

CHAPTER 2C

Principal Provisions of Merger and Acquisition Agreements

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§ 2C.01 Introduction

In Chapters 1, 2 and 2A we reviewed the business and legal settings of mergers and acquisitions and the principal legal concepts that come into play in planning a merger or acquisition. In Chapter 2B we reviewed the business and legal due diligence activities that confirm the specific information about the businesses of the parties needed to document a particular transaction. The purpose of this Chapter is to review the principal provisions of merger and acquisition agreements. Although there are substantive and procedural differences between the various forms of agreement, they share much in common: specification of the parties, recitals, description of the transaction, the consideration to be paid, the mechanics of transferring or exchanging the consideration, representations and warranties of the buyer and the seller, covenants, conditions, provisions relating

to termination and miscellaneous matters such as notices, governing law, interpretation, further assurances and especially in some transactions, guaranty and indemnification provisions.

In drafting merger or sale documents, it would seem obvious that the parties' counsel should exercise due care to assure that all the terms of the agreement are reflected. Sometimes that does not happen. In *Cerberus International, Ltd. v. Apollo Management, L.P.*,¹ an agreement to pay shareholder/option holders for their options was omitted. The consequences of the omission were an expensive trial and appellate litigation and embarrassment.

The model agreement that will be used to discuss these and many related matters is an Agreement and Plan of Merger between Avnet, Inc., a New York corporation ("Parent"), Alpha Acquisition Corp., a Texas Corporation that is a wholly-owned subsidiary of Parent (the "Buyer") and Kent Electronics Corporation, a Texas corporation ("Company"). The transaction is cast as a triangular merger. See § 3.03[4], *infra*. Before each Article or Section of the Agreement, there will be a separate commentary explaining its purpose.

In Volume 4 of this treatise, additional forms of agreement, from a variety of transactions in various industries, are set forth. Each of them is preceded by a comment which discusses the salient points of the particular agreement. Generally, the bold-face comments preceding each of the provisions of the sample agreement below will be helpful in analyzing the agreements in Volume 4.

AGREEMENT AND PLAN OF MERGER

By and Between

**AVNET, INC.,
ALPHA ACQUISITION CORP.**

and

KENT ELECTRONICS CORPORATION

Dated as of March 21, 2003

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¹ 794 A.2d 1141 (Del. 2002). *See also* Joyce v. RCN Corp., 2003 Del. Ch. LEXIS 69 (July 1, 2003), in which plaintiff alleged that by virtue of a mutual mistake there was a substantial disparity between the amount shareholders were to receive and the actual amount received.

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