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ACC San Francisco  
**Flight Check:  
Pre-Merger  
Considerations**

November 17, 2022

# Agenda

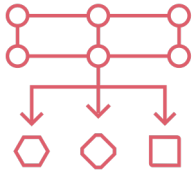
1. Framing M&A
2. Initial Considerations
  - Non-Disclosure Agreements
  - Due Diligence / Data Room
  - The Team
  - Structuring (tax, regulatory, global trend considerations)
3. Critical Diligence
  - Capital Structure
  - Top Customer / Supplier Diligence
  - Employment
  - Consents
  - Disclosure Schedules
  - Intellectual Property
  - Integration
4. Merger Agreement
  - Working Capital
  - Indemnification
  - Litigation / Dispute Preparedness



“...the rule confirmed  
by nearly all studies:  
M&A is a mug's game, in  
which typically 70%-90%  
of acquisitions are  
abysmal failures.”

Harvard Business Review, “M&A: The One Thing You Need To Get Right” (Magazine, June 2016) by Roger L. Martin

# Framing M&A Transactions – Three Phases



## Pre-Signing / Diligence

- Arguably one of the most critical phases of diligence
- This is your chance as legal counsel to shine. Can you guide teams to assess risk in line with your business concerns?
- Can you help create efficiencies as project manager to drive your transaction to completion in a timely way?



## Between Signing and Closing

- Be careful of “gun-jumping” pitfalls
- Understand what needs to happen post-closing – down to the details – and who is responsible for leading post-integration activities
- Keep your foot on the pedal



## Post-Closing

- Be mindful that closing is the last day of the deal but the first day of running your new business



# Initial Considerations

## Target Acquired: First Points to Consider in Pre-Signing and in Diligence



## Non-Disclosure Agreements (“NDAs”)

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- Understand existing NDAs
- Public company “standstill” provisions
- Use Transactional NDAs

# Due Diligence / Data Room

- Start early
  - Ask for a diligence request list
  - Organize a data room provider
    - Phase the data room
- Legal review of data room documents





## Roll Call: Who is on the team?

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- Point person
- Board / management
- Financial advisors
- Outside counsel (M&A, Tax, Regulatory, Specialists)
- Jurisdictional issues





# Tax Structuring

*The more tax hoops a buyer has to jump through, the less incentivized they will be to close the deal*

- Tax structuring for equity investors should be done early
- Reorganizations may not always be possible down the line
- Consider cross-border issues



# Controlled Airspace: Regulatory Considerations

*Evaluate risk and make filing decisions on an informed basis*

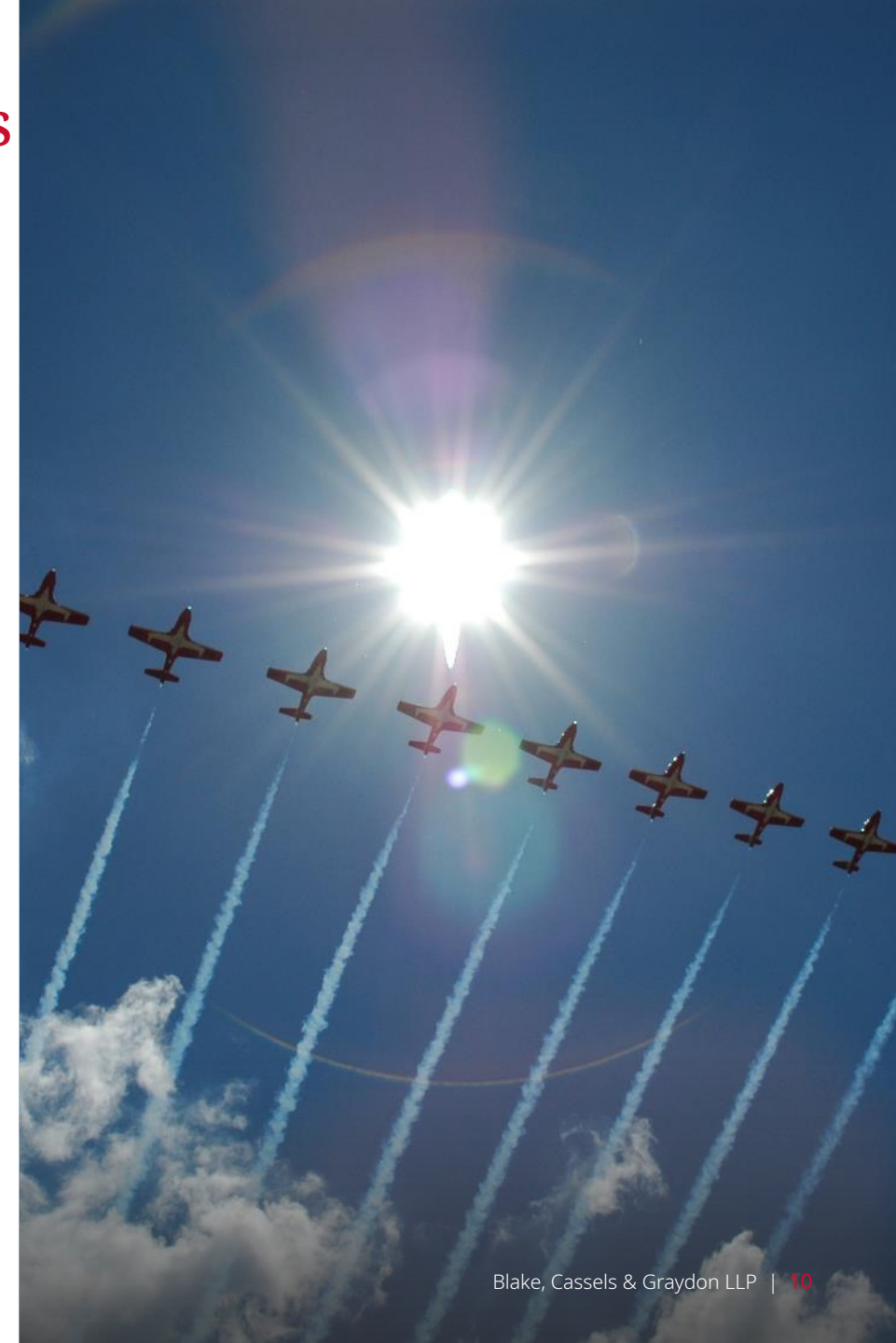
- Early analysis needed to determine which (1) Acts are engaged and (2) thresholds are triggered
- Competition – check thresholds because they change

Hart-Scott-Rodino Act  
(USA)  
\$101 million USD

Competition Act  
(Canada)  
~\$69 million USD

Antimonopoly Law  
(China)  
~\$111 million USD

- Committee on Foreign Investment (CFIUS) review
- Anti-Bribery / Anti-Corruption



# Merger Review - Global Trends

## Macro Trends

- Pandemic and economic recovery
- Inflation
- Big tech / digitization of economy



## Possible Antitrust Questions

- Industry repositioning (M&A)
- Higher prices due to concentration
- Control of big data, privacy



### *United States*

- July 2021 E.O. focuses on technology mergers
- Key personnel appointed (L. Khan, J. Kanter)
- Higher bar, reduced guidance for merger clearance by US antitrust agencies



### *Europe*

- Merger policy change focused on digital economy



### *Others*

- UK, Australia also considering proposals to expand to antitrust scrutiny of mergers, particularly in the technology area

Number of jurisdictions increasing antitrust scrutiny of mergers given concerns over Big Tech, inflation and wealth inequality

# Anti-Competitive Business Practices - Global Trends

## International antitrust trends

- Pursuit of large tech companies under monopolization, abuse of dominance provisions
- Evolving ideas about role of enforcement in pursuing non-antitrust goals (ESG, gender-based analysis)



### *United States*

- Google and Facebook monopolization cases ongoing
- Wage-fixing and no poach agreements pursued under criminal provisions
- American Airlines / Jet Blue domestic alliance challenged



### *Europe*

- Relaxation of competition rules in UK to address acute supply chain issues
- September 2021: Competition Directorate-General of the EC releases Competition Policy Brief outlining how it could better support the European Green Deal by clarifying its guidelines on horizontal cooperation and vertical agreements



### *Others*

- China reigning in market power of domestic champions (Alibaba / Tencent / Didi Chuxing)



Mission Critical: Key Diligence

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# Capital Structure

*Providing certainty to a potential buyer adds value to the company*

*Clean deals are worth more*

- Conduct a Minute Book review
- Review Equity Incentive Plan(s)
  - Avoid shareholder and/or option holder disputes
- Review Shareholder Agreements and Investor Agreements

“ Without a customer, you don’t  
have a business – all you have is a  
hobby. ”

- Don Peppers

# Top Customer/ Supplier Diligence

*Information needs to flow when negotiations begin*

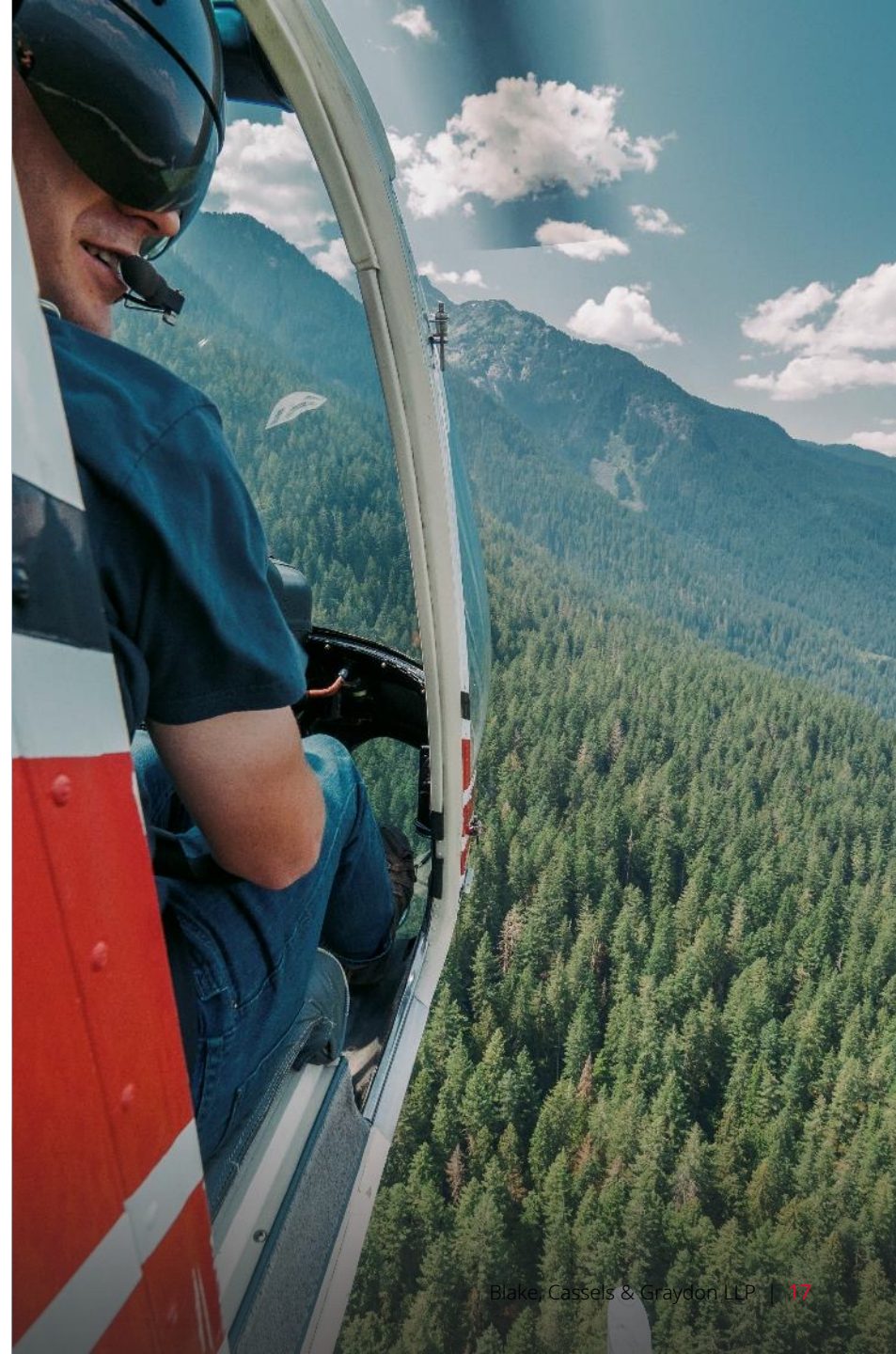
- Review contracts with customers / suppliers regarding information disclosure
- Understand the practical realities of client relationships
- Adhere to privacy obligations





# Employment

- Equity-Based Incentive Plans
- Cash-Based Incentive Plans
- Termination Entitlements
- Restrictive Covenants





# Consents

*Who needs to say “yes” and who can say “no”*

- Identify required consents
  - Are there any legal, regulatory or governmental restrictions on the transfer of shares, a business or assets in your jurisdiction?
  - Do transactions in particular industry require consents from specific regulators or a governmental body?
  - Are there any applicable public or national interest considerations?
- Private
  - Third-parties
  - Minority shareholders
- Regulatory
  - Who has the pen?

# Disclosure Schedules

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- Affirmative and negative disclosures
- Disclosing litigation, investigations or other areas of sensitivity
- Updating disclosure schedules
- Is one entry in the disclosure schedule sufficient?



# Intellectual Property

- Target should prepare a robust list of all IP that is material to the Target's business
- Confirm ownership of material IP
- Assignment / Change of Control issues
  - Consents may be required
  - Structure of the transaction has impacts
- Beware open source software issues





# Integration

- Not just a matter for closing
- Critical that due diligence is not just focused on transaction risk but also transition and integration (harmonizing contract terms/T&Cs, identifying vendor gaps and overlaps at target/operational deficiencies, legal entity rationalizations)
- Track matters identified in due diligence early to ensure future integration
- Consider opportunities to shift integration costs to seller pre-closing



# Formation Flying: The Merger Agreement

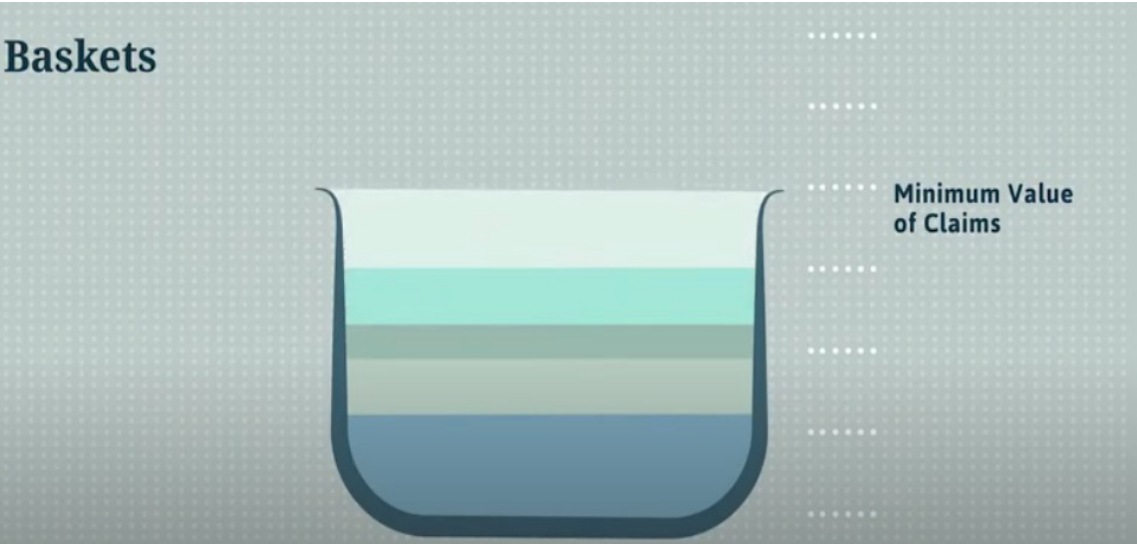
# Working Capital

## *Preserving deal value*

- Plan how to calculate (relevant accounting principles and methodologies, subsequent events, items included)
- Involve accountants
- Specific dispute resolutions clauses – arbitration versus expert determination
- Overlap with indemnification



# Indemnification





# Litigation / Dispute Preparedness

- Consider the following early
  1. Jurisdiction
  2. Choice of law
  3. Attornment
  4. Style of dispute resolution
- Privilege
  1. Common interest
  2. Attorney-client
  3. Litigation privilege
  4. Issues for in-house counsel (business communications, shared advice within corporate group)



# Presenters

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- National, full-service law firm
- Blakes has one of the largest and most active mergers and acquisitions practices in Canada
- In the past 10 years, Blakes has been involved in more than 1,480 global public and private M&A transactions, with an aggregate dollar value of US \$1.5 trillion
- Band 1, Corporate/M&A, Nationwide Canada, Chambers Canada: Canada's Leading Lawyers for Business 2022



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