

INTER OFFICE MEMORANDUM

TO: Business Drafting Course, Fall 2018  
FROM: Professor Barry D. Goldberg  
DATE: August 1, 2018  
RE: Prospective Clients, Mark D. Pest and T. H. E. Leech

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Our clients are Mark D. Pest ("Pest") and T. H. E. Leech ("Leech").

Mr. Pest actively buys and sells companies. He has targeted the purchase of W. T. Ever's ("Ever") company, One Tuff Can Company, Inc. ("OTC"), a New York corporation.

OTC manufactures tin cans. The company has been owned by Mr. Ever's family for over 50 years, but Mr. Ever recently inherited the company and was not involved in the day to day operation of OTC. He wants out and quickly to pursue his hobbies of sailing and stamp collecting. Mr. Pest has limited experience in the can manufacturing business, but is hoping to improve the business and sees this as a good opportunity. He has decided to name the new business Candid Cans.

Mr. Pest, while wealthy, generally brings into his deals as an investor his brother-in-law, Leech. Mr. Leech is also wealthy, but does not like to get involved in the details of the business. There has been tension in the past between Pest and Leech over business decisions. Pest would like to avoid those issues in the OTC transaction.

Mr. Pest has hired us to help him and Mr. Leech to acquire OTC. There may be other smaller items for you to complete for your client during the course, but these three are your larger assignments. Their details appear on the pages that follow, as Exhibits A, B, and C. Please do not start an assignment until I direct you.

For the last assignment, I will assign each of you to represent either Mr. Pest, as the buyer or Mr. Ever as the seller. For the first two assignments you will each be representing Mr. Pest. Please remember that Mr. Pest and his brother-in-law, Mr. Leech, may in some instances be adverse. For example, each of them thinks that he is smarter than his brother-in-law, but neither of them would tell that to the other. Within Candid Cans, there is a delicate balance of control that is unspoken.

EXHIBIT A – Due Diligence and Entity Formation; Assignment # 1

Due: TBD

You represent Mr. Pest. He has asked for a memo summarizing the key points he should consider in acquiring substantially all of the assets of One Tuff Can Company, Inc. (“OTC”). The memo should be addressed to Mr. Pest’s general counsel, Mr. P.K. Unne. He has asked that the memo address:

- (1) The type and scope of due diligence you would recommend for this potential acquisition. What resources would be needed (type of experts, what access that would be needed to OTC (interviews and document review). [You may want to review sample due diligence checklists. Please be sure to tailor to your need. Since this will be an asset deal and not a stock deal or merger.]
- (2) What type of entity would you recommend he form to acquire OTC and why? [Based on that recommendation, you should also prepare the appropriate formation document in New York, i.e. certificate of incorporation, certificate of limited partnership or articles of organization for a limited liability company.]
- (3) What issues do you see Mr. Pest encountering with Mr. Leech? How would that impact on the entity you form.

Your memo should not be longer than four to six double spaced pages. **(All of your assignments should be double spaced). For this assignment and each of your subsequent assignments, you are to hand in a hard copy on the date the assignment is due and you are to email to me a copy. The email can be sent after class but no later than 72 hours after the due date for the hard copy.**

EXHIBIT B – Employment Agreement; Assignment # 2

Due: TBD

Although Pest and Leech will own the majority interest in Candid Cans (the “Company”), the Company will be hiring Donna Duck to run day to day operations.

Please draft an employment agreement for Donna that explains her role within the Company. You will be representing the Company. In order to complete this assignment, you will need to find a form of an employment agreement, and tailor the form to provide, among other things:

- (i) that Duck is employed by the Company as senior vice president for manufacturing;
- (ii) Duck has told the Company that she has an undergraduate degree in mechanical engineering, from Seaview University and is completing a graduate degree at Canarsie University in industrial engineering. She has also advised the Company that she has been employed as chief engineer in a canning plant in Orlando, Florida;
- (iii) that the term of employment is one year;
- (iv) a base salary for Duck of \$70,000 and a bonus that is based upon a percentage of the earnings of the Company (feel free to create the bonus formula);
- (v) that, as a condition of her employment, she agrees to complete her degree in industrial engineering;
- (vi) that Duck was hired because of her high academic achievement and prior work experience ; and
- (vii) that in the event that Duck violates any of the Company’s rules, her employment by the Company can be terminated at the election of the Company.

Please include with your employment agreement a cover memorandum that explains the major provisions of your agreement, and any necessary business considerations for your client to keep in mind when reviewing the agreement. You should try to focus on the major points and not summarize every provision in the agreement. Your memo should be *significantly* shorter than the agreement. The agreement should be between 15-20 pages and the memo should be between five to seven pages. Each document should be double spaced.

## EXHIBIT C – Purchase Agreement and Exhibits; Assignment # 3

### Due: AT LAST SESSION OF CLASS

The last assignment involves the sale of substantially all of the assets of OTC to a New York corporation called Candid Cans, Inc. (“Candid Cans”). Those assigned to represent Mr. Ever will represent OTC (the “Seller”) and those assigned to represent Mr. Pest and Mr. Leech will represent Candid Cans (the “Buyer.”)

The attached draft of a term sheet set forth the basic business terms that you will incorporate into a purchase agreement. From this term sheet, you will draft an asset purchase agreement (“APA”), and certain related closing documents for your final assignment, along with a memorandum explaining the provisions on which you would like your client to focus.

The closing and other documents you will **each** need to draft are as follows (**you will prepare these independently and not with your team member**):

- Bill of sale
- Promissory note
- Opinion of counsel of the buyer<sup>1</sup>
- Bring down certificate for your client
- Name change documents for seller, changing the name to No More Can, Inc.
- Secretary’s certificate for your client

Our last class session will be spent reviewing how you and your classmate negotiated the terms of this deal, with the class divided up in pairs representing the Buyer and the Seller. You will need to bring to that negotiation a list of the specific terms you sought on behalf of your client [survivability of reps and warranties, payment terms, escrow, set off, indemnification etc.] At our last session, each pair will hand in one APA and each partner will hand in closing documents. Each of you will also provide a cover memo, explaining what you sought to get for your client, and what you ultimately agreed to in the APA.

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<sup>1</sup> With respect to legal opinions, you will note that you are only responsible for drafting the buyer’s opinion of counsel, as it is typically a much simpler document (even if you are representing the seller you will draft the buyer’s legal opinion). We will talk in class about how to draft the more complicated seller’s opinion of counsel, for future reference. With respect to any legal opinion, you need to deal with the scope of your review and examination, your assumptions regarding the genuineness of what you have reviewed, where you are licensed, what law you are opining on, and what your actual opinion is and tie this to the representations and warranties of your client, for this assignment, the buyer.

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We will go over the details of drafting closing documents in class, getting you acclimated to the kinds of issues that may arise, and suggestions on language to handle them.

You can use any form book or source to start with, but be careful with documents from a stock purchase agreement that you tailor them to the sale of assets – these documents will likely require significant structural modification and may be more work than they are worth! And keep it as simple as possible. Do not include any provision that you do not understand!

You should work with your assigned partner in drafting the APA and closing documents. You will only hand in one copy of the APA for the pair. **You will each, however, hand in a separate cover memo and negotiation list and the closing documents. You are to prepare the cover memo, negotiation list and closing documents on your own.**

The APA should be no more than 30-50 pages. The memo should be four to six pages. All of these should be double spaced.

## TERM SHEET

Proposed transaction: Sale of substantially all of the assets of OTC ("Seller") to Candid Cans ("Buyer").

Seller is a closely-held corporation with one principal shareholder, Mr. Ever, who is also the CEO.

Buyer is a closely-held corporation with two principal shareholders, Pest and Leech. Buyer is hoping to keep the existing management in place after the closing. It is critical to Buyer that the assets it is purchasing constitute an ongoing and viable business.

In general:

- Substantially all of Seller's assets will be sold;
- Move rapidly to closing, by December 31, 2018;
- Initially, Mr. Pest will own 75% of Buyer and Mr. Leech will own 25%; the parties will enter into a shareholders' agreement to preserve their rights and ownership percentages; and
- Mr. Ever will be entitled to sit or designate someone to sit on the board of directors of the Buyer.

More specifically:

**Nature of the business and assets to be purchased:** After the closing, Seller will cease business operations and will, at some point, be dissolved and liquidated. Seller anticipates distributing the proceeds of the sale to its shareholders after satisfaction of tax and other retained liabilities.

Although the transaction is structured as an asset purchase, Buyer is, in effect, buying an ongoing business of Seller, which Buyer intends to continue to operate after the closing. The assets purchased are intended to constitute all of the operating assets of the Seller's business. Seller owns its assets directly.

**Leases:** Buyer will assume certain leases of Seller for office space in Brooklyn. Seller owns a factory building and the land on which it is located.

**Excluded assets:** Certain of Seller's assets will be excluded from the transaction, such as original prints by Walt Disney. Also, Seller has a small portfolio of short-term investments and cash in the bank that will not be transferred.

**Purchase price:** Purchase price is \$10,000,000 in a combination of cash and a promissory note, and Buyer seeks that some percentage of the purchase price will be held in escrow for some period of time to secure Seller's indemnification obligations. Buyer seeks to have the right to offset against amounts due under the promissory note any claims for indemnification.

**Liabilities:** Only certain liabilities of Seller will be assumed by Buyer at closing, including the following: (1) trade accounts payable reflected in interim financial statements or incurred after the date of the interim financial statements in the ordinary course of business; and (2) other disclosed ongoing liabilities of the business. Buyer's position is that it will not assume other liabilities of Seller, including existing bank debt, environmental matters, tax liabilities, undisclosed product liability claims and other undisclosed liabilities. Seller will need to indemnify Buyer for all non-assumed liabilities.

**Taxes:** Seller will provide certificates at closing from appropriate authorities as to payment of state and local sales and license taxes and other taxes attributable to the operation of the business. Seller will pay all sales taxes, real estate transfer taxes and other state and local taxes that are imposed as a result of this transaction.

**Regulatory matters:** The closing will be subject to compliance with the Hart-Scott-Rodino Antitrust Improvements Act and with any other applicable laws and regulations.

**Liens:** The assets of Seller will be conveyed free and clear of all liens and encumbrances, except certain liens arising by operation of law in the ordinary course of business or identified by Seller. Seller and Buyer agree to waive compliance with any applicable bulk sales law, but Seller will give appropriate indemnities for failure to comply and for other unassumed liabilities.

**Accounts receivable:** Buyer will purchase all of Seller's existing accounts receivable at face value, less Seller's reserves. Buyer's position is that Seller must indemnify buyer for any accounts receivable exceeding reserves that are not collected.

**Employees:** Buyer has not determined which or how many of Seller's employees it will offer to hire (except as noted below) but the number of employees not hired may be sufficient to trigger the WARN Act [Worker Adjustment and Retraining Notification Act]. Approximately 50% of Seller's employees are members of organized labor unions. Buyer desires to terminate or renegotiate the arrangements Seller had with its union employees. Buyer does not know whether any of Seller's union employees are participants in a union-sponsored multiemployer pension plan.

**Employee benefits and pension plans:** Buyer is not willing to assume any existing employee benefit, vacation, bonus or other similar obligation. **You do not need to address any ERISA issues.**

**Employment and non-compete agreement:** Buyer will employ the chief financial officer of Seller, Elizabeth Nixon, for some period of time, on terms to be agreed upon by the parties later; such agreement will contain a non-compete agreement, including provisions restricting the use of confidential and proprietary information.

**Indemnification:** Seller will be required to indemnify Buyer with respect to the obligations of Seller under the purchase agreement and the various bills of sale, assignments and other writings and certificates delivered pursuant thereto.

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**Corporate action:** the proposed asset sale has been approved by the shareholders of both companies to the extent required under applicable state corporation law. No shareholders dissented.