



## SELLING A COMPANY

I. BACKGROUND → THE DECISION TO SELL IS NOT ALWAYS YOURS: INVESTORS MAY NEED AN EXIT OR A PARTNER MAY NEED TO GET OUT.

II. ROLE OF THE LAWYER → GET THEM INVOLVED EARLY; IT WILL SAVE YOU IN THE LONG RUN. LET THE LAWYER TAKE THE HEAT FOR YOU → YOU MAY NEED TO WORK WITH THESE PEOPLE GOING FORWARD. BUYERS DO ACQUISITIONS FOR A LIVING, YOU DON'T. YOUR LAWYER DOES THIS EVERY DAY.

A. ENGAGEMENT LETTER → CONTRACT WITH INVESTMENT BANKER TO SELL COMPANY. MAKE SURE IT SPELLS OUT HOW THE RELATIONSHIP WILL END. IF THEY INTRODUCE YOU, THEY'LL WANT A FEE, EVEN IF YOU'RE RELATIONSHIP IS LONG OVER.

B. NON-COMPETITION IS A FREQUENT COMPONENT OF THE PURCHASE AGREEMENT, THESE HAVE FAR MORE TEETH IN THE CONTEXT OF SELLING THE BUSINESS THAN IN THE EMPLOYMENT CONTEXT.

C. CONSIDERATION → COUNSEL: CASH IS KING, GET IT UP FRONT. IF YOU HAVE A KICKER, MAKE SURE YOU FEEL GOOD ABOUT THE DEAL EVEN IF THE KICKER NEVER MATERIALIZES. IF IT IS STOCK, YOU WANT LIQUIDITY AS SOON AS POSSIBLE. RESTRICTED STOCK IS NOT REGISTERED AND CANNOT BE SOLD → SOMETIMES YOU NEGOTIATE OVER TIMING OF REGISTRATION. EARN OUT: YOU CAN DESIGN A PAYOFF BASED ON THE COMPANY'S PERFORMANCE POST-CLOSING. PROBLEMS: AS YOU MOVE TOWARD A SALE, YOU EMPHASIZE CURRENT OVER FUTURE PERFORMANCE. AFTER PURCHASE, ACQUIER WANTS TO INVEST IN R+D AND DEVELOP FUTURE PERFORMANCE.

D. LEGAL FEES → LAWYER WILL TYPICALLY BILL ON AN HOURLY BASIS. FIXED PRICE DEALS WILL RESULT IN CONSTRAINTS ON YOUR LAWYER.

E. LETTER OF INTENT → SAVE FOR THE NO-SHOP CLAUSE OR AN AGREEMENT TO NEGOTIATE IN GOOD FAITH, THEY'RE NOT BINDING. THEY SET OUT THE DEAL ECONOMICS AND INTENTIONS OF THE PARTIES. YOU SHOULD ABSOLUTELY HAVE A LAWYER AT THIS POINT.

→ SOMETIMES THE PURCHASE AGREEMENT IS SIGNED FIRST.

F. DUE DILIGENCE → ACQUIER WANTS A LOT OF INFORMATION AND WANTS TO TEST IT. PURCHASE AGREEMENT INCLUDES REPRESENTATIONS AND WARRANTIES BY THE SELLER. PRE-CLOSING, BUYER SENDS HIS EXPERTS IN TO VERIFY INFO. LEGAL OPINIONS ADD A CERTAIN DEGREE OF CREDIBILITY → THEY SIGNAL TO THE OTHER LAWYER THAT THIS IS SERIOUS. THEY ARE TYPICALLY CONDITIONS OF CLOSING. A BIG ISSUE IS THAT PRINCIPAL SCIENTIST HAD A NON-COMPETITION WITH A PRIOR EMPLOYER. ALSO, ENVIRONMENTAL LIABILITIES ARE A BIG DEAL, BUT IT IS LESS INTENSE NOW. EMPLOYEE BENEFITS - PURSUANT TO ERISA - CREATES CONCERN OF UNFUNDED PENSION LIABILITIES.

III. PURCHASE AGREEMENT → SIMILAR TO INVESTOR OR LOAN AGREEMENT. COVENANTS OF COURSE INCLUDE CONDITIONS TO CLOSING. INDEMNIFICATION → CLARIFIES BUYER'S RECOURSE AGAINST SELLER AFTER CLOSING. YOU LIMIT THE TIME, TRY TO LIMIT AMOUNT OF EXPOSURE. FRAUD IS NOT COVERED. IF THERE IS AN EARN-OUT, IT WILL BE SPELLED OUT. IF YOU'RE STAYING WITH THE COMPANY, YOU NEED TO THINK THRU POST CLOSING PERFORMANCE ISSUES.