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DUE DILIGENCE AND THE HIGH-TECHNOLOGY CLIENT

Robert W. Dunaway*

I. INTRODUCTION

It seems that the term due diligence pops up in conversation everywhere these days. Attorneys are sometimes heard to say, "XYZ Company looks like a good acquisition candidate, but we haven't finished our due diligence." Or entrepreneurs seeking venture capital often state optimistically, "The venture capitalist said, as soon as due diligence is finished, we're funded." Any such comment usually evokes a nod of appreciative recognition from listeners familiar with business and finance. Yet few people can agree on a common due diligence definition because its meaning changes with every situation.

Defining the term due diligence is difficult, owing to the fact that the term really refers to both a concept and a process. The due diligence concept is relatively straightforward; however, the process definition changes with each situation. The concept refers to the investigation and evaluation of a proposed transaction or course of action. The process consists of the specific steps and procedures undertaken in performing the investigation. The steps and procedures in the due diligence process must change to fit the needs of each client, situation or transaction.

Legal counsel is often called upon to actively participate in the due diligence process. In fact, most clients look to the attorney to define the thoroughness of the due diligence investigation required in any given situation. Thus, it is a basic and important skill for counsel to be able to both identify the need for due diligence in a

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given situation (concept), and plan an appropriate due diligence strategy (process).

This essay explores the use of a due diligence investigation and discusses the special concerns the attorney must address when planning and conducting due diligence for the high-technology client. For purposes of discussion, this essay will refer to the proposed acquisition of XYZ Company by your client, Gulf and Devour, Inc. XYZ Company is engaged in the development and marketing of computer software and hardware.

II. DUE DILIGENCE IN THE ORDINARY COURSE OF BUSINESS

Attorneys encounter the need for the investigation of facts surrounding a given situation daily, although the scope of the investigation may be quite limited. The legal counseling process as a whole can be likened to one due diligence investigation after another, as the attorney researches, evaluates and advises on behalf of clients. At some point, as the scope and complexity of the transaction increases, the investigative process may be referred to as due diligence. For many transactions, due diligence is a traditional, recognized requirement — most often in relation to financing investments, securities, and acquisitions of companies through sale of assets, merger or other reorganization.

Proper due diligence insures that the client can accurately evaluate the proposed course of action, be it a simple real estate purchase or a multi million dollar merger. In conducting a proper course of due diligence, the attorney often relies on a generic due diligence checklist. Just as the due diligence requirements for one transaction vary from the next, factors to be considered in preparing a due diligence strategy vary from one industry to the next, even in identical transactions.

Generic due diligence checklists give the attorney a good start on launching the initial due diligence investigation. Typical items on a generic checklist include financial statements, physical plant and equipment, personnel, market-place, suppliers, and corporate and accounting records. An example of a good generic checklist is set forth in Appendix A.

In the ordinary course of business, generic due diligence checklists serve the attorney quite well in identifying those areas for investigation and evaluation. Generic checklists cover the areas essential to most transactions, and as many industries are stable, their marketplaces clearly established, and past operating histories of companies solid, the attorney and client know that even with a few

questionable results in the investigation process the proposed transaction on the whole is a secure investment. With high-technology clients, however, the attorney and client often do not have the reassurance of a stable industry, marketplace, or past operating history. It is common for a high-tech deal to fall through based on a single area of concern to the attorney and client. Reliance solely on a generic due diligence checklist, without recognition of special concerns posed by transactions involving high-technology, falls short of conducting an investigation adequate for the high-tech client's needs.

The speed with which technology advances, the short market windows, the mobility of key personnel, and the changing consumer markets are just a few reasons why high-technology investments and transactions are risky. When retained by the high-technology client, the attorney must be aware of the sometimes unique implications arising from facts discovered in due diligence. The attorney must be aware that a generic due diligence checklist may not adequately serve the needs of the high-technology client, and also know where the due diligence needs of the high-tech client may exceed those of clients in other industries.

III. HIGH-TECHNOLOGY DUE DILIGENCE

A. *The Due Diligence Team*

Due diligence investigations are normally a team effort, with duties delegated among the attorney, accountant and key client personnel. Many due diligence investigations are conducted under time deadline pressures. The team approach can greatly speed completion of the due diligence process, in addition to effectively using each team member's expertise. Each team member's responsibility should be assigned at the earliest possible time. Counsel may want to coordinate the team effort for efficient results. Clear definition and delegation of each team member's duties also decreases the possibility that important areas will be overlooked by one person trying to "do it all." Counsel should confirm each person's responsibilities in writing.

The attorney normally handles legal inquiries into the organizational, operational and securities history of the acquiree as well as inquiries regarding assets, liabilities and the overall structure of the transaction. The accountant or CPA will review financial statements, accounting practices and tax consequences of the transaction, as well as review accounting records, and assets and liabilities. Company personnel can provide the special expertise required to

evaluate areas such as manufacturing processes, sales organizations, and in the case of the high-tech companies, current technology and research and development programs.

B. *Motivation Analysis*

When the client first alerts counsel to the potential transaction requiring some degree of due diligence, counsel should discuss with the client the overall motivations behind the transaction. First, early discussions can save the client a great deal of money by imparting a healthy dose of cautious practicality to what may have initially been perceived as “a deal made in heaven.”

Counsel should be satisfied that ascertainable motivations exist for consummating the transaction. This process may take some time. Company management often over-simplify the justifications for a proposed transaction. Counsel can refocus attention on solid business and financial reasons for a proposed course of action prior to incurring significant expense.

Second, early discussion of the motivations driving the transaction may reveal “red flags” not previously apparent to the client. An apparently innocent remark made to your client may indicate an area for indepth investigation that may otherwise have escaped attention.

When discussing the motivations behind a proposed transaction, the attorney should be careful to view the transaction from both the client’s and (in the case of XYZ Company) the acquiree’s perspective. Counsel and client may be completely satisfied that the deal makes financial sense. However, there may not be any discernible reason for the acquiree to close the deal. The lack of motivation on the acquiree’s part should be a “red flag” to counsel. Satisfactory reasons must be uncovered for the acquiree’s course of action.

Part of the motivation analysis should include discussions regarding a budget for the due diligence effort. Counsel should remind the client that company personnel will be necessary to the effort, which is a hidden cost beyond the legal and accounting fees. Setting a budget early accomplishes two things — it allows counsel to set priorities on areas of investigation, and it avoids fee misunderstandings with the client. As an aside, counsel should not overlook the opportunity to shift fees to the other party; custom may dictate that the other party pay all legal fees incurred. Acquirors, for example, normally pay both parties’ legal and accounting fees.

C. *Scope of the Due Diligence Effort*

Many attorneys discount the need for thorough due diligence. The rationale is that a carefully drafted merger or sale of assets agreement will adequately protect the client's interests. Such a document may indeed ultimately protect the client's interests, but at what expense? Three or four lawsuits arising out of undisclosed facts, while ultimately successful, do little to bolster a client's confidence and may well have been avoided through basic due diligence. Counsel should avoid the common errors of restricting the scope of the due diligence and primarily relying on the written transaction documents.

All due diligence investigations differ to some degree, depending upon the nature of the proposed transaction and the parties involved. Due diligence efforts will also vary depending upon whom counsel represents. For example, the level of due diligence required for a client acquiror greatly exceeds that required for a client acquiree. Counsel must assess the true needs of the client and plan accordingly.

A client such as Gulf and Devour, Inc. , as an acquiror, must thoroughly evaluate almost every aspect of XYZ Company's operation. XYZ Company's counsel, on behalf of the acquiree, will make a basic investigation of Gulf and Devour, Inc. to verify representations, but will probably focus more effort on cleaning up problem areas within XYZ Company.

Thus, the nature and the scope of due diligence varies according to the situation. Acquiror's investigation can be seen as an offensive (literally, in some cases), aggressive effort as counsel's goal is to assess strengths and weaknesses in XYZ Company. Acquiree's investigation is much more defensive in that efforts are concentrated towards completion of the deal — dealing with problems that arise, and coordinating production of documents for acquiror's counsel, accountant and management.

D. *Due Diligence Checklist*

The due diligence checklist set forth in Appendix A will serve as a generic starting point for high-tech due diligence efforts.

As discussed, counsel should use the checklist as the starting point for the investigation process, and tailor the checklist to meet the needs of a particular situation. Primary areas of concern for high-tech companies are discussed below.

IV. AREAS OF SPECIAL CONCERN TO HIGH-TECHNOLOGY CLIENTS

A. *Identification of Assets*

Identifying the assets of XYZ Company would not appear to be particularly difficult, or different from determining the assets of any company, whether or not involved in high-technology. Typically, XYZ Company would present financial statements, supporting schedules and assets lists, which counsel for Gulf and Devour, Inc. could verify as accurate. When people think of business assets, generally real estate, plant equipment, and inventory come to mind. Many high-tech companies, however, do not consider those assets to be the foundation of their business.

Counsel should undertake the task of verifying and evaluating XYZ Company's list of intangible assets, such as copyrights, patents, trademarks, product concepts, computer program code, product designs, and marketing strategies. These various items can all constitute significant "assets" in the high-technology arena. Verifying and evaluating hard assets, such as computers, plant equipment, furniture, etc. is an easy task compared with quantifying intangible items. Counsel must recognize that the real value of high-technology companies often is not in their hard assets. It is the intangible assets that most often provide the real motivations for transactions involving high-technology companies.

The key concern regarding intangible assets vis-a-vis high-technology companies is ownership rights. Does XYZ Company really own everything it claims? An extremely high incidence of ownership problems occur during due diligence investigations of high-tech companies. The cornerstone of counsel's due diligence investigation is the confirmation of XYZ Company's property rights and the continued protection of those proprietary rights.

Counsel should carefully examine XYZ Company's technology and other assets to ensure that Gulf and Devour, Inc. will receive full value in the acquisition. The attorney should trace the technology back to the founders or the original developers, and confirm that all rights to the technology have been properly transferred to XYZ Company. A common problem in this regard is the existence of an undisclosed original partner, who will undoubtedly come out of the woodwork when the money starts changing hands. Another common problem is the lack of valid transfer agreements documenting the assignment of all rights to XYZ Company. A third common problem is that the company is paying a royalty to the original developers, which reduces the income stream from the

technology. Yet another problem is that the technology may be based on previous research that is in the public domain, or university affiliated research in which case XYZ Company may not legally own most or all of the technology.

Second, counsel should review current employment agreements, assignment of inventions agreements and third party development contracts for problems with current employees and technology under development. Competing claims to XYZ Company technology must be eliminated before consummation of the acquisition. The employment of consultants is also a fertile area for problems relating to ownership of work product.

Third, the attorney should review XYZ Company's legal protection of its ownership rights. Most intangible assets require intellectual property protection, utilizing copyright, trade secret, patent or trademark law. XYZ Company may have acquired good title to its assets, but have subsequently lost rights through lack of legal protection. Proper trade secret protection is rare even among experienced high-technology companies. Gaps in the legal protection of intellectual property severely affect the value of such assets.

B. *Corporate Records*

Counsel will review corporate records as a matter of course during a due diligence investigation. In many closely held companies, the corporate records (board minutes and resolutions, bylaws, stock ledgers, etc.) are quite limited in size and scope. A cursory review may satisfy counsel that corporate housecleaning could be in order.

The opposite is often true with high-tech companies regardless of size. Because of the complex financing arrangements utilized by many high-tech companies, corporate records should be an area of great concern to counsel. Many high-tech companies begin life with extensive corporate records. The documentation associated with financing techniques such as preferred stock, limited partnerships, options and warrants, all of which are commonly utilized by high-tech companies, is sometimes beyond belief. In addition, a company may have employee plans and subsidiary companies. Counsel must review the material and understand the required corporate and contractual documentation for each individual transaction.

The implications of poor or incorrect corporate records are far reaching. For example, an undocumented loan transaction could be disavowed by Gulf and Devour, Inc., leading to litigation over responsibility for the debt. Similarly, the issuance of stock in viola-

tion of applicable state and federal securities laws may void the issuance altogether. An acquiror such as Gulf and Devour, Inc. would be concerned with the effect of an acquisition on its publicly traded stock. Irregularities in the securities history of XYZ Company may impact Gulf and Devour, Inc.'s ability to issue new stock, and could result in unwanted Securities and Exchange Commission interest.

Counsel's primary goals in reviewing corporate records are to verify that:

1. XYZ Company was properly organized as a corporation;
2. XYZ Company properly documented subsequent stock issuances and securities transactions in accordance with state and federal securities requirements;
3. XYZ Company properly documented all other board level decisions; and
4. Corporate actions have not exceeded authorized limits.

Counsel's review of the corporation's records will probably reveal a few oversights. In many due diligence cases, XYZ Company's counsel will have spent a great deal of time bringing the records up to date for the acquisition. All oversights should be brought to the parties' attention immediately and remedied prior to closing of the deal. Oversights most frequently occur in the organizational and securities areas. Common irregularities include the lack of required shareholder and board of directors meetings and votes, undocumented stock transactions, illegal trading of restricted stock, issuance of unauthorized stock, and failure to maintain a stock transfer ledger.

C. Accounting Records

The accounting records of high-tech companies, particularly start-ups, are often in disarray owing to the fact that more attention is given to the development of technology than is given to a general ledger. Counsel for Gulf and Devour, Inc. should devote time to an investigation of XYZ Company's accounting records.

Although the accountant will usually be responsible for reviewing accounting records, counsel should discuss the review carefully with the accountant in order to identify problem areas and draft an accurate transaction document. Counsel should ascertain whether the accountant is truly familiar with XYZ Company's industry and operations. If the accountant is unfamiliar with XYZ Company's general business, obvious "red flags" will slip by undetected. An

experienced accountant can often tip the attorney and client to undisclosed problems.

The accountant's review can also help tailor the transaction documents to the client's benefit. For example, in acquisitions, certain allocations regarding assets and consideration are normally made for tax purposes. The accountant can provide valuable assistance to counsel in drafting language providing for favorable client allocations. Counsel should be on the lookout for financial "bombs" not apparent at first glance. For example, XYZ Company may have entered into third party agreements that paid XYZ Company cash advances against future royalties. Those advances may look good as revenue on financial statements, but future sales revenues will be depressed until the advances are recouped.

Counsel should be able to read financial statements. Cross-checking corporate records with financial statements will sometimes reveal interesting discrepancies that an accountant might not catch. Again, the accountant can be of invaluable help to counsel regarding accounting records; but, it will be up to counsel to recognize the need for that help.

D. Product Distribution and Marketing

Client personnel will provide the expertise necessary to gauge the value of XYZ Company's products and technology. However, counsel must examine product distribution and marketing methods for potential problems.

All industries must comply with federal and state antitrust laws regulating the sale and distribution of goods. Most attorneys are familiar with areas of concern in this regard, such as dual distribution channels, price discrimination, mandatory pricing, product tying and dealer terminations. Counsel should review company practices for possible antitrust violations. High-tech companies, however, face a multitude of potential problems in this area, more so than companies in non-high-technology industries.

When working with high-tech companies, counsel should look for problems arising out of import/export restrictions, franchise law, and product distribution agreements. XYZ Company's technology may be subject to export restrictions if it has national defense implications. If any part of the technology or product is classified, the federal government (Department of Commerce) can stop XYZ Company from exporting the product overseas or to certain countries. Due to the fact that seemingly harmless technology shows up on restricted lists, this problem occurs quite often. Export

problems often involve products containing computer memory and processing chips. Engineers may laugh, but some Pentagon officials see nuclear weapons systems behind every Commodore 64 computer. Counsel should verify that any overseas markets for XYZ Company products are not blocked by export regulations, and that applicable export licenses have been obtained.

Export regulations are just one potential regulatory headache for high-tech companies. Counsel also should verify that all applicable government regulations are being complied with. Such regulations range from Federal Communications Commission electromagnetic emanation standards to consumer protection statutes such as the Magnuson-Moss Warranty Act.

Another distribution and marketing issue relates to franchises. A company that establishes a distribution network for the marketing of its goods or services, (including arrangements with distributors and dealers licensing the use of the company's trademark or service mark) may technically fall within the definition of a "franchisor." Many high-tech companies routinely license the use of products and technology together with trademarks. As such, the company may have to comply with federal and/or state statutes governing franchisors.

Counsel should also review product distribution agreements carefully. Start-up high-tech companies, hungry for distribution, often sign onerous third party distribution agreements. Most favored pricing clauses, extended payment schedules, generous return policies and reserves, and exclusivity clauses are examples of concessions XYZ Company may have made in breaking into the marketplace. Recognition of the effect such clauses have on business operations is crucial to high-tech due diligence. XYZ Company may also look healthy now and projections may also look promising, but poor distribution agreements will almost certainly hamper XYZ Company's growth.

E. Protection of Proprietary Rights

Counsel must review XYZ Company's policies and practices with respect to the continued ownership and/or distribution of products and technology. Several issues were discussed in section A above. Since policy and practice can be miles apart, counsel must look beyond written policy and agreements to verify actual practice.

Specific items for review are copyright, trademark and patent applications; statutory compliance with copyright and trademark notice requirements on products, packaging and promotional

materials; in-house trade secret protection programs; and contractual provisions that limit or affect proprietary rights.

Any and all agreements, written or oral, respecting company assets and technology must be carefully reviewed. In particular, license agreements often contain numerous limitations on property rights, many of which are innocent "time bombs" such as non-assignment clauses, expiration provisions, minimum sales guarantees, non-competition covenants, or unusual marketing obligations. XYZ Company may be worthless if the rights to its technology can be easily terminated.

Counsel should be very familiar with intellectual property law, or, as its application is referred to in the high-tech world, computer law. Entire companies are often built around one product or one basic technology. If XYZ Company has not properly protected its proprietary rights to that technology, counsel had better recognize that fact. The horror stories in this regard are legendary in the computer industry. More than one venture capital group has invested in a company, only to discover later that the company did not own the technology outright. If counsel lacks the necessary expertise, he or she should consider bringing in computer law counsel to assist in the due diligence effort. Obtaining a written opinion of counsel from an outside specialist may be warranted in suspect situations.

Counsel can also take this review opportunity to draft a legal protection checklist for implementation following the acquisition of XYZ Company.

V. RESULTS OF INVESTIGATION

As with any due diligence investigation, high-tech due diligence provides the client and counsel more than assistance in making the basic transaction decision. Additional benefits include:

1. Familiarity with XYZ Company's personnel, products and policies.
2. "Clean-up" of any missing links in the chain of ownership of XYZ Company's assets and proprietary rights.
3. Increased awareness by all of XYZ Company's personnel of the importance of (and, consequently, improvements in) the protection of XYZ Company's proprietary rights.
4. Protective or remedial actions, such as identification of issues that need specific representations and warranties, indemnifications, escrows or other measures.
5. Adjustments, if appropriate, in the dollar amount involved in the transaction.

This last point is particularly salient, as intelligently conducted due diligence may discover facts which require an adjustment in the transaction's financial terms.

VI. TRANSACTION DOCUMENTS

The principal concern of any due diligence investigation is whether the client should go ahead with the loan, investment, or, as in XYZ Company's case, acquisition, in light of what the investigation has uncovered. In concluding the due diligence investigation, counsel should be careful to inform the client in writing of the results of the investigation. The attorney must remember that clients tend to view such reports as outright opinions on the transactions; if opinions are given, relevant risk analysis assumptions and appropriate disclaimers should be included. Once an informed decision is made, counsel can proceed to draft applicable transaction documents.

Just as carefully drawn transaction documents are no substitute for thorough due diligence, the reverse is also true. Unless counsel accurately incorporates the results of due diligence into the transaction documents, the client's interests have not been fully protected or served. Carefully drafted documents, utilizing the results of due diligence, protect the client's current and future interests to the fullest extent possible.

VII. CONCLUSION

Many attorneys deal with the concept of due diligence on a day to day basis. Without proper recognition of relevant issues, however, putting the concept into practice may not serve the client's interests. High-technology companies present unique due diligence problems for the attorney. Traditional due diligence strategies may not adequately protect the interests of the high-technology client, and it is up to the attorney to identify those areas of special concern in conducting high-tech related due diligence.

APPENDIX A
MEMORANDUM
DUE DILIGENCE CHECKLIST

A. *Corporate Organization.*

1. Articles of Incorporation and amendments thereto.
2. Bylaws and amendments thereto.
3. Minutes of all Board of Directors meetings.
4. Minutes of all shareholders meetings.
5. Annual or special reports to shareholders or employees.
6. Disclosure documents, if any, prepared in connection with issuance of securities.
7. List of all security holders (including holders of options or warrants), indicating names of record and beneficial owners, type and amount of securities held, the number and type of securities purchasable on exercise of options or warrants and the exercise price, and certificate numbers representing such securities.
8. All powers of attorney executed by officers or directors of _____ or on behalf of _____.
9. All licenses, permits or government authorizations held by _____ or needed to conduct business of _____.
10. All press releases issued by _____ during its existence.
11. A list (names, addresses, type of businesses) of all corporations, firms, associations, partnerships or other business entities, if any, in which _____ has a direct or indirect ownership or partnership interest (include foreign and domestic) and describe the ownership interest (e.g., "100% ownership of common stock"). Include copies of all operative documents (i.e. partnership agreements, stock agreements, etc.).
12. Names, addresses, age, title, principal occupation for last five years of each officer and director of _____.
13. A list of the states in which _____ has an office or is qualified or authorized to do business, the date on which _____ was qualified or authorized to do business in such state, and the date of expira-

tion, if any, of any qualification or authorization. Include copies of the latest certificates of qualification.

14. List of all securities owned by _____, if any, designating certificate numbers.
15. Number of _____ employees, including breakdown by location, general job category and salary range.
16. Descriptive list of all daily, weekly, monthly and annual reports generated by _____.
17. All business plans generated.
18. Addresses of all offices and facilities.

B. *Securities.*

1. Stock record book and all stock transfer ledgers and journals, if any, in the possession of _____.
2. Proxy solicitation materials and proxies, if any, used in the past.
3. All applications for permits, documents of registration, or other documents relating to the sale of securities by _____ since its existence.
4. Any voting and trust instruments, buy-sell agreements, voting proxies or other shareholders' or founders' agreements.
5. Stock option plans and agreements, stock options, subscription agreements, warrants, notes, security agreements. All contracts regarding securities of _____.
6. Any merger, acquisition or stock purchase agreements to which _____ is a party and any amendments thereto.
7. List of security holders (addresses and share certificates) who will exist at closing date, if different from current security holders.

C. *Financial Condition.*

1. Financial statements since formation of corporation (balance sheet, profit and loss statements, and notes thereto).
2. State and federal tax returns since formation of the corporation.
3. Notices of tax assessments or proposed assessments; notices of audit; any waiver or extension of time for imposition of assessment.
4. Latest inventory or products, raw materials and supplies.

D. *Agreements.*

1. Schedules of compensation paid to each director, officer and key employee.
2. All bonus, profit-sharing, deferred compensation or incentive programs for officers or employees.
3. Detailed description of all fringe benefits made available to directors, officers, or employees, including any stock purchase, stock option, pension, medical, hospitalization, life and disability, retirement, insurance plans, programs or agreements. Copies of all operative documents.
4. Employment or consultancy contracts, oral or written.
5. Collective bargaining agreements, if any.
6. Confidentiality or non-disclosure or invention assignment agreements.
7. Employee manuals.
8. Detailed description of _____ personnel policies, including policies on vacations, sick leave, etc.
9. All bulletins or memoranda to employees reflecting policies of _____.
10. All warranty agreements for _____ products.
11. Summary of policies regarding refunds or exchanges of products.
12. Description of new products.
13. Statement indicating whether any products violate state or federal laws or regulations; have been subjected to recall or seizure; are subject to regulatory investigation.
14. Descriptive list of all policies of fire, liability or other forms of insurance carried by _____ including carrier, policy number, amount of coverage, premiums, expiration date and any pending claims.
15. All leases, including amendments thereto, for real property to which _____ is a party.
16. Descriptive list of all real property held by _____, if any; copies of deeds thereto and title reports covering same.
17. All leases for personal property to which _____ is a party.
18. All instruments creating liens, mortgages, pledges, security interests or other encumbrances affecting the real or personal property of _____.
19. Loan and other debt agreements to which

- _____ is a party, including lines of credit with banks.
20. List of all accounts and safe deposit boxes with any banks or financial institutions and the names of all persons authorized to draw on such accounts or have access to such boxes.
 21. Descriptive list of all accounts receivable, designating date on which they became due and any accounts which are doubtful for recovery.
 22. All indemnification or guaranty agreements.
 23. List of all third parties whose consent will be needed to merger or assignment of rights, e.g.:
 - banks
 - insurance companies
 - mortgagees
 - landlords
 - parties to principal contracts
 - administrative agencies
 24. All distributorship agreements, if any.
 25. All dealer and sales representative agreements, if any.
 26. All supplier's contracts, if any.
 27. All service/warranty agreements, if any.
 28. All agreements with customers, if any.
 29. All contracts for machinery, office supplies, or capital expenditures.
 30. All contracts containing provisions limiting _____'s freedom to compete.
 31. All agreements which might have a material adverse impact on the financial condition of _____, if any.
 32. All agreements which forbid or limit the right of _____ to merge with another business or acquire another business.
 33. Any agreements with financial advisors or consulting firms or consultants.
 34. Any agreements between _____ and (a) a director, officer, or employee; (b) a family member of a director, officer or employee or (c) a business in which a director, officer or employee or a member of his/her family owns an interest.
 35. List of each officer, director or key employee who owns a direct or beneficial interest in any competitor, supplier or

customer of _____ and description of such interest.

36. All patents, licenses, copyrights, trademarks and trade names held by _____ and evidence of rec-ordation or registration.
37. A list of all licenses granted and any other agreements to which _____ is a party relating to patents, copyrights, trade names, trademarks, trade secrets, inven-tions, discoveries, improvements, processes, formula, ideas, customer lists, technology or other know-how, or labels.
38. A list of all contracts continuing over a period of more than one year from the date thereof, except for open sales contracts, purchase orders, and supply contracts that are not material in amount.
39. A list of all contracts not made in the ordinary course of business.
40. Any contract or arrangement under which any officer or director of _____ is insured or indemnified in any manner against any liability which he may incur in his capacity as such.
41. A list of _____'s principal customers, sub-contractors, contractors and suppliers.
42. List of any brokers or finders with which _____ has an agreement.
43. Descriptive list of all pending bids or proposals currently outstanding by _____.

E. *Litigation.*

1. Names, addresses and telephone numbers of all attorneys consulted within the past two years for general advice, lit-igation, tax or other matters.
2. Descriptive list of all litigation matters previously liti-gated or settled within the last two years, those now pend-ing or threatened, unasserted or contingent claims or assessments and names of persons responsible for such matters, if any.
3. Letters to accountants (audit response letters) prepared by counsel, if any.

F. *Research and Development Partnership.*

1. Copies of all final *executed* agreements entered into in connection with the _____ Partnership, in-

cluding any documents filed with the California Department of Corporations.

2. Name and address of each general partner and number of partnership units held by each.
3. Summary of status of the _____ Partnership regarding, stage, products developed, transactions with partners or third parties and all other relevant data.