Negotiating Loan Documents in Today’s Environment

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Disclaimers

• This presentation does not create an attorney-client relationship and may not be relied upon as legal advice.

• Circumstances affecting individual companies may vary.
Roadmap

• Market Overview
• Opening Stages
• Negotiating the Loan Documents
• Living with Your Credit Facility
Market Overview
Since the Crunch

• **First, a period of more cautious lending**
  – Fewer lenders, tighter covenant structures and increased collateral

• **Followed by the return of covenant-lite loans**
  – No financial covenants (if any, they are incurrence-tested rather than maintenance-tested)
  – Few negative covenants (e.g., liens and fundamental changes)
  – Extensive carveouts and add-backs
  – Equity cures
  – Migration of terms from large cap to middle market

• **Refinancings**

• **Amends and Extends – extension of maturity of existing credit facility (on a non-pro rata basis)**
  – Can change pricing, fees and other terms solely for the accepting lenders
RFP Process
Opening Stages of Negotiating a Credit Facility

- **Shop around – leverage is strongest before signing**
  - RFP for lead arranger role (even if you want to stay with the current lead)
    - **Wish list**
    - Obtain sufficiently detailed quotes
      - Fees – upfronts and arrangement (splits between leads)
      - Pricing levels
      - Detailed covenants
    - Make the potential lenders compete
      - Marry the best parts of the various responses
      - Pricing should not be the sole factor
      - Ancillary business
      - How they will position you in market
Opening Stages (cont.)

• **Think about your business needs**
  – Know your business
    • Need to have, nice to have, like to have and throwaway
  – Ideas on structure
    • Sizing, tranche (revolver and/or term loans), amortization
  – Financial projection model
    • Stress test

• **Compare yourself to similarly situated credits**
  – What covenants and pricing do they have?
Opening Stages (cont.)

• Negotiate sufficiently detailed commitment letter and term sheet upfront
  – Include all keys points and changes
  – Term sheets, post crisis, are more detailed than ever
  – Commitment letter
    • Firm commitment/underwritten: Arranger must fund, even if cannot syndicate
    • Best efforts: Arranger will attempt to syndicate, but no promises
A Credit Agreement: The Basics

- Definitions
- Loan Mechanics
- Yield Protection
- Conditions Precedent
- Representation and Warranties
- Covenants – Affirmative and Negative
- Events of Default and Enforcement
- Inter-lender, Voting and Agency Issues (including assignments and participations)
- Boilerplate
Lead-Time Items

• Third party documents
  – Intercreditor agreements
  – Lien releases
  – Landlord waivers
  – Account control agreements

• Real estate
• International
• Completion of schedules
• Good standing issues
• If pledging shares, collect the original stock certificates
Negotiating the Loan Documents
1. Market Flex

- Arranger can change terms of the facility, if necessary to syndicate
- Who can exercise and what is the standard?
  - Administrative Agent
- Examples of terms that can change:
  - Pricing
  - Tenor
  - Call protections
  - Number of permitted equity cures
  - Leverage ratio (modify or add)
  - Collateral
  - EBITDA add-backs
- Duration of flex rights?
  - Stop at closing, or
  - Extend post-closing (60-90 days is standard)
Reverse Flex

• If facility is oversubscribed, arranger can ask lenders to recommit to the facility on more borrower-friendly terms
  – Reduce pricing and eliminate LIBOR floors
  – Eliminate call protection (prepayment penalty)
Market Flex: Example

The Agents reserve the right, which shall be exercised only after consultation with you, to make one or more of the following changes to the Senior Credit Facilities in order to ensure a successful syndication:

(a) requiring delivery of a mortgage with respect to one or more of the properties listed on Exhibit A;

(b) reallocating up to $200,000,000 in the aggregate of commitments among the Senior Credit Facilities; provided that, unless you otherwise agree, the aggregate amount of the Senior Credit Facilities will not be less than $3,500,000,000;

(c) increasing the interest rates applicable to the Senior Credit Facilities by up to 50.0 bps per annum, which may be accomplished, at the option of the Agents, through the issuance of a portion of the principal amount of the Senior Credit Facilities with original issue discount (“OID”) in a manner determined by First Bank and Second Bank and consistent with generally accepted financial practice, based on the aggregate commitments under the Senior Credit Facilities on the Closing Date and an assumed three-year average life to maturity (i.e. a 3.0:1.0 ratio of interest rate to OID, such that a 25.0 bps of interest rate is equivalent to 75.0 bps of OID), it being understood that (i) OID shall not exceed 100.0 bps and (ii) the Agents may use a combination of increased interest rate and OID within the parameters set forth in this paragraph; or

(d) any other change to the terms, structure or pricing of the Senior Credit Facilities so long as you consent to such change (such consent not to be unreasonably withheld or delayed).

For purposes hereof, “successful syndication” means a syndication in which each of First Bank and Second Bank has been able to reduce its underwriting exposure to $125,000,000 or below. The rights of the Agents under the foregoing paragraph will survive until the earlier of (i) 60 days following the initial funding under the definitive loan documentation and (ii) the date on which syndication efforts are completed (as determined by the Agents). If the definitive loan documentation is executed and delivered prior to the completion of syndication efforts, you agree that you will execute any amendment to such definitive loan documentation reasonably deemed advisable by the Agents to effect the changes contemplated in the foregoing paragraph and that any failure to do so shall be an event of default under the definitive loan documentation as though fully set forth therein.
2. Incremental Facilities

• **Incremental Facility**
  – Creates a new tranche
  – Often capped, becoming more common to be uncapped so long as satisfy pro forma leverage ratio
  – MFN provision – new facility cannot be priced higher than X bps above the existing loan
    • Can have MFN provision fall away after a set time period

• **Accordion**
  – Increase option on size of a revolving facility (not a new tranche)
2.24 Incremental Facilities.
(a) Company may by written notice to Administrative Agent elect to request (A) prior to the Revolving Commitment Termination Date, an **increase to the existing Revolving Commitments** (such increase, the “**Additional Revolving Commitments**”) and/or (B) prior to the Term Loan Maturity Date the establishment of one or more new term loan commitments (the “**Additional Term Loan Commitments**”), in an amount, with respect to clauses (A) and (B) collectively, not in excess of Maximum Incremental Facilities Amount in the aggregate and not less than $10,000,000 individually (or such lesser amount which shall be approved by Administrative Agent or such lesser amount that shall constitute the difference between Maximum Incremental Facilities Amount and all such Additional Term Loan Commitments and Additional Revolving Commitments obtained prior to such date), and integral multiples of $10,000,000 in excess of that amount. Each such notice shall specify (A) the date (each, an **Increased Amount Date**”) on which Company proposes that the Additional Term Loan Commitments or Additional Revolving Commitments, as applicable, shall be effective, which shall be a date not less than ten (10) Business Days after the date on which such notice is delivered to Administrative Agent and (B) the identity of each Lender or other Person that is an Eligible Assignee (each, an “**Additional Term Loan Lender**” or “**Additional Revolving Lender**”, as applicable) to whom Company proposes any portion of such Additional Term Loan Commitments or Additional Revolving Commitments, as applicable, be allocated and the amounts of such allocations; [continued on next page...]
provided that any Lender approached to provide all or a portion of the Additional Term Loan Commitments or Additional Revolving Commitments, as applicable, may elect or decline, in its sole discretion, to provide such commitment. Such Additional Term Loan Commitments or Additional Revolving Commitments shall become effective, as of such Increased Amount Date; provided that (1) no Default or Event of Default shall exist on such Increased Amount Date before or after giving effect to such Additional Term Loan Commitments or Additional Revolving Commitments, as applicable; (2) both before and after giving effect to the making of any Additional Revolving Loan or Series of Additional Term Loans, each of the conditions set forth in Section 3.2 shall be satisfied; (3) with respect to any request for Additional Term Loan Commitments or Additional Revolving Commitments, as applicable, Company and its Restricted Subsidiaries shall be in compliance with the covenants set forth in Section 6.7 as of the last day of the most recently ended Fiscal Quarter (after giving effect to all Additional Term Loan Commitments and Additional Revolving Commitments requested at such time); (4) the Additional Term Loan Commitments or Additional Revolving Commitments, as applicable, shall be effected pursuant to one or more Joinder Agreements executed and delivered by the relevant Additional Term Loan Lender and/or Additional Revolving Lender, each Credit Party and Administrative Agent, and each of which shall be recorded in the Register and shall be subject to the requirements set forth in Sections 2.20(e) and (g); (5) Company shall make any payments required pursuant to Section 2.18(c) in connection with the Additional Term Loan Commitments or Additional Revolving Commitments, as applicable; and (6) Company shall deliver or cause to be delivered any legal opinions or other documents reasonably requested by Administrative Agent in connection with any such transaction. Any Additional Term Loans made on an Increased Amount Date shall be designated a separate series (a “Series”) of Additional Term Loans, for all purposes of this Agreement.
The terms and provisions of the Additional Term Loans and Additional Term Loan Commitments of any Series shall be, except as otherwise set forth herein or in the Joinder Agreement, substantially consistent with the Term Loans and Term Loan Commitments. In any event (i) the Weighted Average Life to Maturity of all Additional Term Loans of any Series shall be no shorter than the Weighted Average Life to Maturity of Term Loans, (ii) the applicable Additional Term Loan Maturity Date of each Series shall be no shorter than the Latest Maturity Date of the Term Loans (as determined on the date of incurrence of such Additional Term Loans) and (iii) the rate of interest applicable to the Additional Term Loans of each Series shall be determined by Company and the applicable new Lenders and shall be set forth in each applicable Joinder Agreement; provided that the interest rate margin (which shall be deemed to include all upfront fees or original issue discount (“OID”) (other than customary underwriting or arranger fees, and with respect to OID and upfront fees, determined based on an assumed four year life to maturity) or interest rate “floors” payable to all Additional Term Loan Lenders) in respect of any Additional Term Loan shall be the same as that applicable to the Term Loans, except that the interest rate margin (determined as above) in respect of any Additional Term Loan may exceed the interest rate margin (determined as above) for the Term Loans, respectively, by no more than 50 basis points, or if it does so exceed, such interest rate margin (determined as above) of the Term Loans shall be increased so that the interest rate margin (determined as above) in respect of such Additional Term Loans, is no more than 50 basis points higher than the interest rate margin (determined as above) of the Term Loans. The terms and provisions of the Additional Revolving Commitments and Additional Revolving Loans shall be the same (except for fees) with the Revolving Commitments and Revolving Loans, except as otherwise set forth herein or in the Joinder Agreement (it being acknowledged that Additional Revolving Commitments may be documented as an increase of the Revolving Commitments or as a separate Class of revolving commitments). Each Joinder Agreement may, without consent of any other Lenders, effect such amendments to this Agreement and the other Credit Documents as may be necessary or appropriate, in the opinion of Administrative Agent, to effect the provision of this Section 2.24.
3. EBITDA Add-Backs

- *These are almost quotes*
- Delinkage between leverage and coverage – not use FCCR, look to enterprise value
- Increased focus on EBITDA definition and add-backs
- Pro forma cost savings, synergies, optimization expense
  - Projected by borrower (modified S-X standard)
  - Projected adjustments capped at % of adjusted EBITDA unless Reg S-X compliant
4. Subsidiaries

• **Material Subsidiaries**
  – Want to limit universe of companies that must:
    • Comply with reps and covenants
    • Grant collateral
    • Provide upstream guaranties

• **Exclude:**
  – Foreign subsidiaries
  – Securitization entities
  – Joint ventures
  – Immaterial subsidiaries: A set % of revenue (and/or assets) of the consolidated group
    • Exclude intercompany revenue/assets from the calculation
    • For consecutive months/fiscal quarters?
    • But note: The more expansive the exclusions, the higher the coverage requirement

• Add a joinder and a release mechanic to the documents
• Expedites closing and saves money
“Material Subsidiary” means each Subsidiary of the Borrower other than (a) [Specifically Excluded Company] and (b) any other Subsidiary with total (net) revenues (on an unconsolidated basis and after eliminating intercompany revenues) for the preceding four fiscal quarter period of less than 5% of the Borrower’s consolidated total (net) revenues for such period based upon the Borrower’s most recent annual or quarterly financial statements delivered to the Administrative Agent pursuant to Section 6.1.3.
Excluded Subsidiary: Example

“Excluded Subsidiary” means any of the following: (a) any Foreign Subsidiary; (b) any Subsidiary that is engaged solely in Securitization Transactions; (c) any Subsidiary that has equity interests (excluding directors’ qualifying shares) owned by a Person other than the Company or a Subsidiary so long as (i) the Administrative Agent has agreed that the ownership of such equity interests by such Person serves a bona fide business purpose; and (ii) the Company has designated (which designation has not been rescinded by the Company) such Subsidiary as an Excluded Subsidiary; and (d) each other Subsidiary having assets with a value of less than $1,000,000.

Section 6.12. Subsidiary Guaranty. The Company will take, and will cause its Subsidiaries to take, such actions as are reasonably necessary or as the Administrative Agent may reasonably request (including delivery of authorization documents and customary opinions of counsel) so that (subject to the provisos below) as of each Test Date all of the Company’s obligations hereunder are guaranteed by Subsidiaries (other than Excluded Subsidiaries) that, in the aggregate together with the Company, own 90% or more of the consolidated assets of the Company and its Subsidiaries (other than the Excluded Subsidiaries) and earned 90% or more of the consolidated revenue of the Company and its Subsidiaries (other than the Excluded Subsidiaries) during the most recent period of four consecutive fiscal quarters (excluding the revenues of any Subsidiary or business unit that has been divested or liquidated on or prior to any date of determination and after giving effect to the elimination of intercompany items), in each case pursuant to the Subsidiary Guaranty; provided that the provisions of this Section 6.12 shall cease to be effective (and thereafter, except as provided in the following proviso, no Subsidiary shall be obligated to guarantee the Company’s obligations hereunder) on the first date after the date hereof on which the Company’s long term senior unsecured public Debt without third party credit enhancement has a rating (or, if no such Debt is outstanding, the Company has a corporate or similar rating) of BBB or better by S&P and Baa2 or better by Moody’s.
Structural Issue: Foreign Subsidiaries

- U.S Borrowers: Beware of deemed dividends where pledge or guarantee involves stock of a controlled foreign corporation
- Limit U.S. pledges of stock of first-tier foreign subsidiaries to 65% (or 66-2/3%) of total voting stock
- No upstream guaranties by foreign subsidiaries
5. GAAP

- GAAP changes over time (e.g., proposed changes to lease accounting standards)
- 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
    - **Freeze for purposes of financial and other covenant compliance to avoid adverse effects of inclusion of operating leases on balance sheet**
- **Add ability to amend financial covenants if required by changes to GAAP**
“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 the Closing Date, 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.
6. Fees: Letter of Credit Fees

- LC fees are based off of the applicable margin (or can be at a specified rate)
- Two kinds of LCs
  - Standby LC – support an obligation to make payments to the beneficiary
  - Commercial (or “Trade”) LC – support the payment for and shipment of goods
- Potential for lower pricing for standby LCs (e.g., priced at 50 - 70% of the fee for commercial LCs)
  - Bank required to hold less capital
  - Less likely to be used
Fees: Proration of Agent’s Fee

- Annual fee payable to the Administrative Agent
  - If amending the facility with the same Administrative Agent, get a credit for amounts paid earlier in the year

(iii) an annual administration fee to the Bank in an amount equal to $100,000 per year, which fee will be payable on the Closing Date and annually in advance on each anniversary thereof prior to the maturity or earlier termination of the Facility and the payment in full of all amounts owing thereunder (it being understood that you will receive pro rata credit for any unused administration fee you paid to the Bank as Administrative Agent under the Existing Credit Agreement).
7. Dodd-Frank and Basel III

- Dodd-Frank Act is still a huge question mark
- Basel III
- “Increased costs” (“yield protection”) provisions protect lenders against increased costs caused by changes in law after the closing date
  - Look-back period so retroactive costs are limited
  - MFN provision
  - Yank-a-bank
- Swap guaranties
“Change in Law” means the occurrence, after the date of this Agreement, of any of the following: (a) the adoption or taking effect of any law, rule, regulation or treaty, (b) any change in any law, rule, regulation or treaty or in the administration, interpretation or application thereof by any Governmental Authority or (c) the making or issuance of any request, guideline or directive (whether or not having the force of law) by any Governmental Authority; provided that notwithstanding anything herein to the contrary, (i) the Dodd-Frank Wall Street Reform and Consumer Protection Act and all requests, rules, guidelines or directives thereunder or issued in connection therewith by any Governmental Authority charged with the enforcement, interpretation or administration thereof and (ii) all requests, rules, guidelines or directives promulgated by the Bank for International Settlements, the Basel Committee on Banking Supervision (or any successor or similar authority) or the United States regulatory authorities, in each case pursuant to Basel III, shall in each case be deemed to be a “Change in Law”, regardless of the date enacted, adopted or issued.
“Change in Law” means the occurrence, after the date of this Agreement, of any of the following: (a) the adoption or taking effect of any law, rule, regulation or treaty, (b) any change in any law, rule, regulation or treaty or in the administration, interpretation or application thereof by any Governmental Authority or (c) the making or issuance of any request, guideline or directive (whether or not having the force of law) by any Governmental Authority; provided that notwithstanding anything herein to the contrary, except to the extent they are merely proposed and not in effect, (i) the Dodd-Frank Wall Street Reform and Consumer Protection Act and all requests, rules, guidelines or directives thereunder or issued in connection therewith by any Governmental Authority charged with the enforcement, interpretation or administration thereof and (ii) all requests, rules, guidelines or directives promulgated by the Bank for International Settlements, the Basel Committee on Banking Supervision (or any successor or similar authority) or the United States regulatory authorities, in each case pursuant to Basel III, shall in each case be deemed to be a “Change in Law”, regardless of the date enacted, adopted or issued.
Increased Costs: Lender-Friendly

Section 8.1. Increased Costs. If any Change in Law:

(i) imposes, modifies or deems applicable any reserve (including any reserve imposed by the FRB, but excluding any reserve included in the determination of LIBOR pursuant to Section 4), special deposit or similar requirement against assets of, deposits with or for the account of, or credit extended by any Lender; or

(ii) imposes on any Lender any other condition affecting its LIBOR Loans, its Note or its obligation to make LIBOR Loans;

(iii) subjects any Lender to any tax of any kind whatsoever with respect to this Agreement or changes the basis of taxation of payments to such Lender in respect thereof (except for the imposition of, or any change in the rate of, any Excluded Tax payable by such Lender);

and the result of anything described in clauses (i) and (iii) above is to increase the cost to (or to impose a cost on) such Lender (or any LIBOR Office of such Lender) of making or maintaining any LIBOR Loan, or to reduce the amount of any sum received or receivable by such Lender (or its LIBOR Office) under this Agreement or under its Note with respect thereto, then upon demand by such Lender (which demand shall be accompanied by a statement setting forth the basis for such demand and a calculation of the amount thereof in reasonable detail, a copy of which shall be furnished to the Administrative Agent), the Borrower shall pay directly to such Lender such additional amount as will compensate such Lender for such increased cost or such reduction.
Increased Costs: Borrower-Friendly

Section 8.1. Increased Costs. If any Change in Law:

(i) imposes, modifies or deems applicable any reserve (including any reserve imposed by the FRB, but excluding any reserve included in the determination of LIBOR pursuant to Section 4), special deposit or similar requirement against assets of, deposits with or for the account of, or credit extended by any Lender; or

(ii) imposes on any Lender any other condition affecting its LIBOR Loans, its Note or its obligation to make LIBOR Loans;

(iii) subjects any Lender to any tax of any kind whatsoever with respect to this Agreement or changes the basis of taxation of payments to such Lender in respect thereof (except for the imposition of, or any change in the rate of, any Excluded Tax payable by such Lender);

and the result of anything described in clauses (i) and (iii) above is to increase the cost to (or to impose a cost on) such Lender (or any LIBOR Office of such Lender) of making or maintaining any LIBOR Loan, or to reduce the amount of any sum received or receivable by such Lender (or its LIBOR Office) under this Agreement or under its Note with respect thereto, then promptly after demand (so long as such demand is substantially consistent with demands made by such Lender with similarly situated customers of such Lender under agreements having provisions similar to this Section 8.1) by such Lender (which demand shall be accompanied by a statement certifying that such demand and a calculation of the amount thereof in reasonable detail, a copy of which shall be furnished to the Administrative Agent), the Borrower shall pay directly to such Lender such additional amount as will compensate such Lender for such increased cost or such reduction, so long as such amounts have accrued on or after the day that is 90 days prior to the date on which such Lender first made demand therefor.
Dodd-Frank: Swaps

• Definition of “swap” by the CFTC includes a guarantee of a swap
• Commodity Exchange Act provides that only “eligible contract participants” can enter into non-exchange traded swaps
  • More than $10M in assets
• CFTC: Guarantors of swaps must be ECPs
  – At closing, and each time a swap is entered into
ECP Issue: Fixing the Problem

- Exclude from “Guaranteed Obligations (and Secured Obligations) obligations to the extent the guarantee (or collateral grant) is or becomes illegal under the CEA – otherwise, unenforceable
- Waterfall and collateral sharing provisions
- Keepwell arrangement – another loan party that is an ECP can guarantee another’s guarantee obligations to confer ECP status to the non-ECP
Excluded Swap Obligations

"Swap Obligation" means, with respect to any Guarantor, any obligation to pay or perform under any agreement, contract or transaction that constitutes a "swap" within the meaning of section 1a(47) of the Commodity Exchange Act.

"Excluded Swap Obligation" means, with respect to any Guarantor, any Swap Obligation if, and to the extent that, all or a portion of the Guarantee of such Guarantor of, or the grant by such Guarantor of a security interest to secure, such Swap Obligation (or any Guarantee thereof) is or becomes illegal under the Commodity Exchange Act or any rule, regulation or order of the Commodity Futures Trading Commission (or the application or official interpretation of any thereof) by virtue of such Guarantor's failure for any reason to constitute an "eligible contract participant" as defined in the Commodity Exchange Act and the regulations thereunder at the time the Guarantee of such Guarantor or the grant of such security interest becomes effective with respect to such Swap Obligation. If a Swap Obligation arises under a master agreement governing more than one swap, such exclusion shall apply only to the portion of such Swap Obligation that is attributable to swaps for which such Guarantee or security interest is or becomes illegal.

"Obligations" means all unpaid principal of and accrued and unpaid interest on the Loans, all LC Obligations, all accrued and unpaid fees and all expenses, reimbursements, indemnities and other obligations of any Loan Party to the Lenders or to any Lender, the Administrative Agent, the LC Issuer or any indemnified party arising under the Loan Documents (or any Person who was a Lender at the time of execution and delivery of the underlying Loan Document relating thereto) exclusive of Excluded Swap Obligations.
Each Qualified ECP Guarantor hereby jointly and severally absolutely, unconditionally and irrevocably undertakes to provide such funds or other support as may be needed from time to time by each other Guarantor to honor all of its obligations under this Guaranty in respect of Swap Obligations (provided, however, that each Qualified ECP Guarantor shall only be liable under this Section for the maximum amount of such liability that can be hereby incurred without rendering its obligations under this Section, or otherwise under this Guaranty, voidable under applicable law relating to fraudulent conveyance or fraudulent transfer, and not for any greater amount). The obligations of each Qualified ECP Guarantor under this Section shall remain in full force and effect until a [Discharge of Guaranteed Obligations]. Each Qualified ECP Guarantor intends that this Section constitute, and this Section shall be deemed to constitute, a "keepwell, support, or other agreement" for the benefit of each other Guarantor for all purposes of Section 1a(18)(A)(v)(II) of the Commodity Exchange Act.

"Qualified ECP Guarantor" means, in respect of any Swap Obligation, each Guarantor that has total assets exceeding $10,000,000 at the time the relevant Guarantee or grant of the relevant security interest becomes effective with respect to such Swap Obligation or such other person as constitutes an "eligible contract participant" under the Commodity Exchange Act or any regulations promulgated thereunder and can cause another person to qualify as an "eligible contract participant" at such time by entering into a keepwell under Section 1a(18)(A)(v)(II) of the Commodity Exchange Act.
8. Bringdown of Representations

- Representations must be true on the date of each borrowing as if made on and as of that date
  - “in all material respects”

- Exceptions:
  - Representations that refer to a specific date (e.g., “As of the Closing Date, the Subsidiaries of the Borrower are set forth on Schedule 5.14.”)
  - For investment-grade credits:
    - MAC and litigation representations are usually excluded
    - Sometimes ERISA and environmental representations are excluded
Section 11.2. *Conditions to All Revolving Loans.* The making of each Revolving Loan is subject to the condition that the Effective Date shall have occurred and to the further conditions precedent that, both before and after giving effect to such Revolving Loan:

(a) the representations and warranties of the Company set forth in this Agreement shall be true and correct with the same effect as if then made; and

(b) no Default or Event of Default shall have then occurred and be continuing.
Section 11.2. **Conditions to All Revolving Loans.** The making of each Revolving Loan is subject to the condition that the Effective Date shall have occurred and to the further conditions precedent that, both before and after giving effect to such Revolving Loan:

(a) the representations and warranties of the Company set forth in this Agreement (excluding Section 9.5 [No Material Adverse Change], Section 9.6 [Litigation], Section 9.9 [Compliance with ERISA] and Section 9.13 [Environmental Matters]) shall be true and correct in all material respects with the same effect as if then made (except to the extent stated to relate to an earlier date, in which case such representations and warranties shall be true and correct in all material respects as of such earlier date); and

(b) no Default or Event of Default shall have then occurred and be continuing.
9. Baskets and Thresholds

- Baskets and thresholds are commonly found in:
  - Limitations on negative covenants
    - Liens, dispositions, investments, and indebtedness
    - Additional exclusions are permitted so long as the obligations do not exceed a threshold amount
    - Dividends may be paid so long as they do not exceed a threshold
  - The cross-default provision
    - A default in respect of other indebtedness in excess of a threshold amount triggers a default under the credit agreement or indenture at issue
Baskets (cont.)

• Basket amounts are often set as a percentage of net worth or tangible assets
  – But: Given the volatility of net worth and tangible assets, Borrowers should try to express the basket in terms of the greater of a specified $ amount and a specified % of net worth / tangible assets

• Borrowers should try to have the covenant specify that the exclusion is measured on the date of incurrence
  – Otherwise, there is a risk that the exclusion that was allowed when incurred (because the net worth of the Borrower was high) becomes disallowed if the Borrower’s net worth declines
Basket: Lender-Friendly

**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: Borrower-Friendly

**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).
10. Anti-Terrorism Laws

- PATRIOT Act and Office of Foreign Assets Control (OFAC): Goal is to restrict the funding of terrorism
- A US lender cannot enter into blocked transactions
  - Loans to someone on the sanctions lists
  - Loans where the lender knows or has notice that the proceeds are intended to be used in violation of anti-terrorism laws
- If a US lender enters into a blocked transaction:
  - The loan documents could be unenforceable
  - Their collateral could be out of reach
  - Fines
- Borrowers: Materiality and knowledge qualifiers
PATRIOT Act Notice

USA PATRIOT Act Notice. Each Lender that is subject to the requirements of the Act (as defined below) and the Administrative Agent (for itself and not on behalf of any Lender) hereby notifies the Borrowers that pursuant to the requirements of the USA Patriot Act (Title III of Pub. L. 107-56 (signed into law October 26, 2001)) (the “Act”), it is required to obtain, verify and record information that identifies the Borrowers, which information includes the name and address of the Borrowers and other information that will allow such Lender or the Administrative Agent, as applicable, to identify the Borrowers in accordance with the Act.
(a) The Company and its affiliated companies and their respective directors, officers, employees, and agents have conducted their business in compliance with Anti-Corruption Laws and have instituted and maintained policies and procedures designed to promote and achieve compliance with such laws.

(b) None of the Company or its affiliated companies or their respective directors, officers, employees, agents or representatives acting or benefiting in any capacity in connection with the Loans:

(i) is a Blocked Person;

(ii) is a Person that is owned or controlled by a Blocked Person;

(iii) is located, organized or resident in a Sanctioned Country; or

(iv) has directly or indirectly engaged in, or is now directly or indirectly engaged in, any dealings or transactions (1) with any Blocked Person, (2) in any Sanctioned Country, or (3) otherwise in violation of Sanctions.
Anti-Terrorism Rep: More Borrower-Friendly

(a) The Company and, to the Company’s knowledge, its controlled affiliated companies and their respective directors, officers, employees, and agents have conducted their business in compliance in all material respects with Anti-Corruption Laws and have instituted and maintained policies and procedures designed to promote and achieve compliance with such laws.

(b) None of the Company or, to the Company’s knowledge, its controlled affiliated companies or their respective directors, officers, employees or agents or representatives acting or benefiting in any capacity in connection with the Loans:

(i) is a Blocked Person;

(ii) is a Person that is owned or controlled by a Blocked Person;

(iii) is operating, organized or resident in a Sanctioned Country; or

(iv) has directly or indirectly engaged in, or is now directly or (or, except as disclosed in writing to the Administrative Agent prior to the date hereof, has, to the Company’s knowledge, within the year preceding the Effective Date) directly or, to the Company’s knowledge, indirectly engaged in, any dealings or transactions (1) with any Blocked Person, (2) in any Sanctioned Country to the extent that after giving effect to such dealings or transactions the Company and its Subsidiaries have more than 5% of their consolidated assets in Sanctioned Countries or derive more than 5% of their consolidated operating income from investments in or transactions with Blocked Persons or Sanctioned Countries, or (3) otherwise in violation of Sanctions to the extent that such violation of Sanctions under this clause (3) could reasonably be expected to have a Material Adverse Effect.
The Company shall not, and shall ensure that none of its affiliated companies will, directly or indirectly use the proceeds of the Loans: (i) for any purpose which would breach the U.K. Bribery Act 2010, the United States Foreign Corrupt Practices Act of 1977 or other similar legislation in other jurisdictions; (ii) to fund, finance or facilitate any activities, business or transaction of or with any Blocked Person or in any Sanctioned Country, or otherwise in violation of Sanctions, as such Sanctions are in effect from time to time; or (iii) in any other manner that will result in the violation of any applicable Sanctions by the Bank.

The Company shall not, and shall ensure that none of its affiliated companies will, use funds or assets obtained directly or indirectly from transactions with or otherwise relating to (i) Blocked Persons or (ii) any Sanctioned Country, to pay or repay any amount owing to the Administrative Agent or any Lender under any Loan.

The Company shall, and shall ensure that each of its affiliated companies will: (i) conduct its business in compliance with Anti-Corruption Laws; (ii) maintain policies and procedures designed to promote and achieve compliance with Anti-Corruption Laws; and (iii) have appropriate controls and safeguards in place designed to prevent any proceeds of any Loan from being used contrary to the representations and undertakings set forth herein.
Anti-Terrorism Covenant: More Borrower-Friendly

(a) The Company shall not, and shall institute and maintain policies and procedures designed to ensure that none of its controlled affiliated companies will, directly or, to the Company’s knowledge, indirectly use the proceeds of the Loans: (i) for any purpose which would breach the U.K. Bribery Act 2010, the United States Foreign Corrupt Practices Act of 1977 or other similar legislation in other jurisdictions in a manner that could reasonably be expected to have a Material Adverse Effect; (ii) to fund, or finance or facilitate any activities, business or transaction of or with any Blocked Person or in any Sanctioned Country, or otherwise in violation of Sanctions, as such Sanctions are in effect from time to time; or (iii) in any other manner that will result in the violation of liability to the Administrative Agent or any Lender under any applicable Sanctions by the Bank.

(b) The Company shall not, and shall ensure that none of its affiliated companies will, use funds or assets obtained directly or, to the Company’s knowledge, indirectly from transactions with or otherwise relating to (i) Blocked Persons or (ii) any Sanctioned Country, to pay or repay any amount owing to the Administrative Agent or any Lender under any Loan.

(c) The Company shall, and shall ensure that each of its controlled affiliated companies will: (i) conduct its business in compliance with Anti-Corruption Laws in all material respects; (ii) maintain policies and procedures designed to promote and achieve compliance with Anti-Corruption Laws; and (iii) have appropriate reasonable controls and safeguards in place designed to prevent any proceeds of any Loan from being used contrary to the representations and undertakings set forth hereinafter.
11. Debt to EBITDA Ratio

• Subtracting cash on hand (i.e., unrestricted cash) from debt can help with ratios and pricing
  – Cap the amount of cash on hand?
  – Require a minimum amount of cash on hand?
Debt to EBITDA Ratio and Cash on Hand: Example

“Total Net Leverage Ratio” means, for any Computation Period, the ratio of (i) the remainder as of the last day of such Computation Period of (x) all Debt of the Company and its Subsidiaries minus (y) Specified Cash to (ii) EBITDA for such Computation Period.

“Specified Cash” means the lesser of (i) the aggregate amount of cash, cash equivalents and short-term investments of the Company and its Subsidiaries in excess of $50,000,000 and (ii) $100,000,000.
Other Topics

- Defaulting Lenders
- FATCA
- Disqualified Lenders
- LIBOR “scandal”
Living With Your Credit Facility
After Closing a Facility

- **Debt compliance**
  - Training across organization – compliance team with defined roles
  - Calendaring – reporting requirements and payments
  - Compliance/covenant checklists
  - Debt compliance policy
  - Tracking and forecasting – financial covenants and baskets

- **Maintain ongoing relationship with your lenders**
  - Open dialog – be proactive
  - Meet 1-2 levels above relationship manager
  - Senior management introductions
  - Meet key bank credit personnel
  - Onsite tours and product demonstrations

- **Develop and maintain relationships with potential lenders**
Termination of a Facility

• Often, can only terminate upon giving irrevocable notice
  – Problems arise if that notice is given and the take-out financing is delayed or 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 a Facility (cont.)

- Thus, Borrowers prefer that the credit agreement:
  - Provide that such notice is revocable, or
  - Expressly acknowledge that any such notice may be contingent on the closing of the replacement financing (or any other event)

- Failing that, Borrowers can try to have the notice of prepayment state that the prepayment date is the closing date of the replacement financing
SECTION 2.09. Termination and Reduction of Commitments. Unless previously terminated, the Commitments shall terminate on the Maturity Date.

(a) The Company may at any time terminate, or from time to time reduce, the Commitments; provided that (i) each reduction of the Commitments shall be in an amount that is an integral multiple of $500,000 and not less than $5,000,000 and (ii) the Company shall not terminate or reduce the Commitments if, after giving effect to any concurrent prepayment of the Loans in accordance with Section 2.11, the Dollar Amount of the sum of the Revolving Credit Exposures would exceed the Aggregate Commitment.

(b) The Company shall notify the Administrative Agent of any election to terminate or reduce the Commitments under paragraph (a) at least three (3) Business Days prior to the effective date of such termination or reduction, specifying such election and the effective date thereof. Each notice delivered by the Company pursuant to this Section shall be irrevocable; provided that a notice of termination of the Commitments delivered by the Company may state that such notice is conditioned upon the occurrence or non-occurrence of any event specified therein (including the effectiveness of other credit facilities), in which case such notice may be revoked by the Company (by notice to the Administrative Agent on or prior to the specified effective date) if such condition is not satisfied. Any termination or reduction of the Commitments shall be permanent. Each reduction of the Commitments shall be made ratably among the Lenders in accordance with their respective Commitments.
Payoff Letters

• New lender will want a payoff letter
  – Establishes payoff amount
  – Establishes existing lender’s obligation to provide collateral releases, return possessory collateral, etc.
  – A payoff letter is not technically necessary to pay off a facility
  – Possible alternatives when paying off a secured facility (UCC 9-210):
    • “Request for an accounting”
    • “Request regarding a statement of account”

• Lenders are increasingly including in their payoff letters a global release of claims, especially where:
  – Existing lender is an asset-based lender
  – Contentious situations

• Borrowers should try to delete this release
Global Release: Very Lender-Friendly

Each Borrower and Guarantor hereby releases, discharges and acquits Existing Agent and each Existing Lender, its and their respective officers, directors, agents and employees and its and their respective successors and assigns, from all obligations under the Loan Documents to each Borrower and Guarantor (and its or their respective successors and assigns) and from any and all claims, demands, debts, accounts, contracts, liabilities, actions and causes of actions, whether in law or in equity, that any Borrower or Guarantor at any time had or presently has against Existing Agent and each Existing Lender and its respective officers, directors, agents or employees and its and their respective successors and assigns.
Each Borrower and Guarantor hereby releases, discharges and acquits Existing Agent and each Existing Lender, its and their respective officers, directors, agents and employees and its and their respective successors and assigns, from all obligations under the Loan Documents to each Borrower and Guarantor (and its or their respective successors and assigns) and from any and all claims, demands, debts, accounts, contracts, liabilities, actions and causes of actions arising in connection with the Loan Documents, whether in law or in equity, that any Borrower or Guarantor at any time had or presently has against Existing Agent and each Existing Lender and its respective officers, directors, agents or employees and its and their respective successors and assigns.
Global Release: Preferred
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