Team Y
Seller

Issues Memo:

Issue 1: Indemnification
A) Indemnity Cap: 25% of purchase price for Fundamental Representations and 5% of purchase price for Non-Fundamental Representations
We would like to implement a cap of 5% for Non-Fundamental Representations (a majority of the caps in recent private acquisition being 5% or less of the purchase price). Since the client's business is operated efficiently and subject to risks and claims customary for businesses of its size, a standard 5% reflects a proper allocation of risk. For Fundamental Representations, we will accept a 25% cap to cover critical components of the transaction. We also included a $2,500,000 cap on the cost of resolving claims related to Section 4.12(a) of the Disclosure Schedule, since we believe FTG benefit from a positive resolution on the most favored nations clause, and the cost of settlement may increase as a result of the acquisition. Lastly, our clients are individuals, some at the stage of retirement, who desire post-closing deal certainty and are not in the position to assume high liability for future contingencies.
B) Survival: 7 months for Fundamental Representations, 6 months for Non-Fundmental Representations, with a carveout of 7 years for representations relating to taxes and title
We believe that a 6-month survival period is sufficient to discover breaches. 6 months allows for two quarterly internal audits, providing enough information to assure the quality of the representations. As our client aims to wind down the company, and achieve an issues-free retirement post-closing, 6 months accommodates these outcomes.
C) Basket: $2,000,000 deductible
We believe that $2,000,000 deductible aggregate "basket" is appropriate. Our client's business is well-managed and associated with customary risks. Since FTG is in the business of trucking and has conducted due diligence of our client's business, the possibilities of material unknown risks arising is small. Certainty around the purchase price is significant to our client who is looking to cease operations.
D) Mini-Basket: $80,000
$80,000 per-claim is appropriate. Any claim below $80,000 pertains to minor issues under the materiality thresholds – they are consequently a part of the ordinary course of business and part of the risk assumed by the Buyer in acquiring the assets. Our client does not have the resources post-acquisition to engage in resolution procedures for a multitude of smaller issues. With this mini-basket, indemnification claims will be limited to larger, more substantial issues.

Issue 2: Purchase Price and Holdback
A) Assumed and Excluded Liabilities:
We believe FTG should assume liabilities as a result of the closing, including employee benefits and compensation, transfer taxes as well as any liabilities arising out of FTG's

ownership and operation of the business after the closing. Although our client is willing to help transition the business and the customers, our client does not want to be responsible for liabilities that occur due to FTG's management decisions and operations.

B) Holdback/Escrow

We believe the purchase price should be paid with no holdback since the deal includes no earn-out provisions and no pending regulatory approvals. Additionally, this is a long-standing business with an existing financial history, in an industry where comparable companies exist. As traditional methods of valuation can be applied, there is no pressing reason for a holdback – a later discovery which will dramatically affect the value of the company is unlikely.

Issue 3: Deal Certainty

A) Termination Fee: $5 million and damages

A termination fee of $5 million with damages is appropriate if Agreement is terminated based on closing conditions in 9.01(c)(i), (ii) or (d). Since FTG is a strategic buyer engaging in a vertical acquisition, the deal may face higher antitrust risks than with other potential buyers. The termination fee helps compensate our client in case the deal falls through due to antitrust concerns. Damage occurs to our business with the prolonged wait time until close (with 6 months being the minimum time due to the nature of the two-part transaction). We run the risk that the buyer may not want to take the steps required to gain antitrust approval (ie. divestitures). A breakup fee appropriately compensates our client for the time, money, effort spent on the deal, as well as provide our client with greater confidence to grant access to confidential information to a competitor despite the risk that the deal may not close. Additionally, if terminated, the pending transaction may have resulted in loss of employees and customers. Thus, we also ask for a recovery of funds to compensate for the damage to our client's business.

B) No MAC Closing Condition

MAC outs rarely succeed in the Delaware Chancery Courts, the jurisdiction mandated by the purchase agreement. By agreeing upfront that there is no MAC out, both parties save resources and time for fruitless litigation. As the parties were previously competitors, it is in the interest of both parties to protect information revealed in the deal making process. Particularly due to the risk we are taking on as a smaller private company in revealing details about our business to a competitor, we need to be assured that the opposing party will not take advantage of the information we have shared.

C) Material Adverse Change Definition

The exceptions carved out of the MAC definition aligns with the principles of fairness and appropriately allocates risk between parties. Our client should not bear excessive risk for phenomena beyond their control.

D) Termination Provisions

We updated a Drop-Dead Date to clarify the time by which our client has to cure any breach, inaccuracy, or failure.