



# Building Blocks of Complex Deals

Eric E. Johnson

[ericejohnson.com](http://ericejohnson.com)



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## Building Blocks

- Introductory matter
- Definitions
- Representations and warranties
- Covenants
- Conditions precedent
- Remedial provisions
- Operative provisions
- Signature blocks

## Form of contract

- Normal
- Letter agreement
- Old fashioned / fancy

## Normal agreement intro

### **PURCHASE AGREEMENT**

This asset purchase agreement is dated March 12, 2009, and is between ENORMO ENTERTAINMENT, INC., a Delaware corporation ("Enormo"), and FOLKSTONE FILMS CORP., a New York corporation ("Folkstone").

## Definitions

- In-line, *or*
- Definitions section
  - Do not put operative provisions in the definitions. It is bad drafting.

## Representations, Warranties, and Covenants

- Representation – statement of fact intended to be relied upon
- Warranty – assurance of a fact coupled with an implicit indemnification obligation if false
- Covenant – ongoing promise to act or refrain from acting, to maintain a certain factual condition

## Reps and Warranties

- Little distinction in practice (because a contract usually specifies remedies in case reps and warranties are false)
- Snapshot in time
- Used to smoke out facts
  - Cf. depositions
- Used to allocate risks

## Kinds of representations

- About the contract “enforcability representations”
- Subject-matter representations
- Representations about the parties

## Representations: Exceptions

- “except for those disposed of in the normal course of business ...”
- “except for those set forth on Schedule G”

## Bringdowns

- make the reps and warranties current as of the closing date

## Bringdowns - examples:

- Schedule F describes all of Folkstone's Script Options as of the Closing Date.
- All of Folkstone's Script Options stands are described in Schedule F or have been introduced in accordance with Section 28-6.
- All Script Options are described in Schedule F, which may be updated from time to time with the consent of Enormo, such consent not to be unreasonably withheld.

## Survival of representations

- Unless otherwise provided for, a representation is a snapshot of facts at signing
- Representations may specified to "survive the closing"
- Representations may be specified to merge or terminate at closing
  - As is / where is

## Covenants

- Affirmative
- Negative (or “restrictive”)
- Financial

## Covenants: Exceptions

- Carveouts
  - The Operator shall not make repairs or modifications to the test theater, except for those that are required for safe operation.
- Baskets
  - The Operator shall not make any repairs or modifications to the test theater, except for ordinary maintenance costing in aggregate no more than \$10,000.

## Specification of Remedies

- Specify remedies if covenants are breached or representations are false
  - Specific performance
  - Liquidated damages
  - Time to cure
  - Penalties

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## Conditions Precedent

- Conditions that must be satisfied before performance is required
- Timing issues: delayed closing
- “Outs”

## Common conditions precedent

- Breach of covenants or reps
- Bringdown of representations
- Delivery of certified documents
- Evidence of corporate action
- Incumbency certificate
- Government approvals
- Third-party consents
- Legal opinions