

Drafting Term Sheets and Financing Agreements

Ward Buringrud
Partner, Finance and
Commercial Law Transactions

The business plan



What the lender wants



What the borrower wants



Agenda

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- Term sheet basics and problem areas
 - Structuring loan documentation
 - Negotiating credit agreements
 - Representations and warranties
 - Affirmative and negative covenants
 - Events of default
 - Security document essentials
 - Oddball collateral
 - Closing conditions and 3rd party consents

Term sheet basics

ABC CORPORATION

SUMMARY OF TERMS AND CONDITIONS

\$2.0 Million Secured Revolving Credit Facility
\$5.0 Million Secured Term Loan Facility

BORROWER: ABC Corporation (the "Borrower").

GUARANTOR: XYZ Corporation.

LENDER: National Bank. ("Bank of America")

REVOLVING CREDIT FACILITY:

Amount: Aggregate principal amount of revolving loans not to exceed at any time the lesser of (a) \$2,000,000 or (b) the sum of 80% of eligible receivables plus 50% of eligible inventory.

Purpose: Accounts receivable and inventory financing and general working capital purposes, including funding of the acquisition of Target Company.

Interest: Revolving loans shall bear interest at Prime Rate plus a per annum margin determined in accordance with the pricing grid below.

"Prime Rate" means the rate as publicly announced from time to time by National Bank as its "prime rate."

"Pricing Grid" the per annum margin shall be determined with reference to the following grid:

Total Funded Debt To EBITDA	Prime Rate Per Annum Margin	Non-use Fee
3.25 to 3.50	0.50%	.375
2.75 to 3.24	0.25%	.25
<2.75	0.00%	.125

Interest shall be payable monthly.

Availability and Maturity: Revolving loans may be obtained prior to, and shall mature not later than February 28, 2006.

Repayment: Amounts repaid may be re-borrowed. All outstanding revolving loans shall be due on February 28, 2006.

Loan Fee: Loan fee of 0.25% on the amount of the Revolving Facility payable at closing.

Parties' names

Description of credit facilities

Interest rate and fees

Payment terms and maturity date

Term sheet basics

DOCUMENTATION:

The loan facilities described above will be subject to the execution of a loan agreement (the “**Loan Agreement**”) and other documentation, which will contain terms, conditions, and covenants satisfactory in form and substance to the Lender, including, but not limited to, those described below.

Collateral:

The Lender shall be provided a first priority perfected security interest in all of the following:

- (a) all of the Borrower’s receivables and inventory;
- (b) all of the Borrower’s equipment;
- (c) all of the Borrower’s intellectual property; and
- (d) all of the Borrower’s real property

Description of the collateral security

ABC CORPORATION

FINANCIAL COVENANTS:

The Loan Agreement shall contain the following financial covenants, each of which shall be measured on a consolidated basis at each fiscal quarter end of the Borrower (using trailing four quarters for #1 and #2), except net worth which is measured at the Borrower’s fiscal year end.

The Borrower shall maintain:

1. A maximum ratio of Funded Debt to EBITDA as follows:

Fiscal Year of Borrower	Ratio of Funded Debt to EBITDA
2006	less than or equal to 3.50
2007	less than or equal to 2.75
2008	less than or equal to 2.50
2009 and thereafter	less than or equal to 2.25

“**Funded Debt**” and “**EBITDA**” will be defined in the Loan Agreement.

2. A minimum ratio of Cash Flow to scheduled principal and interest payments of 1.50.

“**Cash Flow**” to be defined as EBITDA minus cash taxes, minus unfinanced capital expenditures.

3. A minimum ratio of Current Assets to Current Liabilities of 1.1 at fiscal year end December 31, 2006, increasing to 1.5 at fiscal year end December 31, 2007 and thereafter.

Affirmative and negative covenants

Term sheet problem areas

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February 16, 2005

National Bank

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Description of guarantors as “all subsidiaries”

Descriptions of collateral as “all property”

Closing conditions that require 3rd party consent

Describe parties specifically

- The Credit Facility shall be guaranteed by all existing and future direct and indirect material subsidiaries of the Borrower.
- The Credit Facility shall be guaranteed by all current and future material domestic subsidiaries.
- The Credit Facility shall be guaranteed by Ableco, Inc., Holdco, Inc., Newco, Inc. and each other existing and future direct and indirect domestic subsidiary and, to the extent no material adverse tax consequences would result, foreign subsidiary of the Borrower.
- The Credit Facility shall be guaranteed by each domestic subsidiary of the Borrower that (i) during the then current fiscal year of the Borrower (on a pro forma basis), accounts or accounted for 10% or more of the EBITDA of the Borrower on a consolidated basis and/or (ii) as of the end of the most recently ended fiscal year of the Borrower, owned 10% or more of the consolidated assets of the Borrower.

Describe collateral specifically

- The Credit Facility shall be secured by a first priority perfected security interest on all assets.
- The Credit Facility shall be secured by a perfected security interest in all present and future personal property of Borrower and each Guarantor.
- The Credit Facility shall be secured by a perfected first priority (subject to certain exceptions to be set forth in the loan documentation) security interest in the following:
 - (a) All present and future shares of capital stock of each domestic subsidiary and, to the extent no material adverse tax consequences would result, foreign subsidiary of the Borrower and each Guarantor;
 - (b) All of the present and future property and assets, real and personal, of the Borrower and each Guarantor, including, but not limited to, machinery and equipment, inventory and other goods, accounts receivable, owned real estate, leaseholds, fixtures, bank accounts, general intangibles, financial assets, investment property, license rights, patents, trademarks, tradenames, copyrights, chattel paper, insurance proceeds, contract rights, hedge agreements, documents, instruments, indemnification rights, tax refunds and cash; and
 - (c) All proceeds and products of the property and assets described in clauses (a) and (b) above.

Structure documentation to reduce paperwork

- Identify parties that will enter into the same documents.
- Identify documents that can be combined.
- Anticipate growth, include joinder provisions for future parties.

Joinders

21. Additional Guarantors. Pursuant to Section 6.12 of the Credit Agreement, each Material Subsidiary that was not in existence or was not a Guarantor on the date of the Credit Agreement is required to enter into this Guaranty as a Guarantor upon becoming a Material Subsidiary. Upon the execution and delivery by such Material Subsidiary of an instrument in the form of Annex 1 hereto and acceptance thereof by the Administrative Agent, such Material Subsidiary shall become a Guarantor hereunder with the same force and effect as if originally named as a Guarantor herein. The execution and delivery of any such instrument shall not require the consent of any other Guarantor hereunder. The rights and obligations of each Guarantor hereunder shall remain in full force and effect notwithstanding the addition of any new Guarantor as a party to this Guaranty.

Manage the documentation

- Prepare a closing checklist at the beginning of the transaction.
- Assign responsibilities.
- Circulate checklist regularly to indicate progress or lack of progress.

Structure of the credit agreement

Recitals

Definitions

Terms of the credit facilities

Closing conditions and conditions to future advances

Representations and warranties

Affirmative covenants

Negative covenants

Financial covenants

Events of default and remedies

Miscellaneous terms

Credit agreement – representations and warranties

- A “representation” is defined as “a statement of fact made to induce another to enter into a contract,” while “warranty” is defined as “a promise that a proposition of fact is true.”
- A list of statements of facts and conditions that must be true before the lender will lend money to the borrower.
- A “snapshot” of the borrower’s condition at a given point in time, disclosures that are relevant to the lender’s underwriting of the credit.
- In a term loan agreement, representations and warranties are made at closing. In a revolving credit, representations and warranties are made at each credit extension and can limit access to the credit facilities in the future.
- Representations and warranties are frequently unqualified statements, and the borrower will often request a materiality qualifier to more comfortably make the statements.
- The scope of the representations and warranties and the affirmative covenants frequently overlap.

Material adverse effect

“Material Adverse Change” means a material adverse change in (a) the condition (financial or otherwise), operations, assets, liabilities, business, or prospects of the Borrower and its Subsidiaries, taken as a whole, or (b) the ability of the Borrower to repay the Obligations or the ability of any Subsidiary to perform their respective obligations under the Loan Documents, or (c) the rights and remedies of the Lender under the Loan Documents, or (d) the legality, validity or enforceability of any Loan Document or (e) the Liens granted the Lender pursuant to the Security Documents.

“Material Adverse Effect” means (a) a material adverse change in, or a material adverse effect upon, the operations, business, properties, condition (financial or otherwise) or prospects of the Borrower, any Material Subsidiary or the Borrower and its Subsidiaries taken as a whole; (b) a material impairment of the ability of any Loan Party to perform its obligations under any Loan Document to which it is a party; or (c) a material adverse effect upon the legality, validity, binding effect or enforceability against any Loan Party of any Loan Document to which it is a party; or (d) a material adverse effect upon (i) the perfection or priority of any Lien granted under any of the Collateral Documents; provided that the Collateral covered by such Lien has a fair market value, individually or in the aggregate, in excess of \$1,000,000.

Representations and warranties – common exceptions

2.1 Existence and Power. Borrower and each Guarantor is validly existing and in good standing under the laws the state of its incorporation. Borrower and each Guarantor is duly qualified to do business in each state where its business is presently conducted.

2.2. Authorization and Validity. This Agreement and each promissory note, contract, mortgage, instrument and other document required hereby or at any time hereafter delivered to Lender in connection herewith have been duly authorized, and upon their execution and delivery in accordance with the provisions hereof will constitute legal, valid and binding agreements and obligations of Borrower or the party which executes the same, enforceable in accordance with their respective terms.

Representations and warranties – common exceptions

2.1 Existence and Power. Borrower and each Guarantor is validly existing and in good standing under the laws the state of its incorporation. Borrower and each Guarantor is duly qualified to do business in each state where its business is presently conducted, except where the failure to so qualify could not reasonably be expected to have a material adverse effect on the financial condition or operation of Borrower and Guarantors taken as a whole.

2.2. Authorization and Validity. This Agreement and each promissory note, contract, mortgage, instrument and other document required hereby or at any time hereafter delivered to Lender in connection herewith have been duly authorized, and upon their execution and delivery in accordance with the provisions hereof will constitute legal, valid and binding agreements and obligations of Borrower or the party which executes the same, enforceable in accordance with their respective terms, except as enforceability may be limited by bankruptcy, insolvency, reorganization, similar laws affecting creditors' rights generally or general principles of equity.

Representations and warranties – more common exceptions

2.4 Litigation. There are no pending, or to the best of Borrower's knowledge threatened, actions, claims, investigations, suits or proceedings by or before any governmental authority, arbitrator, court or administrative agency which could have a material adverse effect on the financial condition or operation of Borrower or any Guarantor taken as a whole, other than those disclosed by Borrower to Lender in writing prior to the date hereof.

2.11. Environmental Matters. Except as disclosed by Borrower to Lender in writing prior to the date hereof, the Borrower and each Guarantor is in compliance in all material respects with all applicable federal or state environmental, hazardous waste, health and safety statutes, and any rules or regulations adopted pursuant thereto, which govern or affect any of Borrower's operations and/or properties.

Representations and warranties – more common exceptions

2.4 Litigation. There are no pending, or to the best of Borrower's knowledge threatened, actions, claims, investigations, suits or proceedings by or before any governmental authority, arbitrator, court or administrative agency which could reasonably be expected to have a material adverse effect on the financial condition or operation of ~~Borrower or any Guarantor~~ Borrower and Guarantors taken as a whole, other than those disclosed by Borrower to Lender in writing prior to the date hereof.

2.11. Environmental Matters. Except as disclosed by Borrower to Lender in writing prior to the date hereof, and except for such failures to be in compliance which could not, individually or in the aggregate, reasonably be expected to have a material adverse effect on the financial condition or operation of Borrower and Guarantors taken as a whole, the Borrower and each Guarantor is in compliance in all material respects with all applicable federal or state environmental, hazardous waste, health and safety statutes, and any rules or regulations adopted pursuant thereto, which govern or affect any of Borrower's operations and/or properties.

Credit agreement – affirmative covenants

- The affirmative covenants in a credit agreement are things the borrower promises to do and remain obligations until the credit extended by the lender is repaid.
- From the perspective of the borrower, the affirmative covenants should not require the borrower to do anything it is not already doing.

Affirmative covenants – common exceptions

4.3. Compliance. Preserve and maintain all licenses, permits, governmental approvals, rights, privileges and franchises necessary for the conduct of its business; and comply with the provisions of all documents pursuant to which Borrower is organized and/or which govern Borrower's continued existence and with the requirements of all laws, rules, regulations and orders of any governmental authority applicable to Borrower and/or its business.

4.5. Accounting Records. Maintain adequate books and records in accordance with generally accepted accounting principles consistently applied, and permit any representative of Lender to inspect, audit and examine such books and records, to make copies of the same, and to inspect the properties of any Borrower.

Affirmative covenants – common exceptions

4.3. Compliance. Preserve and maintain all licenses, permits, governmental approvals, rights, privileges and franchises necessary for the conduct of its business; and comply with the provisions of all documents pursuant to which Borrower is organized and/or which govern Borrower's continued existence and with the requirements of all laws, rules, regulations and orders of any governmental authority applicable to Borrower and/or its business, **except for such failures to be in compliance which could not, individually or in the aggregate, reasonably be expected to have a material adverse effect on the financial condition or operation of Borrower and Guarantors taken as a whole.**

4.5. Accounting Records. Maintain adequate books and records in accordance with generally accepted accounting principles consistently applied, and permit any representative of Lender, **at any reasonable time following reasonable notice**, to inspect, audit and examine such books and records, to make copies of the same, and to inspect the properties of any Borrower.

Affirmative covenants – more common exceptions

4.8. Litigation. Promptly give notice in writing to Lender of any litigation pending or threatened against any Borrower with a claim in excess of \$500,000.00.

4.13 Change In Management. To maintain the present executive management of Borrower.

Affirmative covenants – more common exceptions

4.8. Litigation. Promptly upon Borrower receiving notice thereof, give notice in writing to Lender of any litigation pending or threatened against any Borrower with a claim in excess of \$500,000.00 in excess of any available insurance coverage.

4.13 Change In Management. To maintain the present executive management of Borrower (each an “Executive”); provided, however, that in the event of the death, disability, resignation or termination of any Executive, Borrowers shall have ninety days after the death, disability, resignation or termination of such Executive to appoint a replacement Executive reasonably acceptable to Lender.

Credit agreement – negative covenants

- The negative covenants in a credit agreement are things the borrower promises not to do and remain obligations until the credit extended by the lender is repaid.
- From the perspective of the borrower, the negative covenants should not prohibit the borrower from doing (1) what it currently does and (2) what it wants to do in the future.
- The negative covenants require special attention due to the complexity of and interplay between the negative covenants, a transaction that is permitted by one covenant can be prohibited by another covenant.
- Without question, the negative covenants generate the most business issues.

Negative covenants – common exceptions

5.1. Dividends. Declare or pay any dividend on any shares of any class of Borrower's or any Guarantor's capital stock or apply any assets to the purchase, redemption or other retirement of any shares of any class of capital stock of Borrower or any Guarantor except except dividends payable in the form of its capital stock.

5.2. Merger, Consolidation. Merge into or consolidate with any other Person, make any substantial change in the nature of any Borrower's business as conducted as of the date hereof; or acquire all or substantially all of the assets of any other Person.

Negative covenants – common exceptions

5.1. Dividends. Declare or pay any dividend on any shares of any class of Borrower's or any Guarantor's capital stock or apply any assets to the purchase, redemption or other retirement of any shares of any class of capital stock of Borrower or any Guarantor except (a) except dividends payable in the form of its capital stock; (b) distributions and dividends by any Guarantor to Borrower or any other Guarantor; (c) the repurchase or redemption of Borrower's capital stock held by or for the benefit of former employees, officers, directors or any other stockholder of Borrower; (d) the repurchase or redemption of Borrower's capital stock utilizing the cash proceeds received by Borrower from any life insurance policies maintained in respect to any stockholder; and (e) annual dividends by Borrower to its stockholders; provided that the aggregate amount of such distributions and dividends do not exceed twenty-five percent (25%) of Borrower's positive net income for the most recently completed fiscal year of Borrower.

5.2. Merger, Consolidation. Merge into or consolidate with any other Person, make any substantial change in the nature of any Borrower's business as conducted as of the date hereof; or acquire all or substantially all of the assets of any other Person, except (a) Borrower or any Guarantor may liquidate, dissolve, merge, consolidate with or into Borrower or any other Guarantor and (b) Borrower may acquire all or substantially all of the assets of any Guarantor and any Guarantor may acquire all or substantially all of the assets of any other Guarantor.

Negative covenants – more common exceptions

5.4. Indebtedness. Create, incur, assume or permit to exist any indebtedness or liabilities resulting from borrowings, loans or advances, whether secured or unsecured, matured or unmatured, liquidated or unliquidated, joint or several, in the aggregate for Borrower, except : (a) the liabilities of Borrower to Lender, and (b) any other liabilities of Borrower existing as of, and disclosed to Lender prior to the date hereof.

5.5. Guaranties. Guarantee or become liable in any way as surety, endorser, accommodation endorser or otherwise for, nor pledge or hypothecate any assets of Borrower or any Guarantor as security for, any liabilities or obligations of any Person, except any of the foregoing in favor of Lender.

Negative covenants – more common exceptions

5.4. Indebtedness. Create, incur, assume or permit to exist any indebtedness or liabilities resulting from borrowings, loans or advances, whether secured or unsecured, matured or unmatured, liquidated or unliquidated, joint or several, in the aggregate for Borrower, except : (a) the liabilities of Borrower to Lender, ~~and (b) any other liabilities of Borrower existing as of, and disclosed;~~ **(b) any of the foregoing reflected on the most recent financial statement of Borrower delivered to Lender prior to the date hereof and in amounts not greater than the amounts referred to therein; (c) current accounts payable or accrued expenses incurred by Borrowers in the ordinary course of business; (d) intercompany indebtedness or liabilities of Borrowers to a Guarantor or of any Guarantor to Borrower or any other Guarantor; and (e) additional indebtedness or liabilities incurred in the ordinary course of business not to exceed \$500,000 in the aggregate at any one time outstanding.**

5.5. Guaranties. Guarantee or become liable in any way as surety, endorser, accommodation endorser or otherwise for, nor pledge or hypothecate any assets of Borrower or any Guarantor as security for, any liabilities or obligations of any Person, except (a) any of the foregoing in favor of Lender; **(b) any of the foregoing reflected on the most recent financial statement of Borrower delivered to Lender prior to the date hereof and in amounts not greater than the amounts referred to therein; (c) guaranties of any indebtedness or liabilities permitted under Section 5.4 hereof; (d) by endorsement of negotiable instruments for deposit or collection or by similar transactions in the ordinary course of business; and (e) with respect to performance, surety, bid, appeal or similar bonds incurred in the ordinary course of business.**

Negative covenants – more common exceptions

5.6. Loans, Advances, Investments. Make any loans or advances to or investments in any Person, except (a) any of the foregoing existing as of, and disclosed reflected on the most recent financial statement of Borrower delivered to Lender prior to the date hereof; and (b) advances made in the ordinary course of business consistent with past practice.

5.7. Pledge of Assets. Mortgage, pledge, grant or permit to exist a security interest in, or lien upon, all or any portion of Borrower's or any Guarantors assets now owned or hereafter acquired, except (a) Liens and security interests in favor of Lender; (b) Liens for taxes not yet due.

Negative covenants – more common exceptions

5.6. Loans, Advances, Investments. Make any loans or advances to or investments in any Person, except (a) any of the foregoing **existing as of, and disclosed** reflected on the most recent financial statement of Borrower delivered to Lender prior to the date hereof and in amounts not greater than the amounts referred to therein; (b) investments held in the form of cash or cash equivalents; (c) receivables owing to any Borrower in the ordinary course of business; (d) intercompany loans, advances or investments made by Borrowers to or in a Guarantor or made by a Guarantor to or in another Guarantor; and ~~(b)~~(e) advances made in the ordinary course of business consistent with past practice.

5.7. Pledge of Assets. Mortgage, pledge, grant or permit to exist a security interest in, or lien upon, all or any portion of Borrower's or any Guarantors assets now owned or hereafter acquired, except (a) Liens and security interests in favor of Lender; (b) Liens for taxes **not yet due which are not delinquent or which remain payable without penalty or the validity or amount of which is being contested in good faith by appropriate proceedings, which shall have the effect of staying execution if execution is threatened or possible;** and (c) Liens which are existing as of, and disclosed to Lender in writing prior to the date hereof; (d) Liens imposed by law (such as mechanics' and landlord's liens) incurred in good faith in the ordinary course of business which are not delinquent or which remain payable without penalty or the validity or amount of which is being contested in good faith by appropriate proceedings, which shall have the effect of staying execution if execution is threatened or possible; (e) Liens incurred or deposits made in the ordinary course of business to secure the performance of bids tenders, statutory obligations, fee and expense arrangements with trustees and fiscal agents and customary deposits granted in the ordinary course of business under operating leases; (f) Liens securing surety, indemnity, performance, appeal and release bonds; and (g) customary rights of set off, revocation, refund or chargeback under deposit agreements or under the UCC in favor of banks where Borrower or any Guarantor maintains deposits in the ordinary course of business.

Credit agreement – events of default

- The event of default section generally states the events that will constitute a default under the credit agreement and permit the lender to exercise its default remedies.
- The borrower will often request grace or cure periods with respect to the payment defaults, breaches of representations and warranties, affirmative covenant defaults and negative covenant defaults.
- The scope and materiality of the agreements that would trigger the cross default will be of concern to the borrower.
- The borrower will often request threshold amounts be set for debt cross defaults and judgment defaults.

Events of default – common exceptions

6.1 Borrower shall fail to pay when due any amount of principal, interest, fees or of or interest on any advances made under the line of credit, any other amounts payable under this Agreement or under any of the Loan Documents;

6.3 Any default in the performance of or compliance with any obligation, covenant, agreement or other provision contained herein or in any other Loan Document;

Events of default – common exceptions

6.1 Borrower shall fail **(a)** to pay when due any amount of principal, interest, fees or of or interest on any advances made under the line of credit, **and such failure shall continue unremedied for a period of three days after the same becomes due** or **(b) to pay when due** any other amounts payable under this Agreement or under any of the Loan Documents **in accordance with the terms hereof or thereof and such failure shall continue unremedied for a period of five days after the same becomes due**;

6.3 Any default in the performance of or compliance with any obligation, covenant, agreement or other provision contained **herein in Sections 4.3, 4.5, 4.9, 4.10(a), 4.11** or in any **other Loan Document** **provision of Article 5 of this Agreement**;

6.4 **Any default in the performance of or compliance with any obligation, covenant, agreement or other provision contained in this Agreement (other than those described in Section 6.3) or in any other Loan Document and such default shall continue unremedied for a period of thirty (30) days after the earlier of (a) the date upon which written notice thereof shall have been given to Borrower by Lender or (b) the date upon which an Executive (as defined in Section 4.13) knew or reasonably should have known of such default**;

Events of default – more common exceptions

6.5 Any default in the payment or performance of any obligation, or any defined event of default, under the terms of any contract or instrument (other than any of the Loan Documents) pursuant to which Borrower or any Guarantor has incurred any debt or other liability to any Person, including Lender;

6.6 Any judgments or arbitration awards are entered against Borrower or any Guarantor, or Borrower or any Guarantor enters into any settlement agreements with respect to any litigation or arbitration, in an aggregate amount of \$100,000.00 or more in excess of any available insurance coverage;

Events of default – more common exceptions

6.5 Any default in the payment or performance of any obligation, or any defined event of default, under the terms of any contract or instrument (other than any of the Loan Documents) pursuant to which Borrower or any Guarantor has incurred any debt or other liability to any Person, including Lender, of \$100,000.00 or more, if (a) such default shall continue without waiver after the applicable grace period, if any, specified in such contract or instrument and (b) the effect of such default is to accelerate or to permit the holder of such debt or other liability to accelerate of the maturity of such debt or other liability;

6.6 Any judgments or arbitration awards are entered against Borrower or any Guarantor, or Borrower or any Guarantor enters into any settlement agreements with respect to any litigation or arbitration, in an aggregate amount of \$100,000.00 or more in excess of any available insurance coverage and such judgment or arbitration award shall continue without being discharged, vacated, bonded or execution thereon stayed pending appeal for a period of thirty (30) consecutive days;

Proofread the Documents

Guaranties

- Down-stream Guaranties.
- Upstream and Cross-stream Guaranties.
- Co-borrowers.

Fraudulent transfers

3. Limitation of Liability. Anything contained in this Guaranty to the contrary notwithstanding, if any Fraudulent Transfer Law (as hereinafter defined) is determined by a court of competent jurisdiction to be applicable to the obligations of the Guarantor under this Guaranty, the obligations of the Guarantor hereunder shall be limited to a maximum aggregate amount equal to the largest amount that would not render its obligations hereunder subject to avoidance as a fraudulent transfer or conveyance under Section 548 of the Bankruptcy Code (Title 11, U. S. Code) or any applicable provisions of comparable state law (collectively, the “Fraudulent Transfer Laws”), in each case after giving effect to all other liabilities of the Guarantor, contingent or otherwise, that are relevant under the Fraudulent Transfer Laws and after giving effect as assets to the value (as determined under the applicable provisions of the Fraudulent Transfer Laws) of any rights to subrogation, reimbursement, indemnification or contribution of the Guarantor pursuant to applicable law or pursuant to the terms of any agreement.

Common collateral security documents

- Security Agreements.
- Pledge Agreements.
- Real Property Security.

Security document essentials

- Describe the Collateral Correctly and Completely.
- Describe the Secured Obligations Correctly and Completely.

Odd-ball collateral

- Documented Vessels.
- Aircraft.
- Intellectual Property.

Documented vessel considerations

- Ship Mortgage Act (Title 46 United States Code § 31301 et seq.)
- Property Not Constituting the “Whole of the Vessel.”
- Citizenship Regulations and Fisheries Regulations.

Aircraft considerations

- Federal Aviation Act of 1958 (Title 46 United States Code § 1441 et seq.)
- The Cape Town Convention on International Interests in Mobile Equipment.

Intellectual property considerations

- Patent Act (Title 35 United States Code § 1 et seq.)
- Copyright Act of 1976 (Title 17 United States Code § 101 et seq.)
- Lanham Trademark Act (Title 15 United States Code § 1051 et seq.)
- 1984 Semiconductor Chip Protection Act (Title 17 United States Code § 901 et seq.)

Closing conditions – anticipate third-party consents

- Subordination Agreements.
- Landlord Waivers
- Governmental Approvals.

More documentation management

- Update the closing checklist regularly to add or delete documents.
- Circulate the closing checklist regularly to indicate progress or lack of progress.

The road ahead



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