KMZ Rosenman
KATTEN MUCHIN ZAVIS ROSENMAN

LETTERS OF INTENT IN THE ACQUISITION OR SALE OF THE PRIVATELY HELD COMPANY

I. Introduction.

A buyer and seller frequently desire to enter into a letter of intent to formalize the successful completion of the first stage of negotiations in a purchase and sale transaction. The parties often want to memorialize their agreement on the principal terms of the transaction, such as the purchase price. Once the key terms are set forth in a writing signed by both parties, the parties may feel morally obligated, even though they may not be legally bound, to abide by those terms.

Sometimes a letter of intent is used by a potential buyer to formalize its offer to a potential seller, or by a seller to present the terms on which the seller is willing to enter into a transaction (a "bid letter").

The main advantages of a letter or intent are that (i) issues that could be "deal breakers" can be identified early in the negotiation process before substantial expenses are incurred in a due diligence review and the drafting of a definitive agreement, and (ii) resolution of the principal terms of the transaction at an early stage can make the negotiation of the definitive agreement more focused and straightforward.

While letters of intent are relatively common, attorneys may often disagree regarding the desirability of a letter of intent in a particular situation. For example, many attorneys believe that a letter of intent is generally more advantageous to a buyer than a seller. In the case of a smaller deal, the costs of preparing, negotiating and revising a letter of intent can be substantial in comparison to the size of the deal and the overall transaction costs. A letter of intent may burden the parties' negotiations with too may difficult issues too early in the process and may impair, or even halt, a deal's momentum. In some situations, a court may find that provisions of a letter of intent that one of the parties considered to be non-binding are binding.

Nevertheless, many buyers and sellers prefer a letter of intent as a method of "testing the waters" for the likelihood that a definitive agreement can be reached, before proceeding with the time commitments and costs of negotiating a definitive agreement, or before allowing a detailed due diligence investigation to begin.

II. Letters of Intent -- Overall Advantages

One advantage to preparing a letter of intent is that putting the parties' understanding in writing lays a foundation for the deal and can enhance deal stability and commitment early on in the transaction process. The letter of intent often provides a format for the transaction which can be used as the basis for drafting the definitive agreement. The letter of intent can also establish the time frame for the proposed deal, and memorialize the parties' agreements regarding how expenses of the transaction, such as brokers' fees, attorneys' fees, accountants' fees and the fees and expenses of other advisers will be allocated between the parties.

A letter of intent can also facilitate compliance with certain regulatory requirements, and thus keep the transaction "on track." For example, a pre-merger notification report under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 can be filed using a letter of intent, thereby starting the clock on the applicable waiting period.

A signed letter of intent may also assist a buyer in convincing potential lenders to evaluate the transaction for the purpose of providing financing.

III. Letters of Intent -- Buyer's Perspective

Generally, the buyer's principal interest in signing a letter of intent is to commit the seller to not negotiate with others for a specified time. Such "no-shop" provisions are generally desired to be enforceable by the buyer, even in a "non-binding" letter of intent. Therefore, the buyer should ensure that the "no shop" provision is sufficiently explicit to be enforceable, and the letter of intent should contain a statement that the parties intend that the "no shop" provision be enforceable notwithstanding any other non-binding provisions of the letter of intent. However, if the target company (or its parent) is a public company, the sellers are likely to insist on a "fiduciary out" with respect to any exclusivity arrangement.

The buyer will also want the letter of intent to include provisions which facilitate the buyer's due diligence investigation of the seller, and ensure the seller's cooperation with the investigation. For example, a letter of intent generally permits a buyer to inspect the seller's assets and to review its operations, books and records.

Other than with respect to the "no shop" provision and the provisions describing the buyer's rights to conduct its due diligence investigation and the seller's related cooperation obligations, a buyer is often best served by having the remaining provisions of the letter of intent be nonspecific. By using very general language, the buyer can defer negotiation of the more difficult issues until it has gained more detailed knowledge about the target. The buyer is also likely to have substantially improved its negotiation position by this time. Once the buyer has completed its investigation of the target, the target's employees, vendors, customers and lenders may have an expectation of a sale to the buyer, and if the sale does not occur, the target may be left with a "damaged goods" reputation.

IV. Letters of Intent -- Seller's Perspective

Generally, the seller's negotiation leverage is greatest prior to signing a letter of intent. Thus, it is in the seller's best interests that the letter of intent be as specific as possible with respect to the material terms of the transaction, such as the purchase price, the structure of the transaction, limitations on the seller's exposure with respect to representations and warranties that will be part of the definitive agreement, and key terms of employment agreements, non-competition covenants and any special arrangements. The negotiation of a letter of intent provides a seller with an excellent opportunity to negotiate key transaction terms at a time when the seller possesses maximum leverage.

Sellers are also concerned with preserving confidentiality, both about the proposed transaction itself and about their business. Breaches of confidentiality can damage employee morale, jeopardize relationships with vendors and customers, force untimely public disclosures or jeopardize proprietary or other confidential information. Thus, the seller will want the letter of intent to include a strong confidentiality covenant on the part of the buyer, which will be enforceable notwithstanding any other non-binding provisions of the letter of intent.

The seller may also want to include a provision which prohibits the buyer from soliciting or hiring any of the seller's employees for a period of time if the transaction is not consummated.

V. Attorney's Role

Once the parties have determined to proceed with a letter of intent, the proper drafting of the content of the letter of intent is crucial. This generally means that attorneys for each side should be involved as early in the process as possible. Frequently, the principals make a first attempt at a draft, followed closely by review and comments of each of their attorneys.

Whether, and what parts of, a letter of intent should be binding are of great significance, and it is important that the principals and the attorneys understand the consequences. For example, an acquisition may be so economically or strategically attractive to a buyer that, as a business decision, it is willing to be legally bound at a very early stage in the negotiations because it so highly values having the seller bound to the deal. The parties may also intend to be bound if the due diligence review has been completed and all economic issues have been settled, although at this point, moving promptly to a definitive agreement is likely a better strategy.

The level of detail in the letter of intent and which matters should be addressed or deferred are key strategic issues that should be evaluated carefully. For public companies (whether buyer or seller), disclosure requirements may be triggered depending on the level of specificity and binding nature of a letter of intent.

Whatever the purpose of a letter of intent in a transaction, the parties must draft the document carefully to ensure that it unambiguously reflects their intentions. Letters of intent frequently spawn litigation, and the outcome of any lawsuit will be determined by whether the parties intend to make the letter of intent, or any provision of the letter, a binding and enforceable agreement. Furthermore, if the parties choose to enter into a binding letter of intent, they need to be aware that a court may impose on them its interpretation of commercially reasonable terms for any unresolved matters.

VI. Binding vs. Non-Binding Letters of Intent

There are numerous reported cases of litigation involving letters of intent. The cases generally apply the following legal principles:

1. If the parties intend not to be bound to each other until the execution of a definitive agreement and clearly state such intent, a court will give effect to that intent and the parties will not be bound, even if all issues in the negotiation have been resolved. See Quake Construction, Inc. v. American Airlines, Inc., 565 N.E.2d 990, 141 Ill.2d 281 (1990); R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69 (2d Cir. 1984).

2. Even if the parties do not intend to be bound, a court may impose a duty to negotiate in good faith, and will impose liability if one party acts in bad faith. See Fickes v. SunExpert, Inc. 762 F.Supp. 998 (D. Mass. 1991); A/S Apothekernes Laboratorium v. I.M.C. Chemical Group, Inc., 678 F.Supp. 193 (N.D.Ill. 1988), aff'd, 873 F.2d 155 (7th Cir. 1989); Feldman v. Allegheny Int'l Inc., 850 F.2d 1217 (7th Cir. 1988).

3. If the parties intend to be bound prior to the execution of a definitive agreement, a court will give effect to that intent and the parties will be bound even though they contemplate replacing their earlier understanding with the definitive agreement at a later date. See Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. Ct. App. 1987), cert. denied, 485 U.S. 994 (1988); R.G. Group, 751 F.2d at 74; Borg-Warner Corp. v. Anchor Coupling Co., 156 N.E.2d 513, 16 Ill.2d 234 (1958).

4. Parties intending to be bound prior to the execution of a definitive agreement will be bound even if there are certain matters that have not been resolved. Depending on the significance of those matters to the transaction, a court will either supply commercially reasonable terms for the unresolved matters or impose a contractual duty on the parties to negotiate the resolution of those matters in good faith. See Itek Corporation v. Chicago Aerial Industries, Inc., 248 A.2d 625 (Del. 1968).

In determining whether the parties intended to be bound, a court will generally examine the following factors:

a. the actual words of the document. In some states, such as Illinois, the inquiry may be limited to the "four corners" of the document;

b. the context of the negotiations. In "four corners" states, if the letter of intent is ambiguous on its face, a court may look to the context of the negotiations to determine the intent of the parties;

c. partial performance of the obligations of either of the parties. Again, in "four corners" states, if the letter of intent is ambiguous, a court may look to partial performance to determine the intent of the parties;

d. whether there are any material issues left to negotiate or whether the terms as stated in the letter of intent are sufficiently definite to be enforceable. In order to be enforceable, a letter of intent must contain the essential terms of the transaction: the price, a description of the structure of the transaction and the assets or properties involved; and

e. whether the subject matter of the discussions concerns complex business matters that customarily involve definitive written agreements.

The most important factor in determining whether a letter of intent is binding, or which provisions of a letter of intent are binding, is the language used by the parties in the document. Therefore, the language of the letter of intent should be clear and precise. If the parties do not want to be bound by the letter of intent, they should use language such as:

"This letter of intent is not intended to be binding on the parties or a legally enforceable agreement, and imposes no obligations upon nor grants any rights to any of the parties. The rights and obligations of the parties shall be set forth in a definitive agreement to be executed by the parties."

The parties should not rely on making the letter of intent subject to the negotiation of a final or definitive agreement or board approval or approval by a third party as sufficient evidence that the letter is intended to be non-binding.

Many letters of intent are intended to be binding with respect to certain specific provisions, for example, the "no shop" promises of the seller and the confidentiality and/or no solicitation obligations of the buyer. The parties can make these provisions binding by clearly identifying these provisions as binding notwithstanding the non-binding nature of the other provisions of the letter of intent.

Parties to a non-binding letter of intent may want to affirm a duty to negotiate in good faith. A few courts are reluctant to imply such a duty. On the other hand, if the parties do not want to impose a duty to negotiate in good faith, they should specifically disavow any such duty. In other circumstances, it may be helpful to specify what constitutes bad faith, for example, negotiating with a third party in violation of a no-shop provision, failure to use reasonable efforts to obtain financing, breach of confidentiality provisions, or lack of cooperation by seller in buyer's due diligence investigation.

Remedies for breach of binding obligations under a letter of intent range from specific performance, to reliance damages, to expectation damages. In order to limit a court's ability to fashion its own remedies, the parties may wish to bind themselves to specific remedies for any breach of the letter of intent. For example, damages could be limited to reimbursement of the non-breaching party's expenses by the breaching party or other direct damages, and exclude any consequential or other damages.

The letter should include a date after which either party may unilaterally terminate negotiations for any reason; however, some provisions, such as confidentiality and non- solicitation covenants should survive the termination of the letter.

VII. Letter of Intent Provisions

In view of the many considerations that are part of negotiating a letter of intent, it cannot be overemphasized that there is no such thing as a "typical" letter of intent applicable to all, or even most, transactions. Everything in a letter of intent is subject to variation depending on the negotiations of the parties, the comparable bargaining positions, and the overall context of the proposed transaction. Nevertheless, here are points each of the parties should consider when contemplating entering into a letter of intent:

A. Description of the basic transaction, for example, merger, purchase of stock, or purchase of assets, including any liabilities to be assumed;

B. Description of any assets or liabilities to be excluded from the transaction;

C. Price terms;

1. The actual purchase price, or the method for determining the purchase price;

2. Purchase price adjustment, if any;

3. The form of payment (cash, securities, notes or any escrow arrangement);

D. Description of any other related agreements containing relevant financial terms, for example, employment agreements, non-competition agreements, or stockholder lock-ups;

E. Description of representations and warranties to be contained in the definitive agreement;

F. Description of any limitations on the seller's exposure for any breaches of any representations or warranties;

G. Obligations of the seller to conduct its business only in the ordinary course and to refrain from any extraordinary transactions;

H. Conditions to the parties' obligations (as applicable)

1. Satisfactory completion of the buyer's due diligence;

2. Obtaining financing, third party consents, board of directors approval or regulatory approval;

3. Obtaining employment and non-competition agreements with key employees;

4. Executing a definitive agreement;

I. The scope of, and procedures for, the buyer's due diligence investigation;

J. The buyer's confidentiality obligations;

K. The buyer's non-solicitation obligations;

L. The seller's exclusive dealing or no-shop covenants (including any appropriate "fiduciary outs");

1. The seller may agree to a provision which states that the seller will not actively solicit or will not negotiate with a third party unless an event occurs or facts arise which would make proceeding with a transaction with the buyer illegal, invalid, or contrary to the directors' fiduciary obligations;

2. The buyer will want to limit the board's right to entertain other offers with language stating that a competing offer standing alone cannot trigger the "out," and perhaps to specify other conditions which would trigger the clause;

3. The seller may want additional protections, such as:

a. limiting the duration of the exclusive dealings provision; or

b. requiring a break-up fee as consideration for a "no shop" provision;

4. If the seller will not agree to a strict "no shop" provision, the buyer also may seek a break-up fee;

M. When, and under what circumstances, will the transaction be publicly announced;

N. Responsibility for expenses. The parties often agree to bear their own costs, subject, as the case may be, to a remedy for breach of the duty to negotiate in good faith;

O. A termination provision; and

P. A statement as to whether the letter of intent is intended to be binding or non- binding, and if non-binding, which provisions of the letter of intent (if any) are binding and intended to survive any termination of the letter of intent.

Appendix 1: Sample Binding Letter of Intent

Ladies and Gentlemen:

This letter agreement sets forth our agreement and understanding as to the essential terms of the sale to ___________________ (the "Purchaser") by ________________ (the "Seller") of the Seller's business (the "Business"), located in _______________ and engaged in ___________________. The parties intend this letter agreement to be binding and enforceable, and that it will inure to the benefit of the parties and their respective successors and assigns.

1. Purchased Assets. At the closing, the Purchaser will purchase substantially all of the assets associated with the Business, including all inventories, all intellectual property, all accounts and notes receivable, all contracts and agreements, all equipment, all legally assignable government permits, and certain documents, files and records containing technical support and other information pertaining to the operation of the Business.

2. Assumed Liabilities. The Purchaser will assume as of the closing date only those liabilities and obligations (i) arising in connection with the operation of the Business by the Purchaser after the closing date, and (ii) arising after the closing date in connection with the performance by the Purchaser of the contracts and agreements associated with the Business.

3. Purchase Price. The purchase price will be $_____, payable in cash in immediately available funds on the closing date.

4. Pre-Closing Covenants. The parties will use their reasonable best efforts to obtain all necessary third-party and government consents (including all certificates, permits and approvals required in connection with the Purchaser's operation of the Business). The Seller will continue to operate the Business consistent with past practice. The parties agree to prepare, negotiate and execute a purchase agreement which will reflect the terms set forth in this letter agreement, and will contain customary representations and warranties.

5. Conditions to Obligation. The Purchaser and the Seller will be obligated to consummate the acquisition of the Business unless the Purchaser has failed to

obtain, despite the parties' reasonable best efforts, all certificates, permits and approvals that are required in connection with Purchaser's operation of the Business.

6. Due Diligence. The Seller agrees to cooperate with the Purchaser's due diligence investigation of the Business and to provide the Purchaser and its representatives with prompt and reasonable access to key employees and to books, records, contracts and other information pertaining to the Business (the "Due Diligence Information").

7. Confidentiality; Non-competition. The Purchaser will use the Due Diligence Information solely for the purpose of the Purchaser's due diligence investigation of the Business, and unless and until the parties consummate the acquisition of the Business the Purchaser, its affiliates, directors, officers, employees, advisors, and agents (the Purchaser's "Representatives") will keep the Due Diligence Information strictly confidential. The Purchaser will disclose the Due Diligence Information only to those Representatives of the Purchaser who need to know such information for the purpose of consummating the acquisition of the Business. The Purchaser agrees to be responsible for any breach of this paragraph 7 by any of the Purchaser's Representatives. In the event the acquisition of the Business is not consummated, the Purchaser will return to the Seller any materials containing Due Diligence Information, or will certify in writing that all such materials or copies of such materials have been destroyed. The Purchaser also will not use any Due Diligence Information to compete with the Seller in the event that the acquisition of the Business is not consummated. The provisions of this paragraph 7 will survive the termination of this letter agreement.

8. Employees of the Business. Until the consummation of the acquisition of the Business, or in the event that the parties do not consummate the acquisition of the Business, the Purchaser will not solicit or recruit the employees of the Business.

9. Exclusive Dealing. Until __________, the Seller will not enter into any agreement, discussion, or negotiation with, or provide information to, or solicit, encourage, entertain or consider any inquiries or proposals from, any other corporation, fire or other person with respect to (a) the possible disposition of a material portion of the Business, or (b) any business combination involving the Business, whether by way of merger, consolidation, share exchange or other transaction. If for any reason the acquisition of the Business is not consummated, and the Seller is unable to enforce the provisions of this letter agreement, the Buyer will pay to the Seller a break-up fee which will equal the sum of 1% of the purchase price, and the Seller's expenses in connection with the negotiation of the acquisition.

10. Public Announcement. All press releases and public announcements relating to the acquisition of the Business will be agreed to and prepared jointly by the Seller and the Purchaser.

11. Expenses. Subject to the provisions in paragraph 9 of this letter agreement, each party will pay all of its expenses, including legal fees, incurred in connection with the acquisition of the Business.

12. Indemnification: The Seller represents and warrants that the Purchaser will not incur any liability in connection with the consummation of the acquisition of the Business to any third party with whom the Seller or its agents have had discussions regarding the disposition of the Business, and the Seller agrees to indemnify, defend and hold harmless the Purchaser, its officers, directors, stockholders, lenders and affiliates from any claims by or liabilities to such third parties, including any legal or other expenses incurred in connection with the defense of such claims. The covenants contained in this paragraph 12 will survive the termination of this letter agreement.

If you are in agreement with the terms of this letter agreement, please sign in the space provided below and return a signed copy to ____________________ by the close of business on _______________, 1995. Upon receipt of a signed copy of this letter, we will proceed with our plans for consummating the transaction in a timely manner.

Very truly yours,

XYZ CORPORATION

By:________________________
[Name and Title]

____
ABC CORPORATION

By: ________________________
[Name and Title]

Appendix 2: Sample Non-Binding Letter of Intent With Some Binding Provisions

Ladies and Gentlemen:

This letter of intent sets forth our understanding as to the proposed terms of the sale to ______________ (the "Purchaser") by _________________________(the "Seller") of the Seller's business (the "Business") located in ________________ and engaged in __________. Other than the covenants contained in paragraphs 4,5, 7-11 and 13 of this letter of intent, this letter of intent is not binding upon either the Purchaser or the Seller, and is subject to the negotiation and execution of a definitive acquisition agreement between the Purchaser and the Seller. The covenants in paragraphs 4, 5, 7-11 and 13 are binding upon the Purchaser and Seller whether or not the parties reach a definitive agreement with respect to the acquisition of the Business.

1. Purchased Assets. At the closing, the Purchaser will purchase substantially all of the assets associated with the Business, including all inventories, all intellectual property, all accounts and notes receivable, all contracts and agreements, all equipment, all legally assignable government permits, and certain documents, files and records containing technical support and other information pertaining to the operation of the Business.

2. Assumed Liabilities. The Purchaser will assume as of the closing date only those liabilities and obligations (i) arising in connection with the operation of the Business by the Purchaser after the closing date, and (ii) arising after the closing date in connection with the performance by the Purchaser of the contracts and agreements associated with the Business.

3. Purchase Price. The purchase price will be $________, payable in cash in immediately available funds on the closing date.

4. Pre-Closing Covenants. The parties will use their reasonable best efforts to obtain all necessary third-party and government consents (including all certificates, permits and approvals required in connection with the Purchaser's operation of the Business). The Seller will continue to operate the Business consistent with past practice.

5. Best Efforts: The parties agree to negotiate in good faith, and to use their best efforts to (a) execute definitive agreement with respect to the acquisition of the Business as expeditiously as possible, on or before __________, and (b) close the transaction as soon as is reasonably practicable. Mere disagreement over a terms of the transaction does not constitute bad faith and a breach of this paragraph 5. In the event either party violates the covenants contained in this paragraph 5 (the "breaching party"), the other party may recover from the breaching party [its expenses incurred in the negotiation of the acquisition of the Business] [its damages incurred in reliance on the good faith of the breaching party].

6. Conditions to Obligation. Neither the Purchaser nor the Seller will be obligated to consummate the acquisition of the Business contemplated hereby unless and until the parties have reached a definitive agreement as to all of the essential terms of the acquisition, and the Purchaser has obtained financing for the acquisition. In addition, neither the Purchaser nor the Seller will be obligated to consummate the acquisition of the Business unless the Purchaser has obtained all certificates, permits and approvals that are required in connection with Purchaser's operation of the Business, and satisfactorily completes its diligence investigation as described in paragraph 7 of this letter of intent.

7. Due Diligence. The Seller agrees to cooperate with the Purchaser's due diligence investigation of the Business and to provide the Purchaser and its representatives with prompt and reasonable access to key employees and to books, records, contracts and other information pertaining to the Business (the "Due Diligence Information"). Unless the Purchaser notifies the Seller in writing on or prior to of its failure to complete satisfactorily its due diligence investigation of the Business, such condition will be deemed to have terminated and been waived by the Purchaser.

8. Confidentiality; Non-competition. The Purchaser will use the Due Diligence Information solely for the purpose of the Purchaser's due diligence investigation of the Business, and unless and until the parties consummate the acquisition of the Business the Purchaser, its affiliates, directors, officers, employees, advisors, and agents (the Purchaser's "Representatives") will keep the Due Diligence Information strictly confidential. The Purchaser will disclose the Due Diligence Information only to those Representatives of the Purchaser who need to know such information for the purpose of consummating the acquisition of the Business. The Purchaser agrees to be responsible for any breach of this paragraph 8 by any of the Purchaser's Representatives. In the event the acquisition of the Business is not consummated, the Purchaser will return to the Seller any materials containing Due Diligence Information, or will certify in writing that all such materials or copies of such materials have been destroyed. The Purchaser also will not use any Due Diligence Information to compete with the Seller in the event that the acquisition of

the Business is not consummated. The provisions of this paragraph 8 will survive the termination of this letter of intent.

9. Employees of the Business. Until the consummation of the acquisition of the Business, or in the event that the parties do not consummate the acquisition of the Business, the Purchaser will not solicit or recruit the employees of the Business.

10. Exclusive Dealing. Until __________, or the termination of this letter of intent as provided for in paragraph 14, the Seller will not enter into any agreement, discussion, or negotiation with, or provide information to, any other corporation, firm or other person, or solicit, encourage, entertain or consider any inquiries or proposals, with respect to (a) the possible disposition of a material portion of the Business, or (b) any business combination involving the Business, whether by way of merger, consolidation, share exchange or other transaction. If for any reason the acquisition of the Business is not consummated, the Buyer shall pay to the Seller a break-up fee which shall equal the sum of 1% of the purchase price, and the Seller's expenses in connection with the negotiation of the acquisition.

11. Public Announcement. All press releases and public announcements relating to the transaction contemplated by this letter of intent will be agreed to and prepared jointly by the Seller and the Purchaser.

12. Expenses. Subject to the provisions in paragraph 10, each party will pay all of its expenses, including legal fees, incurred in connection with the acquisition of the Business.

13. Indemnification. The Seller represents and warrants that the Purchaser will not incur any liability in connection with the consummation of the acquisition of the Business to any third party with whom the Seller or its agents have had discussions regarding the disposition of the Business, and the Seller agrees to indemnify, defend and hold harmless the Purchaser, its officers, directors, stockholders, lenders and affiliates from any claims by or liabilities to such third parties, including any legal or other expenses incurred in connection with the defense of such claims. The covenants of the Seller in this paragraph 13 will survive the termination of this letter of intent.

14. Termination. Subject to the provisions in paragraphs 4-7 of this letter of intent, either party may terminate this letter of intent at any time by sending written notice thereof to the other party. In addition, either party may terminate this letter of intent upon the breach by the other party of the covenants contained in paragraphs 7-11 of this letter of intent. The written notice must state the grounds upon which the party relies to terminate this letter of intent.

If you are in agreement with the terms of this letter of intent, please sign in the space provided below and return a signed copy to __________________ by the close of business on ____________________________, 1995 and return a signed copy to __________________ by the close of business on ________________________, 1995. If we do not receive a signed copy of this letter on or before _______, we will assume that you have no further interest in pursuing this transaction. Upon receipt of a signed copy of this letter of intent, we will proceed with our plans for consummating the transaction in a timely manner.

Very truly yours,

XYZ CORPORATION

By: _______________________
[Name and Title]

____
ABC CORPORATION

By: _________________________
[Name and Title]

Appendix 3: Sample Non-Binding Letter of Intent

Ladies and Gentlemen:

This letter of intent sets forth our understanding as to the proposed terms of the sale to ________________ (the "Purchaser") by ___________________ (the "Seller") of the Seller's business (the "Business") located in _______________ and engaged in ___________________________. This letter is not a binding or legally enforceable agreement and imposes no obligations upon nor grants any rights with respect to the acquisition of the Business to the parties hereto; the rights and obligations of the parties with respect to the acquisition of the Business will be set forth in a definitive agreement to be executed by the parties. However, the parties intend that the covenants contained in paragraphs 5-11 of this letter of intent be enforceable and binding; the rights and obligations contained in paragraphs 5-11 will inure to the benefit of the parties' successors and assigns.

1. Purchased Assets and Assumed Liabilities. At the closing, the Purchaser will purchase substantially all of the assets associated with the Business, including all inventories, all accounts and notes receivable, and all contracts and agreements, and will assume as of the closing date only those liabilities and obligations (i) arising in connection with the operation of the Business by the Purchaser after the closing date, and (ii) arising after the closing date in connection with the performance by the Purchaser of the contracts and agreements associated with the Business.

2. Purchase Price and Purchase Price Adjustment. The purchase price will be based on the [audited) [unaudited) balance sheet of the Business dated __________________________, and will be subject to a post-closing adjustment to account for any change in the accounts receivable and inventory of the Business from ______________________ to the closing date.

3. Seller's Covenants. The Seller will continue to operate the Business consistent with past practice, and will cooperate with the Purchaser in its efforts to obtain third-party financing.

4. Conditions to Obligation. Neither the Purchaser nor the Seller will be obligated to consummate the acquisition of the Business contemplated hereby unless and until the parties have reached a definitive agreement as to all of the essential terms of the acquisition, and Purchaser has obtained financing for the transaction

satisfactory to the Purchaser, in its sole discretion. In addition, neither the Purchaser nor the Seller will be obligated to consummate the acquisition of the Business unless the Purchaser has obtained all certificates, permits and approvals that are required in connection with Purchaser's operation of the Business, and has satisfactorily completed its due diligence investigation as described in paragraph 5 of this letter of intent on or prior to ________________.

5. Due Diligence. The Seller agrees to cooperate with the Purchaser's due diligence investigation of the Business and to provide the Purchaser and its representatives with prompt and reasonable access to key employees and to books, records, contracts and other information pertaining to the Business (the "Due Diligence Information").

6. Confidentiality; Non-competition. The Purchaser will use the Due Diligence Information solely for the purpose of the Purchaser's due diligence investigation of the Business, and unless and until the parties consummate the acquisition of the Business the Purchaser, its affiliates, directors, officers, employees, advisors, and agents (the Purchaser's "Representatives") will keep the Due Diligence Information strictly confidential. The Purchaser will disclose the Due Diligence Information only to those Representatives of the Purchaser who need to know such information for the purpose of consummating the acquisition of the Business. The Purchaser agrees to be responsible for any breach of this paragraph 6 by any of the Purchaser's Representatives. In the event the acquisition of the Business is not consummated, the Purchaser will return to the Seller any materials containing Due Diligence Information, or will certify in writing that all such materials or copies of such materials have been destroyed. The Purchaser also will not use any Due Diligence Information to compete with the Seller in the event that the acquisition of the Business is not consummated. The provisions of this paragraph 6 will survive the termination of this letter of intent.

7. Employees of the Business. Until the consummation of the acquisition of the Business, or in the event that the parties do not consummate the acquisition of the Business, the Purchaser will not solicit or recruit the employees of the Business.

8. Exclusive Dealing. Until ________________, or the termination of this letter of intent as provided for in paragraph 12, the Seller will not enter into any agreement, discussion, or negotiation with, or provide information to, any other corporation, firm or other person, or solicit, encourage, entertain or consider any inquiries or proposals, with respect to (a) the possible disposition of a material portion of the Business, or (b) any business combination involving the Business, whether by way of merger, consolidation, share exchange or other transaction.

9. Public Announcement, All press releases and public announcements relating to the transaction contemplated by this letter of intent will be agreed to and prepared jointly by the Seller and the Purchaser.

10. Expenses. Each party will pay all of its expenses, including legal fees, incurred in connection with the acquisition of the Business, whether or not the transaction is consummated.

11. Indemnification. The Seller represents and warrants that the Purchaser will not incur any liability in connection with the consummation of the acquisition of the Business to any third party with whom the Seller or its agents have had discussions regarding the disposition of the Business, and the Seller agrees to indemnify, defend and hold harmless the Purchaser, its officers, directors, stockholders, lenders and affiliates from any claims by or liabilities to such third parties, including any legal or other expenses incurred in connection with the defense of such claims. The covenants of the Seller in this paragraph 10 will survive the termination of this letter of intent.

12. Termination. Either party may terminate the negotiation of a definitive agreement at any time and for any reason.

If you are in agreement with the terms of this letter of intent, please sign in the space provided below and return a signed copy to ______________ by the close of business on ___________________________, 1995. If we do not receive a signed copy of this letter on or before _________, we will assume that you have no further interest in pursuing this transaction. Upon receipt of a signed copy of this letter of intent, we will proceed with our plans for consummating the transaction in a timely manner.

Very truly yours,

XYZ CORPORATION

By: _____________________

[Name and Title]

____

ABC CORPORATION

By: ______________________

[Name and Title]