

Document 4

The Action Sections of an Asset Purchase Agreement

Article 1 — Definitions

1.1 Definitions. Terms defined in the preamble and recitals of this Agreement have their assigned meaning, and each of the following terms has the meaning assigned to it.

- (a) **“Assumed Liabilities”** means the following liabilities and obligations of the Seller:

[The agreement lists the liabilities that the Buyer will be assuming.]¹

- (b) **“Closing”** means the closing of the transactions that this Agreement contemplates in Memphis, Tennessee on the Closing Date.²

- (c) **“Closing Date”** has the meaning assigned to it in Section 2.3.

- (d) **“Note”** has the meaning assigned to it in Section 2.2(a)(ii).

- (e) **“Purchased Assets”** means [the contract lists the assets the Buyer is purchasing].³

Article 2 — Purchase and Sale

2.1 Sale of Properties and Assets. At the Closing, the Seller shall sell, transfer, assign, convey, and deliver the Purchased Assets to the Buyer, and the Buyer shall purchase, accept, and acquire the Purchased Assets from the Seller.⁴

2.2 Purchase Price.⁵ The purchase price is

- (a) \$25 million, consisting of⁶

1. Does every asset sale include assumed liabilities?

2. Why is this definition substantively wrong? Look at Section 2.3.

3. Why might a drafter delete this defined term? What should replace it?

4. What’s wrong with this section from a drafting perspective?

5. Section 2.2 is definitional. The Buyer’s obligation to pay the purchase price at Closing is in Section 2.4.

If part of the purchase price were due concurrently with the signing of the agreement or after signing but before closing, the drafter would add a section to deal with those payments. They would not belong in Section 2.4 because that section deals exclusively with closing conveyances and closing payments. Neither would they belong in the covenant article, despite their being covenants. Covenants are not restricted to the covenant article. (The covenants in the covenant article generally apply during the gap period or post closing.) All payments of purchase price belong in the action sections.

6. Each part of the consideration aggregating \$25 million has its own subsection.

7. What is the purpose of the Exhibit? What is the benefit of defining *Note* here rather than in the definitions article?

8. The *p* from *plus* lines up under the dollar sign to indicate it is joining subsections (a) and (b).

9. What is wrong with the bracketed language from a drafting perspective?

10. Why is the defined term *Closing Date* placed where it is?

11. Section 2.4 is only for actions that occur at closing and for the further assurances provision that applies at the time of the closing.

Section 2.4 does NOT cover any payments of the purchase price before closing. It is only for payments that a buyer makes at closing.

12. In an asset sale, some piece of paper must convey each asset from the seller to the buyer. A bill of sale is used for tangible and intangible assets; a deed is used for real property; and an assignment is used to convey contractual rights. Document 3 is an exemplar of an assignment and assumption agreement. Document 5 is an exemplar of a bill of sale.

A seller must execute and deliver each conveyancing document because the seller is the entity that is doing the conveying. Why must a buyer execute the assignment and assumption agreement?

13. The bracketed language establishes a standard. What risk does this standard pose to the Seller?

Often in an acquisition, the seller must not only legally convey the asset to the buyer using a conveyancing document, but also physically deliver the asset. That may not be possible when what is being sold is a business. But if the asset is a single tangible asset that readily moves, the seller should also be obligated to deliver the asset to the buyer. The promise to deliver the asset belongs in the *Seller's Deliveries*. Carefully review the language that introduces what is to be delivered and confirm that the introductory language parses properly with each enumerated item. If not, perhaps the contract needs an additional delivery section.

- (i) \$10 million in immediately available funds; and
- (ii) a \$15 million promissory note payable to the order of the Seller, substantially in the form of **Exhibit A** (the “**Note**”⁷);

*plus*⁸

- (b) an assumption by the Buyer of the [Assumed Liabilities of the Seller].⁹

2.3 The Closing. The Closing is to occur on December 22, 20X2, or another date as to which the Seller and the Buyer agree, but no later than December 31, 20X2 (the date the sale is consummated, the “**Closing Date**”¹⁰). It is to take place at the offices of Workhard & Playlittle LLP, 1180 Avenue of the Americas, New York, New York, beginning at 9:00 a.m. local time.

2.4 Closing Deliveries; Further Assurances.¹¹ [Instruments of Transfer; Payment of Purchase Price and Assumption of Liabilities; Further Assurances]

- (a) **Seller's Deliveries.** At the Closing, the Seller shall execute and deliver to the Buyer the following:¹²
 - (i) A bill of sale for the Purchased Assets, [in a form [reasonably] satisfactory to the Buyer].¹³

- (ii) An assignment of each lease under which the Seller is tenant, in a form satisfactory to the Buyer.
 - (iii) Such other instrument or instruments of transfer as may be necessary or appropriate to vest in the Buyer good title to the Purchased Assets.¹⁴
- (b) **Buyer's Deliveries.**¹⁵ At the Closing, the Buyer shall deliver [or cause to be delivered] to the Seller the following:
- (i) \$15 million in funds immediately available in New York, New York.
 - (ii) The Note, executed by the Buyer.
 - (iii) An instrument, executed by the Buyer, in a form reasonably satisfactory to the Seller, whereby the Buyer assumes the Assumed Liabilities.¹⁶

14. This is a further assurances provision — a promise to deliver other documents at the time of the Closing, if necessary to convey the assets. This differs from the further assurances provision in subsection (c). That applies to the post-closing period.

15. Section 2.4(b) is the Buyer's promise to pay the purchase price at closing. (Section 2.2 merely stated the amount of the purchase. It was not joined with an obligation to pay it.) Because the purchase price in this transaction has three components, the payment provision must have three corresponding provisions to spell out how each component is to be paid or delivered.

In some transactions, the parties may have put into escrow a portion of the purchase price. That is irrelevant to the drafting of the buyer's covenant to pay the full purchase price (minus any down payments). The seller wants this buyer's promise because it protects the seller against the risk that the escrow agent breaches and fails to pay the escrowed amount at closing. If that should occur, the contract provisions ensure that the seller will nonetheless be paid in full: The buyer promised to pay the full purchase price and must, therefore, make up any deficit. Assuming the buyer pays the escrowed amount to the seller, the buyer would have a cause of action against the escrow agent.

The contract must reflect that the buyer itself will not actually be paying the full amount. The language introducing subsection (b) reflects that the buyer is promising a result (full payment), but not promising that it will be the actor that causes the result. The salient language is *cause to be delivered*. In the vernacular, *cause to be delivered* means that a party promises that something will get done, but makes no promises as to how it will get done.

16. The Buyer's assumption is listed under *Buyer's Deliveries*. Generally, one agreement — an Assignment and Assumption Agreement — contains both the seller's assignment and the buyer's assumption. Nonetheless, the promises to assign and assume must be separately stated.

17. This further assurances provision kicks in post-closing. Compare the two further assurances provisions. What differs, and is it problematic?

18. Note the parallel structure of subsections (i) and (ii). Each one begins with an infinitive followed by a reference to the Buyer. This is a matter of good drafting and craftsmanship.

19. As with all provisions, before using this subsection, think through whether it applies to the agreement being drafted.

- (c) **Further Assurances.**¹⁷ Following the Closing, at the request of the Buyer, the Seller shall execute and deliver any further instruments of transfer and take all reasonable action as may be necessary or appropriate
- (i) to vest in the Buyer good title to the Purchased Assets; and¹⁸
 - (ii) to transfer to the Buyer all licenses and permits necessary for the operation of the Purchased Assets.¹⁹

Document 5¹Bill of Sale²

State of New Jersey, Bergen County

1. Purchase Agreement.³ This Bill of Sale (“**Bill of Sale**”) refers to the Boat Purchase Agreement, dated October 1, 20XX (the “**Purchase Agreement**”), between Richard Hunter (the “**Seller**”) and Dana Jackson (the “**Buyer**”). The Seller’s current address is 1231 Forest Ave., Paramus, NJ 07652. The Buyer’s current address is 721 Hickory Ave., Tenafly, NJ 07670. Capitalized terms used without definition in this Bill of Sale have the meanings assigned to them in the Purchase Agreement.

2. Sale and Transfer of the Boat.⁴ The purchase price for this sale is stated in the Purchase Agreement, and the Buyer is paying it contemporaneously with the execution and delivery of this Bill of Sale. By executing and delivering this Bill of Sale, the Seller sells to the Buyer all of the Seller’s rights to the Boat and the Related Assets and transfers to the Buyer title to the Boat and the Related Assets.

3. Further Assurances.⁵ Following the Closing, the Seller shall execute and deliver to the Buyer any further instruments of transfer and take all reasonable action as may be appropriate

- (a) to vest in the Buyer good title to the Boat and the Related Assets; and
- (b) to transfer to the Buyer all licenses and permits necessary to operate the Boat.

4. Power of Attorney.⁶

- (a) **Appointment.** Without limiting Paragraph 3 of this Bill of Sale, the Seller appoints Joseph Solomon, 80 Park Plaza, Newark, NJ 07101 as the Seller’s attorney in fact (Joseph Solomon and his successors and assigns, the “**Seller’s Attorney**”) for the following purposes:
 - (i) To exercise any right or perform any obligation that the Seller now has or may acquire relating to the Bill of

1. This Bill of Sale has been drafted as an exemplar. Consult local laws, including those of New Jersey, before drafting a bill of sale for a transaction.

2. What is the business purpose of this document?

3. What are Paragraph 1’s functions?

4. Paragraph 2
(a) What is the legal purpose of the first sentence?
(b) What is the purpose of the second sentence?
(c) What language achieved the purpose?

5. Paragraph 3
(a) What is the business purpose of this provision?
(b) In this transaction, in what document would you expect to see similar language?
(c) What drafting considerations should you have when writing this provision?

6. Paragraph 4
(a) What is the business purpose of this provision?
(b) What is wrong with the language constituting the definition for the defined term *Seller’s Attorney*?

Sale and the transaction that the Purchase Agreement contemplates.

- (ii) To demand, receive, recover, and collect
 - (A) any money related to the transaction that the Purchase Agreement contemplates; or
 - (B) the Boat and the Related Assets.
- (iii) To give receipts and releases for the Boat and the Related Assets.
- (iv) To institute and prosecute, in the name of the Seller, any legal and equitable remedies and any other means that the Seller's Attorney may deem proper to collect or reduce to possession the Boat and any Related Asset.
- (v) To do all things legally permissible, required, or that the Buyer reasonably requests to ensure that the Buyer acquires the Seller's rights to the Boat and the Related Assets.
- (vi) To use the Seller's name in any manner the Seller's Attorney may reasonably deem necessary to complete the transactions contemplated by either or both of this Bill of Sale and the Purchase Agreement.

- (b) **Scope of Power of Attorney.** This Paragraph 4 is to be construed as a power of attorney only for the transactions that are contemplated by either or both of this Bill of Sale and the Purchase Agreement. The enumeration of specific items, acts, rights, or powers does not limit or restrict, and is not to be construed or interpreted as limiting or restricting, the general powers granted to the Seller's Attorney.

7. Paragraph 5
 (a) What is the business purpose of this provision?
 (b) If the closing of the boat sale is October 15, 20XX, on what date does the power of attorney end?

5. **Term of the Power of Attorney.**⁷ The Seller's Attorney may begin exercising the rights, powers, and authority granted in Paragraph 4 when this Bill of Sale is executed and delivered. The power of attorney ends on the 30th day after the Closing.

6. Governing Law. The internal laws of New Jersey govern all matters arising under or relating to this Bill of Sale, including torts.

The Seller has executed and delivered this Bill of Sale on October 15, 20XX.⁸

Seller⁹

Richard Hunter

8. What would be the consequence of rewriting the concluding paragraph as follows?

"The Seller has executed this Bill of Sale on October 15, 20XX."

9. Why doesn't the Buyer sign this document?