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## **Do-It-Yourself Deals**

By: Julie R. Rubin, Esq.

I have a dirty little secret. I have a problem with candy. I eat way too much of it. It's rather embarrassing, so I try to conceal it. It doesn't paint a very lady-like picture to imagine me adrift on a sea of cellophane wrappers, the occasional loud crinkle as I shove wrappers to the bottom of my office waste bin. Sweet Tarts, Jaw Breakers. The cheaper, the better. I don't want truffles. No fancy, handmade bon bons. I want penny candy. I really cannot help myself, especially when I am troubled.

As I write this, my fingers are a bit tacky on my keyboard. I had a very stressful day and found late-afternoon solace in a delightful snack of Bit-o-Honey. My client, we'll call him Jackson, has his own dirty little secret, but it's a lot more expensive and damaging than my candy habit (even though I am convinced I single handedly financed my dentist's cabin in the Berkshires). Jackson is the chief executive officer and president of a local software and IT company that employs about 10 people. Jackson is highly educated and very bright. He is clever and charming and he can send a golf ball into next week. He is a gardener, a voracious reader and is the only man I know who knits. Jackson is many things. A lawyer he ain't.

About three years ago, a large, international software company with its headquarters on the west coast expressed an interest in buying the assets of Jackson's company. The call was quite welcome. Jackson had grown weary of the business. Although he'd enjoyed terrific success over the years, the stress associated with owning his own business and making sure enough new business was coming in the door to feed his employees had taken its toll. He was ready to get out.

Representatives of the potential buyer flew out to meet Jackson and test the waters before discussing deal terms. Before discussions got underway, the parties signed an agreement to protect their respective business information and assets. Standard stuff. As is always the case, during negotiations for any type of acquisition or merger, the parties exchange extensive amounts of sensitive and proprietary financial and business information during the due diligence phase of negotiations. To protect themselves in the event the deal craters, non-disclosure agreements are signed before any information is exchanged, so the parties are protected and can walk away with their businesses intact. Such was the case here.

For reasons that will never be entirely clear to me – but that surely involve some combination of cost-cutting, ignorance and ego – Jackson did not engage counsel. That's right,

faced with negotiating with a 500-pound gorilla, Jackson decided he did not need a lawyer. If any of you readers out there think this is okay or are feeling a touch defensive because you have done something similar, listen here. This is a bad idea. A very bad idea. The guy who cut off his own leg with a penknife when trapped under a rock in the woods for six days is a courageous man, a testament to the will to live. Dollars to donuts, he would have called 911 if his cell phone had any juice. I will never understand why Jackson didn't pick up the phone, given what was at stake.

Jackson received the potential buyer's non-disclosure agreement and signed it without having a lawyer so much as read it, which is to say Jackson sharpened his penknife in preparation for surgery. The parties exchanged a non-binding term sheet setting forth the parameters of the proposed deal, subject to the due diligence phase of negotiations. During due diligence, Jackson disclosed all sorts of financial information and, of course, confidential information about his software and IT products and services, client lists, pricing information, and details about a software product he had been developing for the last two years – all under the protection of the NDA that had been written by the buyer's lawyers.

As is often the case, after reviewing all the information about Jackson's company, the buyer declined to buy Jackson's company for the price reflected on the non-binding term sheet, and, instead, offered a significantly lower price. Jackson balked, demanded more, and the deal tanked.

About four months ago, Jackson discovered that the potential buyer was marketing a software product identical to the software product Jackson had revealed during due diligence, except that this product was less expensive and had more bells and whistles than Jackson's. To make matters worse, it was being pitched to all of Jackson's clients, who had been disclosed by name to the potential buyer, including each client's purchasing and services history with Jackson's company, during due diligence.

It quickly became clear that the potential buyer had negotiated in bad faith. The purchase price reflected on the non-binding term sheet was a ruse to lure Jackson into due diligence disclosures. Once Jackson had revealed everything, the buyer dropped his price betting that Jackson would refuse to sell so low. The buyer could wipe Jackson out of the market and step in where his company left off – with a full basket of clients, the knowhow and the resources to develop, manufacture and sell Jackson's products and services at a reduced cost.

Not so fast, you say. What about that NDA Jackson signed – the one that was supposed to protect his business information if the deal didn't close? Oh, yes. The NDA. The NDA was, in legal parlance, a complete joke. It was nothing more than an illusion of protection. It protected Jackson's business information for a mere two years following either party's termination of negotiations. As a result, as soon as two years passed following Jackson's rejection of the low-ball purchase offer, the potential buyer was free to use my client's proprietary and confidential information to compete.

I just spent the last seven hours taking the deposition of the buyer's CEO. I would like nothing more than to beat the snot out of him in court. Unfortunately, that which is unfair is often not illegal. Jackson signed the NDA without benefit of legal counsel of his own free will.

And it says what it says. The buyer waited the two-year period as required before running off with my client's trade secrets to market. I have, however, managed to craft solid, if not clever, legal claims out of this business disaster. I have never shrunk from battle, but I cannot say what, if anything, will be left of Jackson's business by the time we're through.

Your business took years to grow. Respect it and the years of effort you have put into it by getting competent legal representation. Jackson's lawsuit is expensive, ugly and about as bloody as that guy in the woods.

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