

## **ASSET PURCHASE AGREEMENT**

This Asset Purchase Agreement ("Agreement") is made \_\_\_\_\_, 200\_\_, between Seller Corporation, Inc., 8050 Beckett Center Drive, West Chester, Ohio 45069 ("Seller"), and Buyer Corporation, Inc., 4059 Tylersville Road, West Chester, Ohio 45069 ("Buyer").

### **RECITALS:**

**WHEREAS**, Seller is a [description of business] in a number of states (the "Business"); and

**WHEREAS**, Seller desires to sell, and Buyer desires to purchase, on the terms and conditions of this Agreement some but not all of the assets of the Business,

**NOW, THEREFORE**, in consideration of the mutual covenants contained herein, Buyer and Seller agree as follows:

### **PURCHASE AND SALE**

Buyer agrees to buy and Seller agrees to sell assets that are recited here in general terms. By reference to an exhibit to be attached, this section may also incorporate a specific list of assets with full descriptions including serial numbers.

This section may also incorporate important general terms of sale, such as that all assets are sold "as is where is" if that is the case.

### **PURCHASE PRICE**

The purchase price is stated here along with a description of any adjustments (as for inventory) that will later be made to that price and how those adjustments will be made.

### **PURCHASE PRICE PAYMENT AND PARTIAL ALLOCATION**

This paragraph addresses how, mechanically, the purchase price is to be paid and those values assigned to classes of assets or to specific assets. It's not unusual for the price to be paid in stages:

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"The purchase price shall be paid to the Seller as follows:

- (a) \$ \_\_\_\_\_ upon execution of this Agreement;
- (b) \$ \_\_\_\_\_ at closing;
- (c) Upon delivery to Seller of Buyer's Promissory Note in the amount of \$ \_\_\_\_\_, in the form set forth in the attachment "Note" hereto, wherein Buyer agrees to pay the remainder of the purchase price in consecutive monthly installments, at an interest rate of \_\_\_\_\_% per annum. Buyer shall have the right to prepay the unpaid balance at any time without any penalty for said prepayment."

and for the price to be allocated amongst assets or asset classes:

"The purchase price shall be allocated:

- (i) to fixtures and furnishings, \$ \_\_\_\_\_
- (ii) to goodwill, name, going concern value, and books and records \$ \_\_\_\_\_
- (iii) to intellectual property, patents and trademarks \$ \_\_\_\_\_
- (iv) to the lease \$ \_\_\_\_\_."

### **CLOSING**

This section states the date of the closing and may identify a time and place.

### **CONDITIONS PRECEDENT TO SELLER'S OBLIGATIONS**

(a) Representations True at Closing. Seller represents that the things true at the time of contracting will remain true at the time of closing.

(b) Delivery of Purchase Price. Seller is not obligated to deliver title unless and until the Buyer has delivered the purchase price at closing. At least in theory, Buyer's failure to pay entitles Seller to the return of Seller's assets rather than just an unsecured claim for payment upon which Seller can sue.

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(c) Opinion of Buyer's Counsel. Buyer's lawyer may be asked to provide a letter that the Buyer can legally do the deal, has proper authorization to do the deal, and can sign the documents and do the other acts necessary to fulfill the contract.

(d) Director's Approval. Because the transaction is not in the ordinary course of business, Buyer's Directors must approve it. (Officers can act on their own authority only as to ordinary course of business matters.)

### **CONDITIONS PRECEDENT TO BUYER'S OBLIGATIONS**

(a) Representations True at the Date of Closing. Things that were true when the contract was made remain true at the time of closing.

(b) Documents of Transfer. Seller's documents are good.

(c) Opinions of Counsel. Seller's counsel gives a letter that Seller has the power and has done the things necessary to have and to document authority to do the deal.

### **RISK OF LOSS**

This says who absorbs the loss if there is a casualty to the assets between making the contract and closing.

### **SELLER'S REPRESENTATIONS AND WARRANTIES**

These are the things Seller says are true and can be held responsible for if they are not true.

If Buyer's counsel draws up the Agreement, Seller is responsible if these things are not true.

If Seller's counsel draws up the Agreement, Seller is responsible only if these things are untrue and Seller knew they were false at the time he said they were true.

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- (a) Organization of Seller. Seller is properly formed and qualified.
- (b) Financial Statements. Seller's books are sound. Any oddities or shortcomings are disclosed.
- (c) Power to Sell Assets. Seller can sell.
- (d) Title to Assets. Seller owns the assets and either there are no claims against the assets or those claims will be settled up at closing using the proceeds from the sale so the assets can go to Buyer free and clear.
- (e) Leases. Seller can convey any leasehold interests Seller uses in the business and establishes via consents any Lessor acquiescence required.
- (f) Plants and Equipment. These assets are sound, in good working order, and do what such things are expected to do.
- (g) Patents, Trademarks, Etc. Seller owns these and has protected their ownership and use appropriately and has not violated the rights of others.
- (h) Governmental Approvals. Any government acquiescence required has been obtained.
- (i) Contracts and Commitments. Any Agreements that might tag along with the assets are disclosed and described.
- (j) Labor Provisions. Any labor disputes or actions are disclosed.
- (k) Litigation. Any pending or known claims are revealed and described.
- (l) Compliance with Instruments. Seller hasn't violated any contracts that might but have not yet given rise to a dispute or claim.
- (m) Compliance with Law. Seller has not violated any laws, rules, regulations, or orders.

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- (n) Disclosure. Everything Seller represents in the Agreement is true.
- (o) Taxes. Taxes have all been paid current except those disclosed not to have been.
- (p) Insurance. Insurance policies guarding against hazards to assets are disclosed.
- (q) Previous Sales. No one else has a claim to any assets being sold by Seller.
- (r) Customers and Suppliers. There are no significant disputes with Customers or suppliers.

## **BUYER'S REPRESENTATIONS AND WARRANTIES**

- (a) Organization of Buyer. Buyer is appropriately formed and qualified.
- (b) Agreement does not Violate Other Agreements. Buyer can make this contract without violating other contracts.
- (c) Approval by Buyer's Board. This out of the ordinary course of business transaction has the blessing of the board, which must approve transactions out of the ordinary course of business.

## **BUYER'S OBLIGATIONS**

Anything Buyer must do for Seller's benefit post-closing is set out here. (For example, in some transactions Buyer is obligated to receive payments directed to Seller on accounts receivable and to pass those along to Seller.)

## **CONTINGENCIES**

If these things do not happen Buyer is not obliged to close. Typical contingencies are Seller's signing an appropriate noncompete, Buyer obtaining financing on terms stated and acceptable to Buyer, appropriate consents (where those are needed) being documented, Buyer obtaining appropriate Agreements with vital suppliers, customers, employees, etc. where the absence of those Agreements would impair the value or

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ability of the business to go forward post closing, and no significant change or casualty to the assets between contracting and closing.

### **UNIMPAIRED OPERATION OF THE BUSINESS BETWEEN CONTRACTING AND CLOSING**

Seller pledges to run the business in the usual and normal course consisted with past practices so as not to incur obligations that might be passed through to the Buyer and to preserve in appropriate condition the equipment, receivables, etc. of the business.

### **USE OF NAMES**

For names not sold outright to Buyer, Buyer gets Seller's rights in the names designed for the period of time designed and Seller will not use the name (and sometimes agrees not to permit others to use the name – i.e. to defend the name).

### **ESCROW ARRANGEMENT**

If there is some circumstance preventing the contemporaneous exchange of money and title, an intermediary is designated to accept the items seriatim, hold them until the conditions of the intermediary's instructions are completed, then to act as directed by the instructions.

### **PRORATION OF EXPENSES TO CLOSING**

Expenses paid all at one time to cover a period during which the Seller would no longer be the owner or an earlier period during which the Buyer was not the owner will be prorated so that the obligation during a period matches the ownership during that period.

### **ASSISTANCE TO THE BUYER**

Seller agrees to train and help Buyer in a transition period. If that period is short, this may be rolled into the over all price; otherwise a separate Consulting

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Agreement is made. A Consulting Agreement will be coordinated with the Asset Purchase Agreement in various ways to ensure that the party's expectations in the Asset Purchase Agreement are met as they operate later under the Consulting Agreement.

**NONCOMPETE**

Seller agrees not to compete against Buyer in a specified market or a specified period of time.

**SELLER'S INDEMNIFICATION**

Seller will take care of any liabilities from any misrepresentation in the Asset Purchase Agreement or any breach of the Agreement.

**BUYER'S INDEMNIFICATION**

Buyer agrees to take care of any damage suffered by Seller from Buyer's misrepresentations in the Asset Purchase Agreement or breach of it.

**AGENCY DISCLOSURE/BROKER**

No broker or middleman has a claim against the asset owner from the transfer.

**BULK SALES LAW**

When all or substantially all of the assets of a business are sold in a transaction not in the ordinary course of business, Bulk Sales Acts permit the creditors of the Seller of assets to pursue those assets into the hands of the Buyer to collect the debt if the Seller absconds with the proceeds rather than settling up the Seller's debts. The Acts generally cutoff this right only if the creditors are given notice of the impending sale. Ohio and a number of other states have repealed bulk sales laws as outmoded.

**DEFAULT**

If either party defaults the other has an action for damages but also an action for specific performance so that the Buyer can obtain the specific assets the Seller has agreed to sell.

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## **ATTORNEY FEES**

The prevailing party in any dispute over enforcing the Agreement gets attorneys fees and other costs.

## **NOTICES**

States the specific addressee to which any notices must be sent and the address to which they're sent.

## **TERMINATION**

States the terms on which the Buyer or Seller can terminate the Agreement.

## **MISCELLANEOUS**

- (a) Schedules. Schedules are incorporated by reference and their accuracy.
- (b) Captions. Captions are said to be for convenience and are not intended to be operative.
- (c) Neutral Construction. The legal presumption that drafting ambiguities are resolved against the drafter is overruled.
- (d) Entire Agreement. Discussions, negotiations, and oral representations are all nullified and superseded so that only this Agreement sets forth the terms of the deal.
- (e) Transfer Costs. Filing fees for transfer documents and property transfer taxes are allocated.
- (f) Applicable Law, Binding Effect, Severability. This paragraph states the law to be applied to it, the effect on those claiming by or through parties and the impact of any provisions struck down by the court on the remaining provisions.
- (g) Counterparts and Photocopies to be Treated as Originals. This paragraph obviates the necessity for circulating one document to be signed by all parties. This paragraph may also set out the mechanics by which the Agreement can be signed electronically and be enforceable.

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- (h) Post-Closing Ministerial Co-Operation Required. Co-Operation is pledged in doing later anything overlooked at the time the closing.
- (i) Execution Authority. Seller represents the person signing on behalf of the Seller can.
- (j) No Waiver of Rights by Practice. A failure to enforce every jot and tittle of the Agreement does not preclude insisting in the future on compliance with that requirement.

SIGNED as of the day and year first above written.

SELLER:

\_\_\_\_\_, INC.

\_\_\_\_\_

By: \_\_\_\_\_

Its: C.E.O. \_\_\_\_\_

BUYER:

\_\_\_\_\_, INC.

\_\_\_\_\_

By: \_\_\_\_\_

Its: C.E.O. \_\_\_\_\_

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