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Commercial Loan Documentation

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AGENDA

Basic Principles (20 minutes)

- Borrowers, Guarantors, and Their Assets
- Lenders, Agents, and Participants
- Basic Legal Considerations
- Basic Loan Document Provisions
- Security for the Loan
- Default and Remedies
- Bankruptcy Considerations

Boilerplate and Why It Is Important (10 minutes)

- Choice of Law and Consent to Jurisdiction and Venue
- Recourse Limitations
- Indemnities
- Assignment and Participation Provisions
- Amendment Provisions
- Further Assurances

Basic Loan Documents and Their Terms (15 minutes)

- Loan Agreements and Promissory Notes
- Guaranties
- Authorization Documents
- Legal Opinions

Basic Security Documents and Their Terms (15 minutes)

- Perfection of Liens and Security Interests
- Personal Property Security Documents
- Real Property Security Documents
- Ancillary Security Documents

Questions and Answers (5 minutes)

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Commercial Loan
Documentation
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Basic Loan Documentation Considerations

1. Parties to a Loan Transaction
2. Essential Loan Terms
3. Basic Legal Considerations
4. Bankruptcy Considerations
5. Basic Loan Document Provisions

Parties to a Loan Transaction

BORROWER PARTIES:	Persons (including entities) whose assets are legally available, directly or indirectly, to repay the loan
LENDER PARTIES:	Persons obligated to make the loan and legally entitled to enforce repayment
COMPETING CREDITORS:	Other consensual or non-consensual creditors of one or more of the Borrower Parties
BANKRUPTCY TRUSTEE:	A theoretical competing creditor in every transaction

Borrower Parties: Persons (Including Entities) Whose Assets Are Legally Available, Directly or Indirectly, to Repay the Loan

- BORROWERS: Persons that receive loan proceeds and promise to repay the loan.
- GUARANTORS: Persons that promise to answer for the debt, default, or miscarriage of another, or hypothecate property as security therefor.
- OTHER THIRD PARTIES: Includes Persons that are parties to contracts with a Borrower or Guarantor that are pledged to secure their obligations to the Lender, such as lease tenants or account debtors.

Lender Parties: Persons (Including Entities) Obligated to Make the Loan and Legally Entitled to Enforce Repayment

- LENDERS: One or more Persons who promise to make a loan to a Borrower and are legally entitled to enforce the loan terms against the Borrower.
- AGENT: In loans with multiple Lenders, the Person (typically, but not necessarily, one of the Lenders) that the Lenders appoint to administer the loan and enforce the loan terms against the Borrower.
- PARTICIPANT: A Person that acquires from a Lender a portion of its right to repayment of a loan. A participant's legal relationship is with the Lender, not the Borrower, and a participant is therefore not entitled to enforce the loan terms against the Borrower.

Competing Creditors: Other Consensual or Non-Consensual Creditors of One or More of the Borrower Parties

CONSENSUAL CREDITORS: Include other lenders to a Borrower or Guarantor, or other parties with a contractual relationship with a Borrower or Guarantor such as a landlord or supplier.

- The claims of competing consensual creditors may be secured or unsecured.
- Some consensual creditors may have statutory liens with priority over competing claims (e.g., mechanics lien claimants).

NON-CONSENSUAL CREDITORS: Include taxing authorities, judgment creditors, tort claimants, and environmental, ERISA, or other statutory liability claimants.

- The claims of competing non-consensual creditors are frequently secured, and the liens securing their claims may have statutory priority over competing claims (e.g., liens securing property taxes).

Bankruptcy Trustee: A Theoretical Competing Creditor in Every Transaction

Under Section 544 of the U.S. Bankruptcy Code (11 U.S.C. §544), a trustee has, as of the commencement of a bankruptcy case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by:

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

Essential Loan Terms

Loan Commitment and Amount

- Disbursement conditions
- Funding mechanics
- Commitment increases

Loan Maturity

- Commitment reductions
- Maturity date extensions
- Extension conditions

Essential Loan Terms (continued)

Interest Rate and Interest Payment Terms

- Interest rate definitions
- Interest rate calculation
- Interest rate adjustment mechanics
- Default interest rate

Loan Fees

- Commitment fees
- Unused fees
- Late charges

Essential Loan Terms (continued)

Principal Amortization and Payment Terms

- Mandatory principal prepayments
- Voluntary principal prepayment terms

Security for the Loan Obligations

- Real property security
- Personal property security

Basic Legal Considerations

1. Memorializing the parties' agreement
   - Written loan documents
   - Integration provisions
   - Termination and survival provisions
2. Legally binding the parties and property intended to be bound
   - "Execution" of loan documents
   - Obligations of multiple parties as joint, several, or joint and several
3. Establishing the facts on which the parties' agreement is based
   - Representations and warranties

Basic Legal Considerations (continued)

4. Establishing the facts on which the parties' agreement is based
   - Under what law will the agreement be interpreted and enforced?
   - Default and remedies provisions
   - How will the agreement be enforced (judicial vs. non-judicial enforcement)?
   - Where will the agreement be enforced?
5. Assuring that assets are available to satisfy the lender's claims
   - Consensual security interests
   - Affirmative, negative, and financial covenants
   - Contractual liability or recourse limitations

Basic Legal Considerations (continued)

6. Protecting the available assets from competing claims
   - Perfection of security interests
   - Special purpose entity (SPE) and bankruptcy remoteness provisions
   - Affirmative and negative covenants

Bankruptcy Considerations

BANKRUPTCY ESTATE: The commencement of a bankruptcy case creates an "estate" comprised of all legal and equitable interests of the debtor in property as of the commencement of the case, wherever located and by whomever held, all proceeds, product, offspring, rents or profits of or from property of the estate, and any interest in property that the estate acquires after commencement of the case.

AUTOMATIC STAY: The filing of a bankruptcy petition operates as a stay, applicable to all persons or entities, of (1) the commencement or continuation of a judicial, administrative or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case, or to recover a claim against the debtor that arose before the commencement of the case; (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case; (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; (4) any act to create, perfect, or enforce any lien against property of the estate; (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title; (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case; and (7) the setoff of any debt owing to the debtor that arose before the commencement of the case against any claim against the debtor (11 U.S.C. §362(a)).

Bankruptcy Considerations (continued)

IPSO FACTO CLAUSES UNENFORCEABLE: An executory contract of the debtor may not be terminated or modified, and no right or obligation under such contract may be terminated or modified, at any time after the commencement of a bankruptcy case solely because of a provision in such contract that is conditioned on (A) the insolvency or financial condition of the debtor at any time before the closing of the case; (B) the commencement of a bankruptcy case; or (C) the appointment of or taking possession by a trustee in a bankruptcy case or a custodian before such commencement (11 U.S.C. §365(e)(1)).

POST-PETITION EFFECT OF A SECURITY INTEREST: Property acquired by the estate or by the debtor after the commencement of a bankruptcy case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case unless such property is the proceeds, products, offspring, or profits of property of the debtor covered by such security agreement acquired before the commencement of the case (11 U.S.C. §552(b)).

Bankruptcy Considerations (continued)

AVOIDING POWERS: A bankruptcy trustee (or the debtor-in-possession in a Chapter 11 case) has the power to avoid:

- Any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by (i) a judgment lien creditor that extends credit to the debtor at the time of the commencement of the bankruptcy case, (ii) a creditor that extends credit to the debtor at the time of the commencement of the bankruptcy case that has with respect to such credit an unsatisfied execution against the debtor's property, and (iii) a bona fide purchaser of real property from the debtor as of the commencement of the case (11 U.S.C. §544(a)).
- Any "preference," which is any transfer of an interest of the debtor in property (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made within 90 days before the date of the filing of the petition (or between 90 days and one year before the filing if the creditor was an insider); and (5) that enables the creditor to receive more than it would receive in a chapter 7 liquidation (11 U.S.C. §547(b)).

Bankruptcy Considerations (continued)

- Any fraudulent conveyance, which is any transfer of property or incurrence of an obligation by the debtor within two years prior to the filing date of the bankruptcy petition (i) made with actual intent to hinder, delay or defraud any present or future creditor, or (ii) for which the debtor received less than a reasonably equivalent value, was insolvent on the date of the transfer or incurrence of the obligation or rendered insolvent by such transfer or incurrence, and either (A) engaged or about to engage in business or a transaction for which its remaining property was an unreasonably small capital or (B) intended to incur or believed it would incur debts beyond its ability to pay as they matured (11 U.S.C. §548(a)).

Bankruptcy Considerations (continued)

EFFECTS OF CLAIMS CLASSIFICATION: An allowed claim secured by a lien on property in which a bankruptcy estate has an interest is a secured claim to the extent of the value of the creditor's interest in the estate's interest in such property and is an unsecured claim to the extent that the value of the creditor's interest is less than the amount of such allowed claim (11 U.S.C. §506(a)(1)).

- To the extent that an allowed secured claim is secured by property the value of which (after any surcharge under Section 506(c)) is greater than the amount of such claim, the holder is allowed interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose (11 U.S.C. §506(b)).
- However, the trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim (11 U.S.C. §506(c)).

Basic Loan Document Provisions

Defined Terms and Interpretive Provisions

Loan Mechanics

- Memorializes the essential loan terms
- Parties, disbursement, and payment mechanics

Representations and Warranties

- Define the factual basis for the loan
- Risk shifting devices

Covenants

- Reporting covenants
- Financial covenants
- Borrower operating covenants (affirmative and negative)

Basic Loan Document Provisions (continued)

Events of Default and Remedies

- Notice and cure rights
- Bankruptcy defaults
- Acceleration

Miscellaneous ("Boilerplate") Provisions

- Determine many details concerning how a court will interpret and enforce the written agreements of the parties

II. "Boilerplate" and Why It Is Important

- Every legal document contains "boilerplate" provisions, which contain general agreements by the parties relating to the formation, interpretation and enforcement of the agreement.
- It is important to know what these provisions do and why they are included in agreements.

Provisions Governing the Formation of Agreement — Choice of Law

- Absent agreement of the parties, contracts are governed by, and disputes arising under them are determined by reference to, the law of the jurisdiction in which it is "made."
- A contract is generally "made" where the last act necessary for its effectiveness occurs (e.g., where the offer is accepted).
- Courts consider factors such as where the parties negotiate or execute documents evidencing the agreement.
- Where the laws of two or more jurisdictions could apply, parties often select a particular jurisdiction's law to govern the agreement and any disputes arising under it.

Provisions Governing the Formation of Agreement — Choice of Law (continued)

- Contractual choice-of-law provisions are typically enforceable as long as the chosen law bears a reasonable relationship to the parties to the contract or the transaction at issue.
- Some states, such as New York and California, have statutory opt-in provisions (see, e.g., NY General Obligations Law §5-1401, which applies to any obligation arising out of a transaction involving not less than $250,000 in the aggregate not involving personal services).
- Courts may not apply a contractual choice of law provision to claims that are not dependent upon the agreement containing the provision (e.g., claims relating to entity governance are determined under the law of the jurisdiction of the entity's formation).

Provisions Governing the Formation of Agreement — Choice of Law (continued)

- Courts generally will not apply a contractual choice of law provision to "procedural" matters (e.g., rules of pleading or evidence), which are governed by the law of the forum hearing the dispute.

- Typical contractual choice of law provision:

  APPLICABLE LAW. THIS AGREEMENT, AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES HEREUNDER (INCLUDING ANY CLAIMS SOUNDING IN CONTRACT LAW OR TORT LAW ARISING OUT OF THE SUBJECT MATTER HEREOF AND ANY DETERMINATIONS WITH RESPECT TO POST-JUDGMENT INTEREST), SHALL BE GOVERNED BY, AND SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK WITHOUT REGARD TO CONFLICT OF LAWS PRINCIPLES THEREOF THAT WOULD RESULT IN THE APPLICATION OF ANY LAW OTHER THAN THE LAW OF THE STATE OF NEW YORK.

Provisions Governing Formation — Counterpart Execution/Electronic Delivery

- Contract formation requires the parties' agreement to its terms, a "meeting of the minds."
- Execution and delivery of the same writing is typical evidence of the necessary "meeting of the minds."
- Where execution of the same writing is impractical, the parties can agree that execution of identical "counterpart" copies of the writing is sufficient evidence of their mutual agreement to the terms set forth in the writing.
- Parties frequently agree to delivery of "electronic counterparts" by e-mail in PDF or similar non-alterable format as sufficient evidence of execution and delivery, in lieu of delivery of "wet ink" paper counterparts.

Provisions Governing Formation — Counterpart Execution/Electronic Delivery (continued)

- Typical counterparts provision:

  Effectiveness; Counterparts. This Agreement shall become effective upon the execution of a counterpart hereof by each of the parties hereto and receipt by Borrower and Administrative Agent of written notification of such execution and authorization of delivery thereof. This Agreement may be executed in any number of counterparts, each of which when so executed and delivered shall be deemed an original, but all such counterparts together shall constitute but one and the same instrument. Delivery of an executed counterpart of a signature page of this Agreement by facsimile or in electronic format (i.e., "pdf" or "tif") shall be effective as delivery of a manually executed counterpart of this Agreement.

Provisions Governing Formation — Severability

- If one or more material provisions of a contract are unenforceable the entire contract may fail for lack of consideration to the party the unenforceable provisions were designed to benefit.
- A severability provision is an agreement that the failure of one or more terms will not affect the enforceability of the remaining terms.
- Courts may ignore such contractual provisions where the unenforceable provisions of an agreement cannot reasonably be separated from the remaining provisions or otherwise reformed.
- Typical severability provision:

  Severability. In case any provision in or obligation hereunder or under any other Credit Document shall be invalid, illegal, or unenforceable in any jurisdiction, the validity, legality, and enforceability of the remaining provisions or obligations, or of such provision or obligation in any other jurisdiction, shall not in any way be affected or impaired thereby.

Provisions Governing Formation — Integration

- Where the parties have exchanged multiple writings over the course of negotiating a transaction, they typically specify that the definitive agreement contains the parties' entire agreement and supersedes and "integrates" into a single writing all prior communications relating to the contents of their agreement, whether oral or written.
- Typical integration provision:

  Entire Agreement. This Agreement, any Note, and any other Loan Document or other agreement, document, or instrument attached hereto or executed on or as of the Closing Date integrate all of the terms and conditions mentioned herein or incidental hereto and supersede all oral representations and negotiations and prior writings with respect to the subject matter hereof.

Provisions Governing Formation — Amendment/Waiver

- Despite integration provisions, a contract can be amended by actions of the parties other than execution of a writing.
- Legally, a "waiver" is the intentional relinquishment of a known right.
- Parties to written agreements frequently limit by agreement the forms that an amendment or waiver may take (most often, a writing signed by the party against which enforcement is sought).
- Courts will ignore such provisions if the parties' conduct is inconsistent with the written agreement for a sufficiently long period of time, or if a party changes its position based on the action or inaction of the other party that is inconsistent with the writing.

Provisions Governing Formation — Amendment/Waiver (continued)

- A typical amendment/waiver provision:

  Amendments and Waivers. No amendment, modification, termination or waiver of any provision of the Credit Documents, or consent to any departure by any Credit Party therefrom, shall in any event be effective without the written concurrence of Requisite Lenders; provided that Administrative Agent may, with the consent of Borrower, amend, modify or supplement this Agreement or any other Credit Document to cure any ambiguity, omission, defect or inconsistency (as reasonably determined by Administrative Agent), so long as such amendment, modification or supplement does not adversely affect the rights of any Lender (or Issuing Bank, if applicable) or the Lenders and Issuing Bank shall have received at least five Business Days' prior written notice thereof and Administrative Agent shall not have received, within five Business Days of the date of such notice to the Lenders and Issuing Bank, a written notice from the Requisite Lenders stating that the Requisite Lenders (and, if such amendment, modification, or supplement affects the rights or obligations of Issuing Bank, Issuing Bank) object to such amendment.

Provisions Governing Formation — Successors and Assigns; Assignments

- Parties to a contract typically wish to limit those they deal with.
- Except for "personal" contracts (typically those for personal services), contracts are generally assignable and a contracting party's duties are delegable.
- Some types of assignments of payment streams unenforceable under the UCC (see, e.g., UCC §§9-407 and 9-408).
- Typical Credit Agreement assignment provision:

Provisions Governing Formation — Successors and Assigns; Assignments (continued)

Successors and Assigns; Assignments.

(a) This Agreement shall be binding upon, and shall inure to the benefit of, Borrower and the Lenders and their respective successors and assigns.

(b) The foregoing shall not authorize any assignment by Borrower of its rights or duties hereunder, and, except as otherwise provided herein, no such assignment shall be made (or be effective) without the prior written approval of the Lenders.

(c) No Lender may at any time assign or grant participations in such Lender's rights and obligations hereunder and under the other Loan Documents except by way of (i) an assignment to any Eligible Assignee in accordance with [the relevant assignment provisions], (ii) a participation in accordance with [the relevant participation provisions], or (iii) a pledge or assignment of a security interest subject to the restrictions of [the relevant pledge provisions] (and any other attempted assignment or transfer by any Lender shall be deemed to be null and void).

Provisions Governing Formation — No Third-Party Beneficiaries

- Typically, only parties to an agreement may enforce its provisions, whether or not a third party is affected by the parties' performance or non-performance to the agreement.
- However, where a third party can establish that the parties to a contract intended to confer a benefit on it (e.g., the officer or director of a party covered by an indemnity provision in an agreement), it becomes a third-party beneficiary and has the right to enforce the contract against the contracting parties.
- Parties to a contract will typically seek to prevent third parties from directly enforcing their contracts by including a provision that expressly denies an intent that third parties be benefitted by the agreement.

Provisions Governing Formation — No Third-Party Beneficiaries (continued)

- Typical "no third-party beneficiary" provision:

  No Third-Party Beneficiaries. Nothing in this Agreement is intended or shall be construed to give any Person, other than the parties hereto, their successors, and permitted assigns, any legal or equitable right, remedy, or claim under or in respect of this Agreement or the other Transaction Documents, or any provision hereof or thereof.

Provisions Governing the Interpretation of Agreements — Headings

- Absent a contrary contractual provision dealing with their effect, article and section headings, like other parts of a writing, can be used to interpret or construe the parties' intent.
- Headings are typically included solely for ease of reference and are often incomplete, imprecise, or poorly drafted.
- Parties often agree that they are not part of their substantive agreement.
- Typical provision:

  Headings. Section headings herein are included herein for convenience of reference only and shall not constitute a part hereof for any other purpose or be given any substantive effect.

Provisions Governing Interpretation — Construction Against the Drafter

- "In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds." Restatement of Contracts §206 (1981).
- Drafting parties often attempt to overrule by express agreement.
- Typical provision:

  No Construction Against Drafter. This Agreement and the other Loan Documents are the result of negotiations among and have been reviewed by counsel to Lender, Borrowers, and the other parties thereto and are the products of all parties. Accordingly, they shall not be construed against Lender merely because of Lender's involvement in their preparation.

Provisions Governing the Enforcement of Agreements — Jurisdiction and Venue

- In addition to controlling the law that will govern their agreements, parties to contracts can increase the certainty of outcome by selecting the forum in which disputes will be adjudicated.
- Absent agreement, a contract can only be enforced in a court that has both personal jurisdiction over the parties and subject matter jurisdiction over the dispute.
- Personal jurisdiction has a Constitutional dimension, by which a court can exercise jurisdiction only over parties having "minimum contacts" with the forum state, but personal jurisdiction but may be conferred by consent.
- Consent to jurisdiction provisions can be "exclusive" or non-exclusive. The parties' agreement cannot oust a state of judicial jurisdiction, but even exclusive consent to jurisdiction provisions will typically be given effect unless a court finds it to be unfair or unreasonable under the facts and circumstances of the case.

Provisions Governing the Enforcement of Agreements — Jurisdiction and Venue (continued)

- New York permits parties to contracts involving not less than $1,000,000 to agree to the jurisdiction of the New York courts. New York General Obligations Law §5-1402.
- An action is commenced by service of process on a defendant, and parties will often supplement the applicable rules on service by contract.
- Venue determines which court in a state having personal jurisdiction over the parties should hear the dispute.
- Venue rules are typically tied to the convenience of one or both of the parties and necessary witnesses.

Provisions Governing the Enforcement of Agreements — Jurisdiction and Venue (continued)

- Typical "jurisdiction and venue" provision:

  CONSENT TO JURISDICTION. SUBJECT TO CLAUSE (E) OF THE FOLLOWING SENTENCE, ALL JUDICIAL PROCEEDINGS BROUGHT AGAINST ANY PARTY ARISING OUT OF OR RELATING HERETO OR ANY OTHER CREDIT DOCUMENTS, OR ANY OF THE OBLIGATIONS, SHALL BE BROUGHT IN ANY STATE OR FEDERAL COURT OF THE UNITED STATES OF AMERICA SITTING IN THE CITY OF NEW YORK, BOROUGH OF MANHATTAN. BY EXECUTING AND DELIVERING THIS AGREEMENT, EACH CREDIT PARTY, FOR ITSELF AND IN CONNECTION WITH ITS PROPERTIES, IRREVOCABLY (A) ACCEPTS GENERALLY AND UNCONDITIONALLY THE EXCLUSIVE (SUBJECT TO CLAUSE (E) BELOW) JURISDICTION AND VENUE OF SUCH COURTS; (B) WAIVES ANY DEFENSE OF FORUM NON CONVENIENS; (C) AGREES THAT SERVICE OF ALL PROCESS IN ANY SUCH PROCEEDING IN ANY SUCH COURT MAY BE MADE BY REGISTERED OR CERTIFIED MAIL, RETURN RECEIPT REQUESTED, TO THE APPLICABLE CREDIT PARTY AT ITS ADDRESS PROVIDED IN ACCORDANCE WITH SECTION 10.1; (D) AGREES THAT SERVICE AS PROVIDED IN CLAUSE (C) ABOVE IS SUFFICIENT TO CONFER PERSONAL JURISDICTION OVER THE APPLICABLE CREDIT PARTY IN ANY SUCH PROCEEDING IN ANY SUCH COURT, AND OTHERWISE CONSTITUTES EFFECTIVE AND BINDING SERVICE IN EVERY RESPECT; AND (E) AGREES THAT AGENTS, ISSUING BANK, SWING LINE LENDER AND LENDERS RETAIN THE RIGHT TO SERVE PROCESS IN ANY OTHER MANNER PERMITTED BY LAW OR TO BRING PROCEEDINGS AGAINST ANY CREDIT PARTY IN THE COURTS OF ANY OTHER JURISDICTION IN CONNECTION WITH THE EXERCISE OF ANY RIGHTS UNDER ANY CREDIT DOCUMENT OR AGAINST ANY COLLATERAL OR THE ENFORCEMENT OF ANY JUDGMENT, AND HEREBY SUBMITS TO THE JURISDICTION OF, AND CONSENTS TO VENUE IN, ANY SUCH COURT.

Provisions Governing Enforcement — Jury Trial Waiver

- Commercial parties are often wary of juries and will frequently include jury trial waivers in their agreements.
- Pre-default waivers are enforceable in many jurisdictions, including New York, but are not enforceable in California, Grafton Partners
- Typical "jury trial waiver" provision:

  WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY AGREES TO WAIVE ITS RESPECTIVE RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING HEREUNDER OR UNDER ANY OF THE OTHER CREDIT DOCUMENTS OR ANY DEALINGS BETWEEN THEM RELATING TO THE SUBJECT MATTER OF THIS LOAN TRANSACTION OR THE LENDER/BORROWER RELATIONSHIP THAT IS BEING ESTABLISHED. THE SCOPE OF THIS WAIVER

Provisions Governing Enforcement — Jury Trial Waiver (continued)

IS INTENDED TO BE ALL-ENCOMPASSING OF ANY AND ALL DISPUTES THAT MAY BE FILED IN ANY COURT AND THAT RELATE TO THE SUBJECT MATTER OF THIS TRANSACTION, INCLUDING CONTRACT CLAIMS, TORT CLAIMS, BREACH OF DUTY CLAIMS AND ALL OTHER COMMON LAW AND STATUTORY CLAIMS. EACH PARTY HERETO ACKNOWLEDGES THAT THIS WAIVER IS A MATERIAL INDUCEMENT TO ENTER INTO A BUSINESS RELATIONSHIP, THAT EACH HAS ALREADY RELIED ON THIS WAIVER IN ENTERING INTO THIS AGREEMENT, AND THAT EACH WILL CONTINUE TO RELY ON THIS WAIVER IN ITS RELATED FUTURE DEALINGS. EACH PARTY HERETO FURTHER WARRANTS AND REPRESENTS THAT IT HAS REVIEWED THIS WAIVER WITH ITS LEGAL COUNSEL AND THAT IT KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL. THIS WAIVER IS IRREVOCABLE, MEANING THAT IT MAY NOT BE MODIFIED EITHER ORALLY OR IN WRITING (OTHER THAN BY A MUTUAL WRITTEN WAIVER SPECIFICALLY REFERRING TO THIS SECTION 10.16 AND EXECUTED BY EACH OF THE PARTIES HERETO), AND THIS WAIVER SHALL APPLY TO ANY SUBSEQUENT AMENDMENTS, RENEWALS, SUPPLEMENTS OR MODIFICATIONS HERETO OR ANY OF THE OTHER CREDIT DOCUMENTS OR TO ANY OTHER DOCUMENTS OR AGREEMENTS RELATING TO THE LOANS MADE HEREUNDER. IN THE EVENT OF LITIGATION, THIS AGREEMENT MAY BE FILED AS A WRITTEN CONSENT TO A TRIAL BY THE COURT.

Provisions Governing Enforcement — Arbitration

- Arbitration is a non-judicial alternative to judicial proceedings to adjudicate disputes involving the parties' rights.
- Both state and federal statutes govern arbitration, but ultimately arbitration is a contractual right, and the parties must agree to have their disputes arbitrated.
- In their agreement, the parties have a fair amount of discretion as to the manner in which the dispute will be arbitrated, including selection of arbitrators, timing, and the amount types of discovery permitted.
- Those not parties to the contract to arbitrate cannot be compelled to arbitrate.

Provisions Governing Enforcement — Arbitration (continued)

- Arbitration awards are confirmable by courts in accordance with statutory procedures and are not typically reviewable.
- Typical "Arbitration" provision:

  Arbitration. It is hereby agreed that any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration administered in [State], pursuant to a single arbitrator arbitration administered by the [American Arbitration Association] under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Provisions Governing Enforcement — Indemnification

- Indemnification is a contractual obligation by one party to pay or compensate for the losses or damages or liabilities incurred by another party to the contract or by some third person.
- Indemnity means to pay or compensate the other party for its legal liabilities or losses.
- An indemnitor is the party who is obligated to pay another. An indemnitee is the party who is entitled to receive the payment from the indemnitor.
- Common types of loss that are subject to contractual indemnification: breach of representation or warranty, breach of agreement or covenant, third party claims against [Y] for specific subject matter/reason.

Provisions Governing Enforcement — Indemnification (continued)

- The purpose of an indemnification provision is to shift the risk between parties.
- The scope of the indemnification i.e., the subject matter or classes of subject matter must be expressly set forth in the clause. The court will not interpret it to be broader than the intent of the parties.
- Indemnification clause is interpreted under the same rules governing contracts, with the view to identifying the intent of the parties.
- The obligations of the indemnitor and the rights of the indemnitee generally are narrowly construed, based on the theory that in normal commercial contracts, the indemnitee often has the bargaining power.

Provisions Governing Enforcement — Indemnification (continued)

- Under the common law of NY an indemnitor generally has no duty to defend unless the contract specifically requires such defense.
- A party can generally be indemnified and held harmless from its own negligence under the laws of NY and California.
- Must determine whether the indemnification will cover direct claims between the parties and unrelated third-party claims or only third-party claims.

Provisions Governing Enforcement — Indemnification (continued)

- Sample Indemnity clause:

  Indemnification. (a) Borrower agrees to hold Lender and its Affiliates, and their respective officers, directors, employees, agents, and advisors (each an "Indemnified Party"), harmless from and indemnify any Indemnified Party against all liabilities, losses, damages, judgments, costs, and expenses of any kind which may be imposed on, incurred by or asserted against such Indemnified Party by any third party (collectively, the "Costs") relating to or arising out of this Loan Agreement, the Note, any other Loan Document or any transaction contemplated hereby or thereby, or any amendment, supplement or modification of, or any waiver or consent under or in respect of, this Loan Agreement, the Note, any other Loan Document, the Collateral or any transaction contemplated hereby or thereby, that, in each case, results from anything other than such Indemnified Party's gross negligence or willful misconduct. Borrower also agrees to reimburse an Indemnified Party as and when billed by such Indemnified Party for all such Indemnified Party's actual and reasonable out-of-pocket costs and expenses incurred in connection with the enforcement or the preservation of such Indemnified Party's rights under this Loan Agreement, the Note, any other Loan Document or any transaction contemplated hereby or thereby, including the reasonable fees and disbursements of its counsel.

III. Basic Loan Documents and Their Terms

1. Loan Agreements and Promissory Notes
2. Guaranties
3. Security Documents
4. Authorization Documents
5. Legal Opinions

Loan Agreements and Promissory Notes

- These are the basic agreements that defined the legal relationship between Lender and Borrower
- They identify the parties and memorialize their agreements with respect to the Loan
- They typically contain all of the basic loan document provisions previously identified:
  - Defined terms and interpretive provisions
  - Transaction mechanics
  - Closing and funding conditions
  - Representations and warranties
  - Affirmative, negative, and financial covenants
  - Events of Default and Remedies
  - Miscellaneous provisions
- Promissory note includes a promise to pay principal at maturity and interest
  - May be a stand-alone document, or incorporate terms from the loan agreement
  - May be a negotiable instrument or non-negotiable

Loan Agreement Provisions: Defined Terms and Interpretive Provisions

- Definitions precisely define terms used throughout the agreement.
- They simplify provisions of the loan agreement by establishing the meaning of terms used multiple times throughout the agreement.
  - Examples: "Affiliate," "Event of Default," "Material Adverse Effect," "Term SOFR"
- They reduce ambiguity by establishing the precise scope of particular terms.
  - Examples: "Business Day," "Eligible Assignee," "Environmental Laws," "GAAP," "Indebtedness"
- They can reduce the complexity of particular loan agreement provisions by breaking down concepts into simpler units.
  - Examples: Financial covenant definitions such as "EBITDA," "Adjusted EBITDA," "Consolidated EBITDA," "Leverage Ratio"
- Interpretive provisions establish rules of interpretation of certain terms.
  - Examples: Singular terms include the plural. References to sections or exhibits mean those of the particular agreement. "Including" means "including without limitation" and "or" means "and/or"
  - Examples: Undefined accounting terms will have meanings consistent with GAAP, and how changes in GAAP will affect provisions (e.g., financial covenants or representations) making use of those definitions.

Loan Agreement Provisions: Transaction Mechanics

- Loan commitment and loan disbursement mechanics
  - Form and timing of Borrower requests for loan disbursements
  - If multiple lenders, mechanics for transmitting disbursement requests
- Funding mechanics for loan disbursements
  - Identification of funding account
  - If multiple lenders, mechanics for funding disbursements
- Interest accrual and payment
  - Interest rate determination, rate change mechanics, and interest calculation
  - Default interest and late charges
  - If multiple lenders, mechanics for distributing payments

Loan Agreement Provisions: Transaction Mechanics (continued)

- Commitment and unused fees
- Principal repayment
  - Mandatory prepayments
  - Voluntary prepayments and prepayment conditions
  - If multiple lenders, mechanics for distributing payments and treating disproportionate payments
- Maturity date extensions and extension conditions
- Increased costs for prepayments, untimely payments or regulatory changes
- Payments free of taxes and tax withholding

Loan Agreement Provisions: Closing and Funding Conditions

- Executed loan documents
- Evidence of authorization of loan documents
  - Certified copies of Borrower and entity Guarantor formation documents
  - Board resolutions, unanimous written consents, or certificate of all limited liability company members/managers for each Borrower and entity Guarantor
  - Incumbency certificate of signing officers for each Borrower and entity Guarantor
  - Good standing certificates for each Borrower and entity Guarantor
- Legal opinions from counsel to each Borrower and Guarantor
- Evidence of perfection of security interests
  - Filing UCC-1 financing statements
  - Control agreements for deposit accounts and securities accounts

Loan Agreement Provisions: Closing and Funding Conditions (continued)

- Delivery of share or membership certificates with transfer powers
- Recording of real estate documents
- Title insurance policies
- Other closing date deliverables
  - Request for closing date loan disbursement
  - All required “know your customer” information
  - Closing date financial information (typically, most recent audit and most recent available quarterly financial statements)
  - Evidence of insurance
  - Closing date certificate bringing down representations and warranties
  - Solvency certificate

Loan Agreement Provisions: Closing and Funding Conditions (continued)

- No Events of Default or material adverse change in Borrower’s financial conditions since the date of its most recent quarterly financial statements
- Consummation of related transactions (e.g., repayment of existing indebtedness and release of existing liens)
- Due organization, valid existence, good standing, and power and authority of each Borrower and entity Guarantor to enter into and perform its obligations under the loan documents
- Due authorization, execution, and delivery by each Borrower and entity Guarantor of the loan documents, including all required shareholder, member, or government consents

Loan Agreement Provisions: Representations and Warranties, the Factual Basis on Which the Loan Is Made

- Loan documents are binding obligations of each Borrower and Guarantor
- No conflicts of loan documents with laws or contracts binding on any Borrower or Guarantor
- Material accuracy of financial statements of each Borrower and Guarantor, and no material adverse effect since the date of the most recently delivered financial statements
- Good title to all assets shown on financial statements of each Borrower and Guarantor
- Solvency of each Borrower and Guarantor
- Filing of all required tax returns and payment of taxes by each Borrower and Guarantor

Loan Agreement Provisions: Representations and Warranties, the Factual Basis on Which the Loan Is Made (continued)

- No material litigation, governmental investigations, or threats of same against any Borrower or Guarantor
- Compliance with laws, and no regulatory violations by any Borrower or Guarantor
- Environmental laws
- ERISA
- Investment Company Act
- FRB margin stock regulations (Reg. U)
- Sanctions, anti-corruption, and anti-money laundering laws
- Use of loan proceeds
- Other facts material to the particular loan (e.g., consummation of an acquisition financed with the loan proceeds)

Loan Agreement Provisions: Affirmative Covenants

- Affirmative covenants are agreements by each Borrower to do certain things (which may include causing the Guarantors to do some or all of them)
- Typical affirmative covenants include:
  - Financial and other reporting (annual and quarterly financial statements, compliance certificates, notices of defaults, litigation, material adverse changes, new subsidiaries, name changes, etc.)
  - Maintenance of existence and good standing
  - Maintenance of its properties
  - Maintenance of insurance
  - Maintenance of proper books and records (in accordance with GAAP or other specified accounting standards), and making such records available for lender inspection
  - Payment of taxes

Loan Agreement Provisions: Affirmative Covenants (continued)

- Compliance with laws (including sanctions, anti-corruption and anti-money laundering laws, ERISA, margin stock regulations, and KYC requirements)
- Compliance with material contracts
- Subject additional property to lender security interests
- Further assurances (as to scope and perfection of security interests)
- Use of loan proceeds
- Post-closing requirements
- Other affirmative covenants material to the particular loan, Borrower or Guarantors

Loan Agreement Provisions: Negative and Financial Covenants

- Negative Covenants are agreements by each Borrower not to do certain things (which may include causing the Guarantors not to do some or all of them)
- Negative covenants are designed to prevent transfers of assets to Persons not legally obligated to repay the loan or conversions of assets from more to less liquid forms
- Negative covenants are typically framed as absolute prohibitions, subject to stated exceptions or "carve-outs" that are often heavily negotiated to avoid interfering with the Borrower's present or anticipated business activities
- Typical negative covenants include:
  - Limitations on additional Indebtedness
  - Limitation on additional Liens or encumbrances
  - Limitations on Restricted Payments, typically defined as dividends or equity redemptions, as well as payments on subordinated indebtedness
  - Limitations on investments, both in the form of loans or guaranties and in the form of equity investments
  - Limitations on agreements that restrict subsidiaries from making distributions to Borrower

Loan Agreement Provisions: Negative and Financial Covenants (continued)

  - Limitations on asset acquisitions and dispositions
  - Limitations on changes in entity form, such as mergers, consolidations or dissolution, or amendments of organization documents adverse to the lender
  - Limitations on changes to the nature of the Borrower's business activities
  - Limitations on transactions with affiliates
  - Limitations on changes to the Borrower's accounting standards or fiscal year
  - Other negative covenants material to the particular loan, Borrower or Guarantors
- Financial covenants are measures of the financial health of the business, such as leverage, net worth, or profitability, that the Borrower is required to calculate, certify and compare to established levels each quarter based on its most recent financial reporting.

Loan Agreement Provisions: Events of Default and Remedies

- Events of Default are events that permit the lender to accelerate the loan and exercise legal remedies
- Defined "Events of Default" include the notice, grace, and cure rights the lender is willing to grant to the Borrower (as distinct from "Defaults," which are the events that, with notice or the passage of time, or both, become "Events of Default")
- Typical Events of Default include:
  - Failure to make scheduled payments of principal or interest when due, typically with a short grace period but no requirement of lender notice
  - Failure to make other payments, such as expense reimbursements, within a short grace period following written lender demand

Loan Agreement Provisions: Events of Default and Remedies (continued)

- Breaches of specified non-payment covenants, typically including financial covenants, negative covenants, and failure to maintain required insurance, either immediately or immediately following written notice by lender
- Breaches of other non-payment covenants following lender notice and a cure period that is typically 30 days and sometimes extends another 30–60 days if the borrower commences to cure within such 30-day period and thereafter diligently proceeds.
- Breaches of representation
- Commencement of a bankruptcy proceeding by or against any Borrower or Guarantor, and in the case of an involuntary proceeding not dismissed within 30–60 days after commencement
- Judgements or attachments for amounts in excess of a threshold amount
- Defaults under any other loan document
- Cross-defaults with other material agreements
- Other defaults material to the particular loan, Borrower or Guarantors

Loan Agreement Provisions: Events of Default and Remedies (continued)

- Remedies following an Event of Default typically include:
  - Acceleration of the loan, making it immediately due and payable in full
  - Exercise of remedies under security documents
  - Other remedies available at law or in equity

Loan Agreement Provisions: Miscellaneous Provisions

- Typically includes all of those discussed above.

Guaranties

- A guaranty is a promise by a third party to answer for the debt, default, or miscarriage of another, or to hypothecate property as security therefor
- A third-party pledge of property for another's debt is a (non-recourse) guaranty as a matter of law and should include the suretyship waivers typically found in a payment guaranty
- A Guarantor typically subordinates any obligations owing to it from the Borrower or other Guarantors to the obligations that such party owes to the lender
- A guaranty is an obligation that is legally separate from the obligation that is guaranteed
  - Compare the obligation of a surety, which is secondarily obligated on the same obligation as its principal
- A guarantor is nonetheless entitled in many jurisdictions to the same rights as a surety (in California, by statute), but these rights can typically be waived.

Guarantor Waivers:

- Typical guarantor waivers include:
  - Discharge for invalidity or unenforceability of the guaranteed obligations, or that the guaranteed obligations exceed those of the primary obligor
  - Discharge for modification of the guaranteed obligations
  - Discharge for failure to proceed against a primary obligor or other guarantors
  - Discharge for release of a primary obligor or other guarantors
  - Discharge for release, failure to perfect against or protect, or failure to proceed against any collateral for the guaranteed obligations
  - Right to notice of any foreclosure of collateral for the guaranteed obligations
  - Right to information concerning the condition of the Borrower, any other Guarantors, or any collateral
  - Right to assert Borrower defenses to the underlying obligations guaranteed
  - Subrogation to the guaranteed obligation (at least until the lender has been paid in full)

Types of Guaranties — Generally

- Payment Guaranty
  - Guarantor independently agrees to be legally responsible for paying some or all of the Borrower's loan
  - May be unsecured, or secured by Guarantor or third-party property
- Recourse (or "Bad Boy") Guaranty
  - Guarantor agrees to indemnify the Lender for damages arising from certain "bad acts," such as fraud, conversion of rents, accounts, or other income streams, willful damage to collateral, or failure to maintain insurance
  - Often becomes a full payment guaranty if the Borrower commences a bankruptcy proceeding or otherwise interferes with the lender's enforcement of security interests
  - Frequently required in connection with non-recourse loans to assure that the lender is able to realize on its collateral security, its only source of repayment, without costly delays

Types of Guaranties — Real Estate Secured Loans

- Completion Guaranty
  - Guarantor agrees to complete lien-free construction of improvements located on property encumbered by the lender's mortgage
  - Guarantor typically has access to remaining construction loan proceeds but is responsible for expenses in excess of those contemplated by the loan budget
  - Damages available to the lender may be limited to the difference between the value of the encumbered property in a completed condition and its value in its "as is" condition (which is likely different from and may be less than, the actual cost to complete the improvements)

Types of Guaranties — Real Estate Secured Loans (continued)

- Interest and Carry Guaranty
  - Guarantor agrees to be legally responsible for paying interest on the Borrower's loan, as well as some or all of a project's or Borrower's operating expenses
- Environmental Indemnity
  - Indemnitor agrees to indemnify the Lender for remediation expenses, damages, or costs arising from environmental contamination on borrower real property (typically, but not necessarily, encumbered real property securing the loan)
  - Often includes covenants concerning inspection and reporting of environmental issues affecting the borrower real property

Security Documents

- These are the basic agreements that grant consensual security interests, and therefore legally recognized lien priority, in specified property of the grantor as security for the obligations owing to the Lender.
  - Security may be granted by a Borrower or Guarantor.
  - Personal property security is granted by a Security Agreement or Pledge Agreement, and for most types of personal property is governed by Article 9 of the Uniform Commercial Code (UCC).
  - Real property security is granted by a mortgage or deed of trust and often accompanied by a separate assignment of leases and rents.

Security Documents (continued)

- Security Documents identify the parties, the encumbered property, and the secured obligations, and memorialize the parties' agreements relating to the encumbered property.
- Security Documents establish the contractual relationship between the grantor and the lender/beneficiary of the security.
- To make the rights of the lender/beneficiary enforceable against third parties (i.e., present and future creditors of the grantor, including its potential bankruptcy trustee), the interest of the lender/beneficiary in the encumbered property must be "perfected."
- UCC Article 9 establishes a number of methods of perfection for different classes of personal property, but the most common method, applicable to most classes of personal property, is by filing a UCC-1 financing statement in the proper office (typically the Secretary of State) of the jurisdiction in which the debtor/grantor is "located."

Security Documents (continued)

- Encumbrances of real property must be recorded in the office of the recorder of the county in which the real property is located.
- To be eligible for recording in the real property records, the signatures on the document must be acknowledged by a notary public, and some jurisdictions require that the signer's execution of the document be witnessed.
- The lender's interest under a real property mortgage or deed of trust is typically covered by an ALTA lender's policy of title insurance, which insures the validity of the lien and the state of title to the encumbered property.
- Real property lenders will also typically require a survey of the encumbered property to assure that the legal description of the property matches the property they are financing.

Security Document Provisions

- Security Documents contain many of the same types of provisions found in Loan Agreements, but with the focus on the encumbered property.
- Typical provisions include:
  - Granting clause identifying the encumbered property and the secured obligations
  - Defined terms and interpretive provisions
  - Representations and warranties
  - Covenants
  - Events of Default and Remedies
  - Miscellaneous provisions
- Defined terms, interpretive provisions, and miscellaneous provisions are similar to those found in Loan Agreements and serve the same purposes.

Security Document Provisions: Granting Clauses

- For mortgages or deeds of trust, the grant must describe the encumbered property in a manner that would be sufficient for a grant in a deed to the property
  - A typical legal description is by lot and block, referencing a recorded subdivision map, or by a metes and bounds description
  - Some jurisdictions require a tax assessor's parcel number with the legal description

Security Document Provisions: Granting Clauses (continued)

- For personal property Security Agreements governed by Article 9, a description of the encumbered personal or real property is generally sufficient, whether or not it is specific if it reasonably identifies what is described (UCC §9-108(a)).
  - Generally, a description reasonably identifies the collateral if it identifies the collateral by a specific listing, by category, by UCC collateral type (e.g., accounts, inventory, investment property, deposit accounts, general intangibles, etc.), quantity, computational or allocational formula or procedure, or any other method if the identity of the collateral is objectively determinable (UCC §9-108(b)).
  - Certain categories of personal property collateral (e.g., commercial tort claims) must be described with greater particularity.
  - A description of personal property collateral as "all the debtor's assets" or "all the debtor's personal property" or using words of similar import does not reasonably identify the collateral in a Security Agreement (UCC §9-108(b)), although it is a sufficient description in a UCC-1 financing statement (UCC §9-504).

Security Document Provisions: Granting Clauses (continued)

- Real property mortgages and deeds of trust typically include, in addition to the basic grant of the fee (or leasehold) interest in the property and improvements, both a separate assignment of leases and rents provision and a separate security agreement covering any granted property that constitutes personal property (such as licenses, contracts and non-rent income arising from the property).
  - For deeds of trust, the assignment of leases and rents and the security agreement are made directly to the lender/beneficiary, rather than to the trustee.
- The Security Document must also describe the secured obligations, which are typically all of the Borrower’s obligations under the Loan Agreement and the other Loan Documents.

Security Document Provisions: Representations and Warranties

- Similar in purpose to the representations and warranties in the Loan Agreement, but with a focus on the encumbered property and the elements of perfection of the security interest.
- Typical representations and warranties, particularly in personal property security agreements, include:
  - Debtor/grantor's name, including all prior names and trade names used during the previous five years.
  - Jurisdiction of organization of the debtor/grantor, and location of its chief executive office (which is typically where its business records are located).
  - Locations of tangible collateral (e.g., inventory and equipment, as well as business records).
  - Title to encumbered collateral, free and clear of other liens, encumbrances, or interests, and priority of the lender's security interest.
  - Schedules listing particular types of identifiable collateral, including deposit accounts, investment property (typically, equity interests in subsidiaries), instruments, letter of credit rights, and commercial tort claims.

Security Document Provisions: Covenants

- Further assurances, in which the debtor/grantor agrees to execute any document or take any other action that the lender/secured party requires in order to encumber or perfect the security interest in any property intended to be encumbered.
- Power of attorney to be used by the lender/secured party to collect or enforce any of the collateral consisting of obligations of third parties (such as accounts, contract rights, or rents).
- Notice of acts or occurrences that could affect the encumbered property or the perfected status of the lender's security interest.
  - Opening new deposit or securities accounts, acquiring new equipment, or entering into new contracts.
  - Changing the name of the debtor/grantor or its jurisdiction of organization.
  - Changing the physical location of tangible property or business records.

Security Document Provisions: Covenants (continued)

- Maintain the encumbered property in good condition.
- Maintain appropriate business records relating to the encumbered property and permit the lender to review such records.
- Maintain insurance on tangible encumbered property and turn over insurance or condemnation proceeds (subject to any right to use such proceeds to repair or restore collateral).
- Not to dispose of encumbered property outside the ordinary course of business.
- Not to further encumber any of the pledged property.
- If grantor is not the borrower, suretyship waivers should be included since the grantor has the legal status of a guarantor.

Security Document Provisions: Events of Default and Remedies

- Often, Security Documents simply provide that any Event of Default under the Loan Agreement is an “Event of Default” under the security document.
  - Unless the Events of Default specified in the Loan Agreement expressly cover a lender’s or guarantor’s failure to perform its obligations under the Security Document, the Security Document should include such failure as an “Event of Default.”
- Security Documents will often include their own acceleration clause, allowing the entire secured obligation to become immediately due and payable upon the occurrence of an Event of Default under the Security Document.
- Security Documents, whether covering real property or personal property, will typically include a detailed list of remedies available following an Event of Default and acceleration.

Security Document Provisions: Events of Default and Remedies (continued)

- For real property, the laws of most jurisdictions prescribe detailed procedures for foreclosure of the mortgage or deed of trust.
- Non-judicial foreclosure of real property is available in some jurisdictions; but in many others, foreclosure requires judicial action.
- Receivership and other provisional remedies may be available to assist the lender in connection with a foreclosure action.
- Article 9 permits non-judicial sale of the encumbered property, either by public sale or private sale, provided that statutory notice is given and every aspect of the sale is "commercially reasonable."
- Article 9 also authorizes collection by the lender/secured party of obligations pledged as security (e.g., accounts or payment intangibles), and also has a strict foreclosure remedy.
- Waivers of certain statutory debtor rights are not enforceable prior to the occurrence of an Event of Default.

- In addition to specific remedies, Security Documents will often provide that the lender/secured party shall have the right to exercise all remedies available under applicable law.

Authorization Documents

- Various certificates and related documents that provide evidence of an entity Borrower's or Guarantor's authorization of (i) the incurrence of the loan or guaranty obligations, (ii) grants of security, and (iii) the other obligations under the various loan documents to which it is a party.
- Should include the entity's formation documents, certified as true and complete by an authorized officer.
  - Articles or Certificate of Incorporation and bylaws for a corporation.
  - Articles of Organization or Certificate of Formation and Limited Liability Company or Operating Agreement for a limited liability company.
  - Certificate of Partnership and Partnership Agreement for a partnership.
  - Trust Certificate signed by all of the Trustees for a Trust.

Authorization Documents (continued)

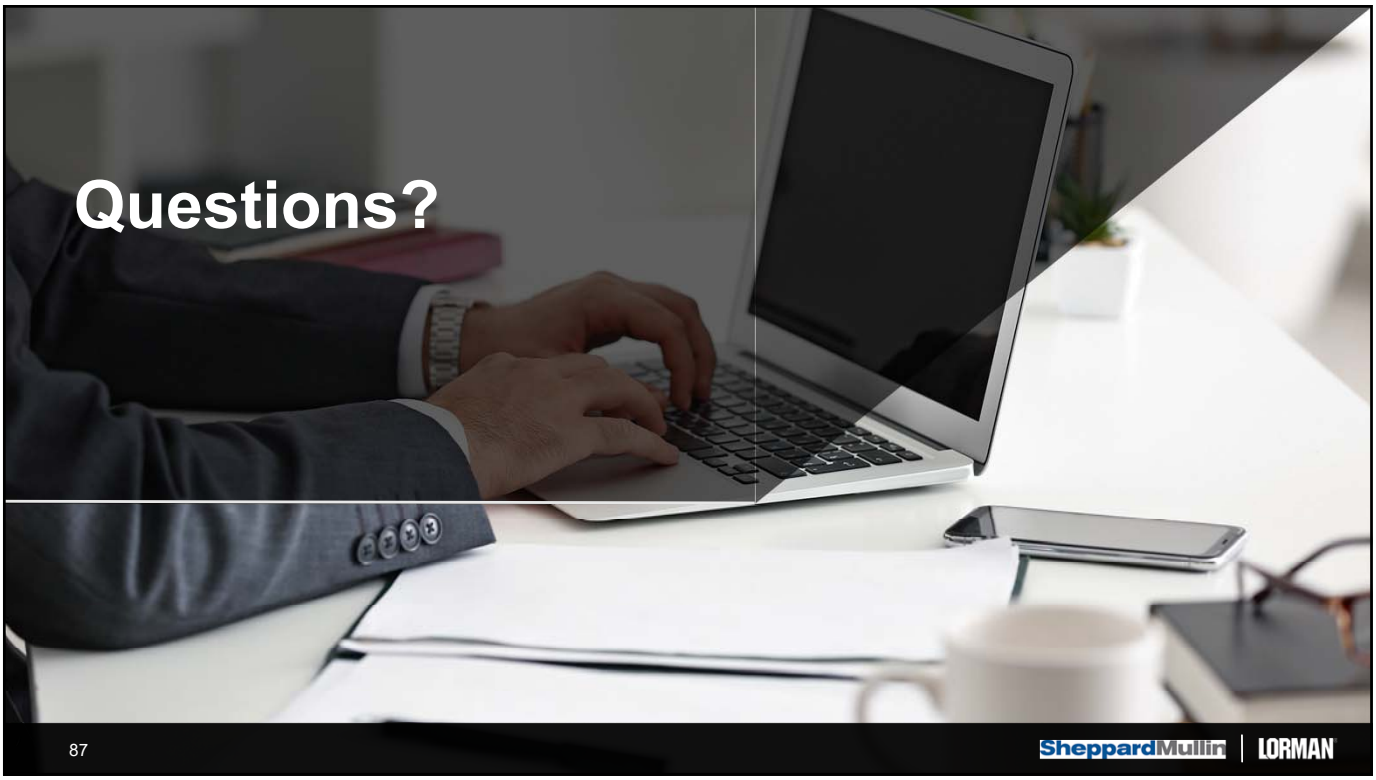
- Should include the formal authorizing resolutions, whether by unanimous written consent or by certification by the entity's secretary, of the person(s) or body with the power to authorize the entity to act.
  - Board of directors for a corporation.
  - Manager(s) or member(s) for a limited liability company.
  - General partner(s) for a partnership.
  - Trustees of a Trust.
- Should include an incumbency certificate from the entity's secretary attesting to offices held by the signing officers and including facsimile signatures for each signing officer.
- Should include a recent certificate (typically less than 30 days old) from the appropriate state officer of the entity's jurisdiction of formation as to the entity's good standing in that jurisdiction.

Legal Opinions

- Typically delivered by counsel to the Borrower and Guarantors
- A legal opinion is designed to provide assurance to the lender that each Borrower and Guarantor has taken the legal steps necessary to authorize, execute and deliver the loan documents to which it is a party, and that each such document is valid and binding.
- A legal opinion may also cover matters such as no conflict between the loan documents and other material agreements binding on a Borrower or Guarantor, and the absence of litigation.
  - However, legal opinions do not typically cover strictly factual matters, but only legal conclusions based on particular facts.

Legal Opinions (continued)

- While legal opinions can provide comfort that a Borrower or Guarantor was represented by counsel who read the documents and took the steps necessary to see that the documents were properly authorized and executed, they are not a substitute for lender diligence.
- Separate legal opinions may also cover certain specific aspects of a transaction as to which there is legal uncertainty (e.g., true sale or non-consolidation). Often, these are "reasoned" opinions that lay out in detail the legal argument that supports the conclusion that a court, in a properly presented case, "would hold" in a particular manner.
- Legal opinions are formal and formulaic and typically contain many pages of assumptions, exceptions, and qualifications.





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