, environmental (including taxes under Code Section 59A), customs duties, capital stock, employer health, franchise, profits, withholding, social security (or similar), unemployment, disability, real property, personal property, sales, use, transfer, registration, value added, goods and services, alternative or add-on minimum, estimated, or other tax of any kind whatsoever, including any interest, penalty, or addition thereto, whether disputed or not.
- **“Tax”** means all federal, state, local, sales, use, and ad valorem taxes.

## Sale of Assets

- **Sale of Assets.** Subject to the terms and conditions set forth in this Agreement, the Company hereby sells, transfers and conveys to Purchaser, and the Purchaser hereby purchases and acquires from the Company, all of the right, title and interest of the Company in, to and under all assets and properties of the Company used in connection with the Business as the same shall exist as of the Effective Time, whether tangible or intangible, wherever located, and whether or not shown on the books and records of the Company (collectively, the "Assets"), *including without limitation the following: ...*
  - Buyer will prefer to be very expansive while Seller will prefer to identify specifically which Assets are to be sold

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## Sale of Assets

- Inventory
- Tangible Personal Property (attach tax detail list)
- Trade names, Trademarks, Service marks, Domain names
- Other Intellectual Property
- Permits
- Business Records
- Telephone Numbers
- Unfilled Customer Orders
- Contracts/Contract Rights including employment contracts
- Goodwill
- Website
- Accounts Receivable
- Work in Process
- Prepaid Expenses
- Intangibles
- Deposits
- All non-Excluded Assets

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## Excluded Assets

- Corporate records
- Investments (cash, cash equivalents, securities, notes receivable owed from the shareholders, etc.)
- Shareholder Assets
- Excluded Contracts
- Causes of Action that relate to Excluded Assets or Retained Liabilities
- Insurance Policies (cash surrender, “split-dollar” arrangements, etc.)
- Tax Assets
- Employee benefit plans

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## Assumption of Liabilities

- Assumption of Liabilities. Subject to the terms and conditions set forth in this Agreement, the Purchaser hereby assumes and agrees to pay, perform and discharge when due, the contractual or other liabilities and obligations as the same shall exist at the Effective Time set forth below (the “Assumed Liabilities”). Except as expressly provided in this Agreement, the Purchaser does not assume any liabilities or obligations of the Company other than the Assumed Liabilities. The Assumed Liabilities include the following:
  - Here, Purchaser wants to limit the scope of assumption, while Seller prefers a more expansive provision

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## Assumption of Liabilities

- Personal Property Leases (list on schedule)
- Purchase Orders (list on schedule)
- Working Capital Adjustment liabilities
  - Accounts payable, accrued expenses, accrued compensation and other current liabilities
- Assumed Contract liabilities after Closing
- Warranties → indemnification?
- Real Property Lease
- Post-closing obligations

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## Assumption of Liabilities

- **Non-Assignable Assets/Contracts**
- Notwithstanding anything in this Agreement to the contrary, to the extent that any Assumed Contract or the Assumed Liabilities are not assignable or assumable, as applicable, without the consent of another party whose consent has not been obtained, this Agreement shall not constitute an assignment or attempted assignment of such Assumed Contract or Assumed Liabilities as provided in the Purchase Agreement, provided that, as between Buyer and Seller, Buyer agrees to fully and timely perform any and all obligations of Seller under all Assumed Liabilities.

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# Purchase Price and Payment

## Purchase Price Amount and Form of Payment

- All cash at Closing
- Guaranteed Deferred Purchase Price
  - not based on post-Closing performance of business
- Payment with a Promissory Note
  - Security Agreement
  - Deed of Trust
  - Subordinate to senior lender?
    - “Standby” limitations
  - Personal Guaranty of Buyer’s principals
  - Default under Note → consequences to restrictive covenants?

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# Net Working Capital Adjustments

- Adjust Purchase Price to take into account difference between working capital on balance sheet used to determine Purchase Price, and the working capital reflected on the closing balance sheet
- Working Capital = Current Assets (cash, accounts receivable, inventory, short term pre-paid expenses, etc.) – Current Liabilities (accounts payable, accrued liabilities, accrued income taxes, etc.)
- Deferred taxes and deferred tax assets generally excluded

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## Net Working Capital Adjustments

- **Example Language:**
- Subject to the provisions below, the Purchase Price for the Assets shall be adjusted, upwards or downwards as the case may be, by an amount determined as follows :
- (i) To the extent that the Closing Net Working Capital reflected on the Closing Balance Sheet is less than \$\_\_\_\_\_, the Purchase Price shall be reduced, on a dollar-for-dollar basis, by the amount of such shortfall
- (ii) To the extent that the Closing Net Working Capital reflected on the Closing Balance Sheet is greater than \$\_\_\_\_\_, the Purchase Price shall be increased, on a dollar-for-dollar basis, by the amount of such excess

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## Net Working Capital Adjustments

- Use of NWC Range as an alternative to NWC Target
- Definition of Net Working Capital is key so CPA involvement is critical
- Process for determining Closing NWC
  - Seller delivery of Closing Balance Sheet and NWC
  - Purchaser's right to review and dispute
  - Dispute resolution - submit to independent outside accounting firm

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# Purchase Price and Payment

- **Contingent Purchase Price (Earnout)**

May be use to bridge the gap when Buyer and Seller can't agree on valuation and Purchase Price of the Business

- Affirmative and Negative Covenants during earnout period
- Seller will want the APA to say the business will be conducted after Closing "in the ordinary course of business as conducted prior to Closing"
  - Operated consistently with Seller's last budget
  - Contracts/sales will not be transferred to another division of Buyer and costs of another division will not be borne by acquired business
  - Certain level of working capital will be maintained or certain operating expenditure levels maintained
  - Will not incur debt in excess of a specified amount; Product line or branding will not be changed
- Buyer will want absolute discretion in how it runs the Business
  - No obligation to achieve or maximize Earnout
  - Buyer may take actions or refrain from taken actions in a commercially reasonable manner
- Often based on EBITDA
- Cap on executive compensation
- Right to audit
- Include max amount per year or in the aggregate?

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# Purchase Price and Payment

- **Escrow of Portion of Purchase Price**

- Who holds the funds?
- How long?
  - If escrow held for more than one year, then a portion of escrow will be treated as interest under the original issue discount rules, resulting in an interest deduction for Buyer and interest income to Seller
  - Escrow amount may also generate taxable income during the escrow period
    - The parties can designate which party will report the income
- What is the process for asserting a claim?

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## Purchase Price Allocation

- Seller will want as much of the purchase price allocated to assets that result in long term capital gain, such as goodwill, rather than assets that generate ordinary income (such as depreciable property subject to recapture)
- Buyer will want to allocate as much of the purchase price to assets that will generate tax benefits on an accelerated basis (such as inventory and short-lived depreciable fixed assets)
- No requirement that Buyer and Seller actually agree on the allocation, but the allocation is less likely to be challenged if the party that bargained at arm's length is reporting the transaction consistently

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## Purchase Price Allocation

- *The Purchase Price shall be for tax purposes among the Assets as provided on “Schedule[ ]” attached hereto. Seller and Buyer hereby acknowledge that such allocation is the result of arm's length bargaining regarding the fair market value of the Assets. Seller and Buyer shall each file, with its respective federal income tax return for the year in which the Closing occurs, IRS Form 8594, and Buyer agrees to report the purchase of the Assets and the Seller agrees to report the sale of the Assets and Premises on IRS Form 8594 consistent with the allocation set forth on Schedule [ ] hereto.*

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# Purchase Price Allocation

- Follow Asset Classes set forth in §1060 Regs

IRS Asset Class	Reference	Amount Allocated
Class I	Cash	\$0
Class II	Securities	\$0
Class III	Accounts Receivable	Balance Sheet
Class IV	Inventory	Balance Sheet
Class V	Personal Property	Balance Sheet
Class VI	§197 Intangible	\$ _____
Class VII	Goodwill	Remainder of PP

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# Purchase Price Allocation

- Classes I through IV generally taken into account in the Working Capital adjustment which will be based on the “Closing Date Balance Sheet”
- Negotiation for Classes V through VII
- **Class V** includes property, plant and equipment → subject to depreciation recapture so seller was less allocated here while Buyer wants more in order to increase post-Closing depreciable tax basis
- **Class VI** → covenants not to compete generate ordinary income to Sellers and amortized over 15 years for Buyer, but Buyer may want a reasonable allocation in case Buyer must enforce covenant (sellers may want to appear reasonable too)
- **Class VII** → goodwill = long term capital gain to Seller and amortizable over 15 years to Buyer

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## Closing Conditions and Deliveries

- Structure of Transaction
  - Simultaneous closing vs. delayed closing with closing conditions
    - Finance contingency
    - Third Party Consents (customers, employees, contracts, etc.)
    - Continued accuracy of representations and warranties re Business
    - "MAC out" provision → No Material Adverse Change
  - Due Diligence Period
    - Access for Buyer and assistance from Seller
    - Noninterference with operations
- Deliveries by the Seller and Shareholders
  - Payoff letters and UCC terminations
  - NCDOR Letter of Good Standing
  - Bill of Sale and Assignment
  - Resolutions
  - Lease Assignments
  - Third Party Consents (customers, employees, contracts, etc.)
  - Closing Statement → Accuracy of Representations and Warranties

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## Closing Conditions and Deliveries

- Deliveries by the Buyer
  - Commitment Letter from lender
  - Purchase Price
  - Promissory Note
  - Security Agreement; Deed of Trust
  - Bill of Sale and Assignment
  - Resolutions
  - Third Party Contract Assumptions

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# Representations and Warranties

- Will they be given “jointly and severally” or will Seller and Shareholders make different reps?
- Seller wants to include “knowledge” qualifier
  - Definition of “knowledge”
    - Actual vs. reasonably expected to have upon reasonable investigation of the matter
    - Whose knowledge is attributed to Seller?
- Seller wants to include “materiality” qualifier
  - Maybe quantify what “material” means with dollar amount
- Advisors must plow through the reps and warranties section with clients in order to produce “Disclosure Schedules”

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# Representations and Warranties

Representations and Warranties of Seller → drafted very broadly by Buyer

- Consents; No Conflicts
- Organization; Qualification and Authority (indicates where subject to tax)
- Financial Statements
  - Attached balance sheets and income statements prepared in accordance with Seller’s historical method of accounting consistently applied and accurately and completely presents the financial condition of the Seller
  - Seller may want “fairly presents in all material respects...”
- Absence of Undisclosed Liabilities
  - Other than on disclosure schedule, financial statements, or would not have a Material Adverse Effect
- Absence of Certain Changes or Events
  - No loss, threatened or actual, of customers, employees, contracts, key suppliers, etc.
  - Operated in the ordinary course of business

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# Representations and Warranties

## Representations and Warranties of Seller

- Title to Assets; Condition of Assets
  - Ability to convey free and clear of all encumbrances
  - “As-is, where-is” vs. good working order
- Accounts Receivable
- Tax Matters
  - Filed all reports and returns completely and accurately
  - Paid all taxes
  - No audits and no valid basis for an assessment
- List of Properties and Contracts on Schedules
- Real Property (owned or leased)
- Legal Compliance
- Permits necessary to operate the business

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# Representations and Warranties

## Representations and Warranties of Seller

- Labor Matters, Insurance, Litigation, Compliance with Laws, Transactions with Certain Persons, etc.
- No other reps or warranties except as provided in APA
- All disclosures made on disclosure schedules shall be deemed to be made with respect to all applicable representations

Representations and Warranties of Buyer → very limited (Consents; Conflicts; Organization; Authority), unless Seller is taking equity in the Buyer as part of the deal

Sandbagging vs. Anti-sandbagging provisions → Importance of Disclosure Schedules

- Disclosures can (1) eliminate termination rights of Buyer, and (2) reduce/eliminate indemnification claim
- Issue → Can Buyer terminate or recover if Buyer knew about the misrepresentation before Closing
- Seller wants diligence to be collaborative and does not want to open files to Buyer only to have Buyer withhold findings, close the deal, and sue Seller after the fact thereby effectively lowering the Purchase Price
- Compromise → pro-sandbagging provision with Buyer acknowledgement that specified “knowledge group” is not aware of any issues that would constitute a breach of a rep or warranty

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# Indemnification

## **Indemnification by Seller and Shareholders**

- Joint and several or separate out
- Agree to indemnify and hold harmless Buyer from:
  - Falsity or breach of a representation or warranty
  - Failure to perform covenants under APA
  - Retained Liabilities
  - Operation of business prior to Closing

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# Indemnification

## **Indemnification by Buyer**

- Agree to indemnify and hold harmless Seller from:
  - Falsity or breach of a representation or warranty
  - Failure to perform covenants under APA
  - Assumed Liabilities
  - Operation of business after Closing

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## Limitations on Indemnification

- **Right of Offset for Buyer**
  - Against future Note payments, earnout, escrow, etc.
  - Example language: *The parties expressly agree that, in the event Buyer shall incur any losses, liabilities, claims, damages, penalties, fines, judgments, awards, settlements, taxes, costs, fees, expenses and disbursements (each, a "Loss" and, collectively, the "Losses"), as the result of a breach by any Seller of any of the representations and warranties contained in this Agreement, or breach of or failure by any Seller to perform any of the covenants or other agreements hereunder or under the other agreements to be executed pursuant hereto, or in any certificate or other instrument furnished by any Seller to Buyer, then Buyer shall be entitled to offset any such Loss against any payments due to any Seller to this Agreement, including, but not limited to, any payments due with respect to the Deferred Purchase Price, [if such defaults have not been cured by Sellers within thirty (30) days after written notice thereof by Buyer]. In addition, Buyer may exercise any other rights Buyer may have against any Seller in law or in equity.*

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## Limitations on Indemnification

- **Deductible vs. Basket**
  - **Deductible** → no liability unless and until Losses exceed \$ \_\_\_\_\_ ("Deductible"), at which point only liable for losses in excess of the Deductible
  - **Basket** → no liability until Losses exceed \$ \_\_\_\_\_, but liable for all Losses once threshold met ("First dollar method") → Seller may also request "mini baskets"
- **Caps** → in no event shall aggregate liability for indemnification exceed \$ \_\_\_\_\_ amount (or % of purchase price)
- Caps and Deductibles usually don't apply in case of fraud or intentional misrepresentation
- Survival Period (specified time period; statute of limitations for claim)
- Seller wants cap as low as possible and deductible as high as possible, with no or limited carve-outs, and will want "knowledge" and "materiality" qualifiers included
- Buyer wants no limitations, but will typically agree to certain cap and deductible, provided there are carve-outs for certain fundamental reps and warranties (authority, taxes, environmental, etc.)
- Private Target M&A Deal Points Survey published by ABA gives "market" practices

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## Limitations on Indemnification

- **Tax Benefit Offset Provision**
- **Example Language:** *The amount of Losses for which Buyer is entitled to indemnification pursuant to Article 8 shall be reduced by twenty percent (20%) to reflect an approximation of the tax benefits realized by the Buyer (or its owners) as a result of incurring the Losses for the year in which the Losses were incurred, provided that there shall be no such reduction in the event Buyer demonstrates that no actual tax benefit was realized by the Buyer (or its owners) for the tax period in which the Losses were incurred.*

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## Ancillary Agreements

- A. Restrictive Covenants
- B. Confidentiality/Nondisclosures
- C. Employment/Consulting Agreements
- D. Intellectual Property Matters
- E. Third Party Consents
- F. Maintenance of Records
- G. Transition Issues

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## Restrictive Covenants

### Four Situations

- Covenants tied to Sale of Business/Assets (contained in APA; provided by Seller and Shareholders)
- Covenants as to Shareholders in role with Buyer (contained in Employment/Consulting Agreement)
- Covenants as to Transitioned Employees (contained in Employment Agreements)
- Assignment of Employee Restrictive Covenants made to Seller

Note to Buyer: Don't let "entire agreement" clauses eliminate or reduce protections

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## Restrictive Covenants

- Non-competition
- Non-solicitation/non-contact as to customers
- Non-solicitation/non-contact as to suppliers
- Non-solicitation of employees
- Non-interference clauses
- Non-disclosure of company information

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## Restrictive Covenants

To be enforceable, restrictive covenants must be:

1. In writing;
2. Part of a contract concerning employment or sale of business;
3. Based on valuable consideration;
4. **Reasonably necessary to protect a recognized business interest of the company; and**
5. **Reasonable as to time, territory and scope of activities**

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## Recognized Business Interests

1. Good Will.
2. Customer/Supplier relationships.
3. Trade secrets or confidential information.

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## Reasonableness of Restrictions

- a. Reasonable as to time
- b. Reasonable as to territory
- c. Reasonable as to scope of activities precluded

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## Confidentiality Provisions

- Protect Trade Secrets and Confidential Information
  - Use Restrictions
  - Disclosure Restrictions
- Confidentiality Provisions should be included in both the APA and any Employment/Consulting Agreements

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## Employment/Consulting Agreement for Shareholder

Provisions other than restrictive covenants and confidentiality provisions:

- Job Duties/Time Commitments
- Term and Termination
- Severance
- Cross-breach provisions

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## Employee Covenants to Seller

- Did any of Seller's employees sign restrictive covenants and/or nondisclosure agreements?
- Are the agreements assignable?
- If so, they should be assigned via the APA.
- Are the agreements enforceable?
- Why important? (departing vs. joining employees)
- Timing issues on breach/enforcement (existing agreement with Seller does not eliminate need for new covenants made to Buyer).

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## Intellectual Property Matters

### Need to Identify Intellectual Property

- Patents
- Trademarks
- Copyrights
- Trade Secrets
- Domain Names/URLs, Other Social Media Accounts
- Identification of IP Rights/Agreements

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## Intellectual Property Provisions

### Representations and Warranties

- Ownership/Right to Assign
- Right to Use (as to all IP not owned by Seller)
- Non-Infringement of/Non-Interference with Third-Party IP or other rights
- Non-Infringement/Non-Interference with Buyer's IP after Transfer

### Provision of all Materials Relevant to IP

Assignment of IP (as to marks, also need to assign goodwill)

Commitment to cooperate/execute additional documents as to IP Rights

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## Third Party Consents

Contract Rights – Seller Needs to Identify all Contracts

- Leases
- License Agreements
- Vendor/Supply Agreements
- Distribution Agreements
- Franchise Agreements
- Is the Contract Assignable?
- Is Consent Required in order to Assign?
- If so, then what?

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## Transfer/Maintenance of Records

- Transfer of records to Seller
- Buyer's right of access to records
- Obligation to maintain records, and for how long?

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## Transition Issues

### Other Considerations

- Key Employees – will they join Buyer?
- Key Customers
- Key Vendors
- Scope of Seller/Shareholder post-closing assistance
- Seller's post-closing access to Buyer employees, etc.
- Collection of Accounts receivable
- Earn-outs

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## Remedies Provisions

- Cross-contract Remedies
- Specific Performance; Injunctive Relief
- Liquidated Damages
- Escrow/Holdbacks/Clawbacks
- Indemnification
- Choice of Law
- Arbitration vs. Courts
- Mandatory Mediation
- Jurisdiction and Venue Clauses
- Attorney Fee Provisions

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