

Maximize Value in a Sale

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April 2, 2019

AGENDA

- When to Sell
- Positioning the Company for Sale/Due Diligence
- Deal Team
- Life Cycle of Deals
- Deal Structures
- Typical Deal Terms



WHEN DO I SELL? RECENT EXAMPLES

LivaNova to buy TandemLife in deal worth up to \$250m

FEBRUARY 14, 2018 BY [FINK DENSFORD](#) — [LEAVE A COMMENT](#)



WHEN DO I SELL? RECENT EXAMPLES

Exclusive: Amazon acquires Pittsburgh tech firm

Sep 25, 2015, 2:34pm EDT



WHEN DO I SELL? RECENT EXAMPLES

Business — PhillyDeals

Bentley buys Pittsburgh bridge software maker

Updated: MAY 15, 2012 — 1:36 PM EDT



by Joseph N. DiStefano [@PhillyJoeD](#)

Bentley Systems Inc., Exton, says it's purchased InspectTech Systems Inc., Pittsburgh, which makes and sells "field inspection applications and asset management services for bridges and other transportation assets."

WHEN DO I SELL? RECENT EXAMPLES



USI Acquires Employee Benefits Business from Pennsylvania's The Hartman Group

May 30, 2017

WHEN DO I SELL? RECENT EXAMPLES

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Where am I? > Article

Biogen Idec signs \$345m deal for Knopp's ALS drug

DAILY NEWS | AUGUST 19, 2010

SELINA MCKEE

1 0 Share

Biogen Idec has bagged exclusive, worldwide rights to Knopp Neuroscience's KNS-760704 (dexpramipexole) for the treatment of amyotrophic lateral sclerosis (ALS), also known as Lou Gehrig's disease, for up to \$345 million.

KNS-760704 is a novel oral neuroprotective therapy with orphan drug designation in the US, which in Phase II trials was shown to be safe and tolerable, with a favourable dose-related effect in preserving motor function and extending survival in patients with the disease.

As per the terms of the deal, Biogen Idec will take the reigns of the drug's development and commercialisation in ALS, and potentially other indications, with Knopp providing support and certain US commercialisation activities.

In return for rights to the drug, Biogen will buy \$60 million of Knopp stock alongside an up-front payment of \$20 million and, subsequently, up to \$265 million on the achievement of certain development, regulatory, and sales milestones. In addition, Knopp stands to receive tiered, double-digit royalties on global sales of the drug.

"ALS is a devastating disorder and, with only one approved therapy, there is a tremendous need to provide more therapeutic options for patients," said Biogen's chief executive George Scangos, explaining the firm's interest in the drug.

biogen ideo

WHEN DO I SELL? RECENT EXAMPLES

Robert Agbede's Chester Engineers merges with Hatch



Christian Morrow, Courier Staff Writer

269
READS



VISIONARY PARTNERS—Ted Lyons, left, and Robert Agbede in front of their new logo after announcing March 31 that Chester Engineers had merged with Hatch Limited. (Photo by J.L. Martello)

WHEN DO I SELL— CONSIDERATIONS

- Early sale – less execution risk
- Significant financial requirements/dilution
- Next level requires a different platform
- Consolidation in the market
- Potential obsolescence of product
- Investors' requirements
- Management (old and new)

DUE DILIGENCE – PROCESS

- Due diligence list
- Data room
- Customer discussions
- Accounting review
- Legal review
- Market review



POSITIONING FOR SALE – KEEP THE COMPANY “CLEAN” (CREATE VALUE)

-
- Shareholder/Board Minutes
 - Cap Chart
 - Intellectual Property
 - Ownership
 - Protection
 - No Infringement
 - Minimize Consents
 - Contracts
 - Investors



POSITIONING FOR SALE – KEEP THE COMPANY “CLEAN” (CONT.)

-
- Keep Contracts Clean (e.g., customer contracts, licenses)
 - Limit liability
 - No liability for incidental and consequential damages
 - Employee/Contractor arrangements
 - Non-competes
 - Non-solicitations
 - Invention assignments
 - Accounting/Records/Taxes

POSITIONING FOR SALE – KEEP THE COMPANY “CLEAN” (CONT.)

- Legal compliance
 - Use of data/privacy
 - Employment practices
 - FCPA/export- import
 - Regulatory obligations
- Open source
- Contract compliance



DUE DILIGENCE – CAUTIONS

- Find and address the issues before the Buyer does
- Time the due diligence for sensitive issues
 - Do **NOT** rely on the Confidentiality Agreement
- Disorganized due diligence can delay a deal



DEAL TEAM

- Lawyer
- Accountant
 - Tax
 - Accounting
- Investment banker



ENGAGE THE DEAL TEAM **EARLY!!!**

DO I NEED AN INVESTMENT BANKER?

-
- Role of Investment Banker
 - Find purchasers (financial or strategic)
 - Position company
 - Negotiate deal (including understanding buyers)
 - “Independent” voice
 - Can play a buffer
 - “Deal-Maker”
 - Fairness opinion
 - Deal Experience



DO I NEED AN INVESTMENT BANKER? (CONT.)

- Choosing an Investment Banker
 - Experience in field
 - Good personality match
 - Economics
- Relationship with Investment Banker
 - Exclusive
 - Percentage of transaction (perhaps with incentive)
 - Tail
 - Term and termination

LIFE CYCLE OF DEAL – 30,000 FEET



- Position the Company
- Confidentiality Agreement
- Solicit offers/offering memo
- Letter of Intent
- Transaction Agreement (Asset Purchase Agreement, Stock Purchase Agreement, Merger Agreement)
- Due Diligence
- Closing
- Post-Closing Matters

KEY POINTS IN THE LIFECYCLE

- A busted deal is the enemy of the Seller
- Time kills deals
- Sellers lose leverage as the deal progresses
 - Details are the Seller's friend at the beginning

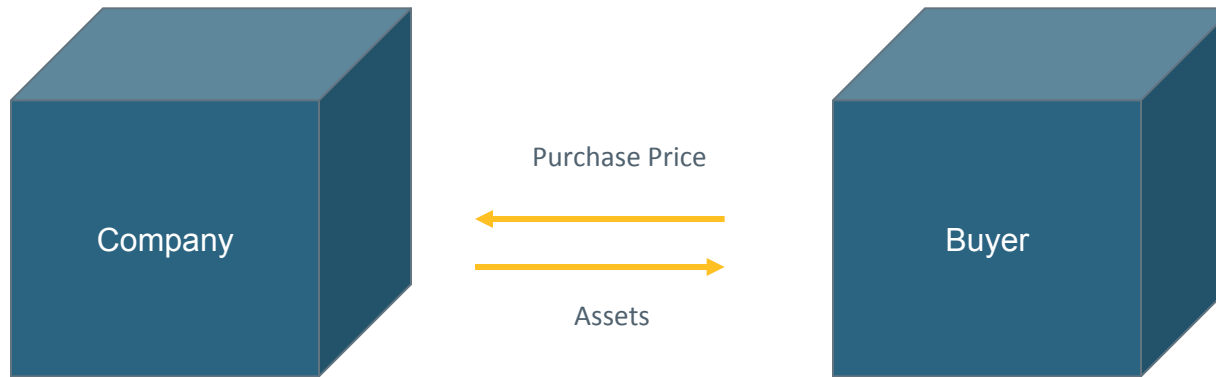


LETTER OF INTENT – THAT IS AS GOOD AS IT GETS!

- Consideration
- Structure
- Non-binding – But Don't Believe it
 - Exclusivity
 - Confidentiality
 - Obligation to negotiate in good faith
- Avoid being interpreted as a contract

STRUCTURES

STRUCTURE 1: ASSET SALE



AFTER



STRUCTURES

STRUCTURE 2: Stock Sale

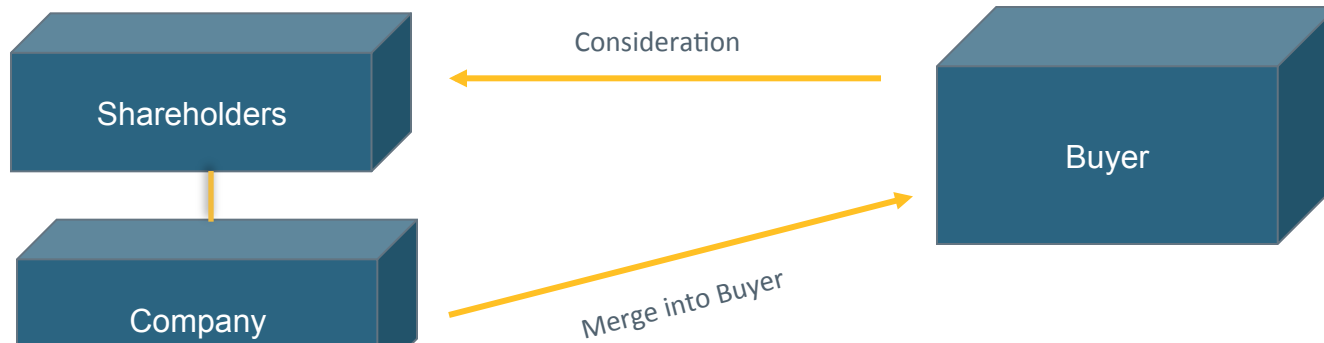


AFTER:



STRUCTURES

STRUCTURE 3: Merger

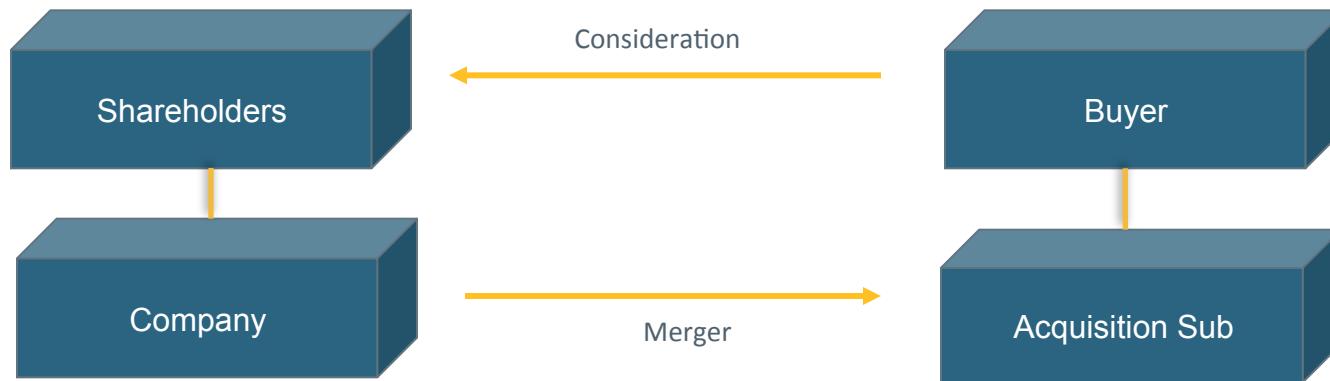


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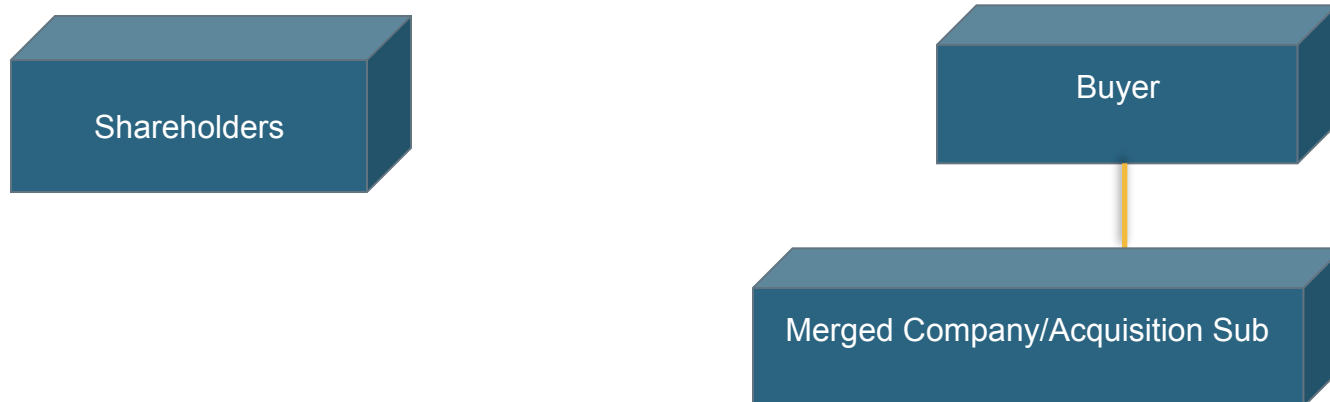


STRUCTURES

STRUCTURE 4: Triangular Merger



AFTER:



STRUCTURE CHART



Consideration	Asset Sale	Stock Sale	Merger	Triangular Merger
Tax	Buyer Favorable	Seller Favorable	Seller Favorable	Seller Favorable
Liabilities Assumption	Buyer Favorable	Seller Favorable	Seller Favorable	Seller Favorable
Consents	Required	Likely Not Required	Likely Not Required	Likely Not Required
Ease of Implementation	Cumbersome	Easy	Easy	Easy
Shareholder Consent (Note: Importance of Drag-Along Rights)	Majority (watch for dissenters' right)	Unanimous (unless agreed otherwise)	Majority (watch for dissenters' rights)	Majority (watch for dissenters' rights)

DEAL TERMS - PRICE

- Ebel Example
- Do homework
- Traditional metrics (e.g., multiples of EBIDTA, revenue)
- Consider value to purchaser
- Create alternatives (e.g., an auction, go it alone)
- It is not all in the financials
 - Team
 - Technology
- Strategic v. financial buyers

EBEL



DEAL TERMS - CONSIDERATION

-
- Form of Consideration
 - Cash
 - Privately-held stock
 - Publicly-held stock
 - Timing of Payment
 - Closing
 - Deferred
 - Collateral



DEAL TERMS – EARN-OUTS

- Purposes
 - Bridge a price gap
 - Share risk
 - Keep the seller(s) committed
- Types
 - Milestones
 - Percentages of Revenue
 - Thresholds and caps
 - Based on Net Income
 - Avoid cliffs



DEAL TERMS – EARN-OUTS (CONT.)

- Protections for Seller
 - Obligations to support earn-out
 - Effect of termination of employment
 - Audit rights
 - Consistency of accounting
 - Penalties for failure to pay
 - Interest
 - Collection costs
 - Acceleration
 - Accelerate on sale of company
 - Collateral

DEAL TERMS – EARN-OUTS (CONT.)

- Lessons
 - Earn-outs are the most disputed terms of a deal
 - Clarity is your friend
 - Dispute resolution (e.g., arbitration)
 - Minimize buyer control

DEAL TERMS – RESTRICTIVE COVENANTS

- Confidentiality
- Non-compete agreements
 - Term – Typically - 2-5 years
 - Scope – Ensure that it relates to the business as sold
 - Geographic scope
- Non-solicitation
 - Employees
 - Customers/Suppliers



EMPLOYEES ARE CRITICAL

- Communication/planning are important
- Employee agreements
- Existing severance arrangements
- Retention agreements/bonuses
- Effect on equity plans
- Benefits



DEAL TERMS – LIABILITIES

- Known liabilities (e.g., loans, contracts)
- Unknown liabilities
- Indemnification
 - Representations and Warranties
 - Threshold
 - Maximum liability
 - Survival period (typically 12-24 months)
- Escrow
- Representation and Warranty Insurance



DEAL TERMS – NET WORKING CAPITAL

- Definition of Net Working Capital: current assets less current liabilities
- Target Net Working Capital
- Estimated New Working Capital at Closing
- Post-Closing Adjustment
 - Timing
 - Audit right
 - Consistency of accounting treatment (e.g., treatment of revenues)
- Second most disputed provision