

# Premeditated Merger

October 6, 2020

Chris Hanslik



Larry Wilson

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# AGENDA: *Thinking Through An Acquisition*

- Binding Provisions in Preliminary Documents
- Definitions that Make a Difference
- Representations and Warranties
- Indemnity Issues
- ....And....Pesky Miscellaneous Terms

# The Players

BUYER:	<p><b>Madrigal Elektromotoren GmbH</b> – An international conglomerate with interests in industrial equipment, manufacturing, global logistics, construction, and hospitality. A small but very profitable and rapidly growing division owns interests in fast casual restaurants.</p>	
SELLER:	<p><b>Los Pollos Hermanos LLC</b> – A successful and vertically integrated fast casual restaurant chain located in the Southwest United States owned by Mr. Gustavo Fring. <i>Los Pollos Hermanos</i> provides a superior product based upon proprietary recipes and has a loyal customer base. Growth is constrained by availability of raw materials and an inefficient distribution network.</p>	

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# The Deal

*Madrigal* will acquire all of the membership interests of *Los Pollos Hermanos* from Mr. Fring (or alternatively, will acquire all of the assets and assume certain liabilities of *Los Pollos Hermanos*) for a cash-free, debt-free purchase price of \$350 million. The parties have agreed that the purchase price will be adjusted up or down based upon the Net Working Capital of *Los Pollos Hermanos* as of the closing date and that Mr. Fring, will make customary representations and warranties relating to the business and assets of *Los Pollos Hermanos*. *Madrigal* and Mr. Fring will sign a long term, evergreen, employment contract under which Mr. Fring will continue to operate *Los Pollos Hermanos*, subject to termination for cause by the *Madrigal* board of directors. An escrow of 10% of the purchase price will be established to secure the post-closing indemnity obligations of Mr. Fring.

# Ties That Bind...

*aka Binding Provisions in Preliminary Documents*

1. Confidentiality
2. Access
3. Exclusivity

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## *aka Binding Provisions in Preliminary Documents*

### 1. Confidentiality

2. Access

3. Exclusivity

### CONFIDENTIALITY

BUYER'S GOAL	SELLER'S GOAL
Obtain information to determine what makes <i>Los Pollos Hermanos</i> superior to its competitors and evaluate <i>Los Pollos Hermanos'</i> assets and liabilities without limiting <i>Madrigal's</i> other operations	Provide information to <i>Madrigal</i> to establish the value of <i>Los Pollos Hermanos</i> without losing the confidential nature of its proprietary recipes or creating a potential competitor

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# Ties That Bind...

## *aka Binding Provisions in Preliminary Documents*

1. Confidentiality

**2. Access**

3. Exclusivity

### ACCESS

BUYER'S GOAL	SELLER'S GOAL
Obtain direct access by <i>Madrigal</i> to the books, records, assets, and personnel of <i>Los Pollos Hermanos</i> for evaluation of the quality of its earnings, assets and operations	Avoid unreasonable interference by <i>Madrigal</i> with the business of <i>Los Pollos Hermanos</i>

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# Ties That Bind...

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1. Confidentiality
2. Access
- 3. Exclusivity**

### EXCLUSIVITY

BUYER'S GOAL	SELLER'S GOAL
Prevent Mr. Fring from shopping the transaction during due diligence and negotiation of a definitive agreement	Avoid being rushed into a bad transaction with <i>Madrigal</i> and comply with any fiduciary duty of <i>Los Pollos Hermanos</i> directors



# You Say Tomato, I Say Tomato....

*aka Definitions that Make a Difference*

1. Material Adverse Effect
2. Knowledge
3. Net Working Capital

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# You Say Tomato, I Say Tomato.... *aka Definitions that Make a Difference*

## 1. Material Adverse Effect

2. Knowledge
3. Net Working Capital

### MATERIAL ADVERSE EFFECT

BUYER'S GOAL	SELLER'S GOAL
Allow <i>Madrigal</i> to renegotiate or avoid the transaction entirely upon the occurrence of certain significant events that adversely affect <i>Los Pollos Hermanos</i>	Preserve the benefit of the transaction and limit those events that could give <i>Madrigal</i> the right to renegotiate or avoid the acquisition of <i>Los Pollos Hermanos</i>

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# You Say Tomato, I Say Tomato.... *aka Definitions that Make a Difference*

1. Material Adverse Effect

## 2. Knowledge

3. Net Working Capital

### KNOWLEDGE

BUYER'S GOAL	SELLER'S GOAL
Prevent Mr. Fring from playing ostrich about his chicken business	Avoid being responsible for knowing everything that happens at every level in <i>Los Pollos Hermanos</i>

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# You Say Tomato, I Say Tomato.... *aka Definitions that Make a Difference*

1. Material Adverse Effect
2. Knowledge

## 3. Net Working Capital

### NET WORKING CAPITAL

BUYER'S GOAL	SELLER'S GOAL
Ensure that <i>Los Pollos Hermanos</i> delivers to <i>Madrigal</i> and that <i>Madrigal</i> receives sufficient working capital to continue the business of <i>Los Pollos Hermanos</i> without additional investment	Ensure that Mr. Fring gets credit for all current assets delivered to <i>Madrigal</i> and does not have to refund any of the initial purchase price

When in Rome...

*aka Not So Customary Representations and Warranties*

1. Undisclosed Liabilities
2. Full Disclosure (10b-5)
3. No Other Representation/Non-Reliance

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# When in Rome...

## *aka Not So Customary Representations and Warranties*

### 1. Undisclosed Liabilities

2. Full Disclosure (10b-5)
3. No Other Representation/Non-Reliance

### UNDISCLOSED LIABILITIES

BUYER'S GOAL	SELLER'S GOAL
Obtain recourse against Mr. Fring for any liability of <i>Los Pollos Hermanos</i> that is not disclosed in the Purchase Agreement	Avoid granting <i>Madrigal</i> a carte blanche and provide reasonable assurance that all liabilities of <i>Los Pollos Hermanos</i> have been disclosed in accordance with recognized accounting standards

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- 2. Full Disclosure (10b-5)**
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### **FULL DISCLOSURE (10B-5)**

<b>BUYER'S GOAL</b>	<b>SELLER'S GOAL</b>
Obtain assurance that Mr. Fring has disclosed all information relating to <i>Los Pollos Hermanos</i> that may be material to <i>Madrigal's</i> decision to enter into the transaction	Avoid granting a carte blanche and prevent <i>Madrigal</i> from making a claim based upon <i>Madrigal's</i> failure to ask the right questions.

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# When in Rome...

## *aka Not So Customary Representations and Warranties*

1. Undisclosed Liabilities
2. Full Disclosure (10b-5)

### **3. No Other Representation/Non-Reliance**

#### **NO OTHER REPRESENTATION/NON-RELIANCE**

<b>BUYER'S GOAL</b>	<b>SELLER'S GOAL</b>
Avoid a limitation on what could be claimed to be a breach of Mr. Fring's representations	Limit Madrigal's recourse to the express representations made by Mr. Fring in the Purchase Agreement



# Lions and Tigers and Bears (OH MY!) ... *aka Indemnity Issues*

1. Sandbagging
2. Survival
3. Thresholds, Caps and Baskets

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# Lions and Tigers and Bears (OH MY!) ... *aka Indemnity Issues*

## 1. Sandbagging

2. Survival

3. Thresholds, Caps and Baskets

### SANDBAGGING

BUYER'S GOAL	SELLER'S GOAL
Preserve the benefit of the representations negotiated between <i>Madrigal</i> and Mr. Fring and the transaction reflected in the Purchase Agreement	Prevent <i>Madrigal</i> from taking advantage of any superior knowledge gained by <i>Madrigal</i> during the due diligence review of <i>Los Pollos Hermanos</i>

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# Lions and Tigers and Bears (OH MY!) ... *aka Indemnity Issues*

1. Sandbagging

## 2. Survival

3. Thresholds, Caps and Baskets

### SURVIVAL

BUYER'S GOAL	SELLER'S GOAL
Provide time necessary for <i>Madrigal</i> to discover and make a claim against Mr. Fring for a breach of representations under the Purchase Agreement	Provide a date by which all claims by <i>Madrigal</i> for a breach of representation by Mr. Fring must be filed or waived

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# Lions and Tigers and Bears (OH MY!) ... *aka Indemnity Issues*

1. Sandbagging
2. Survival

## 3. Thresholds, Caps and Baskets

### THRESHOLDS, CAPS AND BASKETS

BUYER'S GOAL	SELLER'S GOAL
Obtain complete reimbursement for all losses arising from any breach of the Purchase Agreement by Mr. Fring	Limit liability under the Purchase Agreement for insignificant breaches of the Purchase Agreement

# And One More Thing...

*aka Those Pesky Miscellaneous Terms*

1. Conflict Waivers
2. Legal Expenses
3. Governing Law

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# And One More Thing...

## *aka Those Pesky Miscellaneous Terms*

### 1. Conflict Waivers

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- 3. Governing Law

### CONFLICT WAIVERS

BUYER'S GOAL	SELLER'S GOAL
Access to all correspondence between <i>Los Pollos Hermanos</i> and Saul Goodman PLLC that does not relate to the Transaction or the Purchase Agreement	Protection of privilege and confidentiality of correspondence between <i>Los Pollos Hermanos</i> and Saul Goodman PLLC relating to the transaction and the Purchase Agreement and preserve the right of Mr. Fring to engage Saul Goodman PLLC in any dispute arising after the closing between Mr. Fring and <i>Madrigal</i>

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# And One More Thing...

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1. Conflict Waivers

## 2. Legal Expenses

3. Governing Law

### LEGAL EXPENSES

BUYER'S GOAL	SELLER'S GOAL
Mr. Fring will be responsible for any legal fees incurred by <i>Madrigal</i> in a successful suit based upon the Purchase Agreement	<i>Madrigal</i> will be responsible for any legal fees incurred by Mr. Fring in a successful suit against <i>Madrigal</i>

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# And One More Thing...

## *aka Those Pesky Miscellaneous Terms*

1. Conflict Waivers
2. Legal Expenses

### 3. Governing Law, Jurisdiction and Venue

#### GOVERNING LAW, JURISDICTION AND VENUE

BUYER'S GOAL	SELLER'S GOAL
<i>Madrigal</i> distrusts US law in general and TX law in particular (since that is Mr. Fring's home and he has considerable influence over the judicial system)	Mr. Fring has confidence that he will be able to obtain a favorable outcome under TX and does not want the cost or inconvenience of being sued in a foreign jurisdiction



The Outcome....*Spoiler Alert*

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## The Outcome....*Spoiler Alert*

The BUYER and SELLER co-exist very profitably after closing. However, seasons after the closing, the *Los Pollos Hermanos* restaurants, production facilities and logistics operations are forced to close as a result of an FDA investigation. Although the violations were a breach of the Compliance with Laws rep in the purchase agreement, the survival period for breaches of Mr. Fring's representations under the Purchase Agreement has expired and all escrows have been released. Mr. Fring dies in a tragic nursing home explosion and the FDA has seized all of his assets for conspiracy to violate food purity laws. *Madrigal* is left with no remedy for the breach.

Under the direction of *Madrigal* corporate executives and certain key personnel of *Los Pollos Hermanos*, *Madrigal* changes the business model to decentralize production and rely on international distribution of finished product. The venture ultimately fails, however, as product quality declines without the oversight of Mr. Fring and other key personnel that made *Los Pollos Hermanos* successful.

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Questions?

Tell us what you think!  
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