

RESTAURANT PURCHASE AND SALE AGREEMENTS

© 2016 All Rights Reserved
Donald M. Bernstein, Esq.
Bernstein Redo, P.C.
1177 Avenue of the Americas, 5th floor
New York, New York 10036
212.651.3100
donald@brpclaw.com

1. OPTIONS FOR THE NATURE OF THE TRANSACTION

There are alternative methods to acquire ownership of a restaurant or bar. The most typical, and usually the safest for the purchaser, is a purchase and sale of assets. A purchaser may also acquire the business by purchasing the stock or membership interest of the entity that currently owns the business. This carries some risks that do not exist in the asset purchase.

A. Sale of Assets.

Generally in an asset sale all or specifically identified property owned by the seller is conveyed through a bill of sale and other documents to the purchaser. This includes, among other assets depending on the specifics of the deal, the seller's lease, goodwill, identified trade fixtures and equipment, and inventory. Assets such as cash and accounts receivable are typically excluded.

Intellectual property rights, such as trademarks, trade names may also be conveyed, as well as seller's telephone number. Regarding the trade fixtures and equipment, it is advisable to prepare a schedule of all such items so that there is no dispute if after the closing, during the pre-closing inspection, the purchaser finds items missing that he or she thought were included in the sale.

If liquor is being transferred in the sale, the contract must provide that seller will apply for and obtain a liquidator's permit from the New York State Liquor Authority ("SLA"). Alcoholic Beverage Control Law, § 99-b(1)(f). If no liquor is conveyed, the contract should state that prior to closing seller will dispose of liquor in a lawful manner.

B. Special Liabilities on Asset Sale.

The contract of sale should provide that the assets being conveyed are and will at closing be free and clear of any and all liens or encumbrances. The purchaser should obtain clear title. There are, however, some special liabilities that exist even in an asset sale that must be addressed by the attorneys for the seller and/or purchaser.

One of the most important is the purchaser's transferee liability for any of seller's unpaid sales taxes up to the amount paid by purchaser to seller. The seller's principals are also personally liable for their company's unpaid tax liability. (Tax Law §§ 1133 and 1141(c)). As discussed below, part of purchaser's attorney's due diligence is to inquire about potential sales tax liability and to obtain sufficient security to ensure that the purchaser will not be required to incur any such liability.

Certain shareholders of the seller may also have personal liability for unpaid wages. See, Business Corporation Law § 630. A seller transferring its assets should ensure that there are sufficient funds to pay all wages so that there is no personal liability.

There are also specific federal laws and regulations regarding the mass layoff of employees. When this rule applies, sixty days' advance notice to employees is required. If the seller anticipates a mass layoff, it is imperative to consult with employment counsel to determine if the federal statute is applicable and to ensure compliance. See Worker Adjustment and Retraining Notification Act (WARN Act), 29 U.S.C. Chapter 23.

Seller's should also ensure compliance with the Perishable Agriculture Commodities Act of 1930 (7 U.S.C. § 499e). If that Act, known as PACA, is not complied with, sellers are considered trust beneficiaries, assets may be frozen and in some instances there may be personal liability to unpaid vendors.

A corporate seller should also take care to pay any creditors to whom there has been a personal guaranty delivered.

C. Sale of Stock and Membership Interest.

For obvious reasons, a sale of stock or membership interest is less frequently used. A purchaser, acquiring nearly all or all of the equity, will inherit any and all liability including ongoing litigation of that entity, known or unknown. This requires a significant amount of due diligence. The purchaser may also inherit the corporation's original tax basis and may not be able

to step up the basis to the amount being paid for that equity. An accountant or tax counsel should be consulted with respect to this tax issue.

It is likely that there may exist stipulations regarding the seller's liquor license and its method of operation of the premises. While in an asset sale the purchaser may be required to submit to and agree to those stipulations, where a stock or membership interest sale takes place certainly the purchaser will. It is therefore imperative to know exactly what those restrictions are. For example, if the seller has stipulated to operate a fine dining Italian restaurant closing at midnight, the purchaser of the stock of that licensed entity will be required to adhere to that same method of operation and restrictions.

In a stock sale the SLA application is easier, and if the purchaser is requiring less than 80% of the equity no prior community board notification of the application is required. It is also possible, depending upon the structure of the corporate seller, and where in the chain of ownership the purchaser is acquiring the equity, that landlord's consent under lease may not be required. In *Cellular Telephone v. 210 East 86th Street*, 44 A.D.3d 77 (1st Dept. 2007), a lease required the landlord's consent to a transfer of the stock in tenant. The stock conveyed was at a removed parent level. The landlord's consent was held not to be required. Of course the specific lease terms will control.

D. Purchase From Bankruptcy.

Contracts to buy the assets of a debtor are always subject to higher and better offers and the court will schedule an auction. (See, e.g., 11 USC § 363.) The title delivered to the purchaser pursuant to court order is usually clean and free from liens or creditors. Landlord consent may not be required, the terms of the lease notwithstanding.

2. ATTORNEY'S PRE-CONTRACT DUE DILIGENCE

A. Existing Lease.

One of the most important assets to be conveyed that must be carefully reviewed is the seller's lease. While the terms of the lease most likely will be non-negotiable (although there may be instances where a purchaser will condition the transaction on re-negotiating or extending the

lease, or even entering into a new lease) nevertheless purchaser and its counsel must be aware of its terms.

Clearly purchaser must know what the term of the lease is, the rent, the existence of any renewal term, and the method of determining rent for the renewal term to make sure it is not an unenforceable agreement to agree. See *Martin Deli v. Schumacher*, 52 N.Y.2d 105 (1981). While some restaurant leases may have a broad use clause, such as “restaurant and bar,” others may describe the type of food or provide other qualifications. For example, if the use clause provides for a “white table cloth Italian restaurant” the purchaser will be restricted to that use or it will have to condition a closing on a modification of the lease.

The lease assignment and sublet provisions are critical. Almost certainly the landlord’s consent will be required and there may be conditions to granting that consent. Sometimes that includes an increase in rent, sharing in net proceeds received by the seller, an increase in the security deposit, assignment or sublet fees, etc. If those fees are required to be paid to the landlord the purchaser must be aware of it and there may be a negotiation between the parties regarding the allocation of those costs.

Though rare, it is not unheard of for a lease to have recapture rights. In one form or another such a provision may allow the landlord to recapture the premises, that is to terminate the lease, in the event the seller-tenant requests the landlord’s consent to an assignment. Seller’s counsel must be aware of this before such consent is requested.

It is also imperative that the purchaser know that upon becoming a tenant by assignment, it will have the same rights to assign the lease or sublet the premises, and that the assignment rights are not limited to the named original tenant.

A review of the lease must include any guaranty, or more likely a good guy guaranty executed in connection therewith, if any. This is important for both the seller and purchaser. On the seller’s end, if its principals have executed a lease guaranty it is important for them to be released from that guaranty upon a sale of the business. This may self-operative. If it is not, counsel for seller should consider conditioning the transaction on having the landlord agree to the lease seller’s principal from the guaranty and in lieu thereof to replace with a good guy guaranty from the principals of the purchaser. If the landlord is unwilling to do so, seller’s counsel must

carefully review the ramifications of seller's principals remaining on a guaranty when possession of the premises is in the hands of a purchaser over whom the seller's principals have no control.

Purchaser must also review the good guy guaranty if the lease, guaranty and/or the contract requires the purchaser's principals to execute and deliver one to the landlord.

Also review what the tenant's obligations are at the end of the lease. Typically a lease requires the tenant to remove all of its trade fixtures and equipment, and sometimes installations and return the premises to its original condition.

The lease must also be carefully examined for termination rights, default provisions, and all other material terms.

B. Status of Seller's Liquor License.

A copy of the contract of sale executed by the parties will be submitted by purchaser to the SLA in connection with its liquor license application. Be sure that whoever is signing the contract on behalf of the seller has been disclosed to and approved by the New York State Liquor Authority. If whoever signed was not disclosed to the Authority, it will result in the Authority bringing an availing charge against the seller and denying the purchaser's liquor license application.

Purchaser must also determine if there are any pending liquor license violations against the seller. This can be done by a FOIL request. If there are any, the SLA will not approve purchaser's application until those charges are resolved. The contract of sale should address this issue. Counsel for purchaser may want to require the seller to negotiate a monetary penalty and resolve any existing SLA violation as quickly as possible. The seller contesting the charges and going through a hearing could take many months and this will hold up the closing of the transaction.

The purchaser should also investigate any restrictions agreed to with either the New York State Liquor Authority or the local community board regarding the operation of the licensed business. Even though it is an asset sale and the purchaser is not bound by those restrictions, it will provide a good idea as to what the SLA or the community board will agree to and/or permit.

C. Sales Taxes.

As discussed above, under the Tax Law the purchaser may be responsible for any of seller's unpaid sales taxes. The purchaser would be wise to ask seller to produce copies of prior years' sales tax returns with proof of payment to at least be secure in knowing that sales taxes were reported and paid. Even with that, as discussed below, escrow should be held.

D. Liens and Judgments.

Prior to entering into the contract the purchaser must run a UCC, judgment and lien search against the assets of the seller. This can be ordered through a title company. A copy of that search once completed should be provided to the seller. The parties will have to discuss the satisfaction, and proof thereof, of any encumbrances prior to closing, or may discuss an appropriate escrow if the closing funds are going to be used to discharge any of those encumbrances. The search must be updated by purchaser immediately prior to closing to confirm the removal of any liens found to exist, and to see if there are any new liens or judgments.

E. Service Contracts and Equipment Leases.

Do not assume that all of the trade fixtures and equipment located in the premises are owned by seller. Some may be leased. Seller should provide purchaser with any equipment leases and the parties have to discuss and negotiate what leases, if any, will be assumed by the purchaser. If purchaser will not assume any service contracts, seller will have to evaluate any costs for cancelling the contract, and should also know whether the seller's principal executed any personal guaranty with respect to those contracts.

F. Review of Brokerage Agreement.

If a broker is involved in the transaction, seller's counsel (or purchaser's if purchaser is paying the commission) should negotiate a written brokerage agreement prior to entering into a contract of sale with the purchaser. The seller would be advised to make sure that the brokerage agreement provides that any commission is not earned, due or payable unless and until the closing actually occurs. Otherwise, the broker may have earned his or her commission merely by producing a purchaser who is ready, willing and able, even if the matter does not go to contract or does not close.

G. Legal Use of the Premises.

The New York State Liquor Authority will not issue a liquor license to purchaser unless the intended use of the premises is legal and conforms to all applicable building codes. SLA Rule 48.3. The SLA typically will require a certificate of occupancy, or a temporary certificate of occupancy, with the permitted use. (For example, eating and drinking establishment, or use group 6 for a restaurant or bar.) Do not assume that because seller has a liquor license that it is legally using the premises or that there is a proper certificate of occupancy. In certain instances where a building predates the issuance of certificates of occupancy and the total occupancy of the premises to be conveyed is under 75, the SLA will accept a letter of no obligation from the Department of Buildings allowing the intended use.

3. PURCHASE PRICE AND ADJUSTMENTS

The purchase price will consist of a deposit upon execution of the contract (usually 10%) with the balance paid at closing, or some balance of the price to be paid at closing and the rest deferred over a period of years. If deferred, there are a number of security devices that the seller will want to consider in order to secure that.

Adjustments to closing typically include the lease security deposit, rent and other charges under the lease, possible vacation accruals, and liquor inventory if it is included in the sale.

If the seller has received deposits for pre-booked events, the corporation will have to honor those agreements if the purchaser is acquiring the business through a stock purchase. On an asset sale, the purchaser would not be required to honor those agreements. If it elects to do so, however, there should be an adjustment at closing for those prepaid deposits.

4. SECURITY ON DEFERRED PORTION ON PURCHASE PRICE

If a portion of the purchase price is being paid to seller over a period of years or some other term, at closing the purchaser will execute a promissory note, or series of notes made payable to seller. In order to secure those payments there are a number of devices that the seller may use.

First, seller should obtain a security interest in all of the trade fixtures, equipment and other assets being conveyed and should file a UCC Financing Statement with respect thereto. Attention should be given as to whether the notes provide that they are assumable by a subsequent purchaser,

or are due in the event the immediate purchaser thereafter sells its business. If due on sale, the security agreement should so provide.

A security agreement on fixed assets alone is not particularly adequate. A stronger device is a collateral assignment and sublease. Instead of an outright assignment of the lease at closing from seller to purchaser, the lease assignment is deposited and held in escrow at closing under an escrow agreement that provides that it is to be released from escrow and will become an effective instrument only upon full payment of the notes representing the deferred portion of the purchase price. In the interim, the purchaser is given a sublease by seller, which sublease provides that upon any default in payment of the notes, with notice and right to cure, the sublease can be terminated. This would allow the seller, if the notes are unpaid, to commence a holdover proceeding against the purchaser and retake possession of the premises. The landlord's consent is likely required in order for the parties to hold the assignment of lease in escrow and enter into an interim sublease. Moreover if there is a default by purchaser and seller retakes possession, the seller will have to pay rent to the landlord to preserve its leasehold. The seller will also be without a liquor license when it retakes possession. Nevertheless this is an important tool despite its drawbacks.

It is also noteworthy that a court may not recognize a sublease pledged as security for a debt to be a true sublease. *Cagliostro v. Galgano*, 69 Misc. 321.

Another security device the parties can consider is a personal guaranty by the principals of purchaser of the promissory notes. Purchaser's principals will have to determine if they are willing to provide a personal guaranty; if one is requested.

In a stock transaction, a seller would obtain a lien on, or collateral assignment on purchaser's shares.

5. CONTINGENCIES TO CLOSING

Typically the contract of sale will provide that it is contingent upon the landlord's consent to any transactions related to the lease, whether that is an outright assignment of the lease, and/or a sublease. A stock sale may also be treated as an assignment under the lease. As noted above the standard for the landlord determining whether to consent, the requirements upon the seller and

purchaser, and any conditions to consent must be carefully reviewed and may have to be addressed in the contract of sale.

It is possible that the lease would have to be modified or even extended as a condition for purchaser agreeing to enter into a contract. For example, the term of the lease may be too short, the use clause may have to be changed, or other modifications are important to the purchaser. In such event, the contract of sale and obligations to close may be expressly conditioned upon the landlord agreeing in writing to make the required changes. Purchaser may also want to make substantial changes and renovations to the premises and may want the landlord's consent to those changes as a condition to closing.

As noted above, leases are often accompanied by some form of personal guaranty. Some guaranties provide that upon a sale of the business and assignment of the lease the seller's principals will be released from their guaranty on the condition that the purchaser's principals execute and deliver to landlord a similar guaranty. If the lease or guaranty does not so provide, the seller may want to condition the closing upon the landlord agreeing to release seller in exchange for a new guaranty from purchaser's principals.

Purchaser's obligations under the contract should also be conditioned upon the truth and accuracy of seller's representations.

A liquor license contingency, in one form or another, is also critical to the transaction and is discussed below.

6. LIQUOR LICENSE CONTINGENCY

It is critical for the purchaser to know that as of closing it will be able to legally sell and serve alcoholic beverages. In order to do so, it will have to file an application with the SLA. Where there is a sale of assets, the purchaser may also file an application for a Temporary Retail Permit. That Permit, if approved and issued, allows the purchaser to legally sell and serve alcoholic beverages during the period of time that its transfer application is pending. ABC Law § 97-a.

The Temporary Retail Permit may only be obtained if there is a sale of assets and the purchaser is applying for the same class of license as the seller had. In other words, if seller only

had a wine and beer license, a purchaser cannot obtain a Temporary Retail Permit for a full liquor license. The seller must also be open for business within the thirty day period prior to the time a purchaser files its Temporary Retail Permit application. See ABC Law § 97-a(1)(c). So if the seller is closed for business for more than thirty days prior to the date purchaser files, no Temporary Retail Permit will be issued.

The concern a purchaser will have, however, is that issuance of a Temporary Retail Permit is no assurance that the SLA will approve the transfer application. Hypothetically a purchaser can be given the Temporary Retail Permit, close on the transaction, and find out months later that its transfer application was denied. If the purchaser wants absolute certainty, it should wait until the full transfer application is approved as a condition to closing. However the purchaser may consider closing on a Temporary Retail Permit if it is satisfied that there are no substantial risks to denial and provided that the local community board has recommended to the SLA approval of the application. This has to be carefully evaluated on a case by case basis and the conditions must be clearly spelled out in the contract of sale.

The SLA will not approve purchaser's application for either a transfer of the license or a Temporary Retail Permit if there are any violations pending against the seller's license. See SLA Divisional Order 589-A (1990). Purchaser should not only obtain a representation that there are no violations, it should also conduct its own investigation including making a FOIL request to the SLA.

To close on a Temporary Retail Permit, purchaser's counsel must also ascertain that none of the purchaser's principals suffer any statutory disqualification under the Alcoholic Beverage Control Law, that its source of funds is legitimate and can be documented, and that the premises are licensable.

In the event of stock sale or transfer of a membership interest, the contract and closing should be conditioned upon the SLA's approval of a corporate change application. Any transfer of 80% or more of the equity requires prior community board notification. The transfer however of any percentage requires SLA approval.

7. RISK OF LOSS

The contract of sale usually states that the risk of loss is on the seller. Therefore if there is a casualty such as fire, flood or other destruction of the premises, the contract may be cancelled and the contract deposit is returned to the purchaser.

8. SELLER'S RESTRICTIVE COVENANT

When a purchaser pays money for an ongoing business, he or she does not want the seller to open a competing business across the street. This is particularly important if the ongoing business is continued; less important if the purchaser is not interested in seller's trade name, type of cuisine, method of operation, customer base, etc. The restrictive covenant must be limited in scope and duration. *Brown & Brown Inc. v. Johnson*, 2014 WL 486703 (4th Dept. 2014).

If there are notes representing the deferred portion of the purchase price, the restrictive covenant should be cancelled if the purchaser defaults in payment of those notes.

If seller's principals own any other businesses within the area of the restrictive covenant, the covenant should expressly exclude those existing businesses.

9. PURCHASER'S DISCLAIMER OF REPRESENTATIONS

After the closing, the last thing a seller wants is for the purchaser to claim fraud or misrepresentation in connection with the sale. It is important for the seller to therefore obtain in the contract an express disclaimer of representations on the part of the purchaser, except for those expressly set forth therein.

Courts have held that a general integration clause in the contract, or general disclaimer of representations, may be insufficient to bar a purchaser from bringing a claim for fraud. *Danaan Realty Corp. v. Harris*, 5 N.Y.2d 317. See also, Smith and Hall, *Exceptions to the Enforceability of Contractual Disclaimers of Reliance*, N.Y.L.J., June 18, 2010. Rather a specific disclaimer of reliance is essential.

For the seller's benefit the clause should specifically state that purchaser acknowledges that no representations or warranties have been made by seller, broker or any other person relating to any matter regarding the assets or business to be conveyed, including for example, profits, expenses, income, taxes due, liens or encumbrances, executory contracts, debts, liabilities, etc. It

is also critical that purchaser not only disclaim that representations were made, but specifically states that purchaser disclaims reliance upon any representations, warranties or statements.

10. SELLER'S REPRESENTATIONS

There is a number of representations a seller should make for the benefit of the purchaser in the contract of sale. Copies of form asset purchase and sale agreements are annexed hereto contain some of those representations in detail. Some of the critical representations are set forth below, with the understanding that representations may need to be added or deleted as required under the particular terms of any transaction:

a. Identification of the lease, representation that it is in full force and effect, that all rents have been paid to date, that there are no modifications and no defaults or notices of default, or conditions with which the passage of time would be a default.

b. All permits including liquor licenses, health permit, place of assembly permit, sidewalk café permit, as the case may be, are in full force and effect, and that there are no cancellations or other proceedings to revoke them.

c. There are no outstanding contracts or equipment leases except as expressly set forth in the contract.

d. Purchaser may want seller to represent seller's current share of real estate tax escalations under the lease, if applicable.

e. Seller has had no work performed or materials supplied to the premises within the past eight months that could result in a mechanic's lien.

f. All of seller's sales taxes returns have been duly filed and all sales taxes due paid.

g. There is no litigation or judgment pending against seller, and no audits by any governmental agency.

h. All property being conveyed is owned by seller and is free and clear of any and all liens and encumbrances.

i. There are no condemnations proceedings pending against the premises.

j. The execution of the contract is authorized by all of the shareholders or members of the seller.

k. There is no union.

l. All of the property and equipment to be conveyed is in working order.

- m. There are no pending infringement claims on seller's intellectual property.
- n. Representations regarding compliance with environmental laws.

In a contract for the sale of stock or a membership interest, the list of representations will be more detailed as they will relate to ownership of the stock or membership interest to be conveyed.

A purchaser may want these representations to be made not only by the corporate seller but by its individuals as well. It is likely that after the closing, particularly if it is an all cash deal, the seller entity may have no assets with which to satisfy any claim for fraud or misrepresentation in the event any of the representations are proved to be false.

Representations and warranties typically are made as of the date of contract and as of the date of closing. The purchaser will also want the representations to survive closing. A seller may want to limit the period for which they may survive and this is an issue to be negotiated between the parties.

11. SELLER'S INDEMNIFICATION

Purchaser wants to ensure that it is not responsible for any of seller's pre-closing obligations, liabilities or debts, except to the extent any may have been expressly assumed under the terms of the contract of sale. If there are any such claims, including but not limited to the claims of taxing authorities (as noted above purchaser may be liable for seller's unpaid sales taxes for the period prior to closing), purchaser will want seller and seller's principals to execute an indemnification. The contract should require the delivery of an indemnification at closing. The indemnification should include court costs and attorneys' fees.

12.

PURCHASER'S REPRESENTATIONS

Since it is seller that is delivering title, there are not as many representations expected of a purchaser. The seller may want the purchaser to state in the contract that it represents it has examined the lease and all service contracts that have been delivered to it and all are deemed acceptable. Purchaser's authority to enter into the agreement is also a standard representation.

The purchaser may also be asked to make certain representations regarding its anticipated liquor license application. This typically includes a representation that the purchaser and its principals are proper persons to obtain a liquor license, that they suffer no statutory disqualification, that they have never had a liquor license revoked for cause, and that they have sufficient funds from acceptable sources to the SLA to complete the transaction.

A seller may also require purchaser to give seller an indemnification, which is the reciprocal of the seller's indemnification as discussed above, protecting seller against any claims or liabilities that arise after closing.

13.

ESCROW FOR SELLER'S SALES TAXES

It is nearly impossible to ascertain whether or not seller may have any outstanding tax liability for the period prior to closing. Even if the seller has filed sales tax returns and paid taxes thereon, the state could audit those returns.

Ten (10) days before closing a notice (Form AU-196.10) is required to be sent to the New York State Department of Taxation and Finance notifying the State of the intended bulk transfer and including a copy of the contract of sale. The State then will send a letter either releasing the purchaser from any liability for seller's unpaid sales taxes, if any, or will notify the parties that the purchaser is not released and that it may be held responsible for seller's unpaid taxes. It is also likely that the Department of Taxation and Finance will not respond at all by the time set for the closing.

In either event, the contract of sale should provide for money to be held in escrow to secure against purchaser's potential liability for seller's unpaid sales taxes. The amount of the escrow must be negotiated between the parties. The agreement should provide that that the escrow is not

to be released to seller until the parties have obtained from the Department of Taxation and Finance a release of purchaser.

If the transaction involves the payment of promissory notes, those notes can be deposited in escrow and the escrowee would in that instance collect the monthly payments and hold them until the release is obtained.

14. BETWEEN CONTRACT AND CLOSING

The contract should provide that between contract and closing seller does not undertake any obligations other than normal necessary repairs to the premises and continuation of business in its ordinary course. If there are material or adverse changes the parties should address what would occur in that instance and if the contract may be cancelled and the deposit returned.

After the contract is signed seller should make a request to the landlord for consent to the assignment and/or sublease as the case may be and provide such information and documentation as called for in the lease.

Purchaser must also begin the process for filing its application for a transfer of the liquor license, and as part of the transaction a Temporary Retail Permit. In fact the application process, starting with notification to the community board, can begin before the contract is actually signed. It is important, however, to obtain seller's consent to this since notification to the community board will become a matter of public record and seller may not want that to happen before the contract of sale is actually signed and seller has received the deposit.

There may be instances where there are liens outstanding against seller that are going to be satisfied out of the closing funds. In such event, seller should provide to purchaser prior to closing a pay-off letter from the lien holder or secured creditor with the amount due up to at least five days after closing.

As close to the closing date as possible purchaser should inspect the premises to ensure that all is in order and that if seller has represented all trade fixtures and equipment to be in working order that it is. Purchaser should also update the UCC, judgment and lien search. Purchaser will also need to provide an insurance certificate to landlord under the lease and this should be in place prior to or as of closing.

If seller's closed stock of liquor is going to be conveyed to purchaser, prior to closing the parties should prepare a written inventory. Seller must also prepare an application for a liquidator's permit to be filed in connection with purchaser's transfer application.

15. CLOSING AND CLOSING DOCUMENTS

It is advisable to have closing documents prepared in advance so they can be reviewed by counsel. Closing adjustments should be calculated as well. A list of closing documents should be prepared. Typically they include the following:

- a. Assignment of lease and assumption by purchaser. Be sure that the lease assignment includes the security deposited thereunder;
- b. Purchaser's principals' good guy guaranty, if necessary, and any releases of existing guaranty;
- c. Consent by landlord to assignment and/or sublease. The seller should also bring the original lease to closing which will be delivered to purchaser;
- d. New lease or extension of lease if the transaction is so conditioned;
- e. Bill of sale with affidavit of title that contains seller's restrictive covenant;
- f. Resolution signed by seller's managing members or shareholders authorizing the sale;
- g. Seller's indemnification of purchasers for pre-closing obligations as discussed above;
- h. Promissory notes, security agreement, sublease and UCC if there is a portion of the purchase price that is deferred;
- i. Agreement for escrow in connection with purchaser's possible obligations for seller's sales taxes;
- j. Delivery of any assignable warranties;
- k. Assignment of any intellectual property that may be part of the transaction;
- l. Bulk sales notification to the state if that had not been sent prior to closing. Also a check from purchaser in payment of sales taxes on that portion of the purchase price allocated to the sale of seller's trade fixtures and equipment;
- m. Any equipment leases or service contracts being assigned to the purchaser;

n. Purchaser's indemnification of seller for any post-closing obligations, including those under the lease;

o. The lease may require that delivery of the lease assignment or other documents relating thereto will be delivered to landlord within a certain period of time. Confirm this and if required prepare letter to landlord dated as of closing with duplicate original lease assignment and assumption;

p. UCC termination statements for any liens or encumbrances that are shown on any judgment or lien search;

q. Closing checks;

r. Seller's original liquor license certificate, surrender petition, and letter authorizing purchaser's counsel to surrender seller's license;

s. Liquor inventory.

On a stock purchase, the seller's stock certificates will be transferred to purchaser with stock powers (or an assignment of membership interests), seller is to deliver resignations as officers and directors (or managers), all corporate records and documents will be delivered to purchaser.

16. POST-CLOSING

After the closing subject to the terms of the lease a duplicate original lease assignment and assumption should be sent to the landlord.

The sales tax on that portion of the purchase price attributable to seller's trade fixtures and equipment must be sent to the New York State Department of Taxation and Finance.

UCC financing statements should be filed in connection with any security agreement.

Utility companies must be notified and accounts placed in purchaser's name.

Insurance certificates from purchaser should be delivered to landlord as required under the lease.

Counsel for each party should prepare appropriate closing statements.