

The Sale of Personal Property

“Considerations in Buying or Selling a Business in Alabama”
Presented by the National Business Institute
September 15, 1999

By George M. Taylor, III, gtaylor@burr.com

CONTENTS

- I. Introduction
- II. Inventory
- III. Accounts Receivable
- IV. Intangible Assets
 - A. Trade Names, Trademarks and Service Marks
 - B. Copyrights and Patents
 - C. Customer or Client Lists
 - D. Franchise Rights
 - E. Leasehold Interests
- V. Liens and Encumbrances
- VI. Drafting the Bill of Sale

THE SALE OF PERSONAL PROPERTY

I. INTRODUCTION

The sale of those elements of a company's assets constituting personal property is a topic that is addressed almost exclusively in the context of an asset acquisition. In a stock purchase transaction, title to the assets constituting personal property does not change but remains with the corporate entity whose stock is being transferred, but even in a stock transaction, it might be an important element of the due diligence process to undertake lien searches and other investigations of the types outlined below. As we consider the seemingly simple area of transferring title in tangible assets from one entity to another, consider the following:

- More than one practitioner has undertaken the transfer of assets from one corporation to another only to find that significant assets of the seller are not located on the site of the facility and have not in fact been transferred pursuant to the acquisition documents.
- Assets that you can see and touch at the business being sold may not belong to the seller at all. Those assets could easily be leased from third parties or encumbered by liens of creditors.
- Inventories which focus on the identification of assets may miss the fact that many of these are totally useless to your client in the ongoing operation of the business.
- Alabama has repealed its bulk sales law. Does that mean that an Alabama acquisition is free from the operation of bulk sales principles in general? The answer might surprise you.
- A U.C.C. lien search might leave you wanting with respect to certain asset classes. Consider the practitioner who relied on an Alabama Secretary of State search in the acquisition of an airplane.

We acquisition lawyers regularly go to great lengths to include very broad provisions in asset purchase agreements to encompass every imaginable kind of personal property asset. Sometimes in our efforts at being comprehensive, we fail to focus on particular aspects of various asset classes that could make all the difference in obtaining for our client the benefits he or she is seeking.

II. INVENTORY

Inventory is one of the most volatile elements in the acquisition process because it constantly changes. The quantity of the inventory tends to change on a daily basis, and even the nature of the inventory itself changes from raw materials, to work-in-process to finished goods. Both the changing quantities of the inventory and the changing quality of that inventory require careful drafting by the practitioner. First and foremost, the attorney handling an acquisition transaction must communicate well with his client in order to obtain a clear understanding of the nature of the inventory and those aspects and qualities of the inventory which might be important to the transaction.

The handling and valuation of inventory in acquisition transactions generally fall into two camps: (1) the use of an actual physical inventory to value and price inventory present on the closing date, and (2) the use of balance sheet methods to arrive at a general valuation technique for inventory.

A. Physical Inventories; Purchase Price Adjustments.

In the case of a physical inventory, there is an actual adjustment of the purchase price to reflect the amount of inventory present at closing. This may be combined with other purchase price adjustment mechanisms. The following represents a typical physical inventory valuation clause for raw material:

The purchase price for the Seller's raw material inventory shall be valued at Seller's cost based on an actual physical inventory conducted jointly by representatives of Seller and representatives of Purchaser. Said inventory shall be taken immediately prior to the Closing Date and shall be adjusted to include and represent the inventory that is physically present on the Closing Date. Inventory which is new, undamaged and usable in the ordinary course of the Business shall be valued at Seller's cost. All other inventory shall be assigned no value and shall be included in the general purchase price for assets set forth in Section x below and Purchaser shall pay no additional purchase price for said parts. The inventory so conducted shall be binding on and deemed final by both Seller and Purchaser, and the amount so determined shall be the price of the inventory. The cost of conducting this inventory shall be borne equally by Purchaser and Seller.

This clause works well for inventory consisting of raw materials and parts, and from the Purchaser's perspective might work equally well for work-in-process and finished goods. The Seller would object to the use of this valuation for work-in-process and finished goods because it robs the Seller of his profit in those materials already processed. By valuing inventory at Seller's cost, this clause avoids arguments about inventory valuation methods (FIFO vs LIFO) and assures the Purchaser that he or she is getting dollar-for-dollar value in the inventory that is being purchased. The careful practitioner will also give thought to the need for special valuation and inventory techniques in the case of unusual assets. Examples would be the need to value natural resource inventories, such as gas, oil or timber.

All inventory might not be located on the Seller's plant site, and the Purchaser would be well advised to include a specific representation as to location to address that concern such as the following: "All Inventory of Seller is located on the plant site." Inventory which has been consigned to third parties is a major headache and must be addressed on a case-by-case basis that might include inventories at the various consignment locations. In any event, the Purchaser will want to obtain a specific acknowledgment from the consignee of the presence of inventory at his site and will want to confirm that the Seller has complied with Uniform Commercial Code filing procedures to give notice to the consignee's creditors of the presence of that inventory.

Many asset acquisitions involve inventory that is in transit on the date of closing by virtue of having been ordered and paid for by the Seller but not having yet arrived at the plant site. The Purchaser will want to confirm directly with manufacturers and/or shippers the status of such inventory.

B. Reliance on Representations.

Whether or not an inventory valuation technique is used, virtually every asset purchase agreement includes representations regarding inventories. In larger transactions, it is totally impractical to undertake any sort of physical inventory, and the parties are left to rely on representations by the Seller regarding the quality and quantity of the inventory. In such cases, inventory provisions are found not in the purchase price computation section but in the basic representations of the Seller. Consider the following clause that was used for handling of inventory in a large multi-state manufacturing operation:

All items included in the Inventories consist of a quality and quantity usable, and with respect to finished goods, saleable, in the ordinary course of business of Seller except for obsolete items and items of below-standard quality, all of which have been written off or written down to net realizable value in the Balance Sheet or the Interim Balance Sheet or on the accounting records of Seller as of the Closing Date, as the case may be. Seller is not in possession of any inventory not owned by Seller, including goods already sold. All of the Inventories have been priced at the lower of cost or [market] [net realizable value] on a [last in, first out] [first in, first out] basis. Inventories now on hand that were purchased subsequent to the date of the Balance Sheet or the Interim Balance Sheet were purchased in the ordinary course of business of Seller at a cost not exceeding market prices prevailing at the time of purchase. The quantities of each item of Inventories (whether raw materials, work-in-process, or finished goods) are not excessive, but are reasonable in the present circumstances of Seller. Work-in-process Inventories are now and will be valued on the Closing Date according to GAAP.

The clause set forth above assumes that while this is an asset acquisition, great reliance is being placed on balance sheets presented by the Seller on the closing date.

The balance sheet approach to inventory valuation puts great weight on accounting techniques. While the lawyer should rely heavily on accountants and business people in arriving at appropriate valuations, specific note should be made of the disparities that can exist in basic GAAP accounting. Under any method of accounting, determining inventory valuation requires subjective judgments. Overstatement or understatement may occur because, within the boundaries of GAAP, different kinds of cost can be included either in the cost of goods sold or in general administrative and selling expenses, and whether or not such costs are included in the cost of goods sold affects the stated value of inventory and the amount of income reported. While the physical inventory method includes specific exclusion for obsolete goods, the balance sheet approach, by referring to generally accepted accounting principles, includes the opportunity for the making of subjective judgments as to obsolescence. Many asset purchase agreements provide for post-closing adjustment of the purchase price based on a final valuation of inventories according to GAAP.

Also consider whether certain minimum inventory levels are necessary to operate the business. In such cases, the Purchaser would want to require that those inventory levels are available at closing. This is particularly true where inventory shortages might result in manufacturing delays. Representations can be drafted to accomplish this.

C. The Profit Issue.

While arguably the use of a physical inventory is fair to both Purchaser and Seller in the case of raw materials, heated debate usually arises over the valuation of work-in-process and finished goods. If representations are being used and generally accepted accounting principles are the standard, then customary GAAP valuation methods will resolve this issue. If a physical inventory is being used and Purchaser has prevailed on Seller to value all inventory at cost, the Seller will be deprived of his normal operating profit in both work-in-process and in finished goods. But before the wrangling begins over valuation methods, Purchaser's counsel should remember that not all work-in-process is profitable and the Purchaser should be protected from the potential loss by the following clause:

At Closing, Purchaser shall assume Seller's obligation under such work in process contracts, provided, however, that Purchaser shall not be required to assume any Work in Process which will not result in a normal profit to the Business nor will Purchaser be required to assume any Work in Process which was not incurred by Seller in Seller's normal course of business.

As to the general handling of work-in-process and finished goods, the Purchaser will want to pay only Seller's cost in both items while the Seller may well try to negotiate some profit into the equation, for example, by factoring a customary profit figure into work-in-process and finished goods valuations. A typical pro-Purchaser work-in-process clause would read as follows:

All work in process of Seller as of the Closing Date shall be evaluated by Seller and Purchaser on that date with respect to the contract price for completion and the percentage of performance through Closing. Seller shall be entitled to receive for performance through the Closing Date its actual costs (parts and labor) for its performance on such contracts, provided the sum of such amounts does not exceed the percentage of completion applied to the total contract price.

III. ACCOUNTS RECEIVABLE

The easiest approach to accounts receivable from the Purchaser's perspective is simply not to buy them. This leaves the Seller with the daunting task of trying to coax its account debtors to make payments to Seller notwithstanding the fact that Seller may be out of the business and no longer at its original address and may have no further staff to assist with the collection process. The other extreme is for the Purchaser to purchase all the receivables, and in between the two approaches are a number of variations designed to meet various business needs of the Seller and the Purchaser.

A. Retention of Accounts by Seller.

This approach to the issue can be difficult for the Seller to swallow, especially where it has no remaining business enterprise from which to collect the receivables. From the Purchaser's perspective, this is the cleanest, easiest method of dealing with accounts, and requires only a clear statement in the "Excluded Assets" section that receivables are being excluded. (Care should be taken to include, however, those receivables related to work-in-

process that is being purchased by Purchaser.) There are no worries about collections, validity, setoff rights, and the myriad of complexities that surround dealing with debts owed by others. One way to address the Seller's disadvantage in collecting these is to require some cooperative effort by the Purchaser with respect to amounts that are received post-closing. Such a clause would read as follows:

Purchaser will cooperate with Seller (without expending funds or incurring costs on Purchaser's behalf) in collection of Seller's accounts receivable for a period of ninety (90) days after the Closing Date. For a period of one year after the Closing Date, Purchaser will permit one of Seller's employees access to the Business after normal business hours for purposes of handling receivables issues and will permit Seller use of the computer system being conveyed in this transaction for that purpose.

The aggressive Purchaser can go one step further and expressly state that all amounts received from trade debtors will be applied first towards amounts owed to Purchaser, and next to Seller's (older) receivables.

B. Purchase of Accounts by Purchaser.

It is easy enough to include the accounts receivable in the assets being purchased by the Purchaser, but inclusion of those assets prompts a need to insert a whole panoply of representations and warranties to protect the interests of the Purchaser.

The first question to address is exactly which receivables are being purchased. It is not unusual for the language of conveyance to state that only receivables having certain qualities (e.g., not having an age in excess of 90 or 120 days) are being purchased. This works well where there is a dollar amount being allocated to the receivables and a mechanism for adjusting that dollar amount up or down depending on how many "under 90" receivables there are at closing. Other purchase price adjustment mechanisms might reach the same result.

A more general approach is to rely on the representations regarding the receivables to protect the interests of the Purchaser. Such a representation includes (i) an assurance as to genuineness and legitimacy of the receivables and assurance as to the adequacy of any reserves that have been set up on the books. The following is a fairly broad representation of the type that a Purchaser might suggest:

All Accounts Receivable that are reflected on the Balance Sheet or the Interim Balance Sheet or on the accounting records of Seller as of the Closing Date represent or will represent valid obligations arising from sales actually made or services actually performed by Seller in the ordinary course of business. Except to the extent paid prior to the Closing Date, such Accounts Receivable are or will be as of the Closing Date current and collectible net of the respective reserves shown on the Balance Sheet or the Interim Balance Sheet or on the Closing Financial Statement (which reserves are adequate and calculated consistent with past practice and, in the case of the reserve on the Closing Financial Statement, will not represent a greater percentage of the Accounts Receivable reflected on the Closing Financial Statement than the reserve reflected in the Interim Balance Sheet represented of the Accounts Receivable reflected therein and will not represent a material

adverse change in the composition of such Accounts Receivable in terms of aging). Subject to such reserves, each of such Accounts Receivable either has been or will be collected in full, without any set-off, within ninety days after the day on which it first becomes due and payable. There is no contest, claim, defense or right of set-off, other than returns in the ordinary course of business of Seller, under any Contract with any account debtor of an Account Receivable relating to the amount or validity of such Account Receivable. Part x contains a complete and accurate list of all Accounts Receivable as of the date of the Interim Balance Sheet, which list sets forth the aging of each such Account Receivable.

This representation provides for a guarantee of collectibility on an aggregate basis, while other contracts may provide for collectibility on an account-by-account basis. Note also that this representation is careful in specifying the manner in which the reserves are to be determined. This representation in some senses duplicates the general representation regarding financial statements contained in most asset purchase agreements, but the level of detail here is critical to any meaningful right of recourse against the Seller if this particular line item of the financial statements is incorrect. Depending on the wording of other provisions of the Agreement, such a clause might open the door for the Purchaser to renegotiate the purchase price based on its evaluation of the receivables or on its assertion that certain of the accounts are not legitimate or that the reserves are inadequate based on past experience.

C. Repurchase of Uncollected Accounts.

A third approach is to require that while the Purchaser will purchase all the accounts receivable of the Seller, after a certain period the Purchaser will have the right to “put” the accounts back to the Seller for a predetermined price, usually the same price as was paid for them by the Purchaser. The practitioner should be careful to be consistent with pricing in both directions (e.g., either net of reserves or not).

(a) Buyer shall have the right, by written notice (the “Receivables Notice”) to Seller given on or after 90 days following the Closing Date (the “Repurchase Date”), to require Seller to repurchase for cash and without recourse, within five days of the date of the Receivables Notice, all of the Accounts Receivable of the Seller reflected on the books and records of the Seller on the Closing Date that are at the Repurchase Date uncollected. Seller shall repurchase uncollected Accounts Receivable for a purchase price equal to their aggregate face value, and Seller shall purchase and pay for such Accounts Receivable as provided herein.

A more sophisticated approach allocates a specific holdback amount to the receivables purchase obligation as follows:

(b) At the Closing, Buyer shall deduct \$_____ Thousand Dollars from the amount otherwise payable pursuant to Section x and place it in an account (the “Holdback Account”). The repurchase price of the receivables shall first be paid in whole or in part by reducing the amount in the Holdback Account. Seller hereby acknowledges and agrees that if the repurchase price of the uncollected Accounts Receivable exceeds the amount in the Holdback Account, Seller shall, without further demand from Buyer,

pay to Buyer an amount equal to the difference between the total repurchase price of the uncollected receivables and the amounts in the Holdback Account. On the date 180 days after the Closing, Buyer shall close the Holdback Account and pay any balance remaining in the Holdback Account to Seller.

Again, the parties should be careful in treating the reserve for bad debts consistently both when the accounts are purchased by Purchaser and when they are resold to the Seller.

D. Diligence in Collection.

No matter how the transaction is structured, the Purchaser's collection efforts will largely determine the extent to which the Seller is able to collect his money. There should at minimum be an obligation on the part of Purchaser to undertake reasonable efforts to collect the receivables so that the Purchaser is not given the option of doing nothing and waiting for the receivables to age and then tendering them back to the Seller or making demand for reimbursement. Similarly, Seller may want to restrict the authority of the Purchaser to compromise any receivables that are subject to indemnities or buybacks.

IV. INTANGIBLE ASSETS

A. Trade Names, Trademarks and Service Marks.

Trade names, trademarks and service marks are intellectual property rights that are protected under both state and federal laws. Generally, all of these marks are protected initially by state common laws but can be registered for additional protection under both state and federal statutory laws. The owner of any of these rights can prevent others from using the rights and in some cases can obtain damages for infringement. The creation, licensing and transfer of these rights is a specialized area that is beyond the scope of our inquiry here, but the acquisition counsel should be generally aware of the issues that exist with respect to these rights and how they may impact the acquisition process.

Trademarks are defined as "any word, name, symbol, character, design, drawing or device or any combination thereof adopted and used by a person to identify goods made or sole by him and to distinguish them from goods made or sold by others. See 8-12-6, Code of Alabama, 1997. Trade names are similar but identify the business itself rather than the products, and service marks cover services rendered. These three types of intellectual property are treated indistinguishably by case and statutory law. While these rights are created by action of state common law, registration at both state and federal levels is available. One major benefit of federal registration is that the owner is deemed to have used the mark in connection with the goods or services recited in the registration on a nationwide basis as of the filing date of the application so that any person who started using it later is automatically an infringer. Secondly, federal registration gives constructive notice to the world of the registration of the mark as of the date of registration.

The first inquiry in the acquisition process is a determination of how important the mark is to the business or services of the Seller being conveyed. In many acquisitions, where a critical mark is the subject of conveyance, the Purchaser might require registration as a condition to proceeding with the acquisition, but time delays make this a generally impractical means of proceeding. Where marks are registered, acquisition counsel should

verify that the marks have not expired, and conveyance of the mark (by bill of sale or otherwise) should be accompanied by a conveyance of the federal registration.

Representations regarding marks should cover both identification of all applicable marks and a confirmation that Seller has good title to the same and that none are subject to any infringement action. A typical representation in that regard would be as follows:

Trade Names, Trademarks and Service Marks

Schedule X contains a complete and accurate list and summary description, including any royalties paid or received by the Seller, and Seller has delivered to Purchaser accurate and complete copies, of all documents, writings, and instruments evidencing or pertaining to any fictional business names, trading names, registered and unregistered trademarks, service marks, and applications (collectively, "*Marks*") owned by or used by Seller in connection with the Business together with an indication of the owner thereof and the nature of the interest owned by Seller. With respect to the Marks, Seller represents and warrants as follows:

(i) There are no outstanding and, to Seller's knowledge, no threatened disputes or disagreements with respect to any such Mark.

(ii) The Marks are all those necessary for the operation of Seller's business as it is currently conducted. Seller is the owner of all right, title, and interest in and to each of the Marks, free and clear of all Encumbrances, and has the right to use without payment to a third party all of the Intellectual Property Assets.

(iii) All Marks that have been registered with the United States Patent and Trademark Office are currently in compliance with all formal legal requirements (including the timely post-registration filing of affidavits of use and incontestability and renewal applications), are valid and enforceable, and are not subject to any maintenance fees or taxes or actions falling due within ninety days after the Closing Date.

(iv) No Mark has been and is now involved in any opposition, invalidation, or cancellation proceeding and, to Seller's knowledge, no such action is threatened with respect to any of the Marks.

(v) To Seller's knowledge, there is no potentially interfering trademark or trademark application of any other Person. No Mark is infringed or, to Seller's knowledge, has been challenged or threatened in any way. None of the Marks used by Seller infringes or is alleged to infringe any trade name, trademark, or service mark of any other Person.

This is a somewhat Purchaser-oriented provision that Seller would likely want to limit to its knowledge. Acquisition counsel should be careful to exercise appropriate due diligence with respect to the trade names, service marks and trademarks. Such due diligence might include searches with the U.S. Patent and Trademark Office to insure that there are no conflict

claims against unregistered marks of the Seller that are being conveyed as part of the acquisition.

B. Copyrights and Patents.

More so than is the case with trademarks and trade names, the area of copyrights and patents is one which is the subject of specialization in the legal practice and acquisition counsel should not hesitate to obtain expert advice in this area when these are important in an acquisition transaction. Copyrights can exist both by virtue of state common law and by virtue of registration with both federal and state authorities. Where registration has occurred, care should be taken to transfer the registrations as part of the closing process. Due diligence should determine whether any important property rights of the Seller should have been protected by copyright laws but are not (thus diminishing their value to the Purchaser).

C. Customer or Client Lists.

Customer lists and client lists ought to be dealt with specifically in the conveyance language of the asset purchase agreement and enumerated separately in the Bill of Sale. In addition, the representations section should include specific confirmation from the Seller that a listing attached is a true and correct list of the business customers and relationships. More importantly, to the extent that the customer lists are a valuable element of the acquisition, they should be dealt with separately in the confidentiality section of the agreement or in a separate confidentiality agreement or agreement protecting trade secrets.

D. Franchise Rights.

Franchise rights differ from other rights conveyed in asset transactions for the reason that the relationship sought to be conveyed is determined in large measure by the actions of a third party. Franchise rights ought to be dealt with at several points in the asset purchase agreement as follows:

(a) The representations section should include a specific listing of all franchise rights and interests which are owned by the Seller in connection with the business or which are necessary to the operation of the business.

(b) The representations section should also confirm that there are no breaches or defaults with respect to any of the franchises.

(c) Conditions to close should include approval of all franchisors whose approval is necessary to the transfer of the franchise.

(d) Closing should further be conditioned upon there being no deterioration in the relationship between franchisor and the Seller or upon there being certain modifications of the franchise agreement to suit the Purchaser.

(e) Any termination of the franchise agreement should result in a termination of the Purchaser's obligation to proceed to close.

E. Leasehold Interests.

As interests in real property, leasehold interests must be conveyed according to instruments that meet the requirements for conveyances. Due diligence should include a review by counsel of the leases giving rise to the leasehold interests. Where they have been recorded, the assignment of the leasehold interest should be recorded as well. The representations section of the Agreement should include a complete listing of the leasehold interests, and at closing, Purchaser should receive an estoppel certificate from each of the other parties to the leases confirming that the same are in full force and effect and that no defaults exist thereunder.

V. LIENS AND ENCUMBRANCES

The well-written asset purchase agreement will contain the customary representation by the Seller regarding title to the assets, and should, if there are liens and encumbrances, require a listing by the Seller of those for the benefit of the Purchaser. The Bill of Sale (see form below) repeats this information. Aside from these drafting issues, acquisition counsel is charged with a major portion of the due diligence activities related to the purchase of personal property assets. In the case of ordinary personal property, a lien search with state and county authorities is appropriate. In the case of leasehold estates, that would include a real estate search. Counsel should be careful to focus on unusual types of properties (planes, vessels, intellectual property) that might require additional lien searches, and where an asset being acquired arises out of a written instrument, that should be reviewed. Where third parties are involved in the assets (e.g., franchise rights or contracts), appropriate estoppel documents should be obtained.

VI. DRAFTING THE BILL OF SALE

Two schools of thought exist as to the proper manner in which to draft bills of sale for acquisition transactions. One group contends that a blanket conveyance of all assets of every description and wherever located is the best approach and that by adding specific types of property, the drafter has limited the comprehensive nature of the conveyance. Most practitioners, however, continue to delineate specific categories and types of assets and combine that with a blanket conveyance. The listing of specific categories prompts the parties to focus once again on the various assets that are being conveyed and can be very useful against claims by the Seller that one or more types of assets were never anticipated to be conveyed. An example of a more specific bill of sale follows:

BILL OF SALE AND ASSIGNMENT

SELLER, INC., an Alabama corporation (hereinafter the "Seller"), for good and valuable consideration to it in hand paid, receipt of which is hereby acknowledged, acting pursuant to that certain Asset Purchase Agreement between Seller and Purchaser, Inc. dated _____, 1999, (the "Asset Purchase Agreement"; capitalized terms used herein but not otherwise defined herein shall have the respective meanings ascribed to them in the Asset Purchase Agreement), does hereby grant, bargain, sell, assign, transfer, and

convey unto **PURCHASER, INC.**, an Alabama corporation, (“Purchaser”) its successors and assigns, all the tangible and intangible assets wherever located of Seller (except as set forth in the paragraph designed “Excluded Assets” below) used or usable in connection with Seller’s business of building widgets (the “Business”), including, but not limited to, the following assets:

- (a) all fee, leasehold and other title to or interest in all Real Property;
- (b) all Tangible Personal Property, including those items described in Schedule x;
- (c) all Inventories;
- (d) all Accounts Receivable;
- (e) all Seller’s rights in, to and under all Seller Contracts, including those listed in Schedule x, and all outstanding offers or solicitations made by or to Seller to enter into any Contract;
- (f) all Governmental Authorizations and all pending applications therefor or renewals thereof, in each case to the extent transferable to Buyer, including those listed in Part 3.17(b);
- (g) all data and records related to the operations of Seller, including client and customer lists and records, referral sources, research and development reports and records, production reports and records, service and warranty records, equipment logs, operating guides and manuals, financial and accounting records, creative materials, advertising materials, promotional materials, studies, reports, correspondence and other similar documents and records and copies of all personnel records and other records described in Section x;
- (h) all of the intangible rights and property of Seller, including Intellectual Property Assets, going concern value, goodwill, telephone, telecopy and e-mail addresses, websites, domain names, and listings and those items listed in Schedule x;
- (i) all insurance benefits, including rights and proceeds, arising from or relating to the Assets or the Assumed Liabilities prior to the Closing Date, unless expended in accordance with this Agreement;
- (j) all claims of Seller against third parties relating to the Assets, whether choate or inchoate, known or unknown, contingent or non-contingent, including all such claims listed in Schedule x; and
- (k) all rights of Seller relating to deposits and prepaid expenses, claims for refunds and rights to offset in respect thereof which are not listed in Schedule x.

The above and foregoing assets together with all additions thereto are sometimes herein referred to as the “Assets”.

The above and foregoing provisions to the contrary notwithstanding, the Assets shall not include the following: _____

Seller hereby authorizes Purchaser to take any appropriate action in connection with any of said rights, claims, causes of action, and property, in the name of Seller or in its own or any other name. Capitalized terms used herein but not otherwise defined herein shall have the respective meanings ascribed to them in the Asset Purchase Agreement.

TO HAVE AND TO HOLD said rights, claims, property, and assets, unto Purchaser, its successors and assigns, to and for its or their use forever.

And Seller, subject to the terms of the Asset Purchase Agreement, does hereby warrant, covenant, and agree that it:

(a) has good and marketable title to the assets hereby sold, assigned, transferred, conveyed and delivered subject to no liens or encumbrances;

(b) will warrant and defend the sale of said assets against all and every person or persons whomsoever claiming to or making claim against any or all of the same; and

(c) will take all steps, and will execute and deliver, all such additional writings, documents, and instruments, as shall be necessary to put Purchaser, its successors and assigns, in actual possession and operating control of said assets.

IN WITNESS WHEREOF, Seller has caused this Bill of Sale to be executed by its duly authorized officers this _____ day of _____, 1999.

SELLER, INC.

By: _____
Its President