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SELLING A COMPANY FOR STOCK: PROTECTING THE SELLER

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SELLING A COMPANY FOR STOCK: PROTECTING THE SELLER

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Several Defined Terms

Acquisition Agreement: The agreement governing the sale terms; either an acquisition or merger agreement.

Buyer: The corporation that acts as purchaser and issues the securities to the prospective investor.

SEC: The Securities and Exchange Commission.

Seller: The corporation that is being sold and after the transaction, the shareholders of that corporation holding the Shares.

Shares: The equity securities being issued by Seller in the transaction.

This outline addresses the concerns of counsel representing a Seller that accepts equity securities from Buyer as the primary currency in a sale transaction. Generally, Seller's counsel seeks to assure the following business objectives of its client:

- That Buyer's business and affairs are as represented and the Shares constitute a good investment from a legal standpoint.

- That until the Shares are sold, Seller protects its investment with appropriate contractual provisions and in some cases, attributes of the security.

- That Seller eventually can sell the Shares.

I. Diligence Investigations.

By accepting Shares as sale consideration, Seller assumes special risks associated with an

equity investment.[1] As with any investment decision, *Seller should be fully informed before it accepts Shares as consideration.* Seller should insist on full access to Buyer's plant, management, material documents, and books and records, and thoroughly use the access. Good contractual protections will not assure a return on (and perhaps more importantly, a return of) a mistaken investment.

Any Buyer delivering Shares as consideration must comply with disclosure requirements imposed by the Securities Act of 1933 and applicable state securities laws. In the authors' opinion, investors take false comfort in the disclosure requirements imposed by applicable securities laws for several reasons: (a) issuers rarely voluntarily disclose all material adverse information; (b) the remedies of rescission or damages cannot be realized without expensive and time-consuming litigation and, more importantly, the issuer and its principals are often judgment-proof anyway if the venture fails; and (c) courts and finders of fact probably offer relatively less sympathy to a sophisticated seller with leverage and access assuming the risk of an equity investment.

Seller must make a thorough up-front investigation. In its diligence investigations of Buyer, Seller or his counsel should carefully review all material information regarding Buyer, including its governing documents, shareholder agreements, material contracts, business plan, and financial statements and projections, and make inquiries regarding taxes, litigation, employment, contingent liabilities, and ERISA, environmental, and general regulatory compliance. Seller should verify Buyer's state and federal securities law compliance in prior transactions, so that sales to other investors are not rescinded and subscribed funds lost. A core diligence checklist is attached as Appendix "A" to this outline, which should be supplemented with specific inquiries regarding the Buyer's particular business. These inquiries should be supplemented with face-to-face inquiries of officers and key employees by Seller and its legal and financial advisors. If Buyer is in a specialized industry, such as technology, consider hiring experts to confirm its business' viability and proprietary rights. Kick the tires!

II. Supplemental Diligence in the Acquisition Agreement.

The Acquisition Agreement governs the terms of the acquisition, including the kind and amount of equity securities that will be issued and the Seller's representations and covenants. The agreement should also include the following elements that further Seller's diligence investigations:

A. Detailed Representations and Warranties.

The diligence investigations should be supplemented with detailed representations and

[1] The typical risks associated with an equity investment include low priority on liquidation, no fixed repayment date, and no collateral security for repayment or other interest in particular property. As discussed in the outline regarding attributes of securities, these risks can be mitigated to some extent by giving the security a preference on liquidation, or simply bargaining to receive debt or even well-secured debt.

warranties from Buyer that address risks of accepting Shares as consideration, in several substantive areas:

General Business Representations. Start with the general business representations that Buyer has required of Seller. These will typically include such matters as the Buyer's incorporation, its legal compliance, employment matters, absence of litigation, its tax, ERISA, and environmental compliance, material contracts and commitments, and accuracy of its financial statements. If it is a public company, Buyer should represent that it has made all required filings with the Securities and Exchange Commission and that those filings are complete and accurate.

> *Note*: In negotiating this point and contractual protections, emphasize that Seller is effectively *buying* a minority stake in Buyer's business. Seller needs representations regarding Buyer's business for the same reason that Buyer needs representations regarding Seller's business. "What's good for the goose is good for the gander." These considerations don't exist in a cash deal.

Representations Applicable to Stock Consideration. These general representations should be supplemented with the following representations specifically applicable to stock consideration:

- *Capitalization.* Buyer's authorized capitalization consists of ___________ common shares [and other securities as appropriate], of which ______________ common shares [and other securities as appropriate] are outstanding.

- *Shareholder Arrangements.* Seller should know about any special rights extended to other shareholders, including veto rights, preemptive rights, board membership, registration rights, rights of first refusal, co-sale rights, and drag-along rights. Seller should also know about obligations to which it will be bound that concern the Shares, which are typically included in governing documents or a shareholder agreement.

- *Issuance; Fully Paid and Nonassessable.* The shares issued to Seller have been properly authorized, and on issuance, will be fully paid and non-assessable.

- *Reservation of Shares (Applicable Only to Convertible Securities).* Buyer has reserved shares of [securities] issuable on conversion of the [preferred stock, debentures, etc.].

- *Securities Law Compliance.* The Shares are being issued to Seller in a transaction that has been registered in compliance with the registration requirements of applicable securities laws or is exempt from those

registration requirements. If a proxy or information statement will be used to solicit shareholder approval for the transaction, the disclosure information included in those materials is accurate and complete and complies with applicable securities laws.

B. Buyer's Counsel Legal Opinion.

Seller should secure from Buyer's counsel a legal opinion that addresses Buyer's organization, authority, capitalization, enforceability, no conflict, proper issuance of securities, absence of litigation, and securities law compliance. Again, the Buyer's requested opinion of Seller's counsel will be a good start. (Remember, this is a reciprocal process.) Suggested opinion text and a description of diligence required to give these opinions are addressed in Sections I through IV of the Florida Bar Business Law Section's Standards on Legal Opinions, available from the Business Law Section.

III. Attributes of the Shares

Arguably, nothing is more important to a Seller than the form and attributes of its equity security. Common stock is highly vulnerable to adverse changes in Buyer's business - it is especially ill-suited to protecting the Seller's objective of recovering its investment.

Seller's interests are better served by a security that offers both downside protection and upside potential. Given the choice, Seller should prefer a security that has relatively senior status, such as preferred stock or a debenture, and that is convertible into common stock on a public offering or sale of Buyer. If Buyer is sold or liquidates for a low price, Seller recovers its basis, plus a return, before the common shareholders. If Buyer is financially successful, Seller converts into common equity and fully participates in the upside. Seller can also combine downside protection and upside potential by negotiating for debt and warrants to purchase common stock.

An interest or a dividend yield offers Seller a return on its investment until it liquidates its investment and if substantial, an incentive for Buyer to redeem the Shares for cash or an event that triggers conversion of the senior security to common stock and a profitable sale. The return might be in cash or in kind (additional securities of the same kind).

Senior convertible securities are much more common in private company deals, because Seller faces a longer time period before it can liquidate the Shares, and negotiates for a yield and downside protection during this period.

Preferred stock terms are set forth in an amendment to Buyer's articles of incorporation, which should be a focus of negotiations. Seller should assure that it addresses the following terms:

- *Stated value and liquidation preference.* The minimum value that Seller will receive if Buyer later liquidates, as a preference to the common shareholders.

• *Dividends.* An agreed regular payment based on a percentage of the Shares' stated value.

•*Conversion rate and anti-dilution features.* The rate at which the preferred stock can be converted by Seller into shares of Buyer's common stock and accompanying provisions that assure Seller's participation in Buyer's common equity is not diluted by such events as stock splits, stock dividends, extraordinary cash payments, reorganizations, or issuance of cheap stock or warrants

•*Voting rights.* Preferred shareholders' rights to vote, both with the common equity and as a separate class. Preferred shareholders generally must approve charter amendments that adversely affect their rights as preferred shareholders. Seller's counsel should consider other events that also require the preferred shareholders' consent as a class, such as related party transactions and authorization of more preferred stock with senior or parity liquidation rights.

For a sample discussion of drafting considerations for preferred stock, see Haft, Venture Capital and Small Business Financings, which is part of the Clark Boardman Securities Law Series.

IV. Determining the Number of Shares that Seller Receives – Exchange Arrangements.

A. <u>General</u>. The parties agree on a target value to be received by Seller in the sale transaction, which translates into a number of Shares. For example, the parties might agree on a $10 million purchase price. If the trading price of the Shares is $10.00, Seller receives one million Shares if the parties concurrently sign the Acquisition Agreement and close the transaction.

The arrangement becomes more complicated if the transaction will not close when the Acquisition Agreement is signed. The parties must agree on an arrangement for determining the number of Buyer's Shares that Seller receives for its shares that accounts for fluctuations in the trading price of Seller's Shares during the interim period. The parties generally must elect a (1) a fixed exchange ratio or (2) a formula price arrangement, or a combination of those arrangements.

B. <u>Fixed Share Exchange</u>. In a fixed exchange, Seller receives a fixed number of Shares for each of its shares.

Example: Buyer might agree to deliver a one-half Share, priced at $10 per share, for each share of Seller's stock priced at $5 per share, creating a fixed share exchange rate of one half Share for each share of Seller's stock. For 100 of its shares, Seller receives 50 Shares worth $500 ($10 x 50). Changes in the trading price of Buyer's Shares do not affect the number of Shares delivered at closing. If at the time of closing, Buyer's Share price has decreased to $9 per share, the agreed fixed share exchange rate results in Seller receiving only $450 of value ($9 x 50) for its shares. If at the time of closing, Buyer's Share price has increased to $11 per share, the agreed fixed share exchange rate results in Seller receiving $550 of value ($11 x

50) for its shares.

Seller assumes the risk of a decrease in the value of Buyer's stock between the date of the Acquisition Agreement and closing, but is assured of receiving the specified number of shares. Seller effectively becomes a shareholder of Buyer when it signs the Acquisition Agreement, subject to closing contingencies. Buyer gains certainty regarding the dilution that it suffers from the transaction, but risks delivering more than the target value if its share price increases between the date of the Acquisition Agreement and closing.

This arrangement might be supplemented with arrangements to assure the value delivered at closing stays within certain limits. For example, Seller might have a right to terminate if Buyer's Share price *decreases* below a specified amount, so that the value being delivered is far less than the target amount. (Practically, shareholder approval becomes difficult if the value decreases too far.) Conversely, Buyer might have a right to terminate if Buyer's Share price *increases* below a specified amount, so that the value being delivered far exceeds the target price.

C. **Formula Price**. *Generally*. In a formula price deal, the parties agree that Seller will receive a fixed *value* for each of its shares, creating a variable exchange ratio.

> **Example:** The parties might agree that each share of Seller's stock is worth $5. If the Share price is $10 at closing, Seller receives one half ($5/$10) Share for each of its shares. If the Share price is $9 at closing, Seller receives 0.556 ($5/$9) Share for each of its shares. For 1,000,000 of its shares, Seller would receive Shares with an aggregate trading price of $5,000,000 on the closing date, regardless of whether the price of each Share at closing equals $10 [$10 x (.5 x 1,000,000) = $5,000,000] or $9 [$9 x (.556 x 1,000,000) = $5,000,000].

Seller risks receiving fewer Shares if the value of the Shares increases between the date of the Acquisition Agreement and closing, but is assured of receiving the specified *value* on the closing date. Buyer risks being required to deliver an increased number of shares if the value of the Shares declines between the date of the Acquisition and closing, but is assured that the value of the consideration it delivers is limited. The parties typically measure value based on the average trading price of Buyer's common stock during an agreed period before closing.

Collars. To limit their risks from the formula's operation, the parties might agree on a *collar*, which provides that the number of Shares delivered to Seller will be adjusted only within a range between a high and low price for Buyer's Shares. At the end of the range, the Share number is not adjusted for further price changes, and effectively becomes a fixed exchange arrangement. This arrangement limits the potential dilution to Buyer if the Share price decreases below a certain amount and assures Seller of receiving at least a specified minimum number of Shares, even if the Share price increases above a certain amount.

> **Example**: Assume that the parties have agreed that Seller will receive at closing Shares with an aggregate value of $5,000,000, and that the trading price on the signing date is

$10 per share. The parties might supplement this Agreement with a collar: (a) if the price decreases below $8 per Share or (b) if the price increases above $12 per Share, the arrangement converts to a fixed exchange ratio. In this example, Seller would receive no more than 625,000 Shares, even if the price decreased below $8 per share. Seller would receive no less than 416,666 Shares, even if the price increased above $12 per share.

Termination rights. To further limit its risk, Seller's counsel should request a right to terminate a formula price arrangement with a collar, if the trading price decreases below a certain amount, assuring Seller that it can walk away if it will not receive at least a minimum value.

Example: In the last example, Seller might consider requesting a termination right if the trading price decreases below $7 per share, to assure Seller that it receives at least $4,375,000 of value. Buyer likely will request a termination right if the trading price *increases* a certain amount above the collar, to assure Buyer that it does not deliver more than a specific value of consideration.

The parties may agree on other combinations of formula and fixed exchange arrangements. For example, they might agree on a fixed exchange ratio within a range above and beyond a target price, a formula adjustment outside of that range, and a termination right if the price moves still further outside of the initial range.

D. Contingent Value Rights. Of course, after closing, Seller typically bears all price changes in Buyer's Shares. The contractual protections discussed above are effective only through closing.

With leverage, Seller might negotiate contingent value rights ("CVRs") that assure Seller that the Shares will have at least a specified minimum value on a date after closing, for example on the first anniversary of closing. Buyer promises to deliver more Shares to make up any deficiency, limiting Seller's downside risk from a decrease in the value of the Shares. CVRs are unusual and generally not attractive to a Buyer, which bears the dilution risk on a decrease in its Share price, while not benefiting from the upside potential of delivering less Shares on a price increase.

V. Post-Closing Contractual Protections

A. Board Membership.

Seller should consider requesting a board position for its principal, so that it has a voice in governance and further access to internal information. Of course, Seller's leverage in this request will depend substantially on the size of its equity position in Buyer after closing.

B. Covenants and Veto Rights

For an agreement with a private company especially, Seller should consider including in the agreement or a separate shareholder agreement covenants that protect Seller's equity interest, such as provisions restricting reorganizations, executive compensation, related party transactions, issuance of more equity, and change in business focus. The agreement should either specifically prohibit these transactions without prior consent or spell out parameters for permitted transactions.

C. Senior Security Protection (for Preferred Securities Only)

Preferred stock articles must include all of the provisions required to protect a senior position, including dividend payments, voting rights, conversion features, priority on liquidation and in dividend payments, anti-dilution provisions, and provisions governing mergers and reorganizations.

D. Regular Information

Seller should insist on receiving monthly or quarterly financial information and annual financial statements audited by an acceptable accounting firm.

E. S Corporation Distributions

For S corporations and other flow-through entities, Seller should assure that the holder of the Shares receives cash distributions to pay tax obligations arising from Buyer's income.

VI. Gaining Liquidity

The Shares will never have any value unless Seller eventually sells them. If Buyer is a public company, Seller should be able to eventually gain liquidity through broker's transactions. If Buyer is a private company, Seller should consider requesting a put option, co-sale rights, and registration rights to increase its ability to eventually gain liquidity. Seller should also consider these additional rights if Buyer is a relatively small private company with limited liquidity in its trading market or if Seller is receiving a large stake that will be difficult to liquidate in broker's transactions.

A. **Special Public Entity Concerns.** If Buyer is a public company, liquidity is a significantly reduced concern, because Seller typically can liquidate its investment over time in broker's transactions. If Buyer is public, the Shares were registered in the sale transaction, and Seller is not an "affiliate" of Buyer under the SEC's rules, Seller is typically limited in disposing of the Shares only by any contractual holding period and the market's ability to sustain selling.

If the Shares were issued Seller in a *private* transaction, the Shares are "restricted securities." Seller will likely still be able to eventually sell the Shares in broker's transactions,

but only in compliance with the requirements of the SEC's Rule 144[2], promulgated under the Securities Act of 1933. These requirements include: (a) a holding period of at least one year, (b) an limit on the amount of securities that may to sold, to no more than one percent of the issuer's outstanding common stock during any three month period, and (c) a requirement that certain information be filed with the SEC by the issuer and publicly available. If it plans to eventually liquidate the Shares in Rule 144 transactions, Seller should insist on a covenant requiring Buyer to continue filing with the SEC the information required to be on record by Rule 144(c).

B. Put Option.

For a private company especially, Seller should consider requesting a put option feature entitles Seller to require Buyer to purchase the Shares for an agreed price after a specified time period elapses. A favorable price formula gives the Seller the higher of (1) the Shares' cost plus an agreed return (downside protection) or (2) an agreed multiple of earnings, cash flow, or revenues (upside participation).

This provision must be *at Seller's election only*; Seller should strictly avoid any call option that limits its upside potential. Expect objections from Buyer based on liquidity concerns and the accounting requirement that the security be characterized as debt on Buyer's balance sheet.

C. Co-Sale Rights.

(1) Generally. Co-sale rights permit Seller to participate equally or "go-along" in other ("selling") shareholders' sales of their shares. Typically, Seller would share pro rata according to the following formula:

$$\text{\# of Seller's shares} \times \frac{\text{\# of shares being sold}}{\text{\# of shares held by selling shareholder}}$$

These rights may be structured to provide the selling shareholder flexibility with respect to whether Seller (a) directly participates in the original sale or (b) indirectly participates through the selling shareholder using a portion of his sale proceeds to purchase Buyer's shares after the initial sale transaction occurs.

(2) Rationale. Co-sale rights assure Seller (a) that it will not be left behind when other shareholders, especially insiders of Buyer, sell their respective stakes, and (b) that Seller has an opportunity to participate in the sale on the same terms, so that Seller's shares are not subject to a minority discount.

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[2] Rule 144, promulgated by the Securities and Exchange Commission under the Securities Act of 1933 (the "Securities Act").

(3) Exclusions. Exceptions to Seller's co-sale rights are typically furnished for the selling shareholder's transfers to (a) Buyer, (b) close affiliates such as a wholly-owned corporation or trust of the selling shareholder, and (c) sales pursuant to Rule 144 or a public offering.

D. Registration Rights.

1. **General.** Registration rights contractually bind Buyer to undertake a Securities Act registration of the Shares with the SEC at Buyer's expense. The rights are of two kinds, depending on whether (a) Seller can demand that the Buyer initiate registration of its shares ("demand registration rights") or (b) Seller's rights are triggered by and incidental to a registered public offering initiated by Buyer or another person ("incidental" or "piggy-back" rights). Registration rights are a prime liquidity source for Seller if the Buyer's business and the securities market will support an underwritten public offering of Buyer's securities. The Shares will typically have been issued to Seller in an exempt[3] offering and be subject to associated resale limitations imposed by applicable securities laws on "restricted securities" and securities held by "affiliates" of Buyer. Registration rights are no panacea for Sellers, and although often granted, are rarely used because few companies reach the development stage in which they can or should "go public." Seller should place prime emphasis on other exit strategies, such as put options and eventual sale of Buyer on favorable terms. Even so, Seller should bargain for registration rights so that it can, if necessary, overcome management's desire to remain private or reluctance to include the Shares in an underwritten public offering.

2. Demand Rights. With demand rights, Seller can initiate registration whenever it believes the market will yield an acceptable price for its Shares. Following a demand, Buyer generally must proceed diligently with the registration process to facilitate a public offering of Seller's Shares. (Buyer will typically prefer limiting the registration rights to incidental rights, so that it can control whether and when an offering occurs.) With these rights, Buyer facilitates Seller's offering, and Seller typically controls the selection of an underwriter and other terms.

3. **Provisions that Buyer Should Require.**

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[3] Buyer will most likely have issued the Shares to Seller in compliance with the exemption from registration requirements provided by Regulation D, promulgated by the SEC under the Securities Act. Rule 502(d) under Regulation D requires the issuer to impose resale restrictions for an exempt transaction involving more than $1,000,000. (Interestingly, Florida's counterpart small offering exemption, section 517.061(11), does not require comparable resale restrictions. Rule 144 under the Securities Act permits some resales without registration, but Seller must comply with its requirements, which include a two-year holding period and certain current public information being available. Further, Rule 144A permits resale of securities to qualified institutional buyers, provided the buyer is furnished with specified financial and other information.

(1) A delay of some period before Seller may exercise these rights, for example, two years following the date of the investment.

(2) That Seller be required to submit some minimum number or percentage of the Shares for registration, to justify the expense.

(3) A limit on the registration statements required to be filed by Buyer in the aggregate (e.g., six), or in any period of time (e.g., no more than once every six months).

(4) Generally allowing Buyer to defer the registration "if it determines that the timing of the offering would be disadvantageous to Buyer" for certain reasons, such as prospective financing or acquisition activity or unavailability of financial statements.

(5) A right to cut back Seller's participation in the offering to the extent deemed appropriate by the managing underwriter given market conditions.

4. Provisions that Seller Should Require.

(1) A right to limit participation in the offering by others, including Buyer.

(2) A requirement for Buyer to pay all expenses, excluding underwriting discounts and commissions and transfer taxes.

(3) A right to select the underwriter.

(4) Permission to transfer the registration right to subsequent holders of the Shares.

5. Incidental/Piggyback Rights. With incidental rights, Seller may participate in certain registered securities offerings of Buyer.[4] These "piggy-back" rights typically apply only to traditional underwritten public offerings on Forms S-1, S-2, or S-3 or the comparable SB forms. Specifically excluded are registrations (i) on Form or S-4, (ii) relating to shares issuable on exercise of options or in connection with an employee benefit plan, and (iii) in connection with an acquisition of shares by Buyer.

(1) General Buyer Protection. Buyer generally controls the process and:

(a) selects the underwriter;
(b) may elect not to proceed with the offering for any reason; and

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[4] Practically, although it should bargain for these rights, Seller might not exercise them when the time comes. Instead, Seller might prefer to sell its shares pursuant to Rule 144 and avoid the underwriting discount. Seller might be delayed in this process by holdback provisions discussed below, and any delay means risk of a price decline.

(c) has first priority if the managing underwriter cuts back the number of shares that can be sold.

(2) General Seller Protection. Seller should negotiate for:

(a) Buyer to complete any registration process initiated by Buyer;

(b) Seller's rights to preempt those of any later-granted piggyback rights;

(c) in the event shares are "cut back" in an underwritten offering, bargain for the right to sell the non-underwritten Shares on a shelf basis commencing some period (e.g., 120 days) after the completion of the underwritten offering; and

(d) the right to invoke its piggyback registration rights in the event a demand registration right is invoked by another shareholder of Buyer[5].

6. **Special Holdback Provisions.** As a quid pro quo for registration rights, Seller typically must agree to hold back its Shares that will not be sold in the offering for a time period following the effective date of the registration statement, for example, 180 days for an initial offering and 120 days for a secondary offering. The purpose: reduce the supply overhang so that the underwriter can stabilize the market price.

7. **Standard Buyer Covenants.** Regardless of whether the registration rights are "demand" or "incidental," Seller should insist on certain standard Buyer covenants requiring that:

(1) Buyer use its best efforts to cause the filed registration statement to remain effective for at least 270 days or until Seller sells all of its Shares.

(2) Buyer furnish sufficient copies of the registration statement and preliminary and final prospectus to facilitate sales.

(3) Seller be notified of difficulties in the registration process.

(4) The Shares be registered or qualified under state securities laws.

(5) Buyer notify Seller of events requiring an amendment or supplement to the prospectus and furnish Seller with the supplement or amendment.

(6) Buyer allow diligence investigations by Sellers' and underwriters' professionals.

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[5] See Carl Schneider, "Registration Rights Agreements___Variables and Practical Considerations", XXI Special Supplement The Corporate Counsel p. 7 (Mar. - Apr. 1996).

(7) Seller and underwriters receive the benefit of legal opinions rendered to Buyer by its counsel and the comfort letter furnished to Buyer by its accountants.

(8) Buyer exercise its best efforts to cause its shares to be listed with a securities exchange.

(9) Buyer not grant registration rights to other shareholders unless pari passu or subordinate in priority.

Aside from the registration rights provisions, Seller should request a covenant requiring Buyer to continue filing all required SEC reports under the Securities Exchange Act of 1934 on a timely basis, so that Seller can continue to sell its Shares pursuant to Rule 144.

8. Indemnification. Seller should require indemnification from Buyer for losses that arise from defective disclosures in the prospectus and registration statement.

Confirm the following indemnification provisions:

(1) Indemnity protection for Seller's officers, directors, agents and other controlling parties.

(2) A covenant to furnish a similar indemnity protection for any underwriters.

(3) Seller's indemnification responsibilities should be limited to information furnished for use in the disclosure materials (typically very limited). Seller should limit its potential liability to its offering proceeds.

(4) On request, Buyer should assume Seller's defense, and the choice of counsel should be reasonably satisfactory to Seller.

(5) Seller should retain the right to engage its own counsel, and be reimbursed for its expenses if a conflict precludes representation of both Buyer and Seller by the same counsel.

(6) Seller should retain the right to approve any settlement that does not include an unconditional release of Seller.

VII. Conclusion

Protecting the Seller in a sale transaction for equity requires its counsel's close attention to the due diligence process, negotiating contractual protections to further Seller's interests in the acquisition process, and careful and thoughtful consideration of Seller's desired position after closing as an equity investor in Buyer.