

4. Representations and Warranties of Buyer

Buyer represents and warrants to Seller and Shareholders as follows:

COMMENT

The Model Agreement contains over eighty pages (including commentary) of representations by Seller but only a few pages of representations by Buyer. In an acquisition in which the purchase price is paid at the closing in cash, the seller is interested primarily in the buyer's due organization, the power of the buyer and the authority of the buyer's agents to execute a binding acquisition agreement and the buyer's obligations to finders or brokers. Questions as to the buyer's wherewithal or ability to pay the purchase price may be better addressed by the seller's due diligence than by representations. Where a buyer is borrowing to pay part of the purchase price, however, the seller may seek a representation that the buyer's financing commitments are firm. In some circumstances, a seller may desire assurances that the buyer is in a position to pay the cash portion of the purchase price at closing. In addition to due diligence regarding this question, the seller may request a representation such as the following: "Buyer presently has and will have at [Closing](#) all funds or financing in place necessary to pay and deliver to Seller the cash [Purchase Price](#) as contemplated hereby." The buyer may be unwilling to do more than simply describe the nature of its financing arrangements, however, and may even insist that financing be a condition to its obligation to close. See [Section 7.13](#) and the related Comment.

If a buyer is exchanging shares of its stock for the assets, the seller is, in effect, investing in the buyer. Accordingly, the seller might request representations of the buyer that resemble those made by the seller to the buyer. In the case of a stock-for-assets transaction involving two companies of roughly equal size, financial strength and stability, the representations may be virtually the same for each party. Where the buyer's shares are actively traded and registered under the Securities Exchange Act of 1934, a representation regarding the accuracy of the reports filed by the buyer under the Act may replace a number of other representations.

Where a significant amount of the purchase price is to be represented by a promissory note, the seller is placed in the role of lender to the buyer. The notes representing a portion of the purchase price most often are unsecured. Accordingly, the seller must perform a credit analysis of the buyer and assure itself that the buyer is strong enough

financially to make timely payments of the debt service on the promissory note. Depending upon the size of the note in relation to the size of the overall transaction, the seller may insist on receiving certain representations and warranties (as well as covenants) from the buyer. Such representations may cover the buyer's financial statements, the ranking of the notes in the buyer's debt hierarchy, the absence of contingent or undisclosed liabilities that could affect the buyer's ability to pay, the absence of any material adverse change in the buyer's business, accounts receivable and inventories and the absence of liens and encumbrances on the buyer's assets. These representations can form the basis for additional covenants concerning collateral, financial covenants and ratios and the like. For example, if the buyer's note is to be secured, additional representations concerning the collateral may be appropriate.

A buyer will most likely resist giving such representations, however. It may argue that the note is an insignificant amount of the total purchase price, claim to be insulted that its financial standing would be questioned or contend that the seller is needlessly complicating a simple, straightforward transaction. Nevertheless, whenever the seller is investing in and/or lending to the buyer, the seller is justified in demanding the protections it feels are appropriate under the circumstances.

4.1 ORGANIZATION AND GOOD STANDING

Buyer is a corporation duly organized, validly existing and in good standing under the laws of the State of _____, with full corporate power and authority to conduct its business as it is now conducted.

COMMENT

This representation parallels that given by Seller in the second sentence of [Section 3.1](#) and is relevant to a buyer's ability to enter into the acquisition agreement and complete the acquisition. Absent significant noncash consideration, a seller typically has no real interest in other matters concerning the buyer, such as whether it is qualified to do business in foreign jurisdictions, except, perhaps, the jurisdiction in which the business is to be conducted.

4.2 AUTHORITY; NO CONFLICT

- (a) **This Agreement constitutes the legal, valid and binding obligation of Buyer, enforceable against Buyer in accordance with its terms. Upon the execution and delivery by Buyer of the [Assignment and Assumption Agreement](#), the [Escrow Agreement](#), the [Employment Agreements](#), the [Promissory Note](#) and each other agreement to be executed or delivered by Buyer at [Closing](#) (collectively, the "[Buyer's Closing Documents](#)"), each of the Buyer's Closing Documents will constitute the legal, valid and binding obligation of Buyer, enforceable against Buyer in accordance with its respective terms. Buyer has the absolute and unrestricted right, power and authority to execute and deliver this Agreement and the Buyer's Closing Documents and to perform its obligations under this Agreement and the Buyer's Closing Documents, and such action has been duly authorized by all necessary corporate action.**
- (b) **Neither the execution and delivery of this Agreement by Buyer nor the consummation or performance of any of the [Contemplated Transactions](#) by Buyer will**

give any **Person** the right to prevent, delay or otherwise interfere with any of the **Contemplated Transactions** pursuant to:

- (i) any provision of Buyer's Governing Documents;
- (ii) any resolution adopted by the board of directors or the shareholders of Buyer;
- (iii) any **Legal Requirement** or **Order** to which Buyer may be subject; or
- (iv) any **Contract** to which Buyer is a party or by which Buyer may be bound.

Buyer is not and will not be required to obtain any **Consent** from any Person in connection with the execution and delivery of this Agreement or the consummation or performance of any of the **Contemplated Transactions**.

COMMENT

The representations in this section parallel those in [Section 3.2](#) with appropriate modifications.

4.3 CERTAIN PROCEEDINGS

There is no pending **Proceeding** that has been commenced against Buyer and that challenges, or may have the effect of preventing, delaying, making illegal or otherwise interfering with, any of the **Contemplated Transactions**. To Buyer's **Knowledge**, no such Proceeding has been threatened.

COMMENT

See the [Comments to Sections 3.18](#) and [8.5](#).

4.4 BROKERS OR FINDERS

Neither Buyer nor any of its Representatives have incurred any obligation or liability, contingent or otherwise, for brokerage or finders' fees or agents' commissions or other similar payment in connection with the **Contemplated Transactions**.

COMMENT

See the [Comment to Section 3.30](#).

