



**Positioning Your Company for Growth**

Ideas for today and tomorrow

Brad Powers, Legal Counsel  
NewLink Genetics

---

---

---

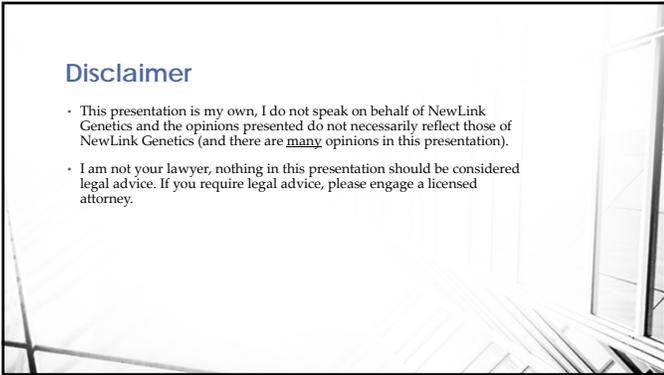
---

---

---

---

---



**Disclaimer**

- This presentation is my own, I do not speak on behalf of NewLink Genetics and the opinions presented do not necessarily reflect those of NewLink Genetics (and there are many opinions in this presentation).
- I am not your lawyer, nothing in this presentation should be considered legal advice. If you require legal advice, please engage a licensed attorney.

---

---

---

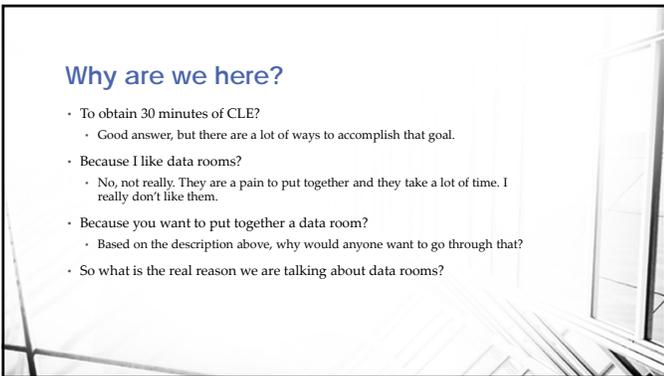
---

---

---

---

---



**Why are we here?**

- To obtain 30 minutes of CLE?
  - Good answer, but there are a lot of ways to accomplish that goal.
- Because I like data rooms?
  - No, not really. They are a pain to put together and they take a lot of time. I really don't like them.
- Because you want to put together a data room?
  - Based on the description above, why would anyone want to go through that?
- So what is the real reason we are talking about data rooms?

---

---

---

---

---

---

---

---



---

---

---

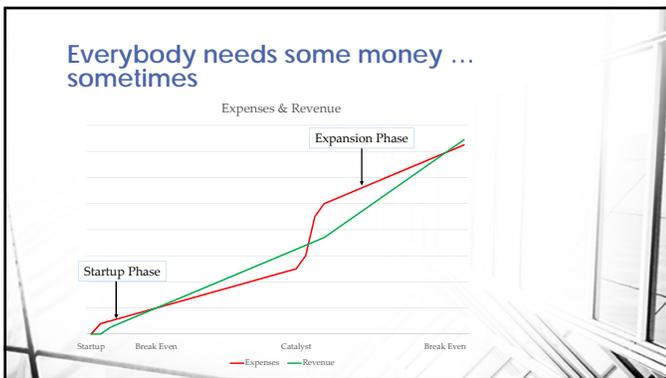
---

---

---

---

---



---

---

---

---

---

---

---

---

### Why are we here?

- Many businesses make it through the start-up funding with just a business plan and presentations
- The assumption is that future funding will be exactly the same approach
- Generally speaking, later fundraising (or sale of the business) are very different from the fundraising that opened the doors

---

---

---

---

---

---

---

---

### Typical Startup Phase Funding

- Based largely on business plan
- Tight group of investors/lenders
  - Smaller amounts of capital
  - Raised from founders, people with a relationship with the founders and local resources
- "Light" Due Diligence
  - Review of assumptions and plans
  - Little focus on past performance
    - No financial history to review
    - No sales/customer/supplier/employee data

---

---

---

---

---

---

---

---

### Why Expansion Funding?

- Ability to leverage current business to feed growth
  - Sudden increase in orders
  - Increase locations and market penetration
  - Offer new products
- Failure to move quickly can allow competition to take advantage of unmet needs in the marketplace
- Bottom line: If things go well, a business will likely need a "large" amount of money and will want to get it quickly

---

---

---

---

---

---

---

---

### Typical Expansion Phase Funding

- Significantly larger amounts of capital
- Short time frame – need to "strike while the iron is hot"
- Professional investors/lenders
  - Debt funding (bank loans)
  - Venture capital/investment groups
  - Public offerings
- Full due diligence
  - Review of internal documents to identify risks and verify numbers
  - Typically, extent of diligence effort is roughly proportional to the amount of financing sought
    - As the dollars increase, the number of experts on the team increase

---

---

---

---

---

---

---

---

### Due Diligence Process

- Areas of Review
  - Formation/Governance
  - Equity
  - Finances/Taxes
  - Property/Assets
  - Intellectual Property
  - Material Agreements
  - Sales
  - Suppliers
  - Litigation
  - Insurance
  - Employees

---

---

---

---

---

---

---

---

### An Ounce of Prevention

- Negotiating a deal is difficult enough without having to assemble key documents
- Difficulties in diligence translate to higher risk assessments and less favorable terms
- Prepare in advance:
  - Obtain a copy of a due diligence checklist
  - Create an internal repository, create folders that correspond with the checklist
  - Incorporate repository updates into standard work flow
  - Assign responsibility for maintenance of documents to specific individuals
  - Regularly check to make sure the repository is kept up to date
- Provides an opportunity to create internal processes that will eliminate diligence concerns in advance

---

---

---

---

---

---

---

---

### Preparing a Data Room

- Our Goals:
  - Eliminate diligence problems before they happen
  - Avoid the last minute scramble to collect thousands of pages of data
- End Result (we hope):
  - Lower risk assessment by diligence teams with better terms for the business
  - Shorter diligence phase and faster access to capital
- What follows:
  - Summary of key areas of diligence
  - Best practices (and problems) I have observed in the past
  - List of types of documents to include (exemplary, not exhaustive)

---

---

---

---

---

---

---

---

## Corporate Formation and Governance

- Goal: Ensure that the company was properly formed, has met all requirements to maintain the corporate form and has appropriate documentation for corporate acts
- Best Practices
  - Review foundation documents annually to ensure they are correct and updated
  - Have the corporate board (and shareholders) meet regularly and ensure minutes are recorded and signed
    - Board should meet at least annually, preferably quarterly
  - Review company bylaws and ensure any minimum meeting requirements are met
  - Ensure amendments are stored and keep the both the pre and post amendment version
    - It can be very difficult to track down original documents after everyone has decided they are "old" and no longer needed

---

---

---

---

---

---

---

---

## Corporate Formation and Governance

- Foundation Documents
  - Articles of Incorporation/Formation
  - Bylaws
  - Subsequent Amendments
  - List of Officers and Directors
- Corporate Acts/Maintenance
  - Regular meetings of corporate board
  - Minutes from each meeting
  - All corporate resolutions
  - List of jurisdictions qualified for business
  - Certificate of good standing in jurisdiction of formation

---

---

---

---

---

---

---

---

## Equity

- Goal: Understanding past rounds of financing and current company ownership structure
- Best Practices:
  - As founders put capital into the company, record any changes in owner equity at that time
    - Avoids having to look through bank statements to determine the past changes
  - For every round of financing, store copies of all documents in the central repository
    - Yes, all documents associated with the fundraising – even "road show" presentations

---

---

---

---

---

---

---

---

### Equity

- Current equity ownership
  - List of shareholders, optionholders, warrant holders
  - Capitalization table
  - Convertible note register
- Agreements concerning equity
  - Stock purchase, registration rights, voting, proxies, etc.
  - Essentially any agreement that touches upon equity
- Offerings
  - Each offering gets its own folder
  - EVERYTHING associated with the offer – term sheets, disclosure documents

---

---

---

---

---

---

---

---

### Finances, Taxes, Property and Assets

- Goal: Understanding the company's finances – past and future projections
  - Typically there has been some level of discussion about finances leading up to the deal, this is the opportunity to see the detail behind the numbers
- Best Practices
  - If the company signs/amends/renews a lease or purchases/sells real property or significant personal property, update the drive
  - When a formal communication is received from the auditor, make sure it goes into the central drive
  - When tax returns are signed, put them in the central drive
  - Organize financial data by year
    - When the company closes out the year, look through the drive and make sure nothing is missing

---

---

---

---

---

---

---

---

### Finances, Taxes, Property and Assets

- A schedule of leaseholds, real property and material personal property
  - Material personal property – easiest to set a dollar threshold
  - Keep the schedule current, review at least annually
- Key agreements
  - Leases, mortgages, loan, credit and security agreements
- Last three years of financial documents (three is typical, five is rare)
  - Tax Returns
  - Financial statements (preferably audited)
    - Monthly, quarterly and annual

---

---

---

---

---

---

---

---

## Material Agreements

- Goal: Review significant agreements that could have an impact on the deal, the valuation of the company or future operations
- Best Practices
  - It is better to be over-inclusive – you can always remove agreements later
  - The company should have a central repository of all contracts anyway, putting them in the central repository is an easy way to do this
  - Failure to do so will create the great paper chase when you need them
- When negotiating:
  - Confidentiality provisions: ensure permitted third parties language is broad enough to cover potential partners/acquirers
    - These parties will want to see the agreements and it is tricky to get consent under the confidentiality provisions without disclosing the potential partner
    - Frequently the terms of an original non-disclosure agreement are incorporated into the final agreement, so push for this early and often
  - Assignment provisions: avoid agreements that require consent in the event of a change of control
    - My favorite alternate language:  
*COMPANY may assign this Agreement in connection with the sale or transfer of all or substantially all assets concerning this Agreement without obtaining the other Party's consent.*

---

---

---

---

---

---

---

---

## Material Agreements

- List of material agreements
  - Indicate which agreements require consent for change of control
- Key agreements with other companies:
  - Distribution, partnership, joint venture agreements
- Merger and acquisition agreements
  - Yes, all of them, even the really old ones
- "Other Agreements"
  - Privacy policy
  - Website terms of use
  - Indemnification agreements

---

---

---

---

---

---

---

---

## Sales

- Goal: Determine sources of revenue, stability of these sources and potential liability stemming from the sales
- Best Practices
  - If possible, try not to be reliant on a small number of big customers
    - Not always possible – try to have a sales agreement that protects source of revenue
      - Termination notice: Lengthy notice provision (e.g. 90/180 days)
      - Termination provision: Require payment on work in process and specialized materials purchased based on signed work order/purchase order
  - Keep past sales literature, manuals and instructions
    - Customers do – and will quote it back to you at inconvenient times
    - Make sure to capture web-based versions of these documents
      - It is really easy for these to be lost in subsequent updates to your site if you don't capture them early

---

---

---

---

---

---

---

---

## Sales

- List of products
- List of key customers, distributors and resellers
- "Form" sales agreement
  - Signed sales agreements for key customers
- Customer Policies
  - Sales, credit, collection, return, warranty
- Product information
  - Marketing materials
  - Product manuals and instructions
- Sales projections and underlying assumptions
  - Include commission calculations, if any

---

---

---

---

---

---

---

---

## Suppliers

- Goal: Determine the ability to meet future demand, how secure is the supply chain
- Best Practices
  - Secure custom/special materials with supplier agreements
    - Make sure termination notice requirement is long enough to secure alternate supply
  - Have provisions that protect the ability to move to different suppliers
    - **Technology transfer provision:** current supplier transfers manufacturing process to new manufacturer (typically at an hourly rate)
    - **Improvements:** Secure intellectual property in improvements to company's custom designed parts
      - You don't want to learn the manufacturer now owns the latest revision to the internal componentry
    - **Know-how/Proprietary processes:** try to prohibit the incorporation of supplier's proprietary technology into the process of making your components
      - If not possible, require (1) notice before the proprietary technology is incorporated and (2) mandatory licensing of included technology (preferably royalty free, but if not get a royalty defined)
  - **Pricing:** Advance notice of price increases, typically annual basis or longer
    - Preferably tied to increased cost of manufacture and on open book basis

---

---

---

---

---

---

---

---

## Suppliers

- List of key suppliers, products supplied and alternate sources
- Agreements with key suppliers
- List of contract manufacturers and alternate sources
- Contract manufacturing agreements

---

---

---

---

---

---

---

---

### Litigation

- Goal: To determine if there is any past, present or threatened litigation that could impact the deal
- Best Practices:
  - Be very upfront and honest about this topic
    - There will be follow-up questions during the verbal diligence phase
    - The company will likely make representations and warranties in the deal agreement concerning current and threatened litigation
  - Anything that comes up later will likely cause trouble
    - Being able to identify the specific disclosure is the "get out of jail free" card
- Get copies of attorney letters to auditors
  - Auditor asks your attorneys about legal issues/threatened litigation every year – get copies and keep in the central repository

---

---

---

---

---

---

---

---

### Litigation

- Summary of any disputes, litigation or arbitrations
  - Both in-process and resolved
- Organize by dispute:
  - Copies of all litigation complaints and arbitration filings
  - Copies of all orders, writs, decrees, injunctions, rulings, judgments, etc.
    - You need to keep copies of these on hand anyway
  - Copies of all settlement agreements
- Copies of lawyers' letters to auditors

---

---

---

---

---

---

---

---

### Insurance

- Goal: Ensure insurance is in place and adequate to cover potential losses
- Best Practices:
  - Work with a good insurance broker, they will:
    - take the time to understand the business, upcoming catalysts and potential issues
    - describe negotiation points with insurers
      - Typically there are a number of "freebie" changes they can get based on knowledge of current market and trends
  - provide industry benchmarking for policies – limits and retentions
    - Including this information helps with the diligence process – provides explanation behind the limits selected
  - help with the claim submission process and management of various insurers
    - Ensures policies are compatible and eliminates gaps
  - clearly disclose their "cut" of the insurance premiums

---

---

---

---

---

---

---

---



## Insurance

- Summary of all insurance policies
  - Directors & Officers
  - Employment Practices
  - Product Liability
  - Property/Casualty
  - Worker's Compensation
  - Auto
- Copies of all policies
- Description of any pending claims

---

---

---

---

---

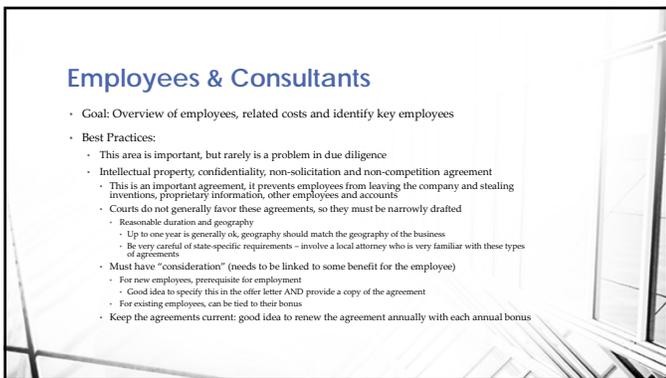
---

---

---

---

---



## Employees & Consultants

- Goal: Overview of employees, related costs and identify key employees
- Best Practices:
  - This area is important, but rarely is a problem in due diligence
  - Intellectual property, confidentiality, non-solicitation and non-competition agreement
    - This is an important agreement, it prevents employees from leaving the company and stealing inventions, proprietary information, other employees and accounts
    - Courts do not generally favor these agreements, so they must be narrowly drafted
      - Reasonable duration and geography
        - Up to one year is generally ok, geography should match the geography of the business
        - Be very careful of state-specific requirements – involve a local attorney who is very familiar with these types of agreements
    - Must have "consideration" (needs to be linked to some benefit for the employee)
      - For new employees, prerequisite for employment
      - Good idea to specify this in the offer letter AND provide a copy of the agreement
    - For existing employees, can be tied to their bonus
    - Keep the agreements current: good idea to renew the agreement annually with each annual bonus

---

---

---

---

---

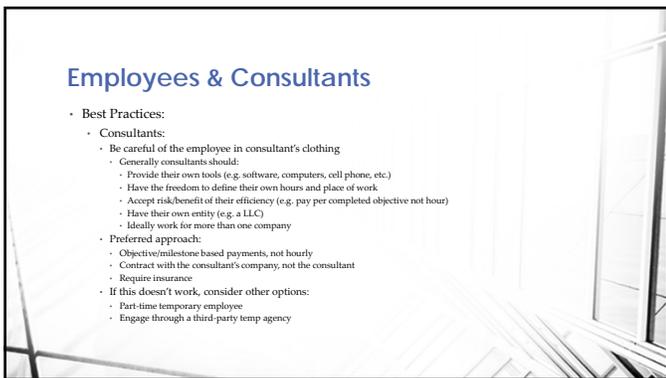
---

---

---

---

---



## Employees & Consultants

- Best Practices:
  - Consultants:
    - Be careful of the employee in consultant's clothing
    - Generally consultants should:
      - Provide their own tools (e.g. software, computers, cell phone, etc.)
      - Have the freedom to define their own hours and place of work
      - Accept risk/benefit of their efficiency (e.g. pay per completed objective not hour)
      - Have their own entity (e.g. a LLC)
      - Ideally work for more than one company
  - Preferred approach:
    - Objective/milestone based payments, not hourly
    - Contract with the consultant's company, not the consultant
    - Require insurance
  - If this doesn't work, consider other options:
    - Part-time temporary employee
    - Engage through a third-party temp agency

---

---

---

---

---

---

---

---

---

---

## Employees & Consultants

- Organization chart
- Summary of employees with executive/employment agreements
  - Form executive/employment agreement
  - Signed copies of executive/employment agreements
- Standard HR documents
  - Standard offer letter
  - Form IP, confidentiality, non-compete & non-solicit agreement
  - Benefit plan summary
  - Copy of all benefit plans – the actual plan not just the summary from the benefit company
  - Employee handbook and policies
  - Bonus, incentive and profit-sharing plans

---

---

---

---

---

---

---

---

## Intellectual Property

- Goal: Ensure the company has protected (as much as possible) the attributes that provide differentiation from competition
- Best Practices:
  - The general problem identified is the failure to identify intellectual property early
    - Failure to file for a patent before public disclosure of invention (loss of rights)
    - Failure to register and defend trademark/trade dress
    - Failure to timely file copyright (loss of statutory damages)
    - Failure to keep trade secrets confidential (public disclosure loses trade secret status)
  - The key: Create internal processes designed to make intellectual property a priority and encourage the organization to regularly review the company's position

---

---

---

---

---

---

---

---

## Intellectual Property

- Best Practices:
  - Understand the different tools for protection and how to use them:
    - **Patents:** used to protect inventions
    - **Trademarks/Trade Dress:** used to protect branding, look & feel
    - **Copyright:** used to protect works of authorship (software programs, printed packaging, marketing materials)
    - **Trade Secret:** used to protect confidential information not generally available to the public (customer lists, supplier lists, pricing sheets, etc.)
  - Have regular meetings with appropriate business units to identify and protect intellectual property

---

---

---

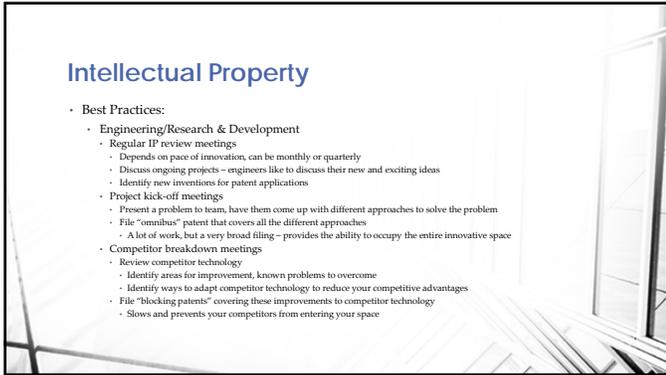
---

---

---

---

---



## Intellectual Property

- Best Practices:
  - Engineering/Research & Development
    - Regular IP review meetings
      - Depends on pace of innovation, can be monthly or quarterly
      - Discuss ongoing projects – engineers like to discuss their new and exciting ideas
      - Identify new inventions for patent applications
    - Project kick-off meetings
      - Present a problem to team, have them come up with different approaches to solve the problem
      - File “omnibus” patent that covers all the different approaches
        - A lot of work, but a very broad filing – provides the ability to occupy the entire innovative space
    - Competitor breakdown meetings
      - Review competitor technology
        - Identify areas for improvement, known problems to overcome
        - Identify ways to adapt competitor technology to reduce your competitive advantages
      - File “blocking patents” covering these improvements to competitor technology
        - Slows and prevents your competitors from entering your space

---

---

---

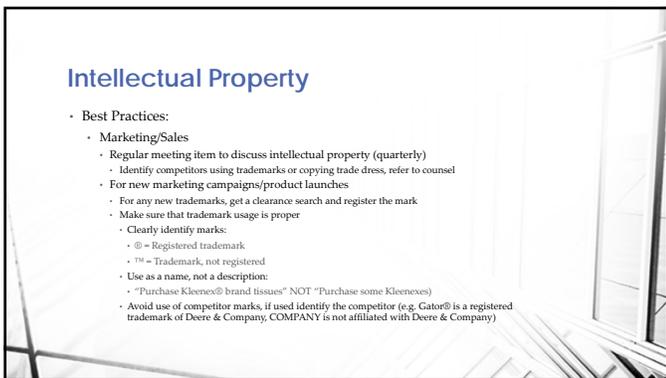
---

---

---

---

---



## Intellectual Property

- Best Practices:
  - Marketing/Sales
    - Regular meeting item to discuss intellectual property (quarterly)
    - Identify competitors using trademarks or copying trade dress, refer to counsel
  - For new marketing campaigns/product launches
    - For any new trademarks, get a clearance search and register the mark
    - Make sure that trademark usage is proper
      - Clearly identify marks:
        - ® = Registered trademark
        - ™ = Trademark, not registered
      - Use as a name, not a description:
        - “Purchase Kleenex® brand tissues” NOT “Purchase some Kleenexes”
    - Avoid use of competitor marks, if used identify the competitor (e.g. Gator® is a registered trademark of Deere & Company, COMPANY is not affiliated with Deere & Company)

---

---

---

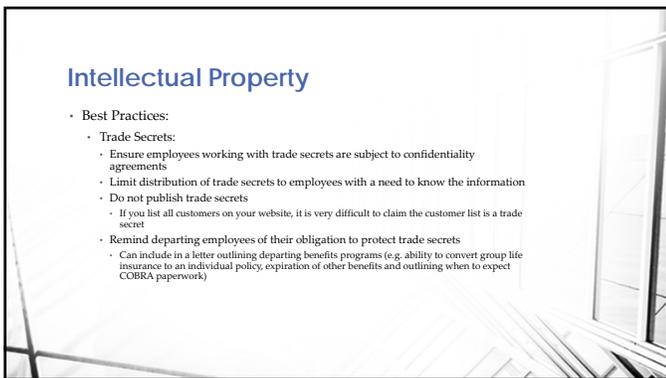
---

---

---

---

---



## Intellectual Property

- Best Practices:
  - Trade Secrets:
    - Ensure employees working with trade secrets are subject to confidentiality agreements
    - Limit distribution of trade secrets to employees with a need to know the information
    - Do not publish trade secrets
      - If you list all customers on your website, it is very difficult to claim the customer list is a trade secret
    - Remind departing employees of their obligation to protect trade secrets
      - Can include in a letter outlining departing benefits programs (e.g. ability to convert group life insurance to an individual policy, expiration of other benefits and outlining when to expect COBRA paperwork)

---

---

---

---

---

---

---

---

## Intellectual Property

- Summary of Patents
- For each patent family
  - Copy of patent as filed
  - Copy of issued patents
  - Receipts for maintenance fees
- Summary of Trademarks
- For each mark
  - Copy of application
  - Copy of trademark grant document
  - Renewals
- List of registered copyrights
- List of domain names (with expiration dates)
- All intellectual property licenses – both inbound and outbound licensing

---

---

---

---

---

---

---

---

## Summary

- Diligence teams want to see everything (and you want them to see everything too)
- Assemble the information you have, if something doesn't apply to your business you do not need to make something up to "check the box"
  - Just explain that it doesn't apply, but have a good reason
- If I perform diligence on your business in the future, I thank you for any of the suggested practices you adopt and all the information you have put together
- If you ever perform diligence on a business I represent, I apologize in advance for any of these suggested practices that may have been missed

---

---

---

---

---

---

---

---

## Questions?

For sides, questions offline or other information contact me directly:  
 Brad Powers  
 bpowers@linkp.com or bjpowers39@gmail.com  
 515-451-6324

---

---

---

---

---

---

---

---