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Trap for the Unwary: Failing to Decide

Many business owners put off the difficult decisions such as:

- Sell or transition to new management
 - Transition to next generation
 - Sell
- When to sell: planning takes time
- How to sell: planning the exit process
- Bad alternatives to planning:
 - Owner dies suddenly or is incapacitated
 - Unsolicited offer

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Trap for the Unwary: Failing to Plan

What to plan:

- Timeline
- Corporate structure and ownership
- Tax optimization
- Management team
- Valuation
- Diligence/Clean up
- Who is your buyer?
 - Private equity, strategic buyer, existing customer, management?

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Trap for the Unwary: Tax Planning

Timing – Tax optimization takes time and planning

Tax treatment of proceeds:

- Capital gain, ordinary income

Section § 1202 – Qualified Small Business Stock

- **Can exclude 100% of gain up to the greater of \$10 million or 10 times the original basis.**
- Less than \$50 million gross assets at time of issuance
- Qualified trade or business
- Eligible holder
- 5 year holding period
- Original issuance of stock from the corporation
- C-corporation

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Trap for the Unwary: Failing to Build the Team of Advisors

- Wealth advisors
- Trust and Estate lawyers
- Transactional lawyers
- Accountants
- Tax team
- Investment bankers

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Trap for the Unwary: Failure to Conduct Diligence

- Clean up the company before going to market
- Scrutinize business as a buyer would
 - Diligence request list (example follows)
 - Quality of earnings analysis
 - Audit

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Trap for the Unwary Deal Time: Taking the Highest Bidder

- Form of consideration: cash, stock, seller note, rollover?
- Deal structure:
 - Merger, Stock Sale, Asset Sale?
 - Tax consequences:
 - Capital gain, ordinary income
- Does seller have to run the business after Closing?

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Contact Me



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Exhibit: Diligence Request List

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DUE DILIGENCE REQUEST LIST

This list requests information for the purpose of conducting due diligence in connection with Project [] Please provide copies of the documents described below with respect to [] Inc. a California corporation, and, unless the context clearly implies otherwise, each of its subsidiaries (collectively, the "Company"). References to any contract, instrument, or other document include all amendments and updates thereto. To the extent that any contract, instrument, or other document requested is oral (and not in writing), please provide a description of such contract, instrument, or other document, including the material terms thereof. The word "including" in a specific request shall be interpreted to mean "including, without limitation" unless the context clearly implies otherwise.

We realize that some of the information requested will be inapplicable to the Company in such cases, simply check "N/A." Please mark the upper right hand corner of the first page of each document with the section of this list to which such document pertains.

This is a preliminary request for information; we anticipate that during the course of our due diligence review, we will request additional materials. In addition, please regard this list as a continuing request, so that any documents or information which would be covered by this letter and which come into existence prior to the closing of Project [] will also be forwarded or made available to us.

Finally, if any particular request would require production of a large number of documents, or if the request is otherwise burdensome, please discuss the request with us since we may be able to provide better guidance at the time as to the necessary scope of the request.

Envised	N/A	
		1. General Corporate Documents:
[]	[]	1.1 Certificate of Incorporation or Certificate of Formation (or equivalent formation document).
[]	[]	1.2 Bylaws, Limited Liability Company Agreements, Partnership Agreements, or analogous documents.
[]	[]	1.3 Minutes of all meetings of directors, committees of directors, and stockholders [since] (including written consents in lieu thereof).
[]	[]	1.4 Written materials, including notices, management reports, and financial projections, distributed to directors, committee members, or stockholders in connection with the meetings or actions by written consent described in the immediately preceding from [and held during the previous [] years].
[]	[]	1.5 The Company's Code of Ethics (or analogous document) as well as any other written policies established by the Board of Directors and any committee thereof.



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Envidio	N/A	
[]	[]	1.6 Charter for each committee of the Board of Directors.
[]	[]	2. Company Location:
[]	[]	2.1 List of jurisdictions in which business is conducted, real property is owned or leased, or employees or consultants reside or operate on behalf of the Company.
[]	[]	2.2 List of jurisdictions in which the Company is qualified or licensed to carry on its business, in which its trade names are registered, or in which the Company has any inventory.
[]	[]	2.3 List of business names and jurisdictions for all unincorporated d/b/a's.
[]	[]	2.4 List of addresses of the Company's principal and registered offices, and its registered agents and their addresses.
[]	[]	3. Organization:
[]	[]	3.1 Organizational chart depicting the ownership structure of the Company.
[]	[]	3.2 List of all directors and officers.
[]	[]	3.3 Management structure organization chart, including reporting responsibilities.
[]	[]	4. Capitalization and Securities:
[]	[]	4.1 Evidence of qualification or exemption under applicable federal securities laws and state blue sky laws for the issuance or transfer of securities of the Company.
[]	[]	4.2 Private placement memoranda prepared and used by the Company.
[]	[]	4.3 List of all stockholders, partners, or members and number and type of securities or percentage interest, as applicable, held by each.
[]	[]	4.4 List of all warrants, including name, amount held, exercise price, and expiration date.
[]	[]	4.5 List of all outstanding options, including number of options granted, date of grant, vesting schedule, price at which granted, and number exercised.
[]	[]	4.6 List of all other instruments convertible into securities of the Company, including material terms of such instruments.
[]	[]	4.7 Copies of stock books and stock transfer ledgers.
[]	[]	4.8 Representative copies of stock certificates, option agreements, warrants, convertible debentures, and any other outstanding securities.
[]	[]	4.9 All director, employee, or consultant stock options, stock purchase, stock bonus and any other equity incentive plans (including any forms of option agreements and stock restriction agreements), options, warrants, pledges, conversion plans, investment letters, arrangements, or commitments relating to the securities of the Company (whether authorized and unissued, treasury or outstanding). Include copies of all stock option agreements containing terms that are different than those terms contained in the form of stock option agreement provided by the Company.
[]	[]	4.10 Inverse rights agreements.
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Envidio	N/A	
[]	[]	4.11 Agreements relating to co-sale rights, redemption, preemptive, or other preferential rights to acquire or dispose of securities and any waivers thereof.
[]	[]	4.12 Voting trust, stockholder, or other similar agreement covering any portion of the securities of the Company.
[]	[]	4.13 Agreements regarding the payment of dividends.
[]	[]	4.14 Other agreements relating to sales of securities by the Company.
[]	[]	5. Indebtedness and Credit:
[]	[]	5.1 List of all long-term and short-term indebtedness of the Company.
[]	[]	5.2 All loan and credit agreements, indentures, and other relevant agreements or documents evidencing or relating to the preceding item.
[]	[]	5.3 All material correspondence with lenders of the Company in the last [] years.
[]	[]	5.4 List of all bank lines of credit of the Company, used or unused.
[]	[]	5.5 Bank lines of credit agreements, including any amendments, renewal letters, notices, and other materials relating to the preceding item.
[]	[]	5.6 All debt securities or instruments, notes, and financial or performance guarantees involving the Company or its affiliates, and all mortgages, liens, pledges, indentifications, security agreements, UCC, or other financing statements by or against such parties.
[]	[]	5.7 List and describe all transactions where directors, officers, stockholders, or others have guaranteed or endorsed any Company obligations, or vice versa, and provide copies of contracts regarding any of the foregoing.
[]	[]	5.8 Capital leases and installment sale contracts or other contracts relating to the deferred and unpaid purchase price of property or services.
[]	[]	6. Certain Material Agreements and Business Arrangements:
[]	[]	6.1 Standard form agreements used by the Company.
[]	[]	6.2 Joint venture, partnership, or franchising agreements or arrangements to which the Company is a party.
[]	[]	6.3 Contracts entitling any entity to any profits, revenues, or cash flows of the Company or requiring any payments or other distributions based on such profits, revenues, or cash flows.
[]	[]	6.4 Agreements which: (i) require payments by the Company over the remaining term of such agreements in excess of []; (ii) have terms exceeding [] months; or (iii) are otherwise material to the Company, its business, or a material asset of the Company, including agreements conferring material rights or obligations on the Company or granting any material rights or obligations to any third parties.
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Provided	N/A	
1	1	6.5 Agreements which limit the freedom of the Company to compete in any line of business or geographical area.
1	1	6.6 List of material contracts and commitments under which a material default has occurred or has been claimed to have occurred, setting forth the nature of the default, the name of the party in default, the monetary amount claimed, and the current status of the claim.
1	1	6.7 Agreements currently in force and a description of all transactions within the last [x] years between the Company and: (i) persons who were or are directors, officers, management employees, stockholders, or other equity holders of the Company; or (ii) persons who are affiliates or family members of such persons. For the purposes of this response, the term "affiliate" means (1) any corporation or other organization (other than the Company) of which such person is a director, officer, or partner or is, directly or indirectly, a beneficial owner of 10% or more of any class of equity securities or (2) any trust or estate in which such a person has a substantial beneficial interest or serves as a trustee or in a similar fiduciary capacity. The term "family member" includes a person's spouse, parents, children, siblings, mother- and father-in-law, sons and daughters-in-law, and brothers- and sisters-in-law.
1	1	6.8 Agreements between the Company and distributors, dealers, sales agents, or representatives.
1	1	6.9 Description of any threatened or potential loss of any such distributor, dealer, sales agent, or representative or material adverse change in relationship between the Company and such distributor, dealer, sales agent, or representative.
1	1	6.10 List of each supplier of goods and services to whom the Company paid in the aggregate more than \$100,000 during the last [x] months, together with the amount paid during each period, unit amounts or purchases, and the types of products purchased.
1	1	6.11 List of each customer to whom the Company billed in the aggregate more than \$100,000 during the last [x] months, together with the amount billed during each period.
1	1	6.12 Agreements or commitments relating to the two preceding items.
1	1	6.13 Description of any threatened or potential loss of any such supplier or customer or material adverse change in relationship between the Company and such supplier or customer.
7. Insurance:		
1	1	7.1 List and description of all insurance policies maintained by the Company, including the type of coverages, annual premiums, name of insurer, terms, and exclusions.
1	1	7.2 Copies of the policies described in the immediately preceding item.
1	1	7.3 Description of claims pending or threatened under or against such policies.

Provided	N/A	
1	1	7.4 Description of dispositions with underwriters existing currently or in the last [x] years.
8. Real and Personal Property:		
1	1	8.1 List and description of all real property owned, leased, or used (or which the Company has an option to purchase or lease), including address, size, the number of years the property has been used, any plans for expansion, change in use, repairs, remediation, or sale of such property.
1	1	8.2 Deeds, mortgages, or other encumbrances reflected in a written instrument, instruments evidencing a grant by or to the Company of an option to purchase or lease any real property, leases and leasehold improvements, and any title policies or commitments and surveys with respect to the real property set forth on the list provided in response to the immediately preceding item.
1	1	8.3 Appraisals performed within the last [x] years of the Company's real property.
1	1	8.4 Restrictive covenants.
1	1	8.5 Zoning letters and conditional use permits.
1	1	8.6 Contracts for construction or renovation.
1	1	8.7 List, including description and location, of tangible personal property owned or leased by the Company (having a book value in excess of \$ [x]).
1	1	8.8 Purchase or lease agreements for material Company equipment.
1	1	8.9 Motor vehicle titles.
1	1	8.10 List and description of any material defects in the condition of the plants, structures, or equipment owned or leased by the Company.
1	1	8.11 Records of repairs within the last [x] years.
1	1	8.12 List of capital expenditure projects in excess of [x] that have been planned or committed to by the Company.
9. Intellectual Property:		
1	1	9.1 List of and copies of: (i) all registered copyrights and pending copyright registrations owned or filed by the Company; (ii) all issued patents and pending patent applications owned or filed by the Company; and (iii) all registered trademarks and service marks and pending trademark and service mark registrations owned or filed by the Company. Include all correspondence and searches related to the items referred to in clauses "(i)," "(ii)" and "(iii)" copies of assignment documents related to such patents and patent applications and proof of payment of maintenance fees and annuities for all issued patents; a brief description and justification in which such copyrights, patents, or trademarks were registered or filed; and a list of all outside counsel that handle such matters including contact information and a brief description of types of matters handled.

Possible	N/A	
[]	[]	9.2 List of all abandoned patent applications filed by the Company including copies of all formal papers, patent office correspondence, and related prior art.
[]	[]	9.3 List of all registered or unregistered copyrights, trademarks, and service marks, and all issued patents and pending patent applications of which the Company is aware, that relate to the Company's products or the marketing, sale, licensing, and/or distribution thereof, but are not owned by the Company, including ones owned by officers, directors, or employees of the Company. Identify owner of such rights and provide copies of license or other royalty agreements.
[]	[]	9.4 All correspondence with any regulatory agency related to copyrights, patents, or trademarks.
[]	[]	9.5 List of and copies of all agreements concerning assignment, purchase, sale, or license of proprietary rights, information, or technology to or from the Company (other than dissemination of the Company's products and services in the ordinary course of business), including patents, copyrights, trade secrets, trademarks, and service marks. Attach a schedule of all corresponding royalty obligations.
[]	[]	9.6 List of each product presently and previously marketed, or presently being developed, by the Company, including: (i) the name of each individual who performed work on the product and/or its enhancements and modifications; (ii) the name of each such individual when the work on the product was performed (e.g., employee of a Company, independent contractor); (iii) the current employment status of such individuals; (iv) a description of any third party component included in the product and any third party product upon which the product is based or from which it was derived, in whole or in part; and (v) the date on which the product was first released to the public or, if still under development, the target date for release.
[]	[]	9.7 List of exclusive rights, whether by product, geographically region, type of use, or otherwise, granted by the Company with regard to its products or intellectual property rights.
[]	[]	9.8 List of all end user licenses to the Company's products granted by the Company and a copy of each form of end user license agreement the Company has used. Include a list of and copies of all such agreements that materially deviate from the relevant form.
[]	[]	9.9 List of and copies of all agreements providing for delivery to a third party or secure agent of source code for any products of the Company, or granting any third party access or a license to such source code.
[]	[]	9.10 List of all agreements pursuant to which the Company is obligated to provide maintenance and support services and a copy of each form of maintenance and support agreement the Company has used. Include a list of and copies of all such agreements that materially deviate from the relevant form.

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Possible	N/A	
[]	[]	9.11 List, brief description of (including summary of status) and copies of all documents relating to all pending or anticipated claims or disputes concerning the creation, use, sale, or other distribution of products by the Company, including infringement, misappropriation, or unfair competition claims.
[]	[]	9.12 List, brief description of (including summary of status) and copies of all documents relating to all pending or anticipated claims or disputes concerning proprietary rights owned by the Company, including infringement, misappropriation, or unfair competition claims.
[]	[]	9.13 List describing all proprietary rights or information of the Company not protected by copyright, trademark, or patent, including trade secrets, know how processes, programs, and confidential information relating to material operations of the Company.
[]	[]	9.14 All invention disclosures.
[]	[]	9.15 List of date of first use of all unregistered trademarks.
[]	[]	9.16 All documents relating to all policies of the Company addressing the protection of proprietary information, including all invention disclosure policies and confidential information policies.
[]	[]	9.17 List of all material software used by the Company and copies of all agreements granting the Company the right to use such software, or otherwise.
[]	[]	9.18 All agreements with employees, former employees, or other parties regarding assignment of intellectual property rights, and a list of all individuals who did use such agreements.
[]	[]	10. Litigation and Audits: 10.1 Litices that have been sent to the Company's accountant by third parties in connection with the audits completed in the last [] years, and any current audit activity, including lawyers' audit responses. 10.2 Identify and describe all pending or threatened commercial disputes, litigation, claims, process, actions, investigations, or proceedings, whether judicial, arbitral, or administrative, which affect or may affect any contracts, property, or business involving the Company. 10.3 Consent decrees, injunctions, judgments, other decrees or orders, settlement agreements, or similar matters.

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Possible	N/A	
		11. Government Regulation:
1	1	11.1 Material reports to and correspondence with any governmental entity, municipality, or agency, including those of any predecessor entity.
1	1	11.2 Governmental approvals, permits, licenses, and other similar documents of the Company, presently in force, together with information regarding any such approvals, permits, licenses, and similar documents which have been cancelled or terminated and are required to carry on the business or operations of the Company.
1	1	11.3 List and description of any problems with regulatory compliance overseen by any governmental entity.
1	1	11.4 Citations and notices received from government agencies.
1	1	11.5 Correspondence and memoranda relating to: (i) complaints regarding the Company's services and/or practices; (ii) regulatory commission or authority or former business bureau inquiries regarding the Company's services and/or practices; and (iii) evaluation of the impact or potential impact of regulatory proceedings upon operations and practices of the Company.
		12. Environmental:
1	1	12.1 Documents and information set forth in Appendix A
		13. Labor and Employment:
1	1	13.1 Information set forth in Appendix B
1	1	13.2 Information set forth in Appendix C
		14. Financial and Tax:
1	1	14.1 Financial statements of the Company, both audited and unaudited, since [#] , including balance sheets, statements of operations, cash flow statements, and statements of stockholder equity.
1	1	14.2 Identify and describe all: (i) contingent liabilities not reflected on the Company's financial statements; (ii) insurance coverage established for specific risk situations; and (iii) disagreements with the Company's outside auditors concerning the Company's financial reporting.
1	1	14.3 Identify and describe all off-balance sheet transactions that could affect the Company's financial condition, results of operations, and prospects, regardless of GAAP treatment.
1	1	14.4 Reports and other materials regarding internal controls over financial reporting which were prepared by or on behalf of the chief executive officer, chief financial officer, or persons performing similar functions.
1	1	14.5 Correspondence between the chief executive officer and the chief financial officer and the Company's auditors and audit committee relating to any deficiencies in the design or operation of the internal controls of the Company, including any corrective actions taken or proposed.

Possible	N/A	
1	1	14.6 Tax returns, reports, estimates, information statements, and other tax related filings submitted to any taxing authority during the last [#] years.
1	1	14.7 Tax sharing and similar agreements between the Company and any other person or entity.
1	1	14.8 List of any pending tax assessments, audits, or audit adjustments proposed by the IRS or other government agencies.
1	1	14.9 List all bank and similar accounts and deposit boxes and similar arrangements of the Company including account numbers, location, and authorized signatories for the Company.
		15. Marketing:
1	1	15.1 Contracts or arrangements with advertising or public relations agencies, and a description of any relationship for which a contract does not exist.
1	1	15.2 Market studies, feasibility studies, and similar reports concerning the Company prepared by consultants or management during the last [#] years.
1	1	15.3 Marketing and other descriptive brochures regarding the Company prepared during the last [#] years.
1	1	15.4 Press releases concerning the Company since [#] .
		16. Other:
1	1	16.1 List and brief description of any outstanding powers of attorney or proxies of the Company.
1	1	16.2 List of memberships of the Company or its employees with respect to the business of the Company.