

An M&A and Transactional Survival Guide: Navigating Transactional Aspects of the Practice And Top 10 Hints for Buying or Selling!

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50,000 Foot Overview In Logistics “Deal World”

- Dearth of inventory
 - “Where do I put my money if I sell?”
 - Many of the “plums” in non-asset logistics world have been picked
- Yet, could be great time to sell
 - Lenders are abundant and want to lend/but interest rates higher
 - PE firms raised the significant money last year/lots of Dry Powder!
 - Strategic buyers have large amount of excess cash on their balance sheets

50,000 Foot Overview In Logistics “Deal World”

- 2023 a different world in logistics deal space than 2021 and first half of 2022
- Different kinds of deals; different aura about them.
- Many 363 bankruptcy stalking horse deals.
- More deals involving bankruptcy, creditor's rights and insolvency issues.
- Although macroworld in logistics was traumatic one in 2023, logistics companies who have cash reserves, who have long term dedicated relationships with trading partners (both shippers and carriers), and who run tight and lean operations, are able to get out there and shop around.
- Lots of operators who are getting in touch with reality as to valuation for their exit strategies.

What is Being Bought?

- Hottest deals remain non-asset based
 - Free cash flow is key to PE firms so:
 - Warehousing/Value Added
 - Brokerages (especially specialized or with dedicated contracts)
 - Expedited/Courier
 - Last Mile/"Dirty Mile"/White Glove
 - Transportation software/Tech (AI)
 - IC dominant (asset light)
 - Intermodal/Drayage

What is Being Bought?

- And yet some PE firms are going to a more asset based model
 - Shorter runs on vehicles
 - Customers want to know you have control of carrier
 - Last mile asset-based
- Even strategics like assets
 - But look to better return with IC's and leasing
 - You can get tripped up by use of IC's/Contracts and Preserve the Model

Overview of the M&A Process

- Preliminary Discussions
 - Exploratory stage where there are high level discussions directly between a buyer and a seller
 - Alternatively, a seller may engage a broker or investment bank to bring the seller's business to market
- Non-Disclosure Agreements
 - Protects confidentiality of information exchanged by the parties to ensure the recipient does not use confidential information of the disclosing party for gain
 - Key terms:
 - Defining confidential information and how confidential information can be used
 - Length of protection for confidential information
 - Return or destruction of confidential information
 - Optional: Non-solicitation provision to protect against solicitation or employment of employees that a party gains knowledge of during the process

Letter of Intent

- Non-binding agreement which outlines material terms for a buyer to purchase a seller's business, including:
 - Purchase Price
 - Payment Terms
 - Equity in Buyer
 - Cash
 - Earn-Out
 - Deferred Purchase Price Payment
 - Conditions to Closing
 - Regulatory Approvals
 - Third Party Consents
 - Buyer Financing
 - Employment Agreements for Key Employees
 - Third Party Diligence (Quality of Earnings, Environmental Reports, Title, Survey)

Letter of Intent

- Scope of Indemnification
 - Fundamental Representations
 - Survival Period
 - Sources of Recovery
 - Limitations on Indemnification
- Confidentiality
- Exclusivity
- Expenses
- Non-Binding Nature

Due Diligence

- Buyer gathers information to understand a seller's business, identify any potential risks and avoid any costly surprises
 - Due Diligence Request List
 - Corporate and Organizational Records
 - Contracts
 - Permits
 - Real and Personal Property
 - Litigation
 - Employees and Employee Benefits
 - Financial Statements
 - Intellectual Property
 - Third Party Searches
 - UCC Financing Statements, Judgment, Lien, Litigation and Tax Searches
 - Background Checks

Purchase Agreement: Structure

- Purchase Agreement is typically drafted by buyer's counsel
- In drafting Purchase Agreement, structure controls:
 - Asset Purchase
 - Buyer picks and chooses assets to purchase and liabilities to assume
 - Allows a buyer to exclude certain liabilities
 - Typically triggers third party consents
 - Licensing and titling requirements
 - Equity Purchase
 - Buyer becomes the shareholder of the seller
 - Buyer assumes all liabilities of the seller, whether known or unknown
 - Typically does not require third party consents or licensing requirements
 - Merger
 - Transfer by operation of law
 - Buyer assumes all liabilities of the seller, whether known or unknown

Purchase Agreement: Simultaneous v. Non-Simultaneous Closing

Simultaneous

- Closing occurs simultaneously with the execution and delivery of the purchase agreement and transaction documents by the parties
- Streamlines negotiation of the purchase agreement

Non-Simultaneous

- Closing occurs after specified conditions are met
 - Receipt of Third Party Consents
 - Receipt of Regulatory Notices or Approvals
- Purchase Agreement requires additional concepts
 - Conditions to Closing
 - Covenants Pending Closing
 - Exclusivity
 - Termination Rights
 - Break-Up Fees

Purchase Agreement: Representations and Warranties

- In the Purchase Agreement, a seller makes representations and warranties regarding the seller's business
 - Acts as a back stop to due diligence to disclose information about a seller's business
 - Allocates risk between the parties
- A seller attempts to limit representations and warranties to matter that are “material” and to qualify representations to “knowledge”
- A buyer wants unqualified and broad representations and warranties
- Provides basis for post-closing indemnification obligations

Purchase Agreement: Indemnification

- Indemnification provisions lay out, in detail, how one party will be compensated by the other party for losses they suffer following the closing of a transaction
- Method for asserting breach
- Timing for asserting breach
 - Non-Fundamental Representations
 - Fundamental Representations
 - Breach of Covenant
 - Fraud
 - Specific Indemnities
- Sources of Recovery
 - Escrow
 - Cash from Seller
 - Set-Off under Transaction Documents

Purchase Agreement: Indemnification

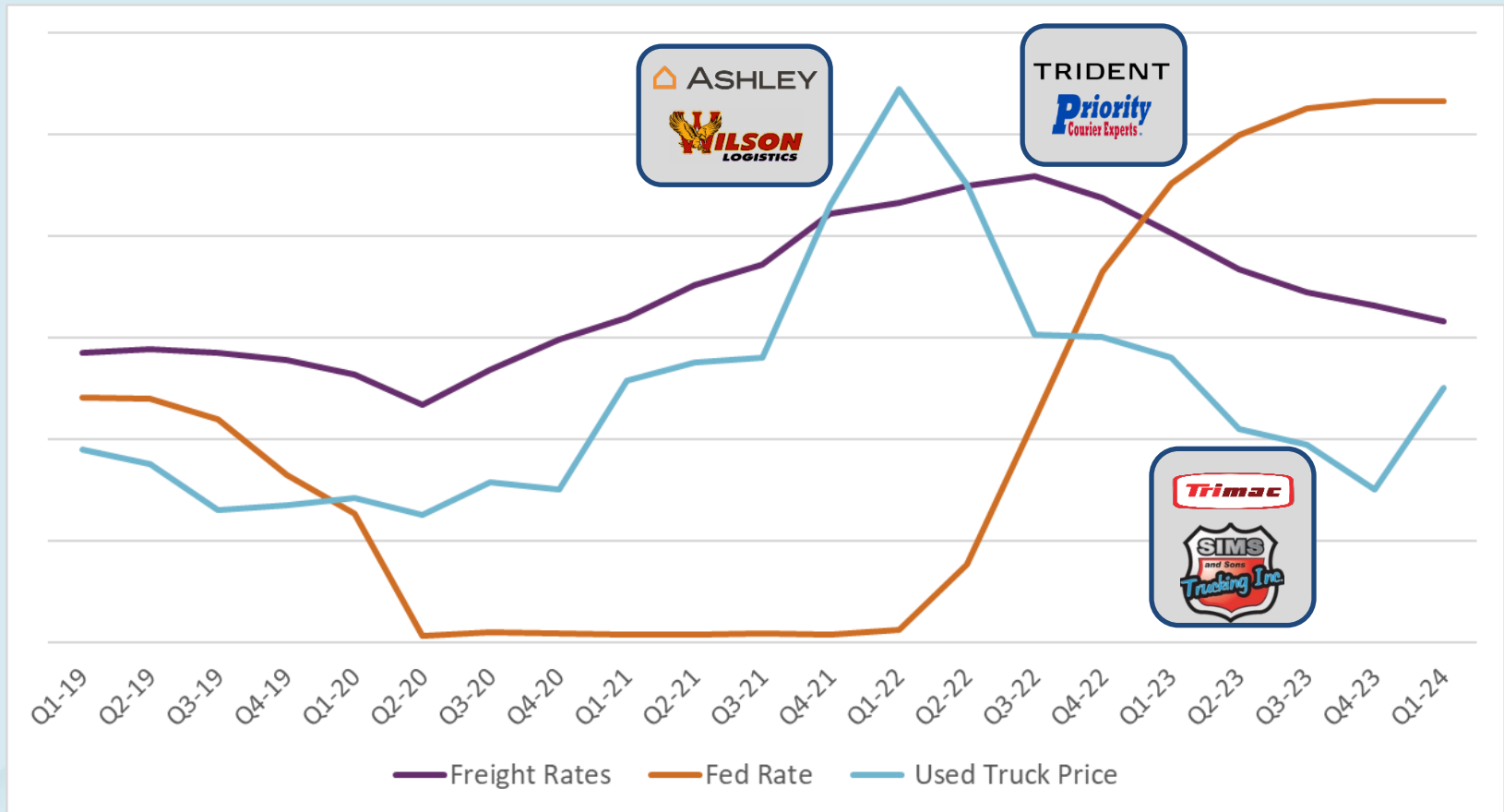
- Limitations on Liability
 - Basket or Deductible
 - Cap on Liability
 - Obligation to Mitigate Damages
 - Third Party Sources
 - Representation and Warranty Insurance

Purchase Agreement: Post-Closing Covenants

- Restrictive Covenants
 - Non-solicitation
 - Non-competition
 - Non-disparagement
- Tax Cooperation
- Further Assurances



Middle Market Transportation M&A Megatrends



Where are we now?



Buyers

with existing credit facilities or committed capital are opportunistic but selective



Transaction Structure Evolution

- earnings volatility
- equipment values
- interest rates



Verticals

Long-term consolidation tailwinds are alive and well

Where are we going?



**Freight Market
Recovery**



**Election &
Regulatory
Pressures**



**Pent-up Demand
to Exit**

Cross-Border M&A – Canada

Deal structure considerably impacts advice and process

- Share Purchase
- Asset Purchase
- Hybrid share/asset
- • Amalgamation

Key considerations

- Competition Law thresholds and notification requirements
- Tax
- Employment Stuff

Recent Transactions in Canada

Glencore PLC's US\$6.93 billion purchase for 77% of Teck Resources Ltd's coal business

- Rail transportation at the core of the business



Recent Transactions in Canada



Cross-Border M&A – Canada

Best Practices

- Get Canadian counsel involved early and often
 - Transport related applications, registrations and licenses take time
- Choose a deal structure early and don't let tax accountants decide everything

Buying a Business

- Diligence Swat Team

- All regulatory review, not just documents, your legal team needs to review operations
- Your finance team needs to get close to a Quality of Earnings Report for the target –if not a complete one (and have accountants forensically tear apart and evaluate)
- Background checks on owner/managers are absolutely necessary
- Reviewing all equipment, employees, independent contractors, customers is critical

The Tire Kicking Checklist

- Aspects of due diligence relevant to logistics and transportation businesses include:
 - Obtain an explanation of the methodologies and rates used to compensate drivers and owner-operators
 - Identify key customers and confirm renewal of their contracts
 - Identify vital leases and confirm renewal
 - Review all contractual, joint venture and partnership relationships with other businesses and vendors
 - Confirm inventory, title, and/or leases of real or personal property such as warehouses, vehicles, and equipment
 - Check the status of any necessary licensing and permits, including vehicle registration

Top 10 Hints for Buying & Selling

- No particular order
 1. Get audited financials (including adjustments) to ascertain true financial picture from an EBIDTA perspective
 - Seller side Q of E (Quality of Earnings Report) really helps
 2. Be fully aware of time constraints involved (management time) to set up data rooms and conduct due diligence
 - Often, the process elongates to create downward spiral, and spurs “transaction fatigue”

Top 10 Hints for Buying & Selling

- No particular order
 3. Ascertain quantum of PE sponsors who are potential acquirors and are thus in the process
 - The more PE sponsors in the process, the bigger “the time suck” for management
 4. Be mindful of the degree of transparency within the organization that is being shopped when you are going through a process (deciding who to inform within the company)
 - Natural tendency is to use discretion, but disclosure decreases rumors and internal politics

Top 10 Hints for Buying & Selling

- No particular order
 5. Make sure there are no hidden liabilities
 6. Make sure that all contracts are current and not assigned
 7. Make sure all IP is protected (and data privacy!)
 8. Make sure non-competition contracts are in place
 9. Conduct appropriate due diligence into the soundness of the accounts receivable
 10. Conduct appropriate due diligence into the soundness of the customer and supplier bases

Top 10 Hints for Buying & Selling

- No particular order
 11. Make sure there is a cultural fit
 12. Work with upper level management for a smooth transition and retention of customers and employees
 13. It's the people! Get it ?!

Hot Off The Presses!

Excerpts from
actual buy
side due
diligence
checklist

Appendix -
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		the Company.		
8.		Management and Employees		
8.1		Employment, consulting, management, advisory and other similar agreements or arrangements (written or oral);		

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			Date Provided	None or N/A
8.2		Collective bargaining agreements;		
8.3		List of the name, job title or classification and compensation of key employees, contractors or consultants of the Company; and		
8.4		Description of all labor disputes, requests for arbitration, grievance proceedings, strikes, work stoppages, charges of unfair labor practices, union organizing activities, etc. for the last 5 years.		

Hot Off The Presses!

Excerpts from
actual buy
side due
diligence
checklist

Appendix -
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14		Governance and Financial Information	
	14.1	List of all directors and officers of the Company;	
	14.2	List of the Company's auditors for the prior 5 years, and copies of auditors' letters to management for the last five years and lawyers' replies to most recent letter from auditors (respecting both litigation and employee benefit plans; and	
	14.3	Copies of the last 5 fiscal years financial statements, the most recent interim financial statements, and notes and schedules thereto, if any.	

QUESTIONS?



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