



**Monday, October 19**  
**2:30 pm–4:00 pm**

## **403 Doing Business in a Tight Credit Market**

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United States Steel Corporation

**Mark Sessions**  
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**Ronald Vaske**  
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Lindquist & Vennum

## Faculty Biographies

### **Brennan Holland**

Counsel  
Litton Loan Servicing

### **Joseph Napoli**

Joseph Napoli is the senior general attorney—corporate of United States Steel Corporation in Pittsburg and handles the legal aspects of all of U.S. Steel's and its subsidiaries' domestic and foreign financings. Those transactions include revolving credit facilities, equity and debt issuances, securitizations, asset-based lending, project financings, and workouts. He also served as the primary attorney for U. S. Steel's lending division. In addition to addressing domestic corporate matters, he is also responsible for legal matters for all of U.S. Steel's foreign holding and some of its foreign operating companies. Mr. Napoli has negotiated several joint venture agreements and manages legal matters associated with most of U.S. Steel's domestic and foreign joint ventures.

Mr. Napoli is president of ACC's Western Pennsylvania Chapter and has served as an officer of that chapter in several capacities. He is a member of the governing body of the business law section of the Allegheny County Bar Association as well as the governing body of the Allegheny County Bar Foundation. His articles have been published in the ACC Docket and the newsletter of the business law section of the Allegheny County Bar Association. He was named "Outstanding Volunteer Attorney of the Year" by the Executive Service Corps and has also been recognized for his pro bono efforts by the Allegheny County Bar Association.

Mr. Napoli earned his B.A. from Duquesne University and his J.D. from the Duquesne University School of Law.

### **Mark Sessions**

Mark G. Sessions is general counsel and secretary of NovaTel, Ltd., a privately owned telecommunications provider based in San Antonio, Texas.

Prior to joining NovaTel, Mr. Sessions practiced at Holland & Knight LLP, where he served as executive partner of the San Antonio office, pursuing commercial litigation practice.

Mr. Sessions received a BS from Southwestern University and is a graduate of Baylor University School of Law.

### **Ronald Vaske**


Attorney  
Lindquist & Vennum PLLP

# Introduction

This Discussion will cover:

- Security Arrangements.
- Factoring Receivables.
- Credit Insurance.
- Bankruptcy Issues.
- Dealing with Your Lender.

Figure 6-24 Letter of Credit.

<b>FIRST EASTERN BANK</b> INTERNATIONAL BANKING DIVISION 4130 WALL STREET NEW YORK, N.Y. 10015	
We hereby issue our irrevocable documentary letter of credit number 1989540.	
<i>Date and place of issue:</i>	New York, NY 11/16/X0
<i>Date and place of expiry:</i>	New Zealand 12/15/X0
<i>Advising bank:</i>	First Charter Bank P.O. Box 665 Auckland, New Zealand
<i>Beneficiary:</i>	Trade Circuit A2-48 Queen Street Auckland 1 New Zealand
<i>Applicant:</i>	International Tool Manufacturing 14390 Riverside Drive Sherman Oaks, CA 91405
<i>Amount:</i>	\$29,750.00 U.S. Dollars
<i>Credit available with:</i>	First Eastern Bank, New York, NY
<i>By:</i>	Negotiation against presentation of the documents detailed herein
<i>And your drafts at:</i>	Sight
<i>Drawn on:</i>	First Eastern Bank, New York, NY
<i>Documents required:</i>	
1.	Signed commercial invoice in one original and one copy
2.	Full set of straight ocean steamer Bills of Lading, showing consignment to First Eastern Bank marked "Freight Prepaid"
3.	Negotiable insurance policy and/or Underwriter's Certificate, endorsed in blank, covering, covering marine and war risks
<i>Partial shipments:</i>	Not permitted
<i>Transshipment:</i>	Permitted
<i>Latest shipment date:</i>	12/05/X0
	 Authorized Signature

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### Letters of Credit

- Promise by a third party (usually bank) to pay an amount upon satisfaction of certain conditions.
  - Shifts risk of non-payment.
  - Governed by UCC Article 5.

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### Letter of Credit Parties

- Issuer:  
  
The bank or other party obligated to pay on the letter of credit.

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### Letter of Credit Parties

- Applicant:  
  
The issuer's customer for whom the letter of credit is provided  
(Buyer)

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**Letter of Credit Parties**

- Beneficiary:

The payee of the letter of credit (Seller).

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**Letter of Credit Parties**

- Advising Bank:
  - Sole responsibility is to notify the beneficiary that a letter of credit has been issued.
  - Undertakes to advise to issuer and beneficiary that the LC, confirmation, and amendment, and undertakes to advise beneficiary to check authenticity of request to advise.
  - No financial responsibility for the LC.

UCC 5-102(a)(1)

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**Letter of Credit Parties**

- Confirming Bank:
  - Undertakes to honor presentation of a letter of credit issued by another.
  - Directly obligated on the letter of credit and has rights and obligations of the issuing bank.

UCC 5-107(a)

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### Documentary Letter of Credit

- Payable upon satisfaction of certain “documentary” conditions:
  - Issuer can determine if payable merely by reviewing documents rather than inspecting physical performance.
  - Typically used in commercial sale of goods, especially between international parties.

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### Standby Letter of Credit

- Payable in the event the applicant fails to pay.
  - The letter of credit issuer “stands by” to assure payment in the event the applicant does not perform.
  - Typical in construction projects.
  - Also payable upon satisfaction of documentary conditions.

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### Bank’s Security

- Documentary:
  - Bank controls the documents and therefore controls the shipped goods.
  - Applicant provides cash deposit or credit facility with bank.

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### Bank's Security

- Standby:
  - Applicant provides cash deposit or other collateral.
  - Applicant has credit facility with bank.

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### Elements of a Letter of Credit (Documentary)

- A payment undertaking given by a bank (issuer).
- On behalf of a buyer (applicant).
- To pay a seller (beneficiary) for a stated amount of money.
- Within specified time limits.
- On presentment of specified documents representing the supply of goods.

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### Documentary LC Process

- Seller requires LC prior to shipping goods.
  - Protects seller against having to collect from buyer.
  - Assures seller of being the defendant in a law suit.
    - Suit will be in Seller's jurisdiction.

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**Documentary LC Process**

- Seller presents LC documentary terms to buyer.
  - Terms provide that issuer will pay seller directly upon presentation of documents.
    - Sight draft
    - Commercial invoice
    - Bill of Lading
    - Bill of Sale
    - Proof of insurance
    - Etc.

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**Documentary LC Process**

- Issuer must pay beneficiary (seller) upon proper presentation of the documents required by the letter of credit.
  - No defenses for defective goods, etc.
  - Timely presentment is required.

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**Legal Issues**

- Is the instrument a letter of credit?
  - UCC 5-106:
    - A document that purports to be a letter of credit but is not conditioned solely upon proper presentment of documents is NOT a letter of credit.
    - Could be characterized as a guaranty, subject to suretyship defenses.

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Is the Document a Letter of Credit?

- If the document is a guaranty.....
  - Issuer has defenses attributable to buyer.
    - Teleport Communications Group, Inc. v. Barclay Financial Group, Ltd., 176 f.3D 412 (7<sup>TH</sup> CIR. 1999).
  - May be *ultra vires* and void because bank regulations do not permit banks to provide guaranties.
    - New Jersey Bank V. Palladino, 77 N.J. 33 (1978)

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Legal Issues - Warranties

UCC 5-110:

- (a) If presentment is honored, the beneficiary under a letter of credit warrants:
  - (1) to the issuer, any other person to whom presentation is made, and the applicant, that there is no fraud or forgery of the kind described in Section 5-109(a); and
  - (2) To the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.
- (b) The warranties in subsection (a) are in addition to warranties arising under Articles 3, 4, 7 and 8 because of presentation or transfer of documents covered by any of those Articles

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Legal Issues – Warranties

- Warranty claims are conditioned upon honor of presentment
  - No warranty is given if presentment is not honored. See UCC 5-110(a)

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### UCP 600

- 2007 Revision of the Uniform Customs and Practice for Documentary Credits.
  - Applies to documentary letters of credit only.
  - Especially important in international transactions.
  - Applies only if incorporated.
    - Has force of law if incorporated.

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### Pitfalls for Sellers

- Documentation Defects.:
  - LC expires prior to presentment.
  - Bill of lading evidences delivery outside of date range specified in the LC.
  - Changes in the invoice not authorized by the LC.
  - Inconsistent description of goods.
  - Insurance document errors.
  - Invoice amount not equal to draft amount.
  - Ports of loading and destination not as specified.
  - Documents inconsistent with LC as to volume, merchandise description, quality, etc.
  - Names of documents not exactly as specified
  - Etc.....

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### Pitfalls – Documentation Defects

- Strict Compliance Standard. UCC 5-108.
  - Seller must be meticulous in providing the correct documentation or could lose the benefit of the letter of credit.
  - Make sure that all of the requirements of the letter of credit can be complied with before accepting it.

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### ISP 98

- International Standby Practices 98 of the International Chamber of Commerce.
  - Applies to standby letters of credit.
  - Applies only if incorporated.
    - Has force of law if incorporated.

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### Security Arrangements

Guarantees:

1. Ideal Form.
2. Revocation.
3. Conditions.

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### Security Arrangements

Stuff you sold:

1. Purchase Money Security Interest.
  - a. Provide for in the contract of sale.
  - b. UCC §9-103.

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Security Arrangements  
UCC §9-103

- a) Definitions.
  - (1) "purchase-money collateral" means goods or software that secures a purchase-money obligation incurred with respect to that collateral; and
  - (2) "purchase-money obligation" means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.

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Security Arrangements  
UCC §9-103

- 1. Goods need to be purchase-money collateral;
- 2. Can include prior collateral; and
- 3. It works for software too.

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Security Arrangements  
UCC §9-203(b)

- (b) A security interest is enforceable against the debtor and third parties with respect to the collateral only if :
  - (1) value has been given;
  - (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

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Security Arrangements

UCC §9-203 continued

- (3) one of the following conditions is met:
  - (A) the debtor has authenticated a security agreement that provides a description of the collateral . . .
  - . . .
  - (D) the collateral is deposit accounts, electronic chattel paper, investment property or letter of credit rights and the secured party has control under Section 9-104, 9-105, 9-106, or 9-107 pursuant to the debtor's security agreement.

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Purchase Money Security Interest

Don't forget to perfect it!

- 1. It doesn't get any better than this: UCC §9-324.
  - a. Fun with §9-324(b):
    - i. Perfected when debtor gets it
    - ii. Notice of conflicting interest.

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Security Arrangements

Other Stuff—things you didn't sell, but they're willing to give you.

- 1. Start with a UCC-11 search—at minimum.
- 2. The Basics: Back to UCC §9-203(b).
- 3. Elements of a security agreement—review form.

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**Security Arrangements**

Unless the secured party is a bank, control over deposit accounts under UCC §9-104 is usually established by an agreement among the debtor, the secured party and the bank.

Forms—ABA and others.

Usually cash in advance beats cash collateral.

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**Be Careful with Cash Collateral**

UCC §§9-340-342.

*Remember:*

The bank has the right to set off the debtor's obligations to it against the account unless waived or perfected by you.

The bank may be able to set off debts owed by the secured party against the debtor's account.

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**Security Arrangements**

Receivables:

Securitization would be the subject of another program.

Who gets to collect?

May need control over the collection accounts (UCC §9-104) and any letter of credit rights (UCC §9-107).

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**Security Arrangements**

Collateral Access:  
Books and records.  
Software/computer access.  
Inspection rights.

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**Security Arrangements**

Real Estate:  
Really?  
Due Diligence as if you were going to buy it.  
Title Report.  
Environmental Report.  
Cash flow.

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**Security Arrangements**

Cash In Advance  
Once you start it, when do you stop it?

Consignment Arrangements:  
Forms.  
Precise agreement with the obligor.  
Where will the material be kept?  
Who gets to remove it?  
Rights of lenders and others (e.g., warehouse).

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**Security Arrangements**

More on consignment.  
 UCC §9-103(d):  
*The security interest of a consignor in goods that are the subject of a consignment is a purchase-money security interest in inventory.*  
 Really?  
 See UCC §2-326:

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**§ 2-326. Sale on Approval and Sale or Return; Consignment Sales and Rights of Creditors.**

(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even if they conform to the contract, the transaction is:  
 (a) a "sale on approval" if the goods are delivered primarily for use; and  
 (b) a "sale or return" if the goods are delivered primarily for resale.

(2) Goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

(3) Any "or return" term of a contract for sale is to be treated as a separate contract for sale under Section 2-201 and as contradicting the sale aspect of the contract under Section 2-202.

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**The good news.**

Remember UCC §9-103 (d):  
*The security interest of a consignor in goods that are the subject of a consignment is a purchase-money security interest in inventory.*  
 AND . . .

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### Perfect the Security Interest!

UCC §9-319:

(a) Consignee has consignor's rights. Except as otherwise provided in subsection (b), for purposes of determining the rights of creditors of, and purchasers for value of goods from, a consignee, while the goods are in the possession of the consignee, the consignee is deemed to have rights and title to the goods identical to those the consignor had or had power to transfer.

(b) Applicability of other law. For purposes of determining the rights of a creditor of a consignee, law other than this article determines the rights and title of a consignee while goods are in the consignee's possession if, under this part, a perfected security interest held by the consignor would have priority over the rights of the creditor.

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### AND

The UCC-1 should indicate that delivery is on consignment to afford the consignor benefits of UCC § § 9-103 and 9-319.

BUT

Don't forget that third-party purchasers in the ordinary course of business defeat the interest of the consignor.

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### UCC-11s can be fun.

- Run them on your debtor.
- And your client once and a while.
- Fix problems. See UCC §9-518.
- Get money? See UCC §9-625(e) and local law.

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**Factoring Receivables**

- Factor:
  - A specialized financial intermediary who purchases accounts receivables at a discounted price, plus a commission
  - Discounted due to likelihood that not all receivables will be collectable
  - A more expensive source of credit than financing

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**Factoring Receivables**

- Favored by businesses with declining credit worthiness because the factor focuses on the credit worthiness of the debtor, instead
- Improves balance sheet by reflecting cash rather than accounts receivable

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**Factoring Receivables**

- Major Issues
  - Non-recourse vs. recourse or a blend of the two
    - Non-recourse:
      - The factor bears the financial risk of the uncollectable receivable
      - Title passes; not the same as 'invoice discounting' where the receivable is the collateral
      - Account debtor notified (more on this below)
      - More expensive due to higher risk associated with uncollectability
    - Blend: usually depends on credit worthiness of the debtor

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### Factoring Receivables

- Sufficient 'spread' to justify this vehicle
- Negotiation of the "Reserve"
  - Factor's payment of less than full invoice amount to cover short or delayed payments from debtor
- Separation of domestic from foreign A/R
- Sending the wrong message
  - In some industries, factoring indicates financial distress to vendors and customers, alike
  - Factor may communicate directly with your customers... source of discomfort

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### Factoring Receivables

- IRS scrutiny of multinational corporations factoring among US and foreign related entities
  - Potential income tax avoidance

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### Factoring Receivables

- Added Benefits:
  - Cost savings: in effect, outsources the accounts receivable function
  - Improved daily management of collections
  - Upgrades information on customer credit worthiness

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**Credit Insurance**

Is it worth it?

**“This is the golden era of credit insurance, it’s an exciting time for the industry.”**

Euler Hermes VP waxing on 18% growth of credit insurance in US...circa March 2008

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**Credit Insurance**

Its certainly popular in the UK

**“The total value of trade credit insurance claims rocketed by 166 per cent ...**

**Claims made by UK companies for defaults on payments for domestic and international trade surged by 48 per cent...the fifth consecutive quarter claims have risen...”**

as reported July 4, 2009 by [The Independent](#)

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**Credit Insurance**

Also known as Business or Trade Credit Insurance

An insurance product (property & casualty) to protect against bad debt for both domestic and international accounts receivable .

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### Credit Insurance

- Plays a substantial role in facilitating international trade as a substitute for cash on delivery, prepayment, letter of credit, deposit or other security
- Can be used to secure against risk associated with political issues or currency instability/valuation

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### Credit Insurance

Major providers covering 85% of the market:

- Euler Hermes (Allianz Group)
- Coface (Natixis Group)
- Atridius
- Also offered by governmental export credit agencies, such EX-IM (Export-Import Bank of the United States)

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### Credit Insurance

- Key to successful use of Trade Credit Insurance:
  - Vendor account management must mirror policy requirements
  - Timely filing of claim
  - Timely notice of events that are likely to give rise to claims

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### Credit Insurance

Common reasons for claim denial

- Shipping when customer is excessively past due (90+ days), or experiencing known financial stress
- Unresolved product / service disputes
- Expired credit limit
- Inappropriate or unauthorized re-scheduling or extension
- Key documents missing or not properly executed
- Missing the claim filing deadline
- Non-payment of premium due to inaccurate sales reporting
- Unenforceable trade obligations or guarantees
- Lapse of enforceable guarantee

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### Credit Insurance

– Remember, it is not a ‘Pas de Deux’

- In addition to working with your delinquent customer, the dance now includes your insurance company
- Avoid the urge to “build your case” solely against the insurance company

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### Bankruptcy Issues to Remember

Preferences: what do you mean we have to give the \$\$\$ back!?!

Reclamation Claims: give me back my ‘stuff’ or give me a better right to get paid

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### Bankruptcy Preferences

- Bankruptcy Trustee has fiduciary duty to examine all transfers of property within:
  - 90 days before bankruptcy filing
  - Between 90 days and one year before bankruptcy filing if creditor was an 'insider'

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### Bankruptcy Preferences

- Trustee has the power to cancel the transfer:
  - Benefitted a creditor
  - On a debt owed before the transfer
  - Transfer made while debtor was insolvent
  - And

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### Bankruptcy Preferences

- Transfer enables the creditor to receive more than:
  - It would receive under Chapter 7 case, i.e. liquidation
  - It would receive if debt paid under the Bankruptcy Code provisions if transfer had not been made

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**Bankruptcy Preferences**

- If your client is unsecured, you have reason to worry (a secured client is not getting more than it would if it repossessed or gets full value)
- So what are the exceptions

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**Bankruptcy Preferences**

- Section 547(c) exception
  - ‘Substantially contemporaneous’ exchange for new value
  - Examples: cash purchases, purchase paid immediately by check, security interest securing new value\*

\* New value must enable debtor to acquire property, use the property for that purpose (provided perfected within 30 days after debtor receives possession)

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**Bankruptcy Preferences**

- Earmarking Doctrine
  - Agreement between new lender and debtor that new funds will be used to pay a specific antecedent debt
  - Terms are actually performed
  - As a whole, transaction does not diminish the debtor’s estate
    - (See, In re: Betty’s Homes, Inc. (W. Dist. Ark. 2008)

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**Bankruptcy Preferences**

- Payments made in 'ordinary course of business'
  - The regular day-in day-out business dealing between creditor and debtor
  - This may exempt late payments if consistent pattern and ordinary practice in industry for similar size business

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**Bankruptcy Preferences**

- Security interests in inventory and receivables are exempt to some extent under §547(c)
- Statutory liens (think tax liens) are not avoidable

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**Bankruptcy Preferences**

- Certain other exceptions:
  - under \$5,000 for non-consumer debtor
  - Child support or other domestic support obligation payments
  - Transfer per repayment schedule created by approved non-profit credit counseling agency

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### Reclamation Claims

Goods shipped to customer and customer files bankruptcy

Now what?

- Reclamation: way for vendor to:
  - Recover the goods already shipped
  - Stop delivery

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

Bankruptcy cases filed after October 17, 2005

- Strengthened creditors' right
- Greater tools available
- Less Hurdles to Jump

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### Reclamation Claims

What Law Applies

Once customer in bankruptcy, forget state law UCC Section 2-702

US Bankruptcy Code Sections 546(c); 503(b)(9)

- 546(c) – get the goods
- 509 (b)(9) – get cash

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### Reclamation Claims

- Getting the Goods Back from Chapter 11 Debtors

– Section 546(c) Requirements:

- Goods sold in *seller's* "Ordinary Course of Business"
- Goods received by insolvent debtor during 45 days prior to bankruptcy petition date
- Seller must make written reclamation demand:
  - » Not later than 45 days after debtor received goods; or
  - » No later than 20 days after commencement of bankruptcy case (if 45 days expires after commencement)

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### Reclamation Claims

- Too late to get the Goods, OK – get some cash instead (or at least status to be paid as an Administrative Expense)
- §546(c)(2) expressly states seller who misses 45 and 20 day deadlines may assert all rights under 509(b)(9)

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### Reclamation Claims

- What's so great about an "Administrative Expense"
- Without 509(b)(9), your claim is an unsecured pre-petition creditor claim, i.e. waiting for your pro-rata portion of ??
  - With 509(b)(9), your claim rests just below secured creditors and superpriority administrative expenses and must be paid at 100% of value

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### Reclamation Claims

- Section 509(b)(9) Requirements:
- Goods sold to debtor in ordinary course of *debtor's* business"
  - Goods received by debtor within 20 days before commencement of bankruptcy case
  - Notice and Hearing required

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### Reclamation Claims

- Special Concerns:
  - "Value" vs. invoice
  - Goods only; out of luck on "services"
    - How to separate the value of goods from services?
  - When will the claim be paid?
    - Immediately or at least prior to effective date of Plan of Reorganization
      - » 2 contra cases... "rule of priority, not of payment"
    - Effective date of the Plan (see, Code §1129(a)(9))
    - Discretion of the Bankruptcy Judge

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### Reclamation Claims

- Best Practices:
  - File Proof of Claim and assert seller's 503(b)(9) claim as part of total 'unsecured' claim
  - Attach supplemental page to specify amount of claim reimbursable under 503(b)(9) *and* state you will amend the Proof of Claim if the 503(b)(9) is paid
  - Submit as soon as possible but not later than deadline of other administrative claims

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### Reclamation Claims

- Too Good to Be True?? Maybe...
  - Reclamation right subject to Good Faith Purchaser/Lien holder
    - "prior rights of a holder of a security interest in such goods or the proceeds thereof"
  - Watch out of debtor's post-petition financing scheme ...it may restrict payment of your reclamation claim

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Dealing with Your Lender

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The process begins:

- Non-committed lending such as commercial paper requires less stringent documentation.
- Committed funding: term loans, leases and revolving credit loans demand precision.
- Secured borrowing adds a layer of complexity—remember Article 9!

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Your CFO contacts your friendly local bank.

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You negotiate a confidentiality agreement (remember Reg. FD) and due diligence begins.

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A commitment letter and term sheet are prepared.

- Why is this critical?
- Bankers are salespeople.
- Until they have a signed commitment letter from you, they don't know they have a deal. Once that letter is signed they will go on to the next customer, turn the documentation process over to their lawyers and you will have a very hard time getting their attention.

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Here comes the good lawyer part.

- Make sure you have a commitment. Sometimes banks give "soft" commitments first, but always get a hard commitment before you begin the definitive documents.
- If there is a soft commitment get time and money limits for a hard commitment.
- Prepare a detailed term sheet.

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Expect tough negotiations.

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‘Then you should say what you mean,’ the March Hare went on.

‘I do,’ Alice hastily replied; ‘at least--at least I mean what I say--that's the same thing, you know.’

‘Not the same thing a bit!’ said the Hatter. ‘You might just as well say that “I see what I eat” is the same thing as “I eat what I see”!’

‘You might just as well say,’ added the March Hare, ‘that “I like what I get” is the same thing as “I get what I like”!’

‘‘You might just as well say,’ added the Dormouse, who seemed to be talking in his sleep, ‘that “I breathe when I sleep” is the same thing as “I sleep when I breathe”!’

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**The Term Sheet**

Review of term sheet.

The term sheet is your tool in negotiating definitive documents with the bank and its lawyers.

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The Three C's of Lending

**Character**  
(Are they willing to pay?)

**Credit**  
(Financial condition—Can they pay?)

**Collateral**  
(Do they have stuff we can sell?)

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**MAC or MAE**

“Material Adverse Effect” shall mean a material adverse effect on: (a) the business, operations, property, condition (financial or otherwise) or prospects of the Borrower, (b) the ability of the Borrower to perform any of its obligations under the Loan Documents, or (c) the rights of or benefits available to the Lender under, or the validity or enforceability of, any Loan Documents.

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**Other Critical Clauses**

- Representations and warranties should be do-able and qualified. Beware of “compliance with all laws” etc. Qualify with MAE.
- Covenants including financial covenants should have lots of “headroom.”
- Mulligans.

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**Ongoing Covenant Compliance**

- Affirmative covenants—certificates, opinions, reports financial statements
- Negative covenants—review deals in advance to assure compliance

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**Warning**

Recipients of period reports, certificates, opinions and the like should take care to read them and make sure they are in order. Failure to address materials evidencing non-compliance could be deemed to be a modification of the original requirement by course of dealing.

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**Crisis Management**

- Make sure they hear it from you first.
- Prepare, prepare, prepare your disclosure and arguments.

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### Defaulting Lenders

- Kicking them out.
  - “Yank a bank” clauses. What’s a defaulting lender?
 

“**Defaulting Lender**” means any Lender that (a)(i) has not made its ratable portion of a requested borrowing available to the Agent within three Business Days after the date due therefor, unless the subject of a good faith dispute or (ii) has not reimbursed the LC Issuing Bank for such Lender’s *pro rata* share of the amount of a payment made by such LC Issuing Bank under a Letter of Credit, within three Business Days after the date due therefor; (b) has notified the Borrower or the Agent that it does not intend to comply with its obligations under to fund borrowings or draw requests; or (c) is the subject of a bankruptcy, insolvency or similar proceeding. For the avoidance of doubt, a Lender that participates in a government support program will not be considered to be the subject of a proceeding of the type described in clause (c) of this definition solely by reason of its participation in such government support program.

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### Yank a Bank

Sample clause:  
 At any time a Lender is a Defaulting Lender, the Borrower may terminate the Commitment of such Defaulting Lender by giving notice to it and the Agent provided, that (a) at the time of such termination, no Event of Default exists; (b) concurrently with such termination, the Borrower shall prepay all outstanding Loans of such Defaulting Lender together with accrued interest thereon and accrued fees and any other amounts payable for the account of such Defaulting Lender hereunder; and (c) if, on the effective date of such termination, any Letter of Credit is outstanding, the conditions set forth for the issuance of a Letter of Credit would be satisfied (after giving effect to such termination) as if each Letter of Credit was issued on the date notice is given. Upon satisfaction of the foregoing conditions, the Commitment of the Defaulting Lender shall terminate on the effective date specified in such notice, its participation in any Letter of Credit exposure shall terminate on such effective date and the participations of the other Lenders in their letter of credit exposure to the Borrower shall be re-determined as of such termination date as if the outstanding Letters of Credit had been issued on the termination date.

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### More on Yank a Bank

- Older loan documents are not as clear.
- Sue for performance:
  - Are you in compliance?
  - What are your damages?
  - How will you collect?
- Can you replace the yanked bank?

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### More on Yank a Bank

- May also want to yank a bank that does not want to agree to an amendment or waiver.
  - Most loan agreements provide that a failure by a lender to respond is an automatic “no” vote on an amendment. versus
  - “Snooze you lose” clause. “Unless a lender objects to an amendment within XX business days, it shall be deemed to have approved the borrower’s request.”

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### Dead Lenders

- Dealing with FDIC
  - If your loan is not purchased, may not be able to obtain additional advances.
  - May be difficult to get FDIC to act quickly on UCC terminations, subordinations, etc.
  - Purchasing bank typically has 30-day review period.
    - Getting decisions during this period are difficult because both purchaser and FDIC must sign off.

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### Dead Lenders

- Bankrupt (non-bank) Lenders.
  - May not be able to get additional advances.
  - Releases, terminations, amendments may be difficult until the loan is sold.

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Beware of Hell and High Water

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**Hell and High Water**

Lessee's obligations under this Lease are absolute, and will not be subject to diminution for any reason, including, without limitation, any breach of any obligation of Lessor (whether by Lessor or its assign(s)), or of any manufacturer of any of the leased equipment. Lessee waives and disclaims all claims, rights of set off, counterclaim and deduction, and any defenses, Lessee may have against Lessor.

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**The consequences of Hell and High Water**

- Required by lessor's lenders.
- Courts have read the clause to require lessees to continue to pay after the lessor's lenders have repossessed the property.

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### Surviving Hell and High Water

- ✓ Modify the clause.
- ✓ Pay the lender directly (rare).
- ✓ Add the following:  
Notwithstanding the foregoing, Lessee shall not be required to pay rent if it is denied use of the leased property as a result of: (a) Lessor's breach of its covenant of quiet enjoyment, or (b) the bankruptcy or insolvency of Lessor.

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### Conclusion

- Use leverage when you have it—if things are going to get worse, deal with it now.
- Be practical.
- Keep and stay well-informed.

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## SECURITY AGREEMENT

THIS SECURITY AGREEMENT (this “**Security Agreement**”), dated as of this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_ is made by and between ABC Company, LLC, a limited liability company organized under the law of the State of Delaware (the “**Debtor**”), with its principal business address at 0000 ABC Boulevard, Pittsburgh, PA 15000 and the XYZ Industries, Inc., a corporation organized under the law of the State of Delaware (the “**Secured Party**”), with an address at 000 Broadway New York, NY 00000 (the “**Secured Party’s Location**”).

Under the terms hereof, the Secured Party desires to obtain and the Debtor desires to grant the Secured Party security for all of the Obligations (hereinafter defined).

**NOW, THEREFORE**, the Debtor and the Secured Party, intending to be legally bound, hereby agree as follows:

**1. Definitions.** Capitalized terms used in this Security Agreement that are not otherwise defined shall have the meanings given to them in the under that certain contract for the delivery of widgets from time to time dated \_\_\_\_\_ between the Beneficiary and the Obligor (the “**Contract**”). In addition, the following terms shall have the following meanings:

(a) “**Collateral**” shall [*describe collateral*] located at Debtor’s facility at 0000 ABC Boulevard, Pittsburgh, PA 15000 including the equipment and fixtures described on Exhibit “A” attached hereto and made a part hereof (the “**Equipment**”); all goods and general intangibles relating to, arising from or embedded in the Equipment, all cash and non-cash proceeds (including insurance proceeds) of the Equipment, all products thereof and all additions and accessions thereto, substitutions therefor and replacements thereof.<sup>1</sup>

(b) “**Obligations**” shall include all loans, advances, debts, liabilities and obligations owing by the Debtor to the Secured Party in connection with the Contract, whether direct or indirect, absolute or contingent, due or to become due, now existing or hereafter arising and any amendments, extensions, renewals and increases of or to any of the foregoing.

(c) “**UCC**” means the Uniform Commercial Code, as adopted and enacted and as in effect from time to time in the State whose law governs pursuant to the Section of this Security Agreement entitled “Governing Law and Jurisdiction.” Terms used herein which are defined in the UCC and not otherwise defined herein shall have the respective meanings ascribed to such terms in the UCC. To the extent the definition of any category or type of collateral is modified by any amendment, modification or revision to the UCC, such modified definition will apply automatically as of the date of such amendment, modification or revision.<sup>2</sup>

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1 See Part 3 of Article 9 of the UCC for answers to the law governing perfection and §9-307 for the location of the debtor. Most organizations will be covered by §9-307(e) so that the debtor’s location is its jurisdiction of incorporation.

2 This clause may not be effective for all types of collateral in all jurisdictions. For example, see UCC §9-301(4).

**2. Grant of Security Interest.** To secure the Obligations, the Debtor, as debtor, hereby assigns and grants to the Secured Party, as secured party, a [purchase money]<sup>3</sup> continuing lien on and security interest in the Collateral including all proceeds and products thereof.

**3. Change in Name.** The Debtor hereby agrees that if the Debtor changes its name, its type of organization, its state of organization (if Debtor is a registered organization) or establishes a name in which it may do business that is not listed as a tradename on Exhibit "A" hereto, the Debtor will immediately notify the Secured Party in writing of the additions or changes.<sup>4</sup>

**4. Representations and Warranties.** The Debtor represents, warrants and covenants to the Secured Party that: (a) all information, including its type of organization, jurisdiction of organization, chief executive office are as set forth on Exhibit "A" hereto and are true and correct in all material respects on the date hereof; (b) the Debtor has good, marketable and indefeasible title to the Collateral, has not made any prior sale, pledge, encumbrance, assignment or other disposition of any of the Collateral (other than pledges or encumbrances that have been subordinated in favor of the Secured Party), and the Collateral is free from all encumbrances and rights of setoff of any kind except the lien in favor of the Secured Party created by this Security Agreement and liens that have been subordinated in favor of the Secured Party; (c) except as herein provided, the Debtor will not hereafter without the Secured Party's prior written consent sell, pledge, encumber, assign or otherwise dispose of any of the Collateral or permit any right of setoff, lien or security interest to exist thereon except to the Secured Party; and (d) the Debtor will defend the Collateral against all claims and demands of all persons at any time claiming the same or any interest therein.<sup>5</sup>

**5. Debtor's Covenants.** The Debtor covenants that it shall from time to time and at all reasonable times allow the Secured Party, by or through any of its officers, agents, attorneys, or accountants, to examine or inspect the Collateral, and obtain valuations and audits of the Collateral wherever located. The Debtor shall do, obtain, make, execute and deliver all such additional and further acts, things, deeds, assurances and instruments as the Secured Party may require to vest in and assure to the Secured Party its rights hereunder and in or to the Collateral, and the proceeds thereof. The Debtor agrees that the Secured Party has full power and authority to collect, compromise, endorse, sell or otherwise deal with the Collateral in its own name or that of the Debtor at any time upon a Termination Event.

**6. Negative Pledge; No Transfer.** The Debtor will not sell or offer to sell or otherwise transfer or grant or allow the imposition of a lien or security interest upon the Collateral (other than liens that have been subordinated in favor of the Secured Party and except for sales of inventory in the Debtor's ordinary course of business and sales

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3 Where there is a purchase-money security interest, it is a good idea to identify it as such. See UCC §§9-324 and 9-203(b).

4 Because the filings are indexed based on the debtor's name, you'll want to file an amendment if the debtor changes its name or jurisdiction of organization—preferably before it occurs. See UCC §9-503 and the official comment thereto.

5 These representations are no substitute for a UCC-11 search.



or other dispositions of obsolete equipment consistent with past practices), will not allow any third party to gain control of all or any part of the Collateral, and will not use any portion thereof in any manner inconsistent with this Security Agreement or with the terms and conditions of any policy of insurance thereon.

**7. Insurance.** Debtor shall obtain and maintain insurance coverage over the Collateral in amounts, with deductibles and with carriers all satisfactory to the Secured Party in its sole discretion. All such policies shall name the Secured Party as an additional insured and provide for at least thirty days (30) prior written notice of cancellation or termination to the Secured Party. If Debtor fails to obtain and maintain any such coverage, the Secured Party may (but is not obligated to) maintain such coverage for its own account and Debtor shall pay all documented out-of-pocket costs incurred by the Secured Party in connection therewith.<sup>6</sup>

**8. Further Assurances.** By its signature hereon, the Debtor hereby irrevocably authorizes the Secured Party to execute (on behalf of the Debtor) and file against the Debtor one or more financing, continuation or amendment statements pursuant to the UCC in form satisfactory to the Secured Party, and the Debtor will pay the cost of preparing and filing the same in all jurisdictions in which such filing is necessary in order to perfect, preserve and protect its security interests. If required by the Secured Party, the Debtor will execute all documentation necessary for the Secured Party to obtain and maintain perfection of its security interests in the Collateral.<sup>7</sup>

**9. Events of Default.** The Debtor shall, at the Secured Party's option, be in default under this Security Agreement upon the happening of any Termination Event under the Contract.

**10. Remedies.** Upon the occurrence and continuation of any such Termination Event, the Secured Party may declare all Obligations secured hereby immediately due and payable and shall have, in addition to any remedies provided herein or by any applicable law or in equity, all the remedies of a secured party under the UCC. The Secured Party's remedies include the right to (a) peaceably by its own means or with judicial assistance enter the Debtor's premises and take possession of the Collateral without prior notice to the Debtor or the opportunity for a hearing, (b) dispose of the Collateral on the Debtor's premises, and (c) require the Debtor to assemble the Collateral and make it available to the Secured Party at a place designated by the Secured Party. The Secured Party will give the Debtor reasonable notice of the time and place of any public sale thereof or of the time after which any

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6 Before the arrangement becomes effective, the Secured Party should receive a certificate from the Debtor's agent showing the Secured Party as an additional insured with the appropriate notification provisions included. If the agreement runs for several years it may be appropriate to have such a certificate delivered annually. As with any periodic reports, it is important that the Secured Party actually review the material it receives to make sure it is in order—if the Secured Party received defective certificates for several years without asking for corrections, the parties may have modified the requirement by course of dealing.

7 Secured Party should undertake a UCC—11 search and take care of any conflicting interests beforehand. It is also advisable to file the UCC-1 before the arrangement takes effect. Invalid UCC-1s can be addressed pursuant to UCC §9-518.

private sale or any other intended disposition thereof is to be made. The requirements of commercially reasonable notice shall be met if such notice is sent to the Debtor at least thirty (30) days before the time of the intended sale or disposition. Expenses of retaking, holding, preparing for disposition, disposing or the like shall include the Secured Party's reasonable attorneys' fees and legal expenses, incurred or expended by the Secured Party to enforce any payment due it under this Security Agreement either as against the Debtor, or in the prosecution or defense of any action, or concerning any matter growing out of or connection with the subject matter of this Security Agreement and the Collateral pledged hereunder. The Debtor waives all relief from all appraisal or exemption laws now in force or hereafter enacted.<sup>8</sup>

**11. Standards for Exercising Rights and Remedies.** To the extent applicable law imposes duties on Secured Party to exercise remedies in a commercially reasonable manner, Debtor acknowledges and agrees that it is not commercially unreasonable for Secured Party (a) to fail to incur expenses reasonably deemed significant by Secured Party to prepare Collateral for disposition or otherwise to fail to complete raw material or work in process into finished goods or other finished products for disposition, (b) to fail to obtain third party consents for access to Collateral to be disposed of, or to obtain or, if not required by other law, to fail to obtain governmental or third party consents for the collection or disposition of Collateral to be collected or disposed of, (c) to advertise dispositions of Collateral through publications in media of general circulation, whether or not the Collateral is of a specialized nature, (d) to contact other persons, whether or not in the same business as Debtor, for expressions of interest in acquiring all or any portion of the Collateral, (e) to hire one or more professional auctioneers to assist in the disposition of Collateral, whether or not the collateral is of a specialized nature, (f) to dispose of Collateral by utilizing internet sites that provide for the auction of assets of the types included in the Collateral or that have the reasonable capability of doing so, or that match buyers and sellers of assets, (g) to dispose of assets in wholesale rather than retail markets, (h) to disclaim disposition warranties, (i) to purchase insurance or credit enhancements to insure Secured Party against risks of loss, collection or disposition of Collateral or to provide to Secured Party a guaranteed return from the collection or disposition of Collateral, or (j) to the extent deemed appropriate by Secured Party, to obtain the services of other brokers, investment bankers, consultants and other professionals to assist Secured Party in the collection or disposition of any of the Collateral. Debtor acknowledges that the purpose of this Section is to provide non-exhaustive indications of what actions or omissions by Secured Party would fulfill Secured Party's duties under the UCC or other law of the State or any other relevant jurisdiction in Secured Party's exercise of remedies against the Collateral and that other actions or omissions by Secured Party shall not be deemed to fail to fulfill such duties solely on account of not being indicated in this Section. Without limitation upon the foregoing, nothing contained in this Section shall be construed to grant any rights to Debtor or to impose any duties on Secured Party that would not have been granted or imposed by this Security Agreement or by applicable law in the absence of this Section.

**12. No Waiver by Secured Party, etc.** Secured Party shall not be deemed to have waived any of its rights or remedies in respect of the Obligations or the Collateral unless such waiver shall be in writing and signed by Secured Party. No delay or omission on the part of Secured Party in exercising any right or remedy shall operate as a waiver of such right or remedy or any other right or remedy. A waiver on any one occasion shall not

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<sup>8</sup> See Part 6 of Article 9.

be construed as a bar to or waiver of any right or remedy on any future occasion. All rights and remedies of Secured Party with respect to the Obligations or the Collateral, whether evidenced hereby or by any other instrument or papers, shall be cumulative and may be exercised singularly, alternatively, successively or concurrently at such time or at such times as Secured Party deems expedient.

**13. Suretyship Waivers by Debtor.** Debtor waives demand, notice, protest, notice of acceptance of this Security Agreement, notice of loans made, credit extended, Collateral received or delivered or other action taken in reliance hereon and all other demands and notices of any description. With respect to both the Obligations and the Collateral, Debtor assents to any extension or postponement of the time of payment or any other indulgence, to any substitution, exchange or release of or failure to perfect any security interest in any Collateral, to the addition or release of any party or person primarily or secondarily liable, to the acceptance of partial payment thereon and the settlement, compromising or adjusting of any thereof, all in such manner and at such time or times as Secured Party may deem advisable. Secured Party shall have no duty as to the collection or protection of the Collateral or any income therefrom, the preservation of rights against prior parties, or the preservation of any rights pertaining thereto beyond the safe custody thereof as set forth in this Security Agreement. Debtor further waives any and all other suretyship defenses.

**14. Marshalling.** Secured Party shall not be required to marshal any present or future collateral security (including but not limited to the Collateral) for, or other assurances of payment of, the Obligations or any of them or to resort to such collateral security or other assurances of payment in any particular order, and all of its rights and remedies hereunder and in respect of such collateral security and other assurances of payment shall be cumulative and in addition to all other rights and remedies, however existing or arising. To the extent that it lawfully may, Debtor hereby agrees that it will not invoke any law relating to the marshalling of collateral which might cause delay in or impede the enforcement of Secured Party's rights and remedies under this Security Agreement or under any other instrument creating or evidencing any of the Obligations or under which any of the Obligations is outstanding or by which any of the Obligations is secured or payment thereof is otherwise assured, and, to the extent that it lawfully may, Debtor hereby irrevocably waives the benefits of all such laws.

**15. Power of Attorney.** The Debtor does hereby make, constitute and appoint any officer or agent of the Secured Party as the Debtor's true and lawful attorney-in-fact, with power to (a) endorse the name of the Debtor or any of the Debtor's officers or agents upon any notes, checks, drafts, money orders, or other instruments of payment or Collateral that may come into the Secured Party's possession in full or part payment of any Obligations; (b) sue for, compromise, settle and release all claims and disputes with respect to, the Collateral; and (c) sign, for the Debtor, such documentation required by the UCC, or supplemental intellectual property security agreements; granting to the Debtor's said attorney full power to do any and all things necessary to be done in and about the premises as fully and effectually as the Debtor might or could do. The Debtor hereby ratifies all that said attorney shall lawfully do or cause to be done by virtue hereof. This power of attorney is coupled with an interest, and is irrevocable.<sup>9</sup>

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<sup>9</sup> This section is arguably not necessary given new UCC §9-509, but practitioners are generally keeping something like it.

**16. Payment of Expenses.** After the occurrence of a Termination Event that is continuing and at its option, the Secured Party may discharge taxes, liens, security interests or such other encumbrances as may attach to the Collateral, may pay for required insurance on the Collateral and may pay for the maintenance, appraisal or reappraisal, and preservation of the Collateral, as determined by the Secured Party to be necessary. The Debtor will reimburse the Secured Party on demand for any payment so made or any reasonable expense incurred by the Secured Party pursuant to the foregoing authorization and the Collateral also will secure any advances or payments so made or expenses so incurred by the Secured Party.

**17. Notices.** All notices, demands, requests, consents, approvals and other communications required or permitted hereunder ("**Notices**") must be in writing and will be effective upon receipt.

**18. Preservation of Rights.** No delay or omission on the Secured Party's part to exercise any right or power arising hereunder will impair any such right or power or be considered a waiver of any such right or power, nor will the Secured Party's action or inaction impair any such right or power. The Secured Party's rights and remedies hereunder are cumulative and not exclusive of any other rights or remedies which the Secured Party may have under other agreements, at law or in equity.

**19. Illegality.** If any provision contained in this Security Agreement should be invalid, illegal or unenforceable in any respect, it shall not affect or impair the validity, legality and enforceability of the remaining provisions of this Security Agreement.

**20. Changes in Writing.** No modification, amendment or waiver of, or consent to any departure by the Debtor from, any provision of this Security Agreement will be effective unless made in a writing signed by the Secured Party, and then such waiver or consent shall be effective only in the specific instance and for the purpose for which given. No notice to or demand on the Debtor will entitle the Debtor to any other or further notice or demand in the same, similar or other circumstance.

**21. Entire Agreement.** This Security Agreement (including the documents and instruments referred to herein) and the Contract constitute the entire agreement and supersedes all other prior agreements and understandings, both written and oral, between the parties with respect to the subject matter hereof.

**22. Counterparts.** This Security Agreement may be signed in any number of counterpart copies and by the parties hereto on separate counterparts, but all such copies shall constitute one and the same instrument. Delivery of an executed counterpart of signature page to this Security Agreement by facsimile transmission shall be effective as delivery of a manually executed counterpart. Any party so executing this Security Agreement by facsimile transmission shall promptly deliver a manually executed counterpart, provided that any failure to do so shall not affect the validity of the counterpart executed by facsimile transmission.

**23. Successors and Assigns.** This Security Agreement will be binding upon and inure to the benefit of the Debtor and the Secured Party and their respective successors and assigns; provided, however, that the Debtor may not assign this Security Agreement in whole or in part without the Secured Party's prior written consent and the Secured Party at any time may assign this Security Agreement in whole or in part.

**24. Termination of Security Agreement.** Upon payment in full of all sums due under the Contract, (i) this Security Agreement shall automatically terminate and become null and void (which termination shall, if requested by Debtor, be confirmed in writing by Secured Party) and (ii) Secured Party shall release all financing statements filed by Secured Party against Debtor.

**25. Interpretation.** In this Security Agreement, unless the Secured Party and the Debtor otherwise agree in writing, the singular includes the plural and the plural the singular; words importing any gender include the other genders; references to statutes are to be construed as including all statutory provisions consolidating, amending or replacing the statute referred to; the word "or" shall be deemed to include "and/or", the words "including", "includes" and "include" shall be deemed to be followed by the words "without limitation"; references to articles, sections (or subdivisions of sections) or exhibits are to those of this Security Agreement; and references to agreements and other contractual instruments shall be deemed to include all subsequent amendments and other modifications to such instruments, but only to the extent such amendments and other modifications are not prohibited by the terms of this Security Agreement. Section headings in this Security Agreement are included for convenience of reference only and shall not constitute a part of this Security Agreement for any other purpose. Unless otherwise specified in this Security Agreement, all accounting terms shall be interpreted and all accounting determinations shall be made in accordance with GAAP as in effect as of the date hereof.

**26. Governing Law and Jurisdiction.** This Security Agreement has been delivered to and accepted by the Secured Party and will be deemed to be made in the State of the Secured Party's Location. This Security Agreement will be interpreted and the rights and liabilities of the parties hereto determined in accordance with the laws of the State of the Secured Party's Location, except that the laws of the State where any Collateral is located (if different from the Secured Party's Location) shall govern the creation, perfection and foreclosure of the liens created hereunder on such property or any interest therein. The Debtor hereby irrevocably consents to the exclusive jurisdiction of any state or federal court in the county or judicial district in the Secured Party's Location; provided that nothing contained in this Security Agreement will prevent the Secured Party from bringing any action, enforcing any award or judgment or exercising any rights against the Debtor individually, against any security or against any property of the Debtor within any other county, state or other foreign or domestic jurisdiction. The Secured Party and the Debtor agree that such venue is the most convenient forum for both the Secured Party and the Debtor. The Debtor waives any objection to venue and any objection based on a more convenient forum in any action instituted under this Security Agreement.

**27. WAIVER OF JURY TRIAL.** EACH OF THE DEBTOR AND THE SECURED PARTY IRREVOCABLY WAIVES ANY AND ALL RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY ACTION, PROCEEDING OR CLAIM OF ANY NATURE RELATING TO THIS SECURITY AGREEMENT, ANY DOCUMENTS EXECUTED IN CONNECTION WITH THIS SECURITY AGREEMENT OR ANY TRANSACTION CONTEMPLATED IN ANY OF SUCH DOCUMENTS. THE DEBTOR AND THE SECURED PARTY ACKNOWLEDGE THAT THE FOREGOING WAIVER IS KNOWING AND VOLUNTARY.

**The Debtor acknowledges that it has read and understood all the provisions of this Security Agreement, including the waiver of jury trial, and has been advised by counsel as necessary or appropriate.**

Witness the due execution hereof as a document under seal, as of the date first written.

Debtor:  
ABC Company, LLC

By: \_\_\_\_\_  
[Name and Title]

Secured Party:  
XYZ Corporation

By: \_\_\_\_\_  
[Name and Title]

**EXHIBIT "A"**

**TO SECURITY AGREEMENT**

1. Description of Equipment:
2. Debtor's form of organization: limited liability company
3. Debtor's State of organization:
4. Address of Debtor's chief executive office:
5. Debtor's EIN:
6. Debtor's organization ID# (if any exists):
7. Address for books and records, if different:
8. Other names or trade names now or formerly used by the Debtor:

## CONSIGNMENT AGREEMENT

This Agreement is made as of [insert date] (this "Agreement") between ABC Industries, Inc. ("Consignor") and XYZ Company LLC ("Customer").

1. Delivery of Consignment Goods. Consignor agrees to deliver to the Customer an initial consignment of goods that are described on Schedule A hereto. The items to be included in consignment deliveries shall be jointly agreed upon by Consignor and Customer. The items on consignment shall be stored at Customer's facility at 1314 Wonderland Drive, Nowheresville, State of Confusion, U.S.A.<sup>1</sup>

2. Basis of Consignment. The parties agree that the consigned inventory is being consigned on a "sale and approval" basis so that the Customer has the ability to reject all or any part of the consigned inventory.<sup>2</sup>

3. Payment for Consigned Inventory. At the end of each month the Customer will provide Consignor with an order listing all items removed from the consigned inventory. This order must be received at Consignor by the end of the first week of the following month. The order must be clearly marked "For Invoicing Only, Consigned Inventory". Consignor will then invoice Customer at [*whatever*] terms.

4. Replacement of Consigned Inventory. A replacement order for consigned inventory sold can be placed by the Customer during the first week of each month, up to the value of the amount invoiced for the prior month. Customer may also return unused consigned inventory on a periodic basis.

5. Pricing. Prices for each items shall be as set forth in Schedule B to this Agreement. Consignor may not increase such prices other than on thirty (30) days prior written notice to Customer.

6. Title. [Title to the consigned inventory shall remain in Consignor until such inventory has been delivered to, accepted by and paid for by Customer as set forth in this Agreement.] Title to the consigned inventory shall remain in Consignor until such inventory has been incorporated into Customer's product and been purchased and paid for by a third party<sup>3</sup>.

7. Storage, Identification. All consigned inventory will be properly stored by the Customer in a secure storage area, separated from the Customer's normal inventory, and clearly marked "Property of ABC Industries, Inc."<sup>4</sup>

8. Record Keeping; Inspection. The Customer will keep appropriate records giving complete information with respect to additions to, withdrawals from and current levels of

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<sup>1</sup> Keeping the consigned goods in a third-party warehouse is ideal, but rarely occurs.

<sup>2</sup> While this is the ideal situation from a legal perspective, it rarely occurs in the commercial setting. Usually consignments are on a "sale and use" basis. See UCC §2-326.

<sup>3</sup> A tool supplier might deliver goods on a sale and approval basis and use the clause in brackets, but if Customer is using the consigned inventory to make something used by someone else, title should not pass until the third party has paid for the goods. In the ideal world, Consignor would also get an assignment of the receivable from the third-party.

<sup>4</sup>



consigned inventory by individual item. These records may be reviewed on a quarterly basis by Cosignor and a physical count taken.

9. Discrepancies. If there is a discrepancy on incoming consigned inventory, the Customer shall report such discrepancies promptly.

10. Shortages. The Customer is responsible for the security of the consigned inventory shall pay for any items identified as missing after Cosignor's quarterly physical count.

11. Risk of Loss. Customer shall assume all risk of loss or damage to the consigned inventory.<sup>5</sup>

12. Insurance. At its own expense, Customer will carry and maintain casualty and public liability insurance, in each case in amounts and against risks customarily insured against on similar goods by similarly constituted reputable companies engaged in the same or similar business. Any policies with respect to such insurance will (i) be with a financially sound and reputable insurance carrier acceptable to Consignor (ii) name Consignor and the Customer as assured and loss payees, as their interests may appear; and (iii) provide for at least 30 days prior written notice by the insurance carrier to Consignor prior to the cancellation or expiration or expiration of coverage. Customer shall furnish appropriate evidence of such insurance to Consignor upon request.

13. Security Interest. To secure any and all indebtedness, obligations, and liability of the Customer to Consignor, the Customer grants to Consignor a continuing security interest in all goods of Consignor (whether described in Schedule A hereto or otherwise) delivered by Consignor to the Customer from time to time, pursuant to this Agreement or otherwise and further agrees as follows:

(a) Financing Statements. Consignor shall have the right, at its discretion, to file one or more financing statements under the Uniform Commercial Code naming the Customer as debtor and Consignor as secured party and, indicating therein the types or describing the consigned inventory delivered to the Customer by Consignor (whether described in Schedule A hereto or otherwise).<sup>6</sup>

(b) Further Assurances. At any time and from time to time, upon the demand of Consignor, Customer will give, execute, deliver, file or record any notice, financing statement, instrument, document, agreement or other papers that may be necessary or desirable, or that Consignor may request, in order to create, preserve, perfect or validate any security interest granted pursuant hereto or to enable Consignor to exercise and enforce its rights hereunder or with respect to such security interest. Consignor shall not be required to take any steps necessary to preserve any rights against prior parties to any of the goods so secured.

(c) Maintenance of Security Interest. Customer represents and warrants that it is not a party to any security agreement relating to the consigned inventory and

<sup>5</sup> Although it might be handy to leave the risk of loss with the Customer, the Consignor may have a better argument against third-party creditors if it kept risk of loss, insured its own goods and let its carrier seek any subrogation against Customer.

<sup>6</sup> The UCC-1 should be filed before the arrangement is effective and identify the parties as "consignor" and "consignee" rather than "secured party" and "debtor" to take full advantage of UCC §§ 9-103(d) and 9-319. The financing statement should further indicate that it is a consignment arrangement. The consignment should be a purchase money security interest to

that there are no financing statements on file which would or might affect the consigned inventory, except as previously disclosed to Consignor in writing. The Customer will not, without the prior written consent of Consignor, file or authorize or permit to be filed in any jurisdiction any such financing.<sup>7</sup>

(d) Removal of Consigned Inventory. The Customer agrees not to remove any of the consigned inventory from the Customer's address as set forth in the first paragraph of this Agreement without the prior written consent of Cosignor.

14. Term. The term of this Agreement is month to month and either party may terminate this Agreement upon thirty days prior written notice to the other for any reason. If a party is in default of its obligations under this Agreement (each, a "Defaulting Party") the other party (the "Non-Defaulting Party") may give notice to of such default to the Defaulting Party. If the Defaulting Party fails to cure the default within five busines days after receipt of such notice, the Non-Defaulting Party shall be entitled to terminate this Agreement immediately. Upon any such termination, the A party may cancel this Agreement upon five days prior upoby providing notice of such Customer shall immediately return all consigned inventory.

15. Governing Law. This Agreement shall be construed and the rights of the parties hereunder shall be determined in accordance with the laws of the State of Disrepute, U.S.A.<sup>8</sup>

ABC Industries Inc.

XYZ Company, LLC

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

<sup>7</sup> If one or more of Customer's lenders has a lien on Customer's inventory (a very likely possibility), notice of the consignment arrangement and Consignor's security interest should be sent to each lender. See UCC §9-324(b).

<sup>8</sup> This form is for use in the United States where most jurisdictions have adopted the Uniform

# Big Bad Bank, N.A.

100 Main Street  
New York, NY 10000

[Insert Date]

[Insert Name and address of Borrower]

Re: USD1 billion 5-year Revolving Credit Facility Proposal

Dear Borrower:

Big Bad Bank, N.A. ("*BBB*" or the "*Agent*") is pleased to arrange an unsecured revolving credit facility of USD 500 million (the "*Credit Facility*") for Borrower, Inc. (the "*Borrower*") on the terms and conditions set forth in the attached Terms and Conditions (the "*Term Sheet*"). This letter and the attached Term Sheet are collectively referred to as the "*Commitment Letter*".

BBB is pleased to advise you of its [willingness to provide a]<sup>1</sup> commitment for up to \$250 million of the Credit Facility on the terms and conditions set forth in this Commitment Letter, subject to the successful completion of syndication to one or more other lenders of the remaining portion of the Credit Facility. BBB is pleased to advise the Borrower of its agreement to use commercially reasonable efforts to assemble a syndicate of financial institutions identified by BBB in consultation with the Borrower, to provide the balance of the necessary commitments for the Credit Facility, in each case upon the terms and subject to the conditions set forth or referred to in this Commitment Letter, the Term Sheet and in one or more Fee Letters each dated the date hereof and delivered herewith (collectively, the "*Fee Letters*"). It is a condition to BBB's commitment hereunder that the portion of the Credit Facility not being provided by BBB shall be provided by the other Lenders referred to in the Term Sheet.

BBB as sole lead arranger will act as administrative agent, and will perform all the relevant syndication and documentation responsibilities for the transaction.

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<sup>1</sup> A bank will attempt to soften its commitment in any number of ways. Recent experience left a borrower with a three page appendix of conditions and qualifications.

Company, Inc.  
[Insert Date]  
Page 2

The Borrower agrees that no other agents or titles will be awarded, or other fees paid, unless agreed upon by BBB and the Borrower.

BBB, in consultation with the Borrower, will manage all aspects of the syndication, including decisions as to the selection of institutions to be approached and when those institutions will be approached, when commitments will be accepted, which institutions will participate, the allocations of the commitments among the Lenders and the amount and distribution of fees among the Lenders. In this capacity, BBB will have no responsibility other than to arrange the syndication as set forth herein and shall not be subject to any fiduciary or other implied duties. To assist BBB in its syndication efforts, the Borrower will promptly prepare and all information with respect to the Borrower and its subsidiaries and the transactions contemplated hereby, including all financial information and projections (the "*Projections*"), as BBB may reasonably request in connection with the arrangement and syndication of the Credit Facility. The Borrower hereby represents and covenants that (a) all information other than the Projections that has been or will be made available to BBB by the Borrower or any of its representatives, taken as a whole (the "*Information*"), is or will be, when furnished, complete and correct in all material respects and does not or will not, when furnished, contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements contained therein not materially misleading in light of the circumstances under which such statements are made<sup>2</sup> and (b) the Projections that have been or will be made

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<sup>2</sup> In order to make this representation the Borrower must clearly identify what information is being provided to the agent for purposes of syndication. If there is an information memorandum, the Borrower needs to: (a) carefully review it before it is circulated, (b) make sure (by contract or otherwise) that each Lender has received a copy and (c) to the extent it contains material non-public information: (i) make sure the recipients are subject to a confidentiality agreement, (ii) label the document "confidential" and (iii) track the number of copies made and to whom they were delivered.

Company, Inc.  
[Insert Date]  
Page 3

available to BBB by the Borrower or any of its representatives have been or will be prepared in good faith based upon reasonable assumptions.<sup>3</sup> If, after the time the Information has been made available to BBB and prior to the execution and delivery of the Finance Documents (as defined in the Term Sheet), events occur that cause the Information to be misleading in any material respect, the Borrower shall promptly advise the BBB. The Borrower understands that in arranging and syndicating the Credit Facility, BBB may use and rely on the Information and Projections without independent verification thereof.

BBB's commitment and agreement to provide the relevant services are subject to (i) the negotiation, execution, delivery and effectiveness of all the relevant documents satisfactory to all parties; (ii) no material adverse change in the business, properties, performance, operations or condition (financial or otherwise) of the Borrower; (iii) no change in financial market conditions that would have a material adverse effect on the syndication<sup>4</sup>; (iv) absence of any competing offering of any debt securities or bank financing by or on behalf of the Borrower or any of its affiliates during the syndication;<sup>5</sup> (v) satisfactory completion of due diligence; (vi) BBB not becoming aware that any information or other matter affecting the Borrower or the Credit Facility is materially inconsistent with any information or other matter theretofore disclosed to BBB; and (vii) the other conditions set forth in the Term Sheet.

BBB shall be entitled, after consultation with you, to change the pricing, terms, structure or amount of the Credit Facility if BBB determines that such changes

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<sup>3</sup> These are the only representations anyone can reasonably make regarding projections—some lenders will try to get more out of you

<sup>4</sup> This is referred to as a “market out” and takes various forms.

<sup>5</sup> Clear market clauses such as these are typical and usually reasonable.

Company, Inc.  
[Insert Date]  
Page 4

are advisable to insure a successful syndication of the Credit Facility. The commitments hereunder are subject to the agreements in this paragraph.<sup>6</sup>

This Commitment Letter and any commitment hereunder will automatically terminate if BBB does not receive from the Borrower a counterpart of this Commitment Letter executed by the Borrower on or prior to December 25, 2009 or if definitive documents for the Credit Facility are not executed by February 30, 2010, unless otherwise agreed in writing. The provisions contained in the subsequent paragraphs (1) and (2) shall survive any such termination, except as expressly provided. Whether or not definitive documents are signed or the Credit Facility is consummated the following shall apply:

- (1) Except as limited by the Term Sheet, Borrower agrees to pay, or to reimburse BBB all reasonable and documented out of pocket costs and expenses that BBB may incur in connection with the negotiation, preparation, execution, delivery, syndication and closing of the documents for the Credit Facility, the completion of due diligence, and the funding of any loans under the Credit Facility. Such costs and expenses may include, without limitation, due diligence expenses and syndication expenses; and
- (2) On the basis described in the Term Sheet, Borrower agrees to defend and indemnify BBB, and each of its respective employees, officers, directors, shareholders, and attorneys (each an "Indemnified Party") against, and hold each of them harmless for, any and all losses, liabilities, damages, taxes, claims, costs and expenses that any Indemnified Party may suffer or incur in performing its services under the proposed Credit Facility, or this

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<sup>6</sup> Recently more lenders are inserting "market flex" clauses such as this one. Resistance is advisable even if futile.

Company, Inc.  
[Insert Date]  
Page 5

Commitment Letter, except for those arising from the from gross negligence or willful misconduct of an Indemnified Party.<sup>7</sup>

This Commitment Letter shall be governed by and construed in accordance with, the laws of the State of New York.

Sincerely,

Big Bad Bank

By \_\_\_\_\_  
[Name and Title]

Agreed and Accepted by:

Borrower, Inc.

By \_\_\_\_\_  
[Name and Title]

Dated: \_\_\_\_\_, 200\_\_

\_\_\_\_\_

<sup>7</sup> If there is a confidential information memorandum, consider adding something like the following:

In no event shall BBB be authorized to make any statements to third parties that are not embodied in a private placement memorandum to be prepared by BBB and approved by Borrower (the "PPM"). Borrower shall not be liable to indemnify BBB in cases where the matter for which indemnification is sought arises out of (a) BBB's failure to deliver a copy of the PPM to a party, and/or (b) BBB's misstatement of a material fact or failure to state a material fact where such misstatement or omission was not made or omitted in the PPM.

## TERM SHEET

### PROPOSED REVOLVING CREDIT AGREEMENT FOR COMPANY

<b>Borrower:</b>	Company
<b>Agent:</b>	Agent Bank
<b>Lenders:</b>	Names of Banks
<b>Type of Facility:</b>	USD 500 million revolving credit facility.
<b>Purpose:</b>	General corporate purposes. <sup>1</sup>
<b>Maturity:</b>	Five years from the closing date.
<b>Security:</b>	Unsecured. Parri passu with senior debt.
<b>Documentation:</b>	Mutually agreeable documentation (the "Finance Documents")
<b>Borrowing Options:</b>	LIBOR <sup>2</sup> , Base Rate <sup>3</sup> and Money Market
<b>Money Market Description:</b>	The Borrower may request the Agent to solicit competitive bids from the Lenders at a margin over LIBOR or at an absolute rate. Each Lender will bid at its own discretion for amounts up to the total amount of commitments and the Borrower will be under no obligation to accept any of the bids. Any Money Market advances made by a Lender shall be

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<sup>1</sup> This is a term of art and essentially means the proceeds will be used in the borrower's business. The Finance Documents will prohibit the borrower from using borrowed funds for purposes that would require the lenders to establish extraordinary reserves under applicable law. For example, banks have to have higher reserves if loan proceeds are being used to fund a hostile takeover.

<sup>2</sup> "LIBOR" means the "London Inter-Bank Offer Rate". This is the interest rate that the banks charge each other for loans. This rate is applicable to the short-term international interbank market, and applies to very large loans borrowed for anywhere from one day to five years. This market allows banks with liquidity requirements to borrow quickly from other banks with surpluses, enabling banks to avoid holding excessively large amounts of their asset base as liquid assets. The LIBOR is officially fixed once a day by a small group of large London banks, but the rate changes throughout the day.

<sup>3</sup> "Base Rate" is also referred to as "Prime Rate"—the rate a bank offers to its most creditworthy customers for short-term borrowings. In multi lateral facilities, the Agent's Base Rate is the rate used for the facility.



deemed usage of the facility for the purpose of availability. However, each Lender's advance shall not reduce such Lender's obligation to lend its pro rata share of the remaining undrawn commitment.

Bid Selection Mechanism: The Borrower will determine the aggregate amount of bids, if any, it will accept. Bids will be accepted in order of the lowest to the highest rates ("Bid Rates"). If two or more Lenders bid at the same Bid Rate and the amount of such bids accepted is less than the aggregate amount of such bids, then the amount to be borrowed at such Bid Rate will be allocated among such Lenders in proportion to the amount for which each Lender bid at such Bid Rate. If the bids are either unacceptably high to the Borrower or are insufficient in amount, the Borrower may cancel the auction.

<b>Pricing:</b>	LIBOR: LIBOR + X.XX
<b>Commitment Fee:</b>	\$XXXXXXXXX per quarter
<b>Undrawn Facility Fee:</b>	X.XX% on the undrawn portion of the Facility payable quarterly
<b>Interest Payments:</b>	At the end of each pricing period or quarterly whichever is earlier.
<b>Interest Periods:</b>	<u>Base Rate:</u> As set forth in the borrowing request, but no shorter than one day. Requests to be made by noon on the date of drawdown.  <u>LIBOR:</u> 1, 2, 3 or 6 months. Requests to be made by noon on the second business day before the date of drawdown.  <u>Money Market:</u> As set forth in the borrowing request but no shorter than 30 days. Requests to be made by 10:00 a.m. on the third business day before the date of drawdown.
<b>Default Rate:</b>	Overdue payments shall accrue interest at a rate that is 2% above the applicable interest rate.
<b>Drawdowns</b>	In minimum amounts of USD10,000,000 and increments of USD5,000,000 or equivalent.
<b>Reductions:</b>	In minimum amounts of USD20,000,000 on three business days notice.

**Breakage:**<sup>4</sup>

The Borrower will reimburse each Lender for break costs incurred as a result of prepayments.

**Change of Control:**

If a Change of Control of the Borrower shall occur, the Borrower will, within ten (10) days after the occurrence thereof, give the Agent notice thereof. Such notice shall describe in reasonable detail the facts and circumstances giving rise thereto and the date of such Change of Control. Each Lender may, by notice to the Borrower given not later than fifty (50) days after the date of such Change of Control, terminate its obligations to make Loans and declare all amounts outstanding under the Finance Documents (together with accrued interest thereon) and any other amounts payable hereunder for its account to be, and such amounts shall become, due and payable, in each case on the sixtieth (60th) day after the date of such Change of Control (or if such day is not a Business Day, the next succeeding Business Day), without presentment, demand, protest or other notice of any kind, all of which are hereby waived by the Borrower.

**“Change in Control”** means the occurrence of any of the following:

- a. any “person” (as such term is used in Sections 13(d) and 14(d) of the United States Securities Exchange Act of 1934, as amended—hereinafter the “Exchange Act”) is or becomes the “beneficial owner” (as defined in Rules 13d-3 and 13d-5 under the Exchange Act, except that for purposes of this clause (a) such person shall be deemed to have “beneficial ownership” of all shares that any such person has the right to acquire, whether such right is exercisable immediately or only after the passage of time), directly or indirectly, of more than 35% of the total Voting Power of the Voting Stock of the Borrower;
- b. individuals who constituted the Board of Directors of the Borrower at any given time (together with any new directors whose election by such Board of Directors or whose nomination for election by the shareholders of the Borrower as approved by a vote of 66-2/3% of the directors of the Borrower then still in office who were either directors at such time or whose election or nomination for election was previously so approved) cease for any reason to constitute a majority of the Board of Directors then in office;

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<sup>4</sup> If LIBOR, Money Market or other types of deposit-funded loans (e.g., “CD rate” loans) are prepaid, the lender will incur costs in reinvesting the funds.

- c. the adoption of a plan relating to the liquidation or dissolution of the Borrower; or
- d. the merger or consolidation of the Borrower with or into another Person or the merger of another Person with or into the Borrower, or the sale of all or substantially all the assets of the Borrower (determined on a consolidated basis) to another Person, other than a merger or consolidation transaction in which holders of securities that represented 100% of the Voting Stock of the Borrower immediately prior to such transaction (or other securities into which such securities are converted as part of such merger or consolidation transaction) own directly or indirectly at least a majority of the Voting Power of the Voting Stock of the surviving Person in such merger or consolidation transaction immediately after such transaction and in substantially the same proportion as before the transaction.

**“Board of Directors”** means, the Board of Directors of the Borrower or any committee thereof duly authorized to act on behalf of such Board of Directors.

**“Voting Power”** as applied to the stock of any Person means the total voting power represented by all outstanding Voting Stock of such Person.

**“Voting Stock”** of a Person means all classes of capital stock or other interests (including partnership interests) of such Person then outstanding and normally entitled (without regard to the occurrence of any contingency) to vote in the election of directors, managers, or trustees thereof.

**Conditions Precedent to Closing:**

The conditions precedent to closing shall consist only of the following:

1. Execution and delivery of the Finance Documents by the parties thereto.
2. The Borrower's existing revolving credit facility shall be cancelled concurrently with closing.
3. The Agent shall receive certified copies of the Borrower's organizational documents—i.e., certificate of incorporation and by-laws—and a certificate of good standing from the State of Delaware.
4. The Agent shall receive an opinion of counsel to the Borrower regarding: (a) the valid existence and good standing of the Borrower, (b) the approval of the

Finance Documents and (c) the absence of litigation that would reasonably be expected to materially adversely affect the Borrower's ability to perform its obligations under the Finance Documents.<sup>5</sup>

5. A certificate of an executive officer of the Borrower to the effect that as of the date of closing: (a) the representations all of the Borrower in the Finance Documents are true and correct, and (b) no Event of Default has occurred and is continuing.

**Conditions Precedent to each Drawdown:**

The conditions precedent to each drawdown shall consist only of the following:

1. The accuracy of the representations and warranties in the Finance Documents.
2. No event of default has occurred and is continuing.<sup>6</sup>
3. The absence of any change or condition that would<sup>7</sup> reasonably be expected to have a Material Adverse Effect.

**Material Adverse Effect:**

"Material Adverse Effect" shall mean a material adverse effect on (a) the business, operations or financial condition of the Borrower<sup>8</sup>, (b) the ability of the Borrower to perform any of its obligations under the Finance Documents, or (c) the rights of or benefits available to any Lender under, or the validity or enforceability of, the Finance Documents.

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<sup>5</sup> Be sure to qualify any enforceability opinion. See representation "(d)" and the ABA model opinion.

<sup>6</sup> Unless the words "and is continuing" are used, your CFO may be anxious at borrowing time.

<sup>7</sup> Many credit agreements employ the word "could" rather than "would" in the representations, covenants and events of default. Clearly the latter is preferable because the word "could" reflects the possibility of something happening where "would" is more reflective of probability or certainty. For example, that asbestos case against your company in Texas *could* be expected to result in a material adverse effect, but is unlikely to do so. Expect to fight hard on this point unless you've gotten it in the term sheet.

<sup>8</sup> Resist if the lenders want to insert the word "prospects" here. The borrower should be keeping the lenders informed about its business, but should not be put in a position where losing (or not getting) a big customer results in a default under its credit agreement.

**Representations and Warranties:<sup>9</sup>**

The representations and warranties shall consist only of the following:<sup>10</sup>

- a. It is a Borrower duly organized, validly existing and in good standing under the laws of the State of Delaware.
- b. It has the necessary power and authority to execute, deliver and perform its obligations under the Finance Documents and to carry on its business and own/lease its properties.
- c. The execution, delivery and performance by the Borrower of the Finance Documents (i) has been duly authorized by all necessary corporate action and (ii) does not require any approval, permits, consent, licenses or the like from any governmental entity or other third party.
- d. Assuming the enforceability of the Finance Documents upon the other parties thereto, the Borrower's obligations under the Finance Documents are enforceable against it except: (i) as limited by bankruptcy, insolvency or other laws affecting creditor's rights generally and (ii) those indemnity and forum selection provisions that may be unenforceable as a matter of public policy.
- e. It is qualified to conduct business in jurisdictions where it is necessary or appropriate or where the failure to do so would not reasonably be expected to result in a Material Adverse Effect.
- f. The Finance Documents do not conflict with laws, judgments, orders or the like binding on the Borrower or conflict with or result in a default under the

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<sup>9</sup> The representations and warranties will be re-made (sometimes in the draw request itself) or deemed re-made with each draw. Expect the lenders to require certificates regarding the accuracy of the representations and warranties at closing, annually and upon any modification of the agreement. One should take care as to which representations and warranties are re-made automatically and, when all of them are re-made (as is usually the case with an amendment) they need to be accurate.

<sup>10</sup> Most lenders' counsel will want to insert something like "including, but not limited to" here and before the lists of covenants and events of default. The lenders should be able to articulate all their representations and warranties, covenants and events of default in the term sheet, but are usually uncomfortable with doing so. See "Additional Provisions" for a solution to this dilemma.

Borrower's other financial obligations.

- g. The Borrower is in compliance with applicable law (including, without limitation, regulations, orders, judgments and decrees) other than such laws, regulations, orders judgments or decrees: (i) the validity or applicability of which Borrower is contesting in good faith or (ii) failure to comply with which would not reasonably be expected to result in a Material Adverse Effect.<sup>11</sup>
- h. The Borrower is in compliance with its indentures and other agreements for the borrowing of funds except where the failure to do so would not reasonably be expected to result in a Material Adverse Effect;<sup>12</sup>
- i. No Event of Default has occurred and is continuing.
- j. Since the date of the most recent filing by the Borrower pursuant to the Securities Exchange Act of 1934, as amended (the "Exchange Act") there has been no change in the Borrower's financial condition and no event has occurred (including, without limitation, events occurring in litigation) that would reasonably be expected to cause a Material Adverse Effect.
- k. The statements made in the Borrower's filings pursuant to the Exchange Act do not contain a misstatement of a material fact or fail to state a material fact so as to make such statements misleading in any material respect.
- l. The Borrower has paid all taxes imposed upon it except for such taxes as it is contesting in good faith or where the failure to pay such taxes would not reasonably be expected to result in a Material Adverse Effect.
- m. The Borrower is solvent.
- n. The Borrower's obligations under the Finance Documents rank on a par with its other senior credit

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<sup>11</sup> In the lenders' standard documentation, this representation is usually unqualified. If the lenders or their counsel balk at the qualification, offer to bring an OSHA inspector through their offices.

<sup>12</sup> Some credit agreements require a non-conflict representation as to all agreements of the borrower. Of course this is silly for a borrower of any significant size. Indentures and other financing agreements are the most likely source of any actual conflicts.

obligations.

- o. The Borrower is in compliance with ERISA except where the failure to do so would not reasonably be expected to result in a Material Adverse Effect.
- p. The Borrower is not subject to the Public Utility Holding Company Act or the Investment Company Act.
- q. The Borrower will use the proceeds of the Loans to refinance existing indebtedness and for general corporate purposes only.
- r. The Borrower will not use the proceeds of the Loans so as to violate Regulations U and X issued by the Board of Governors of the United States Federal Reserve System.

**Affirmative Covenants:** The affirmative covenants shall consist only of the following:

- a. Make the filings required by the Exchange Act in a timely manner (including, without limitation, annual and quarterly financial statements accompanied in the case of annual financial statements by an opinion of a firm of independent certified public accountants).<sup>13</sup>
- b. Provide quarterly compliance certification.<sup>14</sup>
- c. Promptly provide written notice of the occurrence of an Event of Default together with a description of the action the Borrower shall employ to remedy the same.
- d. Promptly provide written notice of the occurrence of any event or circumstance that would reasonably be expected to cause a Material Adverse Effect

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<sup>13</sup> Private borrowers should expect to deliver annual audited and quarterly un-audited financial statements. Some agreements will require public companies to make physical delivery, but will accept an additional clause like the following:

Information required to be delivered pursuant to this section shall be deemed to have been delivered on the date on which Borrower provides notice to Agent that such information has been posted on Borrower's website on the Internet at [www.?????.com](http://www.?????.com), at [sec.gov/edaux/searches.htm](http://sec.gov/edaux/searches.htm) or at another website identified in such notice and accessible by each Lender without charge; *provided* that Borrower shall deliver paper copies of the information referred in this section upon request.

<sup>14</sup> It is common for these certificates to indicate that all the representations and warranties are correct and that no event of default has occurred and is continuing.

An inaccurate certificate could result in criminal charges for bank fraud. See 18 USCA §1344 and remember the three "Cs".

(including, without limitation, circumstances arising in litigation, governmental investigations and environmental matters).

**Financial Covenants:** The Borrower shall maintain the following at the end of each fiscal quarter:<sup>15</sup>

- a. A ratio of EBITDA to interest coverage of at least XX:1.
- b. A ratio of debt to EBITDA of no more than XX:1.

**Negative Covenants:** The negative covenants shall consist only of the following:

- a. Limitations on liens except for (i) liens imposed by law for taxes that are not yet due or being contested in good faith, (ii) carrier's, warehousemen's, mechanic's, materialmen's and other liens imposed by law arising in the ordinary course of business and that are not overdue by more than 30 days, (iii) pledges and deposits made in the ordinary course of business in compliance with workers' compensation, unemployment insurance and other social welfare laws or regulations (including, without limitation, deposits made in the ordinary course of business to cash collateralize letters of credit used to secure obligations described in this sub-clause (iii)), (iv) deposits to secure the performance of bids, trade contracts, leases, hedging obligations, statutory obligations and other obligations of a like nature, (v) liens imposed by statutory or common law relating to deposit accounts, (vi) liens arising in the ordinary course of business in favor of issuers of documentary letters of credit, (vii) judgment liens in respect of judgments that do not constitute an Event of Default; (viii) easements, zoning restrictions, rights-of-way, licenses, minor irregularities of title and similar encumbrances that do not secure any monetary obligations and that do not materially detract from the value of the affected property or interfere with the ordinary conduct of business, (ix) liens associated with any accounts receivable sale program; and (x) liens other than those set forth in the foregoing exceptions that do not in the aggregate affect more than 30% of the book value of the Borrower's

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<sup>15</sup> These are two common financial covenants, but financial covenants can take a wide variety of forms. This is the early warning system for the lenders. Notice they are only maintained when they are measured—sometimes monthly, but at least quarterly.



Tangible Assets.<sup>16</sup>

“Tangible Assets” means the sum of the Borrower’s inventory and property plant and equipment as shown on its most recent balance sheet filed on a form filed pursuant to the Exchange Act.

- b. Sales of assets in any calendar year in amounts that exceed XX% of the book value of the Borrower’s Tangible Assets, provided, however, that the Borrower may make charitable contributions to public and non-profit entities including, without limitation, conveyances of property that further the Borrower’s business interests.<sup>17</sup>
- c. The ability to use the proceeds of loans for other than general corporate purposes.
- d. Transactions with unconsolidated affiliates except for those conducted on an arm’s-length basis.
- e. Mergers and consolidations except where the Borrower is the surviving entity and that do not result in a Material Adverse Effect.
- f. Its ability to change its organizational documents except changes that do not result in a Material Adverse Effect.

So long as the Borrower meets the Financial Covenants there shall be no restrictions on indebtedness, CAPEX, investments or ability to pay dividends.<sup>18</sup>

**Events of Default:**

The “Events of Default” under the Finance Documents shall consist only of the following:

- a. Nonpayment of principal when due.
- b. Nonpayment of interest on the Loans or other amounts owing under or with respect to the Finance Documents within five business days of becoming due.<sup>19</sup>

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<sup>16</sup> Of course each borrower should customize this and the other negative covenants to allow it to operate its business to minimize any need to seek the lenders’ approval.

<sup>17</sup> Expect the lenders to limit this one.

<sup>18</sup> Many agreements contain such covenants—it will depend on the circumstances.

<sup>19</sup> Nearly all loan documents will also contain a cross-default or cross-acceleration event of default. Such a clause will cause a default under the credit agreement if (a) the borrower

- c. Any representation shall prove to be false or misleading in any material respect when made or deemed made.
- d. Breaches of covenants (subject, in the case of affirmative covenants that are capable of being remedied, to a 30-day grace period after the earlier of actual knowledge and notice).
- e. Certain bankruptcy events (subject, in the case of involuntary bankruptcy, to a 60 day grace period).
- f. Involuntary dissolution (subject to a 60 day grace period).
- g. The imposition of any unpaid judgments in excess of USD5,000,000 (which continue for a period of thirty (30) consecutive days during which a stay of enforcement of such judgment or order, by reason of a pending appeal or otherwise, shall not be in effect).
- h. Any material operative provision of the Finance Documents is not enforceable or is invalid or not binding for any reason or any assertion by the Borrower of any of the foregoing, subject to a cure period.
- i. The occurrence of an ERISA default that results in a Material Adverse Effect.<sup>20</sup>

**Additional Provisions:** During the course of its investigations regarding the Borrower, a Lender may in good faith propose, and the Borrower shall in good faith consider, including one or more additional conditions precedent, representations and warranties or covenants to the Finance Documents.

**Voting:** Lenders holding more than a majority of the aggregate amount of the commitments or if the commitments shall have been terminated, Lenders holding more than a majority of the

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breaches a covenant under another credit agreement (cross-default) or (b) a breach by the borrower under another credit agreement causes all sums owed under that agreement to become immediately due and payable (cross-acceleration) . Obviously the latter is more favorable to the borrower. Usually they are also limited to breaches involving more than an agreed-upon amount (e.g., financing agreements over \$20,000,000) because neither the lenders nor the borrower would want a default under a photocopier lease to crash a billion dollar credit agreement.

<sup>20</sup> Another common, but not preferable, event of default is one that involves the occurrence of a Material Adverse Effect. If the lenders insist on such a clause, it should have a cure period.

unpaid principal amount of the loans, except in the case of changes affecting the fundamental nature of the transaction such as changes to the applicable interest rates and principal amounts.<sup>21</sup>

**Assignments and Participations:**

The Borrower shall not be permitted to assign its obligations under the Finance Documents.

The Lenders shall be permitted to assign their obligations under the Finance Documents with the prior written consent of the Borrower (such consent not to be unreasonably withheld or delayed).<sup>22</sup>

The Lenders shall be permitted to sell participations in the loans and their commitments without the permission of the Borrower or the Agent so long as the Lender remains liable for its obligations under the Finance Documents it being understood that a participant shall have no greater rights under the Finance Documents than the Lender from which it purchased its participation.

**Yield Protection:**

Lenders shall be entitled to compensation for increased costs and taxes so long as they (a) make claims for the same no later than ninety days following the incurrence thereof and (b) take such action as the Borrower may reasonably request to eliminate or mitigate such increased costs or taxes.

**Governing Law:**

The internal laws of the State of New York shall govern the Finance Documents.<sup>23</sup>

**Waiver of Jury Trial:**

The parties to the Finance Documents shall waive their rights to a trial by jury in connection with any action or proceedings arising out of the transactions contemplated by the Finance Documents.

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<sup>21</sup> Depending on the number of lenders and the relative size of each of their participations, they may insist on a super-majority rather than simple majority voting.

<sup>22</sup> Expect the lenders to want unfettered rights to assign. This needs to be balanced against the borrower's right to know with whom it will be dealing. Some foreign lenders may be required by law to be able to assign their loans to a state-owned bank or pursuant to governmental decree.

<sup>23</sup> Forum selection clauses are also common.

**Indemnification:**<sup>24</sup>

The Borrower shall defend, indemnify and hold harmless each Lender and any affiliate of a Lender that is made a party or threatened to be made a party to any action or proceeding arising out of such Lender's participation in the loans contemplated by the Finance Documents; provided, however, that (a) the Borrower shall have the right to control the defense of all such proceedings so long as (i) no Event of Default has occurred and is continuing, (ii) the Borrower vigorously prosecutes such defense, and (iii) the indemnified party shall not be required to admit culpability in any criminal proceeding; (b) the indemnified party shall undertake all reasonable efforts to assist in the defense of any such proceedings, (c) the Borrower shall not be required to indemnify any Lender in an action by the Borrower against that Lender for that Lender's failure perform its obligations under the Finance Documents, and (d) no Lender shall be entitled to indemnification for actions arising out of its gross negligence or willful misconduct (including, without limitation, criminal conduct) as finally determined by a court of competent jurisdiction.

**Expenses:**

The Borrower shall pay all reasonable and documented out-of-pocket expenses incurred by the Lenders in connection with the preparation of the Finance Documents and the enforcement of their rights thereunder, including (without limitation) fees and expenses of Clarence & Martini, counsel to the Lenders; provided however, that in no case shall the Borrower be required to pay more than USD50,000 for the preparation, execution and delivery of the Finance Documents by counsel to the Lenders (not including any amendment thereof).<sup>25</sup>

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<sup>24</sup> Lenders are very sensitive to indemnification. This is understandable, but most of what is here can usually be obtained.

<sup>25</sup> You can get most of this most of the time. Some lenders will not tolerate limits on their counsel fees at all. In a few cases, they will agree to a cap with a 50-50 sharing for amounts above the cap. The main idea is to get the agent to control its counsel and to avoid having to pay for more than one law firm—if the matter is left unaddressed, expect each lender to hire its own counsel and have the borrower pay the bill.

## Surviving Hell and High Water

Most leases have some language along the following lines:

Lessee's obligations under this Lease are absolute, and will not be subject to diminution for any reason, including, without limitation, any breach of any obligation of Lessor (whether by Lessor or its assign(s)), or of any manufacturer of any of the leased equipment. Lessee waives and disclaims all claims, rights of set off, counterclaim and deduction, and any defenses, Lessee may have against Lessor.

This is referred to as the “hell and high water” clause. The lessors' lenders push their borrowers to include it in their leases for obvious reasons. Lessors sometimes default on their loans however, and several courts have read hell and high water clauses to mean that lessees must continue making payments even though the lessor's lender has repossessed the property. See *West Virginia v. Hassett (In re O.P.M. Leasing Services Inc.)*, 21 B.R. 993 (Bankr. S.D.N.Y. 1982) and *Colorado Interstate Corporation v. CIT Equipment Financing, Inc.*, 993 F. 2d 743 (10<sup>th</sup> Cir. 1993). That is a horrible result for a lessee, but it can be avoided by adding a sentence to the hell and high water clause:

Notwithstanding the foregoing, Lessee shall not be required to pay rent if it is denied use of the leased property as a result of: (a) Lessor's breach of its covenant of quiet enjoyment, or (b) the bankruptcy or insolvency of Lessor.

This is often not easy to sell to a lessor, but in my experience nearly all of them accept something like the new sentence after being given this explanation. Don't sign a lease from the few that don't—there's always another lessor.

**[LETTERHEAD OF FINANCIAL INSTITUTION]****Irrevocable Standby Letter of Credit No. 0000**

Date: \_\_\_\_\_, 200\_

Beneficiary:

XYZ Industries Inc.  
 000 Broadway  
 New York, NY 00000  
 Attn: Treasurer

We hereby issue in favor of XYZ Industries Inc. ("XYZ") our Irrevocable Standby Letter of Credit No: 0000 for the account of ABC Company, LLC for an amount or amounts not to exceed in the aggregate XXXX and NO/100 UNITED STATES DOLLARS (USD 0,00,000.00) and expiring at our counters on \_\_\_\_\_, 200\_.

Funds under this credit are available against a statement, purportedly signed/sent by an authorized representative of XYZ in the following format (with the blanks completed):

"The undersigned, an authorized representative XYZ Industries Inc. ("XYZ"), certifies that (a) ABC Company, LLC ("ABC") has failed to pay the amount of USD\_\_\_\_\_ pursuant to the terms of an agreement between XYZ and ABC and XYZ is entitled to draw such amount pursuant to your Irrevocable Standby Letter of Credit No. 0000, on the date hereof."

Drawing(s) presented by fax (to fax number \_\_\_\_\_) are acceptable.

Drawing(s) in compliance with all of the terms of this Letter of Credit, presented prior to noon, Eastern (U. S.) time, on a business day, shall be made to the account number or address designated by you of the amount specified, in immediately available funds, on the same business day.

Drawing(s) in compliance with all of the terms of this Letter of Credit, presented on or after noon, Eastern Time, on a business day, shall be made to the account number or address designated by you of the amount specified, in immediately available funds, on the following business day.

This Letter of Credit shall automatically expire and be delivered to us for cancellation on \_\_\_\_\_, 200\_.

Demands for payment presented in compliance with the terms and conditions of this credit will be duly honored on presentation if presented on or before the expiry date.

This credit is subject to International Standby Practices ISP98, International Chamber of Commerce-publication no. 590 or any successor publication by the same organization.

XYZ Industries Inc.  
YYY XX, 200\_  
Page 2

Please address all correspondence regarding this Irrevocable Standby Letter of Credit to [Name and address of Bank], Attention: Business Banking Department, mentioning our letter of credit number.

Sincerely,

XXX Bank

By: \_\_\_\_\_  
Name:  
Title:

[LETTERHEAD OF FINANCIAL INSTITUTION]

Date: \_\_\_\_\_, 200\_

Beneficiary:

XYZ Industries Inc.  
000 Broadway  
New York, NY 00000  
Attn: Treasurer

Re: Irrevocable Documentary Letter of Credit No.: 0000

Currency Amount: USD 00,000,000

Issue Date \_\_\_\_\_, 200\_

Expiry Date: \_\_\_\_\_, 200\_

Ladies and Gentlemen:

We hereby establish our irrevocable letter of credit no. [ ] in your favor for the account of XYZ Industries, Inc. ("XYZ"). We shall remit the following sums to your account number ##### at [insert name of depository bank and ABA number or other appropriate information] by wire transfer upon receipt of a copy of a bill of sale from XYZ together with the draw request in the form attached hereto as Exhibit A.

This letter of credit will expire on the Expiry Date.

This credit is subject to the Uniform Customs and Practice for Documentary Credits (2007 Revision), International Chamber of Commerce Publication No. 600.

This letter of credit sets forth in full the terms of our undertaking.

All of our charges and commissions shall be for the account of ABC Company, LLC.

Sincerely,

Big Time Bank

By: \_\_\_\_\_  
Name:  
Title:



**Exhibit A**  
**Form of Draw Notice**

Big Time Bank  
0000 Main Street  
Any Town USA

Re: Irrevocable Standby Letter of Credit No: 0000 (the "Credit")

Ladies and Gentlemen:

This is notice that all conditions precedent to the drawing under the Credit have been fulfilled and you will find a copy of a bill of sale duly executed by XYZ Industries Inc. attached. You are instructed remit the entire amount of the Credit (USD 0,000,000) as follows:

Account No:  
Bailey Bank

ABA:

Sincerely,

XYZ Industries Inc.

By: \_\_\_\_\_  
Name:  
Title:

## GUARANTEE

This GUARANTEE dated \_\_\_\_\_, 200\_, is given by ABC Corporation, a Delaware corporation ("Guarantor") to XYZ Industries, Inc. (the "Beneficiary") for the benefit of ABC Company, LLC (the "Obligor"), a wholly owned subsidiary of Guarantor.

NOW THEREFORE in order to induce the Beneficiary enter into one or more agreements for the benefit of the Obligor, and intending to be legally bound hereby Guarantor agrees as follows:

1. **Guarantee.** Guarantor hereby absolutely and unconditionally guarantees, on a continuing basis, the punctual payment when due of up to USD 00,000,000 of the payment obligations of the Obligor to Beneficiary now or hereafter existing under that certain agreement for the delivery of widgets from time to time dated \_\_\_\_\_ between the Beneficiary and the Obligor (the "Agreement") whether such payment obligations become due when scheduled or upon early termination (collectively, the "Obligations")<sup>1</sup>. The Beneficiary shall not be bound to exhaust its recourse against the Obligor or any collateral it may hold before being entitled to payment from Guarantor under this Guarantee. Guarantor's obligation hereunder shall not be limited, lessened or discharged by any act on the part of the Beneficiary or other matter or thing including the bankruptcy or insolvency of the Obligor save due performance by the Obligor or Guarantor.

2. **Guarantee Absolute.** Guarantor guarantees that the Obligations will be paid in accordance with the terms of the Agreement, regardless of any law, regulation or order now or hereafter in effect in any jurisdiction affecting any of such terms or the rights of the Beneficiary with respect thereto. The liability of Guarantor under this Guarantee shall be absolute and unconditional irrespective of the following:

a. any change in the time, manner or place of payment of or in any other term of, all or any of the Obligations, or any other amendment or waiver of or any consent to departure from the Agreement, or any notice to or consent of Guarantor in respect of the foregoing, or discontinuances, reductions, increases or other variations in the Obligations, or the granting of any indulgences, extensions, releases or discharges respecting the Agreement; and

b. any other circumstance (other than payment) which might otherwise constitute a defense available to, or a discharge of, the Obligor in respect of the Obligations or Guarantor in respect of this Guarantee

Notwithstanding the foregoing and although Guarantor's obligations under this Guarantee shall not be affected by the invalidity or unenforceability of the obligations against Obligor; the Guarantor reserves the right to assert defenses that it could assert if

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<sup>1</sup> This guarantee is a guarantee of payment. It may not be as useful in situations where performance is called for such as delivery of certain goods at a specified time and place. In that case, the beneficiary would want a guarantee of performance under the terms of the contract. Otherwise, the beneficiary may have to sue to ascertain damages before payment can be obtained.

it had entered into the Agreement and the transactions contemplated thereby directly with Beneficiary.

3. **Revocation.** Guarantor may revoke this Guarantee by giving notice of revocation to the Beneficiary, but revocation shall not be effective until thirty days after receipt of said notice of revocation, and shall not affect or impair the liability of Guarantor with respect to any Obligations incurred prior to the effective date of revocation, whether demand for payment is made before or after the effective date of revocation.<sup>2</sup>

4. **Reinstatement.** This Guarantee shall continue to be effective or be reinstated, as the case may be, if at any time any payment of any of the Obligations is rescinded or must otherwise be returned by the Beneficiary on the insolvency, bankruptcy or reorganization of the Obligor or otherwise, all as though such payment had not been made.

5. **Expenses of Collection.** Guarantor further agrees to pay all costs and expenses, including attorney fees, incurred by the Beneficiary, or its assignee, in the enforcement of this Guarantee, unless a court of competent jurisdiction finds that the Beneficiary's position in attempting to enforce this Guarantee is substantially without merit so that the awarding of cost and expenses, including attorney's fees, would be inequitable.

6. **Subrogation.** Guarantor shall be subrogated to the rights of Beneficiary against the Obligor in respect to any amounts paid by the Guarantor pursuant to the provisions of this Guarantee provided, however, that (a) Guarantor shall not be entitled to exercise any rights of subrogation against Counterparty until Counterparty has fully and finally performed all its obligations under the Agreement and (b) Guarantor subordinates its rights against Counterparty to the rights of the Beneficiary against the Counterparty.

7. **Notices.** Any notices or other communication hereunder shall be in writing and shall be effective upon receipt or refusal of delivery at the following addresses:

If to Guarantor:

ABC Corporation  
[Insert Address and contact data.]

If to Beneficiary:

XYZ Industries Inc.  
[Insert Address and contact data.]

8. **Amendments.** No amendment or waiver of any provision of this Guarantee nor consent to any departure by Guarantor therefrom shall be effective

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<sup>2</sup> A guarantee is revocable unless it is clearly made irrevocable. If you can't get an irrevocable guarantee, it's best to outline how the guarantee can be revoked.

unless it shall be in writing and signed by the Beneficiary, and then only for the specific purpose for which given.

9. **Successors and Assigns.** This Guarantee shall inure to the benefit of the Beneficiary and its successors, transferees and assigns and shall bind the Guarantor, its successors and assigns. Guarantor may not assign its obligations hereunder without the prior written consent of the Beneficiary. The Beneficiary must give written notice to the Guarantor of any assignment of this Guarantee. The Beneficiary cannot make an assignment that would result in any additional taxes being imposed upon the Obligor or the Guarantor.

10. **Partial Invalidity.** A provision of this Guarantee that may be determined by competent authority to be prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

11. **Governing Law.** This Guarantee shall be interpreted in accordance with the internal laws of the State of New York. Guarantor (a) agrees that any action or proceeding arising under this Guarantee may be brought in the Courts of the Any State or the United States of America situated in Any Town, Any State, U.S.A., (b) agrees to submit to the jurisdiction of said courts and (c) waives any argument that such courts represent an inconvenient forum.

12. **Headings.** Section and subsection headings are not part of this Guarantee. They are included solely for convenience and are not intended to be full or accurate descriptions of the content thereof.

13. **Effectiveness.** This Guarantee shall take effect as of the date first written and shall remain in force until all Obligor's obligations under the Agreement have been met.

14. **Waiver of Jury Trial.** THE GUARANTOR HEREBY EXPRESSLY WAIVES ANY RIGHT TO TRIAL BY JURY IN ANY ACTION BROUGHT ON OR WITH RESPECT TO THIS GUARANTEE

IN WITNESS WHEREOF, Guarantor has caused this Guarantee to be duly executed and delivered by a duly authorized officer on its behalf.

ABC Corporation

By: \_\_\_\_\_  
[Name and Title]