




Successful Strategies in Mergers & Acquisitions

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Introduction

- Preparation
- Process
- What's next



What Matters

- Strategy / Team Communication
- Due diligence before due diligence
- Identify behaviors (get advisors in) early
- Speed! Slow kills deals!!!
- Integration, Integration, Integration


Experienced CEOs say:

- Strategy – Ability to integrate – Ability to accelerate
- 100 days




ACQUISITION PROCESS

- **Assets or Stock?**
 - **Assets:**
 - ◆ + Flexibility
 - ◆ – Transfers
 - ◆ – International
 - **Stock:**
 - ◆ + Predictability
 - ◆ – Liabilities
 - ◆ – Preferences and privileges




LETTER OF INTENT

- **Confidentiality and Non-Disclosure Agreement (NDA)**
- **Not Binding BUT...**
- **Terms**
 - Transaction structure (Stock, Assets, Acquisition, merger)
 - Purchase price consideration (adjustment)
 - Breakup fees
 - Employee stock options (single or double trigger)
 - Warrants
 - Treatment of key employees




LETTER OF INTENT

- **Terms (cont.)**
 - Confidentiality, non-compete, non-solicitation
 - Indemnity, escrow, holdback (survival of reps and warranties, one year in general, plus statute of limitation, plus indefinite)
 - Other ancillary agreements (needed at closing)
 - Conditions to closing (buyer wants lots - "and such other matters as may arise during the due diligence process")
 - Confidentiality of discussions including the existence of letter of intent
 - Exclusivity (no shop, 60 to 90 days)




LETTER OF INTENT

- **Terms (cont.)**
 - Due diligence
 - Conduct of business (ordinary course, if outside ordinary course, consent)
 - Expenses
 - Choice of law – venue
 - No binding (except for confidentiality and exclusivity)



DUE DILIGENCE (checklist)

- Reduces odds of failure
- Clarifies strategy and motivations
- Areas
 - Legal (capital)
 - IP (rights assigned?)
 - HR (compensation, “independent contractors”)
- International: Odd laws or customs



EARNOUT

- Additional value paid to seller only if the acquired business meets some prescribed performance measures after closing
 - + Deal insurance/acquisition financing
 - – Nest for disputes
 - Milestones measured over 1-5 years
 - ◆ Net revenue
 - ◆ Net income
 - ◆ Cash Flow
 - ◆ Satisfactory product launch
 - ◆ EBIT
 - ◆ EBITDA
 - “No fiduciary duty” provision




EMPLOYMENT OF SELLER'S MANAGEMENT TEAM AND EMPLOYEES

- **Employment Agreement**
 - Confidentiality
 - Non-compete
 - Non-solicitation
- **Stock Options, RSPA**
- **International issues**
 - SOP
 - Public Policy




REPRESENTATIONS AND WARRANTIES

- **Paint picture of the company**
- **Exceptions in "Disclosure Schedules"**
- **Common representations and warranties**
 - Organization (organize the license in good standing)
 - Capitalization
 - Authority relative to agreement
 - Consents and approvals, no violation of law
 - Financial statements true and correct



REPRESENTATIONS AND WARRANTIES

- **Common representations and warranties (cont.)**
 - Accounting system is reliable
 - Company has no indebtedness
 - No changes since _____
 - No undisclosed liabilities
 - Information supplied so far true and correct
 - Not in default of company charter documents, any contract, debt, et cetera
 - No litigation
 - Compliance with laws
 - Taxes




REPRESENTATIONS AND WARRANTIES

- **Common representations and warranties (cont.)**
 - Returns filed, taxes paid, no audit pending
 - Employee benefits, nothing else than what is in the schedule
 - No contracts subject to “change and control” provisions
 - IP: company owns or has valid rights to use all IP it needs, no liens
 - Contracts and commitments: there are no contracts obligating the company to pay more than \$___; and there are no contracts limiting the company to do business anywhere



REPRESENTATIONS AND WARRANTIES

- **Common representations and warranties (cont.)**
 - Employment and labor
 - Environmental
 - Insurance: in effect, all policies in schedule
 - Title to property
 - Leases
 - Brokers/finders fees
 - Books and records
 - Full disclosure
- **Covenants**
 - Preserve business intact
 - Press release



INDEMNIFICATION

- Triggered by breach of representations and warranties, covenants, unforeseen liabilities;
- Representations and warranties survive closing 12-24 months;
- Longer (SOL) for IP, intentional acts or fraud.



ESCROW AND HOLD BACK

- For issues uncovered after closing
- 10 – 20% of purchase price, over 1-3 years
- Cap on remedies
 - Intellectual Property
 - Intentional acts or fraud
 - Environmental
- Escrow Agreement – Escrow/Payment Agent




SIGNING AND CLOSING

- Signing is a start
- Fulfill conditions to closing (buyer wants many)
- Typical conditions
 - MAC-MAE's (Shift risks regarding: business, assets, properties, liabilities, etc.)
 - R&Ws true and correct as of signing and closing
 - Consents and approvals from 3rd parties (include HSR)
 - Legal opinion
 - Assignment of IP rights to target
 - Execution of Employment (etc.) agreements
- Champagne?



INTEGRATION

- Key to success
- Red Carpet: Employment Agr., equity, honor benefits
- Do it:
 - Start Early (Latest: LOI)
 - Do it fast (remember: 100 days rule)
 - Leader in charge
 - Communicate, Communicate, Communicate!
 - Understand and mesh cultures
 - Integration areas: IT, legal compliance, accounting, products and services, marketing and sales, HR



BEYOND ACQUISITION

- LEARN. FAST.
- MANAGE
- GROW
 - Incorporate (questionnaire)
 - Protect IP (checklist)
- For International acquisitions: Flip company
 - Get US financing at better value
 - Simplify company operations
 - Answer needs, gain confidence of US clients
 - Become a more attractive mergers and acquisitions target
 - Become a more effective mergers and acquisitions buyer
 - IPO



Questions?



THANK YOU!

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Francois is a corporate transactions and international attorney who specializes in technology transactions while still advising clients in commercial litigation and dispute resolution.

Based in Silicon Valley for the past 20 years, Francois helps entrepreneurs , investors and companies build, finance and sell their US or foreign operations, and get past every legal challenge they encounter along the way. He has handled numerous cross-border acquisitions and equity financings and brought many companies from their inception to successful exits for founders and investors alike. Francois advises companies in all aspects of corporate law, including entity formation, equity financing, technology licensing, corporate structure inversions ("flips"), mergers & acquisitions, joint ventures, stock options, employment, commercial leasing, intellectual property protection, negotiation and drafting of virtually any business contract.

François is admitted to practice in California , Washington D.C., and in the European Union. He is a partner, and an elected director of RMKB, a 120-attorney law firm with offices in California (4) New York (1) Boston (1) and affiliates in Paris and Hong-Kong. Francois was recently noted by the *San Francisco Bay Area Lawyer Magazine* as one of the "Top lawyers in the Bay Area" for mergers and acquisitions. An advisor to the board of several technology companies, François is a guest lecturer on the topic of entrepreneurship, technology and international law. He is also an advisor to the French Ministry of Economy and Finances ("Conseiller du Commerce Extérieur").

Francois graduated from Université de Montpellier and University of San Diego law schools.

General Counsel Services

Ropers, Majeski, Kohn & Bentley conducts a multi-service practice offering litigation and transactional services to domestic and international businesses and individuals. In an effort to continue to offer services to meet our clients' needs, the Firm now offers its small to medium market clients senior lawyers that will provide outside general counsel services. A senior lawyer will be assigned to work directly with the client to handle and manage the legal needs of the client. Our goal is for the lawyer that is assigned to your company to become integrally familiar with your business, as would a member of your management team. Our services are offered at a fraction of the cost of hiring an outside firm or a full-time general counsel.

A small to medium sized company ordinarily does not have the need or the resources to hire a general counsel. In addition, the larger firms are now focusing on bigger transactions and litigation matters. However, small to medium sized companies require legal services to address smaller matters and the various issues that arise on a routine basis. In addition, as your company grows it will require ongoing legal services. This is where our Firm can tailor a legal budget and offer your company the required legal services. The senior lawyer assigned to work with you will be like a member of your management team - providing legal advice and guidance as needed and managing the legal needs of the company. We will visit your company and invest the time necessary in order to learn your business and develop trusting relationships with your executives. As the senior lawyer becomes familiar with your business and as the needs arise, he or she will bring in other lawyers within the Firm with the expertise necessary to handle specific matters where he or she does not have the specific expertise.

Due to our size and breadth of experience, the Firm is positioned to handle most of your company's needs. Our lawyers have extensive experience with the litigation matters that are likely to affect small to medium sized companies. In addition, our lawyers have substantial transactional experience to handle the various business deals entered into by your company. The Firm's practice areas include the following:

- Business and commercial litigation;
- Employment counseling and litigation;
- Corporate law;
- Intellectual property;
- Product liability litigation and product warning consulting;
- Environmental law and toxic tort liability;
- Real Estate law; and
- International business matters.

This experience, coupled with our reasonable fee structure, positions the Firm to efficiently and effectively service all of your legal needs.



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Jesshill Love is a business and real estate partner in the Redwood City office. His primary focus is serving as outside counsel to companies that have limited or no in-house legal department capabilities and require assistance with legal issues related to the ongoing business operations.

In addition to practicing law, Mr. Love also has a Masters in Business Administration. He provides outside General Counsel assistance in virtually all areas of business such as lease agreements, contract negotiations, employment agreements, intellectual property matters (trademarks, copyrights, and patents), litigation management, insurance issues, licensing, and M & A work. Mr. Love has successfully taken multiple companies from start-up to sale and acted as outside general counsel to dozens of Fortune 100 and 500 companies during the tenure of his practice.

Mr. Love has also been an active real estate investor since the age of nineteen. He presently sits on the Board of Directors of two local syndicated real estate portfolios as General Counsel. Mr. Love has actively negotiated the purchase and sale of over \$100,000,000 in combined real estate acquisitions and leases nationally. On the real estate law side of his practice, Mr. Love's activities include:

- Real Estate Investments: Representation of investor groups in the context of large multi-million dollar commercial property transactions, including negotiation of terms of sale, preparation of purchase and sale agreements, and performance of due diligence review in context of disclosure.
- Off Market Transactions: Representation of Buyers and Sellers in connection with the purchase and/or sale of "off-market" real estate transactions, including negotiation of terms of sale, preparation of purchase and sale agreements, and performance of due diligence review in context of disclosure.
- Asset Protection: Representation of clients in connection with asset protection assistance, including the preparation of wills and trusts, formation and maintenance of Limited Liability Companies ("LLC's"), Family Limited Partnerships, and benefit plans.
- Real Estate Sales: Representation of brokers and agents in the context of real estate sales related to disclosure duties and ethical obligations to clients;
- Real Estate Development: General and specific plans, zoning, use permits, validity of fees and exactions imposed by local governmental agencies;
- Construction: Mechanics liens, design defects, construction defects, delay issues, and interpretation of construction contracts;
- Business Disputes: Interpretation and enforcement of contracts, insurance claims, and business dissolution;
- Eminent Domain: Representation of property owners and business owners in condemnation actions;
- Easement Disputes: Representation of property owners in the context of easement disputes between adjoining property owners, including prescriptive easements, nuisance, and trespass actions;

- Partition Actions: Representation of property owners in the context of partition actions and partnership dissolutions;
- Foreclosure Assistance: Assisting homeowners and lenders in foreclosure proceedings;
- Unlawful Detainers: Management of unlawful detainer proceedings on behalf of owners and landlords in commercial and residential settings.
- Referee: Mr. Love serves as a Referee for the San Mateo Superior Court in real estate related matters related to valuation of properties and reporting to the court as to the viability of judicially enforced sales.

Mr. Love received his B.A., with distinction, from Connecticut College in 1993, and his J.D. and M.B.A. from Golden Gate University in 1999. Mr. Love is a member of the California Bar and is admitted to all State and Federal courts in California. Prior to joining the Ropers firm, Mr. Love worked in the European Union as the Assistant to the Belgian Prime Minister and in Mexico City with the Center for Free Trade on NAFTA related issues. Mr. Love is also an experienced real estate investor with real estate holdings in the Bay Area. A native of California, Mr. Love is fluent in Spanish and literate in French. Mr. Love also sits on the Editorial Review Board for *The Registry Magazine*, an acclaimed real estate publication for commercial and residential real estate aficionados. Mr. Love is also a frequent contributor of articles and content for *The Registry Magazine*.

Office Locations

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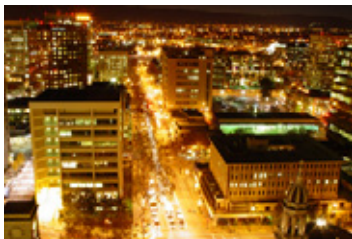
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