

To: Denove Inc.

From: Rockwall Analytics

Subject: Project Reno

Date: December 6, 2020

Review Customer Agreement

Using AI in the due diligence process, analyze three key customer contracts and consider their implication on the drafting of the Merger Agreement

ADDITIONAL INFORMATION

In Project Reno, the parties will enter into a merger agreement, by which Denove will merge into and with a newly-formed subsidiary of Sano, so that Denove will survive as a wholly owned subsidiary of Sano. In this agreement, Denove will provide the following representation:

Abstract

'Except as provided in the Denove Disclosure Schedule , the execution and delivery of this Merger Agreement by Denove do not, and the performance of this Merger Agreement by Denove will not, violate or give rise to a right to notice or consent or give rise to a right of termination or cancellation pursuant to any contract to which Denove is a party'

As stated in the representation, the accuracy of this representation will be subject to the disclosures we make in the disclosure schedule, and any such disclosure will be treated as an exception to representation. For example, if we know that a particular agreement could be terminated in the event of a change of control, we would include that in the disclosure schedule as an exception to the representation. This means that the acquirer is notified of the risk that the third party may terminate the agreement following the transaction and if the third party does terminate the agreement, the acquirer cannot pursue the target for damages for breach of that representation

Samira, would like *Rockwall Analytics* to consider some key clauses discovered in the due diligence process prior to preparing the disclosure schedule

Note: The Kira software Samira references below is an AI-powered platform that, among other things, helps advisors save time by enabling them to more quickly locate the provisions they are searching for within large sets of documents

OUR TASK

Samira sends Rihad the following email:

Abstract

Hi Rihad

I've reviewed Denove's key agreements within the Kira platform, and I'd like you to take a closer look at the attached excerpts from three key manufacturing agreements, and consider whether you think any of them might trigger issues under the "no conflicts" representation in the merger agreement, which I have reproduced below. Please send me a short memo summarizing your analysis as to whether you think we should include any of these clauses in the section of the disclosure schedules corresponding to that representation, and why

Reach out to me if you have any questions

Best,
Samira

Excerpt of the "No Conflicts" Representation

Except as provided in the Denove Disclosure Schedule, the execution and delivery of this Merger Agreement by Denove does not, and the performance of this Merger Agreement by Denove will not violate or give rise to a right to notice or consent or give rise to a right of termination or cancellation pursuant to any contract to which Denove is a party

- Manufacturing Agreement 1:

- *"Denove may not assign or transfer its rights under this agreement without the express written consent of Vendor, to another person, directly or indirectly, whether by operation of law, change of control or otherwise, or a change in a majority of Denove's board of directors. Any such assignment shall be null and void. For purposes of this section, a "change of control" means: (i) the acquisition (directly or indirectly, whether by merger, consolidation, purchase and sale, share exchange or otherwise) by a third party (other than any trust or fund created under a profit-sharing or other benefit plan for employees of a party) of a beneficial interest in the shares of a party representing more than fifty percent (50%) of the combined voting power of a party's then outstanding shares; or (ii) the transfer, sale or assignment of more than fifty percent (50%) of the assets of a party to a third party"*

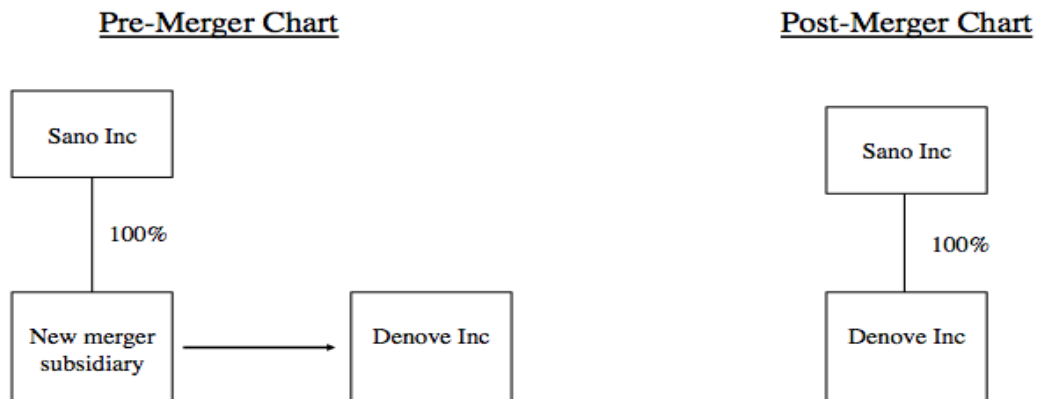
- Manufacturing Agreement 2:

- *"Manufacturer may terminate this Agreement (1) if Denove ceases to be a party to this Agreement for any reason without the prior written consent of Manufacturer, or (2) upon 30 days' written notice from Manufacturer to Denove"*

- Manufacturing Agreement 3:

- *"Denove may transfer this agreement to any third party, including any of its affiliates or successors in interest, without the prior written consent of or notice to the Company. Notwithstanding anything to the contrary in this agreement, neither Denove nor any of its affiliates (nor any of their respective transferees) shall be permitted to commercialize or sell any products that target ovarian cancer in humans from the effective date of this agreement to two years after any termination of this agreement. An 'affiliate' means any person who control, is controlled by, or is in common control with the applicable party"*

Project Reno: Transaction Structure Chart



EXTENDED INSTRUCTIONS (PROJECT RENO) – SUB-TASK 2

Now we have the NDA finalized, we can now commence the due diligence process

Due diligence is a critical element of any strategic transaction – it allows the parties to the transaction to understand the respective legal, financial and business position of the other companies in the transaction, to confirm (or impact) the assumptions underlying their valuation of the target company, and discover any unanticipated risks or concerns related to the respective businesses or the proposed transaction. In Project Reno, Sano is proposing to acquire all Denove for cash. Accordingly, the scope and concerns from a due diligence perspective on each respective company are different. Since Denove's stockholders will walk away from the transaction with cash, Denove's due diligence concerns are:

1. whether this transaction can close
2. whether Sano will have money to pay the purchase price when it does

These due diligence concerns, while important, are generally fairly easy to ascertain, and the risks related to them can often be allocated in the contract that governs the acquisition

Alternatively, Sano is going to own all of Denove after the transaction, and so Sano will be not only concerned with the ability for the transaction to close, but also to understand all of the features, risks and attributes of Denove before it becomes part of the entity

As you might expect, due diligence is a multi-discipline operation, involving input and advice from many specialists, including legal teams, financial advisors, accountants, consultants, human resources teams, tax advisors and business operations teams. Legal due diligence is similarly broad, and can touch upon many of the aspects of the diligence process, including the review and analysis of a company's existing contracts, regulatory, tax, benefits, real estate and employment, among others

Legal due diligence is also intimately tied another major aspect of the transaction in which the lawyers are heavily involved – the negotiation of the actual sales document, which, in this case, would be a merger agreement. The merger agreement sets out the terms of the sale, and amongst other things, Denove will provide representations and warranties in this document, which are a list of statements that, if untrue, would result in a breach in the merger agreement

and entitle Sano to either terminate the agreement or seek damages from Denove's stockholders, or both. In the context of a merger agreement, Denove will typically be expected to represent to a broad range of statements regarding itself, including, among others, its operations, its business, its assets, its liabilities and the impact of this transaction on Denove. Accordingly, in drafting these representations and warranties, Denove and its advisors *Rockwall Analytics* must understand what statements Denove can make without opening itself up to potential risk, and what exceptions, if any, might exist

As you might imagine, that exercise requires a very detailed understanding of Denove's business, contracts, and operations. As such, even though we represent Denove, we will be expected to perform due diligence on our own client, so that we can assist in the negotiations of the representations and warranties, and identify any exceptions that should be listed in the merger agreement. Exceptions that are listed in the merger agreement function as a carve-out to the potential risk of damages or termination of the merger agreement. These exceptions are often listed in a separate document, called a "disclosure schedule," that forms a part of the merger agreement, but are distributed separately, both to keep the merger agreement itself readable, and to keep potentially confidential or sensitive information out of the core agreement. To help understand how a disclosure schedule works, let's say that the merger agreement contains a representation by Denove that it is not currently subject to any litigation proceedings, and we knew about a big dispute related to their core intellectual property related to Denove's product candidate. Absent disclosing that exception on the disclosure schedule, Denove would be in breach of that representation, and thus would "own the risk" of any damages or termination rights that arose from that litigation

One common representation that often triggers disclosure requirements is the "no conflicts" representation, which generally is a representation that the proposed transaction does not conflict with, is not prohibited by or does not create any additional rights under any agreement or law by which the company is bound. This representation is intended to flush out any "change in control" issues that may exist in the company's existing agreements or operating documents, as those can often have a big impact on the value of the transaction. For example, if Denove's product is based on intellectual property that is based on a license agreement from a third party, and the license agreement would require that third party's consent before the merger, that third party the potential ability to "hold up" the deal, or else potentially eliminate a huge portion of Denove's value upon the completion of the project

These contractual change of control issues are generally very complicated, and require significant legal analysis of both the contract, the governing law for that contract, and the structure of the proposed transaction. For example, if one of Denove's contracts says "Denove cannot sell all of its assets without prior consent," and the proposed transaction involves an asset sale (a common deal structure), this contract creates a potential change of control issue, and may need to be disclosed on the disclosure schedules. However, what if the transaction is structured as a sale of stock? How about a merger?

In Project Reno, the proposed transaction structure is what is called a "*reverse triangular merger*." In this structure, Sano will form a new wholly owned subsidiary (as in, a company in which Sano owns all of its shares), and that company will merge into and with Denove, so that Denove will survive as a wholly owned subsidiary of Sano, and the prior stockholders of Denove will have their shares converted into a right to receive cash

Now, as one might imagine, companies often have lots of contracts, and legal due diligence of those documents can be a very time-intensive (and potentially costly) process. As such, many

third party resources, including software resources, have been developed to expedite and supplement that process, often acting as a “first pass” on reviewing certain documents. In this instance, we will be using a software program known as *Kira* to assist with the initial review process of these agreements, which uses adaptive algorithms to read and highlight potential issues in contracts based on proscribed search parameters. You can read more about how *Kira* works below

For this matter, the *Kira* software has identified certain clauses that we need to review in certain key manufacturing agreements that may create a “change in control” issue that may need to be disclosed in the disclosure schedule. For this task, *Rockwall Analytics* will first need to read one of the representations in the merger agreement below. Then will need to review the clauses the *Kira* software has identified in the three key agreements and compare it to the proposed transaction structure. It should then consider whether they should be included in the disclosure schedule against that representation, and compose an memo succinctly summarizing its recommendations