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— November 7-10, 2010 | San Antonio —

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Negotiating a Credit Facility in Today's Environment?

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- This presentation does not create an attorney-client relationship and may not be relied upon as legal advice.
- Circumstances affecting individual companies may vary.
- Consultation with a legal advisor is recommended.

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Since The Crunch

- Less lending
- Fewer lenders
- Higher pricing
 - LIBOR market disruption and interest rate floors
- Tighter covenants
- More collateral

Amend and Extend Transactions

- Extension of maturity of existing credit facility
 - Usually on a non-pro rata basis
 - Usually need approval of Required Lenders and all extending Lenders
- Amendments to credit agreement
 - Higher interest rate for extended tranches
 - Amendment fees
 - Changes to non-market terms in the credit agreement

Opening Stages of Negotiating A Facility

- Shop around
- Think about your needs
- Run stress tests
- Commitment letters and term sheet should be sufficiently specific
- Reverse flex
 - If the facility is oversubscribed, decrease the interest rate and ask the lenders to commit to the facility at the lower interest rate

Specific Negotiating Points

1. GAAP

- Frozen vs. Fluid?
 - If using frozen GAAP, then the borrower needs to keep two separate sets of books
 - If using fluid GAAP, changes in accounting standards could trigger defaults
 - So try to freeze GAAP for things like lease accounting, securitizations and transfers of financial assets and liabilities
- Add ability to amend financial covenants if required by changes to GAAP

GAAP: Example of Preferred Language

“GAAP” means, subject to Section 1.03, generally accepted accounting principles set forth from time to time in the opinions and pronouncements of the Accounting Principles Board and the American Institute of Certified Public Accountants and statements and pronouncements of the FASB (or agencies with similar functions of comparable stature and authority within the U.S. accounting profession), which are applicable to the circumstances as of the date of determination.

Section 1.03. GAAP.

(a) For purposes of calculations made pursuant to the terms of this Agreement, GAAP will be deemed to treat operating leases in a manner consistent with its current treatment under generally accepted accounting principles as of _____, notwithstanding any modifications or interpretive changes thereto that may occur thereafter.

(b) If any change in GAAP occurs after the date of this Agreement and such change results in a material variation in the method of calculation of financial covenants or other terms of this Agreement or in what Subsidiaries are consolidated for financial reporting purposes, then the Company, the Agent and the Lenders agree to amend such provisions of this Agreement so as to equitably reflect such change so that the criteria for evaluating the Company’s financial condition will be the same after such change as if such change had not occurred.

2. MAC Clauses

- The material adverse change (“MAC”) clause should be modified to exclude any events or circumstances disclosed in the Borrower’s SEC filings prior to the date of the credit agreement.
- Thus, any negative impact resulting from those disclosed items would not be factored into a determination as to whether a MAC had occurred.

MAC Clauses (cont.)

- Depending on the specific language, the risk factors may also be covered and therefore excluded from the operation of the MAC clause.
- Try to exclude general economic conditions that do not have a disproportionately negative impact on the borrower.
- Exclude the “prospects” of the borrower.

MAC Clause: Typical

“Material Adverse Effect” means (a) a material adverse change in, or a material adverse effect upon, the business, assets, liabilities (actual or contingent), **prospects**, consolidated results of operations or consolidated financial condition of (i) the Loan Parties, taken as a whole, or (ii) the Company and its Subsidiaries taken as a whole; (b) a material impairment of the ability of any Loan Party to perform its obligations under any Loan Document; or (c) a material adverse effect upon the legality, validity, binding effect or enforceability against any Loan Party of any Loan Document.

MAC Clause: Improved

“Material Adverse Effect” means (a) a material adverse change in, or a material adverse effect upon, the business, assets, liabilities (actual or contingent), ~~prospects~~, consolidated results of operations or consolidated financial condition of (i) the Loan Parties, taken as a whole, or (ii) the Company and its Subsidiaries taken as a whole; (b) a material impairment of the ability of any Loan Party to perform its obligations under any Loan Document; or (c) a material adverse effect upon the legality, validity, binding effect or enforceability against any Loan Party of any Loan Document; provided that (i) events, circumstances, changes, effects or conditions with respect to the Company and its Subsidiaries disclosed in any Form 10-K, Form 10-Q or Form 8-K filed by the Company with the SEC prior to _____, 2010 shall not constitute a “Material Adverse Effect” and (ii) changes, after the Closing Date, in global, national or regional political conditions (including the outbreak of war or acts of terrorism) or in economic or market conditions affecting business generally in the same industry as the Borrower shall not constitute a “Material Adverse Effect” except to the extent that any such changes have a materially disproportionate adverse effect on the Borrower.

3. ERISA Plan Assets Devaluation

- Credit agreements often include representations and warranties regarding the excess, if any, of the present value of accumulated employee-benefit plan obligations over the value of plan assets.
- During a time of decreasing investment value, the borrower's ability to make such representations and warranties should be re-confirmed.

ERISA Rep: Example

4.13 ERISA. Neither a Reportable Event nor an “accumulated funding deficiency” (within the meaning of Section 412 of the Code or Section 302 of ERISA) has occurred during the five year period prior to the date on which this representation is made or deemed made with respect to any Plan, and each Plan has complied in all material respects with the applicable provisions of ERISA and the Code. No termination of a Single Employer Plan has occurred, and no Lien in favor of the PBGC or a Plan has arisen, during such five-year period. The present value of all accrued benefits under each Single Employer Plan (based on those assumptions used to fund such Plans) did not, as of the last annual valuation date prior to the date on which this representation is made or deemed made, exceed the value of the assets of such Plan allocable to such accrued benefits by a material amount. Neither the Borrower nor any Commonly Controlled Entity has had a complete or partial withdrawal from any Multiemployer Plan that has resulted or could reasonably be expected to result in a material liability under ERISA, and neither the Borrower nor any Commonly Controlled Entity would become subject to any material liability under ERISA if the Borrower or any such Commonly Controlled Entity were to withdraw completely from all Multiemployer Plans as of the valuation date most closely preceding the date on which this representation is made or deemed made. No such Multiemployer Plan is in Reorganization or Insolvent.

4. Baskets

- Baskets are commonly found in:
 - The cross-default provision
 - That is, a default in respect of other indebtedness in excess of a threshold amount triggers a default under the credit agreement or indenture at issue
 - Limitations on indebtedness and liens
 - Additional debt and liens are permitted so long as the obligations do not exceed a threshold amount
 - Restricted payments
 - Dividends may be paid so long as they do not exceed a threshold

Baskets (cont.)

- Basket amounts are often set as a percentage of net worth.
- Given the volatility of net worth, try to express the basket in terms of the greater of a specified number and a specified percentage of net worth
 - Or consider using a different balance sheet item such as total assets or tangible assets

Baskets (cont.)

- In addition, the covenant should specify that the permissibility of the debt and liens is measured on the date of incurrence.
- Otherwise, there is a risk that debt that was allowed when incurred (because the net worth of the borrower was high) becomes disallowed and must be paid off as a borrower's net worth declines.

Basket: Typical

Limitation on Liens. The Company shall not, and shall not permit any Material Subsidiary to, directly or indirectly, make, create, incur, assume or suffer to exist any Lien upon or with respect to any part of its property, whether now owned or hereafter acquired, other than the following (“Permitted Liens”):

...

(u) Liens securing Indebtedness or other obligations of the Company and its Material Subsidiaries **not to exceed \$35,000,000** in the aggregate at any one time outstanding.

Basket: Improved

Limitation on Liens. The Company shall not, and shall not permit any Material Subsidiary to, directly or indirectly, make, create, incur, assume or suffer to exist any Lien upon or with respect to any part of its property, whether now owned or hereafter acquired, other than the following (“Permitted Liens”):

...

(u) Liens securing Indebtedness or other obligations of the Company and its Material Subsidiaries not to exceed the greater of (i) 10% of consolidated net worth (as of the end of the most recently completed fiscal quarter of the Company and (ii) \$35,000,000 in the aggregate at any one time outstanding (it being understood that any Lien permitted under the preceding clause (u)(i) at the time of the creation thereof shall continue to be permitted under the preceding clause (u)(i) notwithstanding subsequent changes in the consolidated net worth of the Company).

5. Deposit Arrangements

- Credit agreements may require borrowers to maintain all (or a significant portion) of their deposit accounts with a specified bank (usually the lead lender).
- This can pose issues if that lender experiences solvency problems.

Deposit Arrangements (cont.)

- The borrower can protect itself by:
 - Adding a ratings standard for the depository bank, so that the covenant no longer applies if the standard is not met, or
 - Using a segregated account.

Deposit Arrangements (cont.)

- Unlike deposit accounts (which are insured by the FDIC), segregated accounts operate more like trust accounts.
- Segregated accounts are uninsured, but the bank has an obligation to return the funds in full (together with interest, if an interest bearing account was used).
- This benefits depositors with high balances.

6. Defaulting Lenders

- Defaulting Lenders
 - Failure to fund
 - Insolvency
 - Refusal to consent to amendments
 - Insolvency by holding company of lender
 - Default by lender under other credit facilities
 - Notice of intent
 - Failure to provide adequate assurance
 - Lack of responsiveness
 - Objective criteria (e.g., credit rating dropping below investment grade)
 - Having been a defaulting lender within the past 90 days
-

Defaulting Lenders: Typical

“Defaulting Lender” means any Lender that (a) has failed to fund any portion of the Loans, participations in L/C Obligations or participations in Swing Line Loans required to be funded by it hereunder within one Business Day of the date required to be funded by it hereunder, (b) has otherwise failed to pay over to the Agent or any other Lender any other amount required to be paid by it hereunder within one Business Day of the date when due, unless the subject of a good faith dispute, or (c) has been deemed insolvent or become the subject of a bankruptcy or insolvency proceeding.

Defaulting Lenders: Improved

“Defaulting Lender” means, subject to Section 3.12(b), any Lender that (a) has failed to perform any of its funding obligations hereunder, including in respect of its Loans or participations in respect of Letters of Credit, Swing Line Loans or Fronted Offshore Currency Loans, within three Business Days of the date required to be funded by it hereunder, unless such obligation is the subject of a good faith dispute as to the satisfaction of one or more conditions precedent to funding (specifically identified and including the particular Default, if any); (b) has notified the Company, the Agent or any Lender that it does not intend to comply with its funding obligations or has made a public statement to that effect with respect to its funding obligations hereunder or generally under other agreements in which it commits to extend credit; (c) has failed, within three Business Days after request by the Agent or the Company, to confirm in a manner satisfactory to the Agent (or the Company, as applicable) that it will comply with, and is financially able to meet, its funding obligations; or (d) has, or has a direct or indirect parent company that has, (i) become the subject of a proceeding under any Debtor Relief Law, (ii) had a receiver, conservator, trustee, administrator, assignee for the benefit of creditors or similar Person charged with reorganization or liquidation of its business or a custodian appointed for it, or (iii) taken any action in furtherance of, or indicated its consent to, approval of or acquiescence in any such proceeding or appointment (provided that a Lender shall not be a Defaulting Lender solely by virtue of the ownership or acquisition of any equity interest in, or the exercise of control (outside of the context of a proceeding of the type described in clause (d) above) of, that Lender or any direct or indirect parent company thereof by a Governmental Authority), in each case, as the Agent may reasonably determine based solely on the foregoing.

7. Yank-a-Bank and other Remedies regarding Defaulting Lenders

- Remedies for Defaulting Lenders
 - Yank-a-bank
 - Remove and replace defaulting lender without approval of agent or other lenders (or simply remove, if no replacement lender is available)
 - Traditionally applied where lenders demanded compensation for increased costs such as capital charges
 - Loss of defaulting lender's voting rights
 - Non-pro rata reduction of defaulting lender's commitments
 - Waiver of fees on unfunded commitment
 - Application of payments based on outstanding loans rather than commitments
 - Offset against defaulting lender's unfunded obligations
 - Elevation of participants in defaulting lender's loans
 - Allow borrower to purchase its debt from defaulting lender
 - Allow other lenders to fund

Yank-a-Bank: Typical

(b) Replacement of Lenders. If (i) any Lender requests compensation under Section 5.01, (ii) the Borrower is required to pay any additional amount to any Lender or any Governmental Authority for the account of any Lender pursuant to Section 5.03, or (iii) a Lender asserts an illegality under Section 5.05, then the Borrower may, at its sole expense and effort, upon notice to such Lender and the Administrative Agent, request such Lender to assign and delegate, without recourse (in accordance with and subject to the restrictions contained in Section 12.04(a)), all its interests, rights and obligations under this Agreement to an assignee that shall assume such obligations (which assignee may be another Lender, if a Lender accepts such assignment); provided that (i) the Borrower shall have received the prior written consent of the Administrative Agent, which consent shall not unreasonably be withheld, (ii) such Lender shall have received payment of an amount equal to the outstanding principal of its Loans and participations in LC Disbursements, accrued interest thereon, accrued fees and all other amounts payable to it hereunder, from the assignee (to the extent of such outstanding principal and accrued interest and fees) or the Borrower (in the case of all other amounts) and (iii) in the case of any such assignment resulting from a claim for compensation under Section 5.01, for payments required to be made pursuant to Section 5.03 or an illegality under Section 5.05, such assignment will result in a reduction in such compensation or payments or avoid the illegality. A Lender shall not be required to make any such assignment and delegation if, prior thereto, as a result of a waiver by such Lender or otherwise, the circumstances entitling the Borrower to require such assignment and delegation cease to apply.

Yank-a-Bank: Improved

(b) Replacement of Lenders. If (i) any Lender requests compensation under Section 5.01, (ii) the Borrower is required to pay any additional amount to any Lender or any Governmental Authority for the account of any Lender pursuant to Section 5.03, ~~or~~ (iii) a Lender asserts an illegality under Section 5.05, (iv) a Lender is a Defaulting Lender or (v) a Lender has not approved a proposed waiver, consent or amendment which requires the approval of all Lenders but which has been approved by Lenders having at least ninety percent (90%) of the Aggregate Maximum Credit Amounts, then the Borrower may, at its sole expense and effort, upon notice to such Lender and the Administrative Agent, ~~request(x) require~~ such Lender to assign and delegate, without recourse (in accordance with and subject to the restrictions contained in Section 12.04(a)), all its interests, rights and obligations under this Agreement to an assignee that shall assume such obligations (which assignee may be another Lender, if a Lender accepts such assignment); provided that (i) the Borrower shall have received the prior written consent of the Administrative Agent, which consent shall not unreasonably be withheld, (ii) such Lender shall have received payment of an amount equal to the outstanding principal of its Loans and participations in LC Disbursements, accrued interest thereon, accrued fees and all other amounts payable to it hereunder, from the assignee (to the extent of such outstanding principal and accrued interest and fees) or the Borrower (in the case of all other amounts) and (iii) in the case of any such assignment resulting from a claim for compensation under Section 5.01, for payments required to be made pursuant to Section 5.03 or an illegality under Section 5.05, such assignment will result in a reduction in such compensation or payments or avoid the illegality, and (v) in the case of a Defaulting Lender, if no Default, Event of Default or Borrowing Base Deficiency exists (prior to and after giving effect to such termination), and the Administrative Agent consents (not to be unreasonably withheld or delayed), terminate the entire Commitments of such Defaulting Lender and repay the Revolving Credit Exposure of such Defaulting Lender and all other amounts due under the Loan Documents to such Defaulting Lender on a non pro rata basis. A Lender shall not be required to make any such assignment and delegation if, prior thereto, as a result of a waiver by such Lender or otherwise, the circumstances entitling the Borrower to require such assignment and delegation cease to apply.

Other Remedies for Defaulting Lenders: Sample Language

3.12 Defaulting Lenders.

(a) Notwithstanding anything to the contrary contained in this Agreement, if any Lender becomes a Defaulting Lender, then, until such time as that Lender is no longer a Defaulting Lender, to the extent permitted by applicable law:

(i) Notwithstanding anything to the contrary herein, no Defaulting Lender shall have any right to approve or disapprove any amendment, waiver or consent hereunder (and any amendment, waiver or consent which by its terms requires the consent of all Lenders or each affected Lender may be effected with the consent of the applicable Lenders other than Defaulting Lenders), except that (x) the Commitment of any Defaulting Lender may not be increased or extended without the consent of such Lender and (y) any waiver, amendment or modification requiring the consent of all Lenders or each affected Lender that by its terms affects any Defaulting Lender more adversely (other than as a result of the relative size of its Commitment) than other affected Lenders shall require the consent of such Defaulting Lender.

(ii) Any payment of principal, interest, fees or other amounts received by the Agent for the account of such Defaulting Lender (whether voluntary or mandatory, at maturity, pursuant to Article IX or otherwise, and including any amounts made available to the Agent by such Defaulting Lender pursuant to Section 11.09), shall be applied at such time or times as may be reasonably determined by the Agent as follows (and, in any case, when due): first, to the payment of any amounts owing by such Defaulting Lender to the Agent hereunder; second, to the payment on a pro rata basis of any amounts owing by such Defaulting Lender to any Issuer, Swing Line Lender or Fronting Lender hereunder; third,

(iii) Such Defaulting Lender (x) shall not be entitled to receive any commitment fee pursuant to Section 2.14(b) for any period during which such Lender is a Defaulting Lender (and the Borrower shall not be required to pay any such fee that otherwise would have been required to have been paid to such Defaulting Lender) and (y) shall be limited in its right to receive Letter of Credit Fees as provided in Section 3.08.

(iv) During any period in which there is a Defaulting Lender, for purposes of computing the amount of the obligation of each non-Defaulting Lender to acquire, refinance or fund participations in Letters of Credit, Swing Line Loans or Fronted Offshore Currency Loans pursuant to this Article III, Section 2.05 and Section 2.07, the "Revolving Percentage" of each non-Defaulting Lender shall be computed without giving effect to the Revolving Commitment of such Defaulting Lender; provided that (x) each such reallocation shall be given effect only if, at the date the applicable Lender becomes a Defaulting Lender, no Default or Event of Default exists, and (y) the aggregate obligation of each non-Defaulting Lender to acquire, refinance or fund participations in Letters of Credit, Swing Line Loans and Fronted Offshore Currency Loans shall not exceed the positive difference, if any, of (1) the Revolving Commitment of such non-Defaulting Lender minus (2) the aggregate outstanding amount of the Revolving Loans of such Lender.

8. Defaulting Administrative Agents

- Criteria
 - Failure to perform its obligations as agent
 - Any of the “defaulting lender” trigger events
- Concerns regarding a defaulting agent
 - Can grind operation of credit facility to a halt
 - If agent is insolvent, funds could be held up by automatic stay
- Process for removal
 - Want it to be swift – not want defaulting agent to have any affirmative obligations or consent rights
 - Prefer removal prior to the agent’s insolvency

Defaulting Administrative Agents: Sample Language

Section 11.10. Removal of Agent. If the Agent becomes the subject of an Act of Bankruptcy or if the Administrative Agent is a Defaulting Lender, the Agent shall be removed as Agent hereunder at the request of the Borrower, without the need for any further action by the parties hereto or to any of the Loan Documents. The Required Lenders that are not such Agent or affiliated with such Agent (or, if there are none, the Borrower) shall within thirty (30) days thereafter appoint another Person to act as Agent (such successor Agent shall, if appointed by such Required Lenders, be subject to the consent of the Borrower, which consent shall not be unreasonably withheld or delayed, and which consent shall not be required during any period in which a Default or an Event of Default exists (provided that the successor Agent is then a Lender or is a commercial bank organized or licensed under the laws of the United States or of any state thereof and has a combined capital and surplus of at least \$5,000,000,000)), and such successor Agent shall succeed to the rights, powers and duties of the Agent and the term "Agent" shall mean such successor effective upon its appointment, and the former Agent's rights, powers and duties as the Agent shall be terminated without any other or further act or deed on the part of such former Agent or any of the parties to this Agreement. After the removal of any Agent as Agent hereunder, the provisions of this Article 11 shall inure to the benefit of such former Agent (including without limitation Section 11.5) and such former Agent shall not by reason of such removal be deemed to be released from liability for any breach of contract, gross negligence or willful misconduct by it while it was an Agent under this Agreement.

SIDEBAR: Anticipating a Defaulting Lender or Defaulting Agent

- Borrow and exercise any increase options
- Replace the counterparty
- Segregate and move accounts
- Buy the debt
- Seek funding by the administrative agent
- Prepay and terminate the facility

9. Eligible Assignee and Buybacks

- Low secondary market prices provided an opportunity to repurchase and retire debt cheaply
 - The eligible assignee clause identifies the types of institutions that can become lenders by taking an assignment of an existing commitment without obtaining the consent of the other lenders.
 - The borrower should be added as an eligible assignee so that it has the ability to take an assignment of its own debt.
-

Eligible Assignee and Buybacks (cont.)

- This flexibility is important because it allows the borrower to, in effect, reduce (or assume) the commitment of a particular lender and, in effect, pay down (or pay off) one lender in the group.
- In addition, the borrower should have consent rights, such that competitors of the borrower cannot be Eligible Assignees.

Eligible Assignee: Typical

“Eligible Assignee” means (a) a commercial bank organized under the laws of the United States, or any state thereof, and having a combined capital and surplus of at least \$100,000,000; (b) a commercial bank organized under the laws of any other country which is a member of the Organization for Economic Cooperation and Development, or a political subdivision of any such country, and having a combined capital and surplus of at least \$100,000,000; provided that such bank is acting through a branch or agency located in the United States; (c) a Person that is primarily engaged in making, purchasing, holding or otherwise investing in commercial loans and similar extensions of credit and that is an Affiliate of a Lender; (d) an Approved Fund; and (e) a Lender.

Eligible Assignee: Improved

“Eligible Assignee” means (a) a commercial bank organized under the laws of the United States, or any state thereof, and having a combined capital and surplus of at least \$100,000,000; (b) a commercial bank organized under the laws of any other country which is a member of the Organization for Economic Cooperation and Development, or a political subdivision of any such country, and having a combined capital and surplus of at least \$100,000,000; provided that such bank is acting through a branch or agency located in the United States; (c) a Person that is primarily engaged in making, purchasing, holding or otherwise investing in commercial loans and similar extensions of credit and that is an Affiliate of a Lender; (d) an Approved Fund; ~~and~~ (e) a Lender; (f) any other entity approved by the Company (which approval shall not be required during the existence of an Event of Default) and the Agent, such approvals in each case not to be unreasonably withheld or delayed; and (g) the Company, solely in connection with a transaction permitted under Section 2.22 (provided that all Loans purchased by the Company pursuant to Section 2.22 shall automatically be cancelled and retired by the Company on the applicable settlement date of the relevant purchase (and may not remain outstanding or be resold))].

Eligible Assignee and Buybacks (cont.)

- Different kinds of tender procedures
 - The borrower will prepay loans at a specified discount
 - The borrower will prepay loans within a specified range of percentage discounts
 - Reverse Dutch auction: the borrower invites lenders to offer a percentage discount at which each interested lender is willing to have its loans prepaid

Eligible Assignee and Buybacks (cont.)

- Other considerations regarding buybacks
 - Limited rights for the borrower to vote as a lender?
 - Limited rights for the borrower to receive confidential information from lending group?
 - Cap on amount that can be purchased by the borrower?
 - Limit right to cancel repurchased debt if doing so would be prohibited by law or cause material adverse tax consequences?
 - Impact on calculation of financial covenant calculations?

10. Equity Cure Rights

- Financial covenants typically are not curable
 - Equity cure rights allow a parent company or other equity holder to provide equity or subordinated debt to the borrower so that the borrower can fix a breach of a financial covenant
 - Common limits on equity cure rights:
 - Within a certain period of time after delivery of financial statements
 - Cap on dollar amount
 - Frequency and overall limit
-

Equity Cure Rights (cont.)

Section 7.02. Equity Cure Right. Notwithstanding anything to the contrary in this Agreement, if the Borrower fails to comply with the Interest Coverage Ratio set forth in Section 6.10, until the expiration of the **10th day** following the date on which the certificate calculating the Interest Coverage Ratio for such period is required to be delivered pursuant to Section 5.04(c), **the Parent shall have the right to make a cash common equity contribution to the Borrower** of up to \$24,000,000 (the “Cure Right”), and upon the receipt by the Borrower of such cash amount (the “Cure Amount”), the **Interest Coverage Ratio for such period shall be recalculated after decreasing Consolidated Interest Expense** for such period (solely for the purpose of calculating the Interest Coverage Ratio and not for any other purpose under this Agreement) by an amount equal to the Cure Amount; provided that if, after giving effect to such recalculation, the Borrower shall then be in compliance with the requirement of Section 6.10, the Borrower shall be deemed to have satisfied the requirement of Section 6.10 for such period with the same effect as though there had been no failure to comply with the requirements of such Section for such period; provided, further, (a) in each four fiscal quarter period, there shall be at least two fiscal quarters in respect of which no Cure Right is exercised and (b) the Cure Amount shall be no greater than the amount required to cause the Borrower to be in compliance with Section 6.10.

11. Termination of Facility

- Often a credit agreement allows for termination of the commitments by the borrower upon giving a specified number of days' irrevocable notice.
 - Problems arise if that notice is given and the take-out financing is delayed — or worse, is unable to be completed.
 - Once the notice is given, the borrower is in the position where it may be forced to repay the existing debt while lacking any alternative source of funds.
-

Termination of Facility (cont.)

- Thus, the credit agreement should either:
 - Provide that such notice is revocable, or
 - Expressly acknowledge that any such notice may be contingent on the closing of the replacement financing.

Termination: Typical

Section 2.09. Voluntary Termination or Reduction of Revolving Commitments. The Company may, upon not less than five Business Days' **prior irrevocable written notice** to the Agent, terminate the Revolving Commitments, or permanently reduce the Aggregate Revolving Commitment by \$10,000,000 or any higher integral multiple of \$1,000,000; provided that the Aggregate Revolving Commitment shall not be reduced to an amount less than the Total Revolving Usage.

Termination: Improved

Section 2.09. Voluntary Termination or Reduction of Revolving Commitments. The Company may, upon not less than five Business Days' prior ~~irrevocable written~~ notice to the Agent (which notice may (i) be revoked upon at least two Business Days' prior notice to the Agent and (ii) be conditioned upon the consummation of replacement financing contemporaneously with such termination or reduction), terminate the Revolving Commitments, or permanently reduce the Aggregate Revolving Commitment by \$10,000,000 or any higher integral multiple of \$1,000,000; provided that the Aggregate Revolving Commitment shall not be reduced to an amount less than the Total Revolving Usage.

12. Securitizations

- In tight credit markets, borrowers should have added flexibility to obtain financing by alternative means, including by the securitization of receivables.
- Securitization financing should be excluded from:
 - Covenants restricting debt, liens, dispositions, affiliate transactions and burdensome agreements
 - Cross-default provisions
 - Net cash proceeds prepayment requirement

Permitted Securitization: Example

“Permitted Securitization” means any program providing for (a) the sale, contribution and/or transfer to a Securitization Subsidiary, in one or more related and substantially concurrent transactions, of accounts receivable, general intangibles, chattel paper or other financial assets (including rights in respect of capitalized leases) and related rights of the Company or any Subsidiary in transactions intended to constitute (and opined by nationally-recognized outside legal counsel in connection therewith to constitute) true sales or true contributions to such Securitization Subsidiary and (b) the provision of financing secured by the assets so sold, whether in the form of secured loans or the acquisition of undivided interests in such assets.

Within five Business Days following the receipt of any Net Cash Proceeds from any Disposition (other than (A) a Disposition of the type described in Section 8.02(a), (b), (c), (f), (g), (h), (i), (j), (l), (m) (but only to the extent the property so Disposed was not, at the time of such Disposition, Collateral) or (n), regardless of whether made by a Loan Party; (B) at any time that the Leverage Ratio is less than 3.50 to 1.0 on a pro forma basis immediately after giving effect to any Permitted Securitization, the first \$250,000,000 in Net Cash Proceeds from any Permitted Securitization made after the Effective Date that is permitted by Section 8.02(d); and (C) the first \$25,000,000 of Net Cash Proceeds from any Disposition made after the Effective Date that is permitted solely by Section 8.02(o)), whether by merger, consolidation or otherwise, the Company shall make a Proceeds Application in an amount (rounded down as provided above) equal to the result (if positive) of (x) all Net Cash Proceeds from all such Dispositions received after the Effective Date minus (y) \$50,000,000 minus (z) all amounts previously applied pursuant to this clause (i) after the Effective Date.

13. Fall-Away Events

- If the borrower's credit rating is expected to increase during the term of the facility, consider asking for "Fall-Away Events"
- Upon the borrower achieving a higher credit rating, certain provisions of the credit agreement "fall away"
 - Grant of collateral – liens are released
 - Covenants

Fall-Away Events: Example

Notwithstanding any other provision of this Agreement or any other Loan Document, in the event that the Company obtains corporate family ratings of (i) BBB- (stable) or higher from S&P and (ii) Baa3 (stable) or higher from Moody's ("Investment Grade Ratings"), (including after any re-pledge of the Collateral pursuant to the proviso in this paragraph) then the Company shall have the option (so long as, at the time it exercises such option, the Company continues to maintain Investment Grade Ratings) to require the Agent to promptly (and in any event within 30 days) release its Lien (on behalf of the Guaranteed Creditors) in the Collateral; provided that if the Company shall subsequently have corporate family ratings of (A) BB+ or lower from S&P and (B) Ba1 or lower from Moody's, then, promptly (and in any event within 30 days (or, in respect of real property Collateral or Collateral in which the Agent will have a perfected security interest pursuant to control agreements, such longer period as the Agent determines in its sole and complete discretion) after such corporate family ratings become publicly released by such rating agencies, or if the Company shall otherwise elect to do so, the Company shall, and shall cause its Subsidiaries to, (1) take whatever action (including the filing of Uniform Commercial Code financing statements) that may be necessary or advisable in the reasonable opinion of the Agent to vest in the Agent (for the benefit of the Guaranteed Creditors) valid and subsisting Liens on the Collateral consistent in all material respects in scope, perfection and priority as those in effect prior to such release, and (2) provide to the Lenders customary legal opinions in connection therewith.

14. Bankruptcy Default

- The list of events of default should omit references to:
 - “any action in furtherance thereof” or
 - “any corporate action in furtherance thereof”
- These are nebulous concepts that trap borrowers who are simply planning for contingencies.

Bankruptcy Default: Example of Language to Avoid

(f) Insolvency; Voluntary Proceedings. Any Loan Party (i) ceases or fails to be solvent, or generally fails to pay, or admits in writing its inability to pay, its debts as they become due, subject to applicable grace periods, if any, whether at stated maturity or otherwise; (ii) voluntarily ceases to conduct its business in the ordinary course; (iii) commences any Insolvency Proceeding with respect to itself; or (iv) takes any action to effectuate or authorize any of the foregoing; or

15. Flexible Financial Covenants

- Typically, borrowers are required to comply with the terms of one or more specific financial covenants.
- Some borrowers have successfully negotiated “either/or” financial covenants.
- That is, the borrower, at its option, may comply with one of two financial covenants.

Financial Covenants: Typical

Section 9.01. Financial Covenants.

- (a) Leverage Ratio. The Company shall not permit the Leverage Ratio as of the last day of any fiscal quarter to be greater than 3.75 to 1.0.
- (b) Interest Coverage Ratio. The Company shall not permit the Interest Coverage Ratio as of the last day of any fiscal quarter to be greater than 2.25 to 1.0.

Financial Covenants: Improved

Section 9.01. Financial Covenants.

The Company shall maintain, as of the last day of any fiscal quarter, **either** (i) a Leverage Ratio of not greater than 3.75 to 1.0 **or** (ii) an Interest Coverage Ratio of at least 2.25 to 1.0.

After Closing A Facility

- Compliance checklists
- Maintain a relationship with your lenders
 - High level relationship
 - Operational relationship
- Maintain a relationship with other lenders

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