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Founder Thesis

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The Second Negotiation

Thesis: The first negotiation sets the headline price. The second decides how much of that price survives completion. It is written in the schedules, measured against employees and customers the founder no longer controls, and usually discovered when there is no time left to fix the weaknesses that produced it.

01 The Friday Email

The email arrived at 6.42pm on a Friday, 11 days before completion on 30 June.

Susan had spent almost three months on price. Price was the thing she understood. Price was the thing she had argued about, walked away from twice, and finally settled at $62 million for her Sydney logistics software business doing $28 million in revenue. She had told her husband the number. She had, quietly, worked out what it meant for the next thirty years of her life.

The email was from her lawyer, copied to her M&A adviser. The subject line said SPA Schedule 6, buyer's mark-up. Above the attachment he had written two sentences. "Susan, the retention release conditions have moved a long way from where we left them on Tuesday. I would like the three of us on a call first thing Monday."

Susan was not going to sign anything that weekend. What frightened her was that a document she thought was finished had been reopened 11 days before completion, and her lawyer did not want her reading it alone.

Of the $62 million, $15 million was deferred. Susan had always known this. She had understood it the way most founders understand it, which is to say as a timing issue. The money existed. The money was hers. The money would arrive in a year, in the way that a term deposit arrives in a year.

The deferred amount, 24% of the headline price, would be released on the first anniversary of completion, but only if certain things were true on that date. No more than 10% of the transferring employees could have left. No more than 10% of contracted recurring revenue could have been cancelled or allowed to lapse. There were 9 conditions in total. Susan read them four times.

None of this was an earnout, and the difference matters.

> *An earnout asks whether the business will grow. A retention release condition asks whether it will remain intact.*

Then, on the Monday, she learned the second thing.

Her CTO had met the buyer twice already. Once at a hotel in the city, once on a video call at 7am. He had been shown a retention package and asked not to raise it with her until the structure was settled. He agreed, because the person asking was about to become his employer and the person he would have been raising it with was about to stop being one.

Her first thought was that the buyer had gone around her. Her second arrived within the hour and stayed longer. He had not told her he had been invited. That was the part that lodged. A man she had hired eight years earlier had taken an approach from the other side and decided on his own that she did not need to know.

She was wrong on both counts, and it took her most of a year to see why. Susan had believed she was in a negotiation. There had been two.

02 Two Rooms

The founder assumes the second negotiation is about money. It is not. It is about control, and it happens in the narrow window where control is changing hands but the founder does not yet realise it has moved.

At completion Susan would receive $47 million, hers in the way money is normally yours. The remaining $15 million was a claim, settled a year later by reference to facts she would not be creating.

Who stays and who leaves is a question the buyer answers after completion. Which customers get repriced at renewal is a question the buyer answers. Whether the two account managers who hold 60% of the top 10 relationships are given a reason to stay, whether a warranty claim gets notified in month 11: these sit on the other side of a line Susan was about to cross.

Founders routinely call these provisions conditions precedent, and the shorthand passes because everyone in the room knows what is meant. The distinction is about timing. Conditions precedent sit in front of the transaction: regulatory approval, third-party consents, change-of-control waivers. Retention release conditions sit behind it.

> *One condition can stop the deal. The other can reduce the price after the company is gone.*

03 What the Data Says

Contingent payment mechanisms do not mean a deal is broken. They do change what price means.

The 2026 SRS Acquiom M&A Deal Terms Study, drawn from more than 2,300 private-target acquisitions worth USD 569 billion, reports that 88% of private-target deals in 2025 carried some form of escrow or hold-back. In Australia, Herbert Smith Freehills, reviewing more than 60 private transactions signed in 2024, reported that earn-outs and contingent consideration rose slightly, used to bridge valuation gaps in more instances than in previous years.

One number should hold a founder's attention above the others. Across all deals carrying an earnout, SRS Acquiom's own summary is that closer to one dollar in five is actually paid. Earnouts are the harder case, tied to performance rather than continuity, so the comparison is not exact. But in earnouts at least, the amount agreed and the amount received are very different numbers, because the conditions are measured in an environment the seller no longer runs.

04 The Case With a Transcript

Disputes like this settle privately. In March 2026 the Delaware Court of Chancery published one that did not.

In 2021 Krafton acquired Unknown Worlds Entertainment, the studio behind Subnautica, paying USD 500 million at completion with up to USD 250 million more as an earnout. The founders and chief executive were guaranteed operational control after completion and could be removed only for cause.

As the earnout came into view, Krafton's chief executive consulted ChatGPT on how to avoid it, according to the court's opinion. The key employees were then purportedly terminated for cause. The court found no cause on any reading the contract would bear, reinstated the chief executive, and extended the earnout period by 258 days, the exact time he had been improperly removed.

The sellers won the remedy that mattered at that stage. Founders should take limited comfort from it. Krafton had an unusually explicit control covenant, an express specific performance clause, and a buyer who left a written record of his intentions. Susan has none of those things.

05 Why the Retention Pool Is the Founder's Problem

Now return to the CTO, and the two meetings he did not mention.

The buyer needs the team. That is rational, not hostile, and in a founder-led software business it is often one of the largest unpriced risks on the buyer's side of the table. So the buyer builds a retention pool. The WTW 2024 M&A Retention Study found that 72% of acquirers either track or set aside fixed retention payments, and that pools typically sit at around 2% of purchase price or below.

Here is the part that gets discovered late. In many founder-led transactions of this size, the economics of the retention pool come out of the seller's side of the ledger, whether deducted from the price, embedded inside it, or treated as a transaction cost.

Look at what that does to the founder. Susan funds a pool that pays her senior people to stay. Her own $15 million is conditional on those same people staying. The buyer designs the pool, sets its size, chooses its recipients, and writes the conditions on which it pays. The buyer also wrote the conditions on which Susan's deferred amount pays.

> *The buyer holds the pen on both sides of the same risk.*

And the incentives are no longer identical. Susan needs the 10% thresholds to hold. Her CTO needs his package to be large enough and his post-completion role good enough. Compatible objectives, most of the time. Not the same objective. At the moment Susan most needs her team's judgement about what she is signing, her team is in another room being asked to sign something else.

Which is where both of her conclusions need qualifying. The buyer had not necessarily done anything underhanded; approaching key management before completion is ordinary practice. Her CTO had not set out to betray her. He had been placed, by a structure neither of them designed, where the loyal thing and the sensible thing pointed in different directions. Ordinary mechanics can still feel like betrayal.

06 Schedule 6 as Diagnosis

The instinct, once a founder sees this, is to negotiate the conditions harder. Push 10% to 20%. Carve out good leavers. Insist on covenants about operational control, information rights and enforceable remedies. All of that is worth doing, and competent counsel will do it. None of it addresses the reason the conditions were proposed.

Conditions are priced risk. A buyer does not ask for an employee retention threshold because it enjoys drafting. It asks because diligence showed that the value it is buying can walk out of the building: a customer base whose loyalty is attached to particular people, contracts that renew on handshakes, a top 10 that represents too much of the total.

Every condition is a sentence the buyer wrote about a weakness it found. Read Schedule 6 that way and it becomes a diagnostic report on a business that could have addressed every finding 18 months earlier. That is the whole argument, and it is not a legal argument.

A business where customer relationships sit with the company rather than with three individuals gives a buyer less reason to demand a revenue attrition threshold. A business where the second layer of management already runs the operation weakens the case for a key-person condition. Contracts that assign cleanly and revenue that is genuinely contracted rather than habitual give a buyer very little to write down.

The conditions do not get negotiated away. They get engineered away, and the engineering happens well before anybody drafts a schedule.

Risk that cannot be resolved with a condition has to be resolved with price. A buyer that cannot protect itself against key-person exposure discounts instead. So removing the reason for a condition does not merely improve the odds of being paid. It improves the buyer's willingness to underwrite the headline number.

07 Price, and What Survives It

Susan's deal completed. The number agreed in the first negotiation was $62 million. The number she has received is $47 million, and the balance depends on 12 months of decisions made by people who report to somebody else.

She may well get it.

But the thing she would tell you is that she spent almost three months negotiating the price and 11 days negotiating whether the price was real. She had a good adviser and good lawyers, and she still arrived at Schedule 6 with no room to move, because by then the only available responses were legal ones, and legal responses cannot fix commercial facts.

The first negotiation decides what the business is worth.

The second decides how much of it you keep.

The first happens during the process. The second is decided before the process begins, and it is the one founders discover last.

Cube Capital advises founders and boards of Australian software and technology companies on exit preparation and cross-border M&A transactions. In a transaction the firm acts for sellers, not buyers, and is retained by founders who want an independent view of how buyers will price their business, where value may be lost, and what can be done before a transaction begins.

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Susan and the transaction described are illustrative. They are constructed from patterns common to Australian software M&A transactions and do not represent any single client or deal.