

## 8. Conditions Precedent to Seller's Obligation to Close

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Seller's obligation to sell the [Assets](#) and to take the other actions required to be taken by Seller at the [Closing](#) is subject to the satisfaction, at or prior to the Closing, of each of the following conditions (any of which may be waived by Seller in whole or in part):

### COMMENT

Article 8 sets forth the conditions precedent to Seller's obligation to sell the [Assets](#) to Buyer. The failure to satisfy any of these conditions will give Seller a "walk right" and the right to terminate the acquisition agreement under [Article 9](#).

The structure of Article 8 is similar to the structure of [Article 7](#), and there is a degree of symmetry between the two. In reality, however, the walk rights given to Seller are fewer and much narrower than the walk rights given to Buyer. This reflects the view that, if Seller receives its cash payment (along with appropriately executed [Promissory Notes](#), an [Assignment and Assumption Agreement](#) and [Employment Agreements](#)) at the [Closing](#), Seller and Shareholders will have received the full "benefit of their bargain" and, with few exceptions, should be unconditionally obligated to proceed with the acquisition.

### 8.1 ACCURACY OF REPRESENTATIONS

All of Buyer's representations and warranties in this Agreement (considered collectively), and each of these representations and warranties (considered individually), shall have been accurate in all material respects as of the date of this Agreement and shall be accurate in all material respects as of the time of the [Closing](#) as if then made.

### COMMENT

See the [Comment to Section 7.1](#). Because Buyer's representations are far less extensive than Seller's representations, Seller's walk right under Section 8.1 is considerably narrower than Buyer's corresponding walk right under [Section 7.1](#).

## 8.2 BUYER'S PERFORMANCE

All of the covenants and obligations that Buyer is required to perform or to comply with pursuant to this Agreement at or prior to the **Closing** (considered collectively), and each of these covenants and obligations (considered individually), shall have been performed and complied with in all material respects.

### COMMENT

See the [Comment to Section 7.2](#). Because Buyer's pre-Closing covenants are less extensive than Seller's pre-Closing covenants, Seller's walk right under Section 8.2 is not as broad as Buyer's corresponding walk right under [Section 7.2](#).

## 8.3 CONSENTS

Each of the **Consents** identified in Exhibit 8.3 shall have been obtained and shall be in full force and effect.

### COMMENT

See the [Comment to Section 7.3](#). The Consents referred to in Section 8.3 will not necessarily be the same as those referred to in Section 7.3. Indeed, a buyer may not even include such a section in its first draft because it is sometimes appropriate to make the receipt of a particular consent a condition to the obligation of only one party. See FREUND, ANATOMY OF A MERGER 299 (1975). For example, assume that a seller is leasing an important facility from a third-party landlord under a lease that requires the landlord's approval of any assignment of such lease by the seller. Because the receipt of the landlord's approval will presumably be a condition to the buyer's closing obligation (by virtue of Section 7.3), the buyer can terminate the acquisition if the landlord's approval has not been obtained by the closing date. The buyer may decide, however, that the facility covered by the lease is not sufficiently important to the seller's operations to justify the buyer's exercise of its walk right under Section 7.3. Accordingly, the buyer may elect to waive the applicable closing condition.

In these circumstances, assuming that the shareholders have not personally guaranteed the seller's obligations under the lease and that the landlord's remedies are limited to terminating the lease and recovering damages from the seller (and not from the shareholders), or in a situation in which the shareholders and the seller are willing to bear the risk of not obtaining such a consent and retain the lease as their ongoing obligation following the closing, the consent should not be included in Exhibit 8.3 because the seller arguably should not have a walk right. (Note that Seller's representation in Section 3.2 contains an express exception for **Consents** disclosed in Seller's [Disclosure Letter](#); therefore, this representation will not be rendered inaccurate by virtue of the failure to obtain the landlord's approval, and Seller will not be liable to Buyer if Buyer elects to waive the applicable **Closing** condition and proceeds with the acquisition despite the landlord's refusal to approve the assignment of the lease by Seller.) Similarly, the seller should not necessarily have a walk right if there is a failure to obtain any of the consents identified on Schedule 4.2 (which lists Consents needed to be obtained because of legal and contractual requirements applicable specifically to Buyer).

## 8.4 ADDITIONAL DOCUMENTS

Buyer shall have caused the documents and instruments required by [Section 2.7\(b\)](#) and the following documents to be delivered (or tendered subject only to [Closing](#)) to Seller and Shareholders:

- (a) an opinion of \_\_\_\_\_, dated the [Closing Date](#), in the form of [Exhibit 8.4](#); and
- (b) such other documents as Seller may reasonably request for the purpose of
  - (i) evidencing the accuracy of any representation or warranty of Buyer,
  - (ii) evidencing the performance by Buyer of, or the compliance by Buyer with, any covenant or obligation required to be performed or complied with by Buyer or
  - (iii) evidencing the satisfaction of any condition referred to in this Article 8.

### COMMENT

See the [Comment to Section 7.4](#).

## 8.5 NO INJUNCTION

There shall not be in effect any [Legal Requirement](#) or any injunction or other [Order](#) that (a) prohibits the consummation of the [Contemplated Transactions](#) and (b) has been adopted or issued, or has otherwise become effective, since the date of this Agreement.

### COMMENT

See the [Comments to Sections 7.5](#) and [7.6](#). Seller's walk right under Section 8.5 is considerably narrower than Buyer's walk rights under [Sections 7.5](#) and [7.6](#). For example, Seller will not have the right to terminate the acquisition merely because there is pending or threatened litigation against it that challenges the acquisition; rather, Seller can terminate the acquisition under Section 8.5 only if there is an actual injunction (or other comparable prohibition) in place and only if the injunction was originally issued after the signing of the acquisition agreement.

