

# M&A NOTES

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*An unsigned acquisition agreement may nevertheless be held to be binding on the parties. It is very important that parties to a negotiation agree in writing that only a fully executed definitive agreement will be legally binding on the parties.*

In the recent case of AIH Acquisition Corp. v. Alaska Industrial Hardware, (S.D.N.Y. July 1, 2003), the court held that the parties had entered into a final and binding agreement notwithstanding that formal signatures had not yet been affixed. The court deemed the lack of signatures to be a “mere formality” and the contract to be legally enforceable by the Plaintiff.

AIH Acquisition Corporation (“Acquisition”) entered into a commitment letter to purchase Alaska Industrial Hardware (“AIH”). Acquisition and AIH thereafter negotiated extensively on the terms and conditions of a written Stock Purchase Agreement and agreed to all the “material terms in final form with signatures com-

ing the next day as a mere formality.” In the course of negotiations, Acquisition incurred substantial expense in conducting its due diligence review of AIH.

The form of proposed definitive Stock Purchase Agreement was sent by Acquisition to AIH by e-mail with a cover message stating that both parties had agreed that it was “final without qualification.” AIH then refused to execute the Agreement. Acquisition sued for specific performance. The court held that the Stock Purchase Agreement was final and binding even though signatures had not been affixed and granted Acquisition the motion for specific performance.

This case highlights the importance of including in a confidentiality agreement or similar agreement in principle or letter of intent an explicit written statement to the effect that neither party will be legally bound unless and until a contract is formally executed and delivered.

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Should you have any questions about the matters addressed in this issue of *M&A Notes*, please contact the following Kirkland & Ellis authors or the Kirkland & Ellis partner you normally contact.

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