



208: Conducting Business with a Financially Troubled Company

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Faculty Biographies

Jeffrey S. Fraum

Jeffrey S. Fraum is senior attorney for Tellabs, a leading provider of telecommunications equipment, located in Naperville, Illinois. His practice includes contracts and commercial law, bankruptcy and creditor's rights, joint ventures, antitrust, intellectual property licensing, litigation management, real estate, and acquisitions.

Prior to going to Tellabs, Mr. Fraum worked for Bunge Corporation, Union Camp Corporation, Chicago Board Brokerage, and Siemens Medical Services. After clerking for Hon. John C. Eldridge of the Court of Appeals of Maryland, Mr. Fraum entered private practice with the New Jersey firm of Hanoach Weisman.

His publications include "Transfers of Technology Rights to Joint Ventures," "A Model Questionnaire for Expediting Review of Software Procurements," and "A Practical Strategy for Complying With the Bulk Sales Act," each of which appeared in *The Practical Lawyer*.

He is a graduate of Haverford College and Rutgers School of Law-Newark, where he was a recipient of the Rutgers Graduate Scholars Award.

George Kielman

George Kielman is assistant general counsel for Freddie Mac, headquartered in McLean, Virginia. Freddie Mac holds more than \$1 trillion in residential mortgages, financed either by mortgage securitization activities or the issuance of debt. Mr. Kielman oversees all legal aspects of Freddie Mac's multifamily loan loss mitigation activities, including foreclosure litigation throughout the U.S., documentation of complex workouts with troubled borrowers, and bankruptcy litigation in chapter 7, 9, 11 and 13 bankruptcies. Mr. Kielman also provides bankruptcy advice regarding loan production activities and vendors in bankruptcy or other financial distress.

Prior to coming to Freddie Mac, Mr. Kielman handled complex commercial and bankruptcy litigation for the U.S. Department of Justice and the U.S. Department of Energy, where he was deputy solicitor to the special counsel. Mr. Kielman has conducted dozens of trials, including one to determine the value of a bankrupt utility, lasting two-and-a-half months. Because of this background, and notwithstanding his in-house status, Mr. Kielman personally litigates many of the bankruptcy cases coming his way.

Due to his nationwide practice, in addition to his state court admissions, Mr. Kielman is admitted to and has practiced before numerous federal courts at all levels, including the U.S. Supreme Court. He is an active member of the ABA and the Federal Bar Association.

Mr. Kielman received a BA from the University of Pennsylvania and was awarded a JD by the Boston University School of Law.

Eghosa D. Omoigui

Eghosa Omoigui is a senior attorney with Intel Capital (“ICap”), the venture capital subsidiary of Intel Corporation. In the role of worldwide team lead for ICap Legal, he manages and coordinates ICap portfolio management projects and handles M&A, securities compliance and insolvency issues related to Intel Capital’s investment portfolio activity. Mr. Omoigui is the lead attorney for strategic investments in enterprise software and design technology and by the Intel 64 Fund. He is the team lead for Intel legal’s bankruptcy & insolvency practice group, a member of ICap’s M&A legal team, and also provides support for general Intel Treasury projects and cross-border structured deals.

Prior to Intel, he was general counsel and executive vice president of business & legal affairs of GreenHub, a B2B technology company. Prior to that he was a senior associate at Ball Janik LLP. As a founding member of that firm’s start-ups and technology practice subgroup, he handled corporate/securities matters while representing venture capital firms and start-ups.

Mr. Omoigui serves as an advisor to the Korean IT Network and has served on the judging panel of venture capital professionals at the annual KIN Investment Consulting Conference. He has also been an invited judge/tutor to programs organized by the National Foundation for Teaching Entrepreneurship, an organization with a mission to teach entrepreneurship to low income youth by improving their business, academic, technology and life skills. He has also been a member of several ABA Committees including the Small Business Committee, the Committee on Federal Regulation of Securities and the Task Force on Small Business Issuers.

Mr. Omoigui graduated with honors from the University of Nigeria Law School and received an LL.M in Domestic and International Business Transactions from the University of Pennsylvania Law School. He is currently pursuing an MBA from Babson College.

**YOUR CUSTOMER OR YOUR SUPPLIER IS KNOWN
TO BE HAVING FINANCIAL DIFFICULTIES –**

HOW CAN YOU PROTECT YOURSELF?

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The following materials are intended to raise awareness of legal issues. The information should not be construed as legal advice or a legal opinion on specific facts, or as representative of the views of the author's organizations or of the authors, unless expressly stated. This article is not intended as a definitive statement of the issues discussed herein, but as a tool, providing practical information for the reader.

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In today's sluggish economy, clients are increasingly required to do business with customers and suppliers in financial difficulty. The discussion below addressed certain precautionary measures to better protect against such problems, as well as steps to take if your client has failed to do so.

I. The Risky Customer – Strategies For Dealing With A Customer You Believe May Be Having Financial Difficulties

A. Work With and Educate Your Company's Credit Department.

Your client's Credit Department is your first line of defense. Work with them; provide tutorials, informational sessions and instruction. Topics to be covered should include:

1. Keeping Current Information on Customers.

- a. **Industry News.** The Credit Department can and should regularly check for bankruptcies, news and defaults. Consider running D&B reports. Ask other vendors in the industry about the customer. Check the internet.

Practice Tip: Lexis and other online services offer various services to actively monitor public filings and lawsuits filed by or against specific companies.

- b. **Be Proactive and Be Persistent.** Make sure the customer knows that you are watching them closely. Promptly follow up on late payments. Promptly question the customer on information received regarding the customer's financial difficulties.
- c. **Credit Application.** Consider periodically requesting an updated credit application for existing customers. This is a great tool. Customers will find it difficult to justify saying no to a request for an updated credit application. The information provided in the updated credit application opens the door for discussions regarding additional credit support and enhancement. It may also provide a basis for later claims against the customer for reclamation, adequate assurance of due performance, or fraud.

SAMPLE LANGUAGE FOR REPRESENTATION BY CUSTOMER IN CREDIT APPLICATION:

By executing this agreement, the undersigned entity hereby represents and warrants that all financial information supplied pursuant to this Credit Application is true, accurate, complete and not misleading in any respect and fairly represents the Company's financial position as of the

date submitted, and that the entity signing is solvent as of the current date.

2. **Credit Support and Enhancement.**

- a. **Credit Terms.** Consider changing credit terms to cash-in-advance, cash-on-delivery, or to shortened credit terms with a credit limit. These changes should be reflected by contract amendments (if necessary) on purchase orders and on invoices (order acknowledgements) to the customer.

Practice Tip: Although changing credit terms with a troubled company may heighten the risk of being later sued for a preference, it is always better to get the money and defend against a preference claim than not to get the money at all!

- b. **Security Interests.** If your client sells any personal property or goods, recommend that your client consider requiring that the customer grant a purchase-money security interest ("PMSI") in any personal property or goods being sold. This is a very powerful credit support and enhancement tool. It can be done routinely (using form documents), it costs the customer nothing, is easily justifiable, and is relatively simple and inexpensive to file with the appropriate state agencies (and counties, if appropriate).

What is a PMSI?

A PMSI is a legal mechanism that allows a seller to take a security interest in its own equipment that is being sold on credit (UCC § 302(1)). A PMSI is a "priming lien" which receives a senior priority status over any existing liens on the customer's equipment. PMSI's are designed to encourage sales of new goods to customers on credit, without fear of being "last in line" if the customer later encounters financial difficulties. Under Revised Article 9 of the Uniform Commercial Code (available on the Internet at, for example, <http://www.law.cornell.edu/ucc/9/overview.html>), PMSI's have been extended and may include software being sold as part of the integrated transaction.

A PMSI is obtained by having the customer sign a Security Agreement and a Financing Statement. The Financing Statement is also commonly referred to as a UCC-1. To "perfect" the PMSI, the Financing Statement is filed with the appropriate state agencies (and counties, if appropriate). You can get a list of where to file and the cost of filing in various states on the Internet.

Practice Tip: The customer may argue that its secured lender will not allow PMSI's under its existing credit facility. However, while most credit facilities require the secured lender's consent to PMSI's, secured lenders will usually consent to PMSI's because such personal property or goods were not included in the secured lender's underwriting of its loan and will not impede any of such secured lender's existing collateral.

[A SAMPLE SECURITY AGREEMENT IS ATTACHED AS "ATTACHMENT A" AND A SAMPLE UCC-1 FINANCING STATEMENT IS ATTACHED AS "ATTACHMENT B"]

1. **Guarantees.** Consider requesting guarantees of affiliated companies and corporate principals. It is important to conduct due diligence on the guarantors – request credit applications, financial statements, and credit references. Unless the guarantors themselves file for bankruptcy, you can pursue the guarantors for amounts owed if the customer later files for bankruptcy. Note that Guarantees are tricky beasts, disfavored by the law and involve a minefield of potential defenses, all of which you want the guarantor to be waived. Perhaps most importantly, the guaranty should be a guaranty of payment and not of collection – you do not want to be obligated to pursue the debtor to the ends of the earth before you are able to collect against the guarantor.

[A SAMPLE GUARANTY IS ATTACHED AS "ATTACHMENT C".]

2. **Letters of Credit ("LC's").** Consider requesting that a standby letter of credit be issued that can be drawn upon a payment default. LC's are valuable but can be difficult to obtain from customers because they may tie up a portion of the customer's cash. However, the customer may already have LC availability on its lines of credit from its banks. LC's are generally not "property of the estate" in a bankruptcy, so the LC can be drawn upon even if the customer files for bankruptcy. If you are accepting a Letter of Credit, you want to make certain that you will be able to produce the documents against which the letter of credit is to be paid. [A SAMPLE LETTER OF CREDIT ATTACHED AS "ATTACHMENT D"]
3. **Credit Insurance.** Consider getting credit insurance for riskier customers. However, the paradox is that the riskier

the customer is, the more difficult it will be to obtain credit insurance. Credit insurance also can be expensive, but you may be able to negotiate rates if you establish a long-term relationship with an insurer. Credit insurance is an insurance policy between your client and the insurance company, and the customer is not a party to the contract. Accordingly, the credit insurance proceeds are not “property of the estate” in the customer’s bankruptcy, and can be claimed after the customer files for bankruptcy. You must carefully follow the policy notice requirements and otherwise comply with your duties under the insurance policy (e.g., timely file claims and otherwise perform your obligations under the policy). In some instances, export credit insurance may be available from governmental entities.

4. **Put Agreements.** When a customer is a particularly high credit risk, credit insurance may not be available. However, your client may still be able to obtain some limited protections to defray a portion of the credit risk in the form of a Put Agreement from a third-party source.

II. **The Precipice of Bankruptcy – Pre-Bankruptcy Strategies**

- A. **Aggressively Pursue Collection.** Consider making professional and polite collection phone calls to high-level officers and managers of the customer, sending them demand letters, or making “in-person” collection calls – this is no time to be shy.
- B. **Adequate Assurance of Due Performance.** Consider making a demand for adequate assurance of due performance. This is a legal mechanism under Article 2 of the Uniform Commercial Code, where a seller may make a written demand to a customer for adequate assurance of due performance, and may suspend performance on a contract until the adequate assurance is received. To make such a demand for adequate assurance, a seller must have “reasonable grounds for insecurity”. Also, the suspension of performance must be commercially reasonable. If adequate assurance of due performance is not received within 30 days of the demand, the contract may be considered to be repudiated by the customer.

UCC § 2-609. Right to Adequate Assurance of Performance.

- (1) A contract for sale imposes an obligation on each party that the other’s expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if

commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

[SEE FORM LETTER DEMANDING ADEQUATE ASSURANCES, "ATTACHMENT E"]

- C. **Stoppage-In-Transit.** Consider attempting to stop any shipments of product that are in route to be delivered.
- D. **Reclamation.** Consider sending a demand for reclamation of goods that have recently been delivered. This typically must be done within 10 days after the goods are shipped to the customer, but may be extended for a short period of time under limited circumstances such as a bankruptcy filing or a false representation of solvency.

UCC § 2702. Remedies of seller on discovery of insolvency of buyer.

(b) Reclamation of goods on credit. — Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten-day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

[SEE FORM RECLAMATION LETTER, "ATTACHMENT F"]

Practice Tip: You should specifically identify the goods being reclaimed, and, if possible, arrange for your client to obtain an inventory of such goods as soon as possible after the reclamation demand is sent.

- E. Collection Lawsuit/Replevin.** Consider filing a lawsuit for damages or for replevin to take back any equipment secured by a PMSI. Replevin actions can typically be done very quickly, but you may need to post a bond of up to two times the value of the equipment. Also, these actions typically need to be filed in state court where the equipment is located. The lawsuit can also include claims for the past due amounts owed and, in some cases, for legal fees.
- F. Preferences.** There is a potential risk of “preference” exposure for past due amounts received within 90 days prior to the customer filing for bankruptcy, but it is far better to get the money now and let a bankruptcy trustee try to get the money back later. Although beyond the scope of this discussion, note that in many instances you will be able to make an argument that even preferential payments received fall under one of the defenses to a preference claim. See, 11 U.S.C. § 547.
- G. Setoffs:** Consider advising your client to take any available setoffs against any amounts it owes to the customer prior to the customer filing for bankruptcy, rather than waiting to see if a bankruptcy is filed. Although creditors can generally take setoffs after a bankruptcy is filed, your client will be required to obtain Bankruptcy Court authority to effectuate its setoff.

III. CUSTOMER IN BANKRUPTCY

Upon learning that the customer has filed for bankruptcy, immediately consider the following:

1. Can your client get the goods back?
 - a. Reclamation
 - (i) Within 10 days of shipment (or if the customer’s bankruptcy was filed during this 10-day period, within 20 days after the customer’s receipt of the goods)? If so, send the reclamation letter immediately. (We mean immediately. Stop reading and send the letter now.)
 - (ii) False financials/representation of solvency. Review credit application and other materials to see if your client has a viable claim.
 - b. MSI (discussed above).
 - c. Stop in transit (discussed above).
2. Can your client get paid on pre-filing amounts?
 - a. Executory Contracts/Unexpired Leases. Any contract that is executory or any unexpired lease must be accepted (and cured) or rejected. This is

particularly useful for service/support agreements and software agreements. Consider working with the debtor on a joint motion.

- b. Perfected Security Interest. Generally, your client will either receive payment, or get the goods back.
- c. Critical Vendor. Your client may be able to receive partial or full payment for pre-bankruptcy amounts if your client is considered to be a “critical vendor” of the debtor. Note that such “critical vendor” payments have been called into question in certain recent bankruptcy opinions.
- d. Setoffs. The Bankruptcy Code does not deprive your client of its state law right of setoff. But note that setoffs serve only mutual offsets of pre-bankruptcy amounts, not post-bankruptcy amounts. See, Section 553 of the Bankruptcy Code. Recoupment is a similar concept used to “straddle the line” and setoff pre-bankruptcy debts against post-bankruptcy debts; however, its application is far more limited than setoffs.

IV. THE RISKY SUPPLIER IN FINANCIAL DIFFICULTY

- A. Recommend to your client that your client find another supplier. This may seem absurdly simple (not in the least of which, because it is), but when your client starts asking questions because they are concerned about a supplier’s long-term prospects, raise this issue. Your client may believe that if there is any trouble with the supplier (such as bankruptcy), you will always be able to send a threatening letter and make their goods or payment appear. Explain that you are an attorney, not a magician. Explain the “blood from a stone” concept.
- B. Recommend that your client build up an inventory of critical supplies and components from the supplier and begin making arrangements for an alternative/backup source for such critical components. Single sourcing critical components is always a risk; doing so from an entity in financial difficulty is doubly so — this may result in production stoppage or delay.
- C. Review the terms and conditions of any existing supply contracts or purchase orders. What are your remedies? Would they realistically be available in case of bankruptcy?
- D. Consider entering into a Consignment of Components/Finished Goods to be kept at your client’s your site or in a segregated area of the supplier’s site.

E. File UCC's with respect to the supplier's site with respect to:

1. Raw materials
2. Your goods (finished/unfinished/work-in-progress)
3. Tools/molds/dies/etc.

Note: If there are other lien holders, consider obtaining a subordination agreement from them.

F. Identify and clarify any potential issues with respect to ownership of tools/molds/dies/etc. by agreement and have the customer waive any statutory lien rights on such tools/molds/dies/etc.

G. Manufacturing Rights

[SEE ATTACHMENT G, SAMPLE MANUFACTURING RIGHTS PROVISION]

H. Software/Special Cases

If your client licenses software that is critical to its operations, consider having the licensee escrow the software source code and other related materials, so that your client might still have the right (though it may be technically difficult) to use and maintain the software if the licensor files for bankruptcy.

Also, if your client is a licensee, you should consider filing a security interest as to the software.

1. **Exclusive License.** If your client is or will be the exclusive licensee of the software, consider trying to purchase the software outright. At minimum, make certain that your client has the right to exclude others from using the license. Note that even if your client can continue to use the software, the licensor can reject any obligation to provide services or maintenance on the software; your client may be left on its own for these and need to resort to the escrow. See, Bankruptcy Code, Section 365(n).
2. **Non-exclusive License.** See, Section 365(n) of the Bankruptcy Code.
3. **Software Escrows Generally.** When setting up the escrow of software source code, consider the following:
 - a. **Triggers.** Make certain that the escrow agreement contains triggers that your client will be able to monitor and that will likely be triggered before bankruptcy. Things like credit rating, defaults under other agreements, support performance, meeting new release target dates, etc.

- b. **Separate Agreements.** Consider having a separate agreement between your client and the escrow agent and a separate agreement between the license holder and the escrow agent. That way, if the licensor files for bankruptcy, your client has separate rights that can be enforced against the escrow agent.
- c. **Materials/Testing.** In addition to the source code, the escrow should include other materials, designers/notebooks, and anything else that might assist your client to maintain and develop the software. Also, advise your client to consider doing periodic testing to assure that the escrowed materials are up to date and usable.
- d. **Right to Develop.** Your client should have the right to use the software to develop other feature packages, modify the source code, etc. Your client will likely go to great expense if forced to resort to the escrow, and should be able to use the software as necessary or desirable.
- e. **Right to Hire Licensor's Employees.** Make sure that your client has the right to hire the Licensor's employees; they will be critical to your client's ability to utilize the escrowed materials (despite any non-competes or NDA they may have with their employees/make the employees third party beneficiaries on these rights).

Final Thought: The bankruptcy of a critical supplier or customer is a crisis that requires prompt and careful legal counsel; hopefully the above will assist, should your client ever be in such a situation. However, remember also that an ounce of prevention can make the task much easier.

ATTACHMENT A

SECURITY AGREEMENT

This Security Agreement, made and entered in this _____ day of _____, 200____, by and between SELLER , Inc., located at _____, (hereinafter "Secured Party") and _____, located at _____, (hereinafter "Debtor").

I CREATION OF SECURITY INTEREST

In consideration for the extension of credit, Debtor hereby grants a security interest in and assigns to the Secured Party the Collateral described in Paragraph II below to secure payment and performance of all debts, liabilities and obligations of Debtor of any kind whenever and however incurred to Secured Party.

II COLLATERAL

To secure payment and performance Debtor hereby grants to Secured Party a continuing security interest in all inventory, equipment, and goods manufactured by or distributed by Secured Party, whenever sold, consigned or delivered, directly or indirectly, to or for the benefit of Debtor by Secured Party, wherever located, now owned and hereafter acquired including but not limited to _____, and all proceeds from the sale thereof; and all existing or subsequently arising, accounts, and all accounts receivable which may from time to time hereafter come into existence during the term of this Security Agreement (collectively, "Collateral"). Secured Party's security interest is explicitly limited to outstanding obligations between Secured Party and Debtor.

III DEBTOR'S OBLIGATIONS

- A. The Collateral will not be misused or abused, wasted or allowed to deteriorate, except for the ordinary wear and tear of its intended primary use.
- B. The Collateral will be insured until this security agreement is terminated against all expected risks to which it is exposed.
- C. The Collateral will be kept at the Debtor's place of business, aforementioned, where Secured Party may inspect it at any time. Debtor warrants and covenants that (1) the Collateral will be held for use, sale or lease in and for Debtor 's business and will be kept only at the principal place of business set forth herein (and Debtor 's additional address(es) set forth with its signature, if any), and (2) Debtor will notify Secured Party in writing fifteen (15) days prior to any change in location of any material or substantial portion of the Collateral.
- D. The Collateral will not be sold, transferred, disposed, or made subject to any paid charge, including taxes of any subsequent interest of a third party created or suffered by Debtor, voluntary or involuntary, unless Secured Party consents in writing to such charge, transfer or disposition.
- E. Debtor will sign and execute any financing statements or other document or procure any document and pay all connected costs necessary to protect the security agreement against the interests of a third party.
- F. Debtor will reimburse Secured Party for any action to remedy a default under this agreement.
- G. Debtor will promptly advise Secured Party in writing of its opening of any new places of business, or the closing of any existing places of business, or the change of name or nature of entity of Debtor.

IV DEFAULT

The following shall constitute a default by Debtor:

non-payment: Failure to pay the principal or any installment of principal or of interest on the indebtedness or any notes when due. In addition, Debtor shall be in default if bankruptcy or insolvency proceedings are instituted by or against the Debtor or if Debtor makes any assignment for the benefit of creditors.

misrepresentation: Misrepresentation or misstatement in connection with, noncompliance with or nonperformance of any of Debtor's obligations or agreements under Paragraphs III or VII shall constitute default under this Security Agreement

V SECURED PARTY'S RIGHTS AND REMEDIES

- A. Secured Party may assign this security agreement, and
- (1) If Secured Party does assign this security agreement, the assignee shall be entitled, upon notifying the Debtor, to performance of all Debtor's obligations and agreements under Paragraphs III and VII, and assignee shall be entitled to all of the rights and remedies of Secured Party under this Paragraph V, and
 - (2) Debtor will assert no claims or defenses it may have against Secured Party or against its assignee except those granted in this security agreement.
- B. Upon Debtor's default, Secured Party, shall have all rights set forth under the Uniform Commercial Code, including, but not limited to Article 9, and may exercise his rights of enforcement under the Uniform Commercial Code in force in the state where the Collateral is located or where the UCC Financing Statement is filed and in conjunction with, in addition to or substitution for those rights, the Secured Party may, at Secured Party's discretion
- (1) Enter upon Debtor's premises to take possession of, assemble and collect the Collateral or to render it unusable, and
 - (2) Require Debtor to assemble the Collateral and make it available at a place Secured Party designates in writing which is mutually convenient, to allow Secured Party to take possessions or dispose of the Collateral, and
 - (3) Waive any default or remedy any default in any reasonable manner without any or all Accounts or other collateral or proceeds, or to sell, transfer, compromise, waiving the default remedied and without waiving any other prior or subsequent default.

VI RIGHTS AND REMEDIES OF DEBTOR

Debtor shall have all the rights and remedies before or after default provided in Article 9 of the Uniform Commercial Code in force in the State of where the Collateral is located or where the UCC Financing Statement is filed.

VII ADDITIONAL AGREEMENTS AND AFFIRMATIONS

- A. Debtor agrees and affirms
- (1) That information supplied and statements made by him in any financial or credit statement or application for credit prior to this security agreement are true and correct and,
 - (2) That no financing statement covering the Collateral or its proceeds is on file in any public office and that, except for the security interest granted in this security agreement, there is no adverse lien, security interest or encumbrance in or on the Collateral, and
 - (3) Debtor warrants and covenants that it will keep and maintain its business as presently constituted and will advise Secured Party immediately of any change in the name or nature or location thereof and of any fact or occurrence which does, or with lapse of time could, impair Debtor's ability to perform hereunder. Debtor warrants that all locations of collateral and all corporate, partnership, doing business, trade and individual names are listed below the signature line (hereon) are absolutely accurate and complete and that it will give Secured Party at least thirty (30) days prior written notice of any change thereof, addition thereto or deletion therefrom.
 - (4) That if Debtor is also buyer of the Collateral, there are no express warranties unless they appear in writing signed by the seller and there are no implied warranties of merchantability or fitness for a particular purpose in connection with the sale of the Collateral.
- B. Mutual Agreements
- (1) "Debtor" and "Secured Party" as used in this security agreement include the heirs, executors or administrators, successors and permitted assigns of those parties.
 - (2) The law governing this secured transaction shall be that of the State where the Collateral is located or where the UCC Financing statement is filed.
 - (3) If more than one Debtor executes the security agreement, their obligations hereunder shall be joint and several.

- (4) This agreement does not waive Secured Party's rights under any other agreement that Debtor has signed with the Secured Party.
- (5) Limited Power of Attorney. Debtor appoints Secured Party as Debtor's agent and grants Secured Party limited Power of Attorney to sign UCC-1 and UCC-3 forms for the purpose of protecting Secured Party's interest.

VIII PARTIAL INVALIDITY

If any one or more of the provisions contained in this Security Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and this Security Agreement shall be construed as if such invalid, illegal or unenforceable provision had not been contained herein.

IN WITNESS WHEREOF, Debtor has executed this Security Agreement as of the date indicated above.

DEBTOR NAME: _____

BY: _____
(Signature and Title)

BY: _____
(Signature and Title)

ACCEPTED at _____, _____ (City, State) this ____ day of _____, 200_.

SELLER, Inc.

BY: _____
(Signature and Title)

Additional corporate, partnership, doing business, trade and individual names. (Attach if more than 2)

Additional Locations of Collateral (Attach if more than 2)

ATTACHMENT B
UCC-1 FINANCING STATEMENT

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional]
B. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (1a or 1b) - do not abbreviate or combine names
1a. ORGANIZATION'S NAME
OR
1b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX
1c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY
1d. TAX ID #: SSN OR EIN ADD'L INFO RE ORGANIZATION DEBTOR 1e. TYPE OF ORGANIZATION 1f. JURISDICTION OF ORGANIZATION 1g. ORGANIZATIONAL ID #, if any NONE

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b) - do not abbreviate or combine names
2a. ORGANIZATION'S NAME
OR
2b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX
2c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY
2d. TAX ID #: SSN OR EIN ADD'L INFO RE ORGANIZATION DEBTOR 2e. TYPE OF ORGANIZATION 2f. JURISDICTION OF ORGANIZATION 2g. ORGANIZATIONAL ID #, if any NONE

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) - insert only one secured party name (3a or 3b)
3a. ORGANIZATION'S NAME
OR
3b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX
3c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

4. This FINANCING STATEMENT covers the following collateral:

5. ALTERNATIVE DESIGNATION (if applicable): LESSEE/LESSOR CONSIGNEE/CONSIGNOR BAILEE/BAILOR SELLER/BUYER AG. LIEN NON-UCC FILING
6. This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS. Attach Addendum [if applicable] 7. Check to REQUEST SEARCH REPORT(S) on Debtor(s) [optional] All Debtors Debtor 1 Debtor 2
8. OPTIONAL FILER REFERENCE DATA

ATTACHMENT C

PARENT GUARANTY

GUARANTEE

This Guarantee, dated as of _____, 2003, is made by Buyer Corporation ("Guarantor"), a company incorporated under the laws of Delaware, in favor of Seller Operations, Inc. ("Seller").

1. **Guarantee.** To induce Seller to accept purchase orders from, and grant certain payment terms to, _____, a company incorporated under the laws of _____, (individually and collectively, "Borrower"), and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Guarantor irrevocably and unconditionally guarantees to Seller, its successors, endorsees and assigns, the prompt payment and performance when due, subject to any applicable grace period, of all present and future obligations and liabilities of all kinds, whether such obligations be absolute, contingent, due or to become due, now existing or hereafter arising, of Borrower to Seller (collectively, the "Obligations") and, without limitation, Guarantor undertakes with Seller that whenever Borrower fails to pay, perform or discharge, or is otherwise in default in respect of any of the Obligations, Guarantor shall forthwith on demand by Seller pay, perform and discharge the Obligations and make good any such default as if Guarantor instead of Borrower was expressed to be party to the agreement with Seller.

2. **Absolute Guarantee.** Guarantor's obligations hereunder shall not be affected by the genuineness, validity, regularity or enforceability of the Obligations or any instrument evidencing any Obligations, or by the existence, validity, enforceability, perfection or extent of any collateral therefore. Seller makes no representation or warranty to Guarantor regarding such matters, and has no duty or responsibility to disclose to Guarantor any circumstances that may now or hereafter affect such matters. Seller shall not be obligated to file any claim relating to the Obligations if Borrower becomes subject to a bankruptcy, reorganization or similar proceeding, and the failure of Seller to so file shall not affect Guarantor's obligations hereunder. If any payment of Borrower on account of any Obligation is rescinded or must otherwise be returned as a result of any bankruptcy proceeding, or for any reason whatsoever, Guarantor shall remain liable hereunder for such Obligation as if such payment had not been made, and Guarantor agrees that Guarantor

will indemnify Seller on demand for all reasonable costs and expenses (including, without limitation, fees of counsel) incurred by Seller in connection with such rescission or restoration to the extent the amount of such payment is guaranteed hereunder. This Guarantee is a guarantee of payment and not of collection.

3. **Consents, Waivers and Renewals.** Guarantor agrees that Seller, or any legitimate holder of the Obligations (subject to Section 11 of this Guarantee) may at any time and from time to time, either before or after maturity thereof, without notice to or further consent of Guarantor, extend the time of payment of, exchange or surrender any collateral for, or renew any of the Obligations, and may also make any agreement with Borrower or with any other party to or person liable on any of the Obligations, or interested therein, for the extension, renewal, payment, compromise, discharge or release thereof, in whole or in part, or for any modification of the terms thereof, in whole or in part, or of any other agreement between Seller and Borrower or any such other party or person, without impairing or affecting this Guarantee. Guarantor agrees that Seller may seek payment of any of the Obligations from Guarantor, whether or not Seller shall have released the value of any collateral security, or shall have proceeded against any other obligor principally or secondarily obligated for any of the Obligations.

4. **Expenses.** Guarantor agrees to pay on demand all out-of-pocket expenses (including the reasonable fees and expenses of Seller's counsel, including travel expenses) incurred in connection with any default, collection, enforcement or protection of the rights of Seller hereunder, provided, that Guarantor shall not be liable for any expenses of Seller if no payment under this Guarantee is due.

5. **Subrogation, Indemnification, and Reimbursement.** Guarantor will not exercise any rights it may acquire by subrogation, indemnification and/or reimbursement that it may have against Borrower, until all the Obligations to Seller have

been paid in full. If any amount is paid to Guarantor in violation of the preceding sentence, such amount shall be held in trust for the benefit of Seller and shall be paid forthwith to Seller to be credited and applied to the Obligations, whether matured or not. Subject to the foregoing, upon payment of all the Obligations, Guarantor shall be subrogated to the rights of Seller against Borrower, indemnified or reimbursed, and Seller agrees to take, at Guarantor's expense, such steps as Guarantor may reasonably request to implement such subrogation, indemnification, or reimbursement.

6. **Continuing Guarantee.** This Guarantee is absolute, unconditional and irrevocable and shall remain in full force and effect and be binding upon Guarantor, its successors and permitted assigns until all of the Obligations have been satisfied in full, notwithstanding any intermediate settlement of account or payment or any change in the constitution or control of, or the appointment of a receiver, administrative receiver or administrator of any of Borrower's assets, insolvency or any bankruptcy, winding-up, reorganization, amalgamation, reconstruction or analogous matter or proceedings relating to Borrower. Further, this Guarantee shall not be affected by any other circumstance affecting Borrower's ability to meet its liabilities, or any other matter or thing whatsoever. If any present or future Obligations are guaranteed by persons, partnerships or corporations in addition to Guarantor, the death, release, discharge in whole or in part, or the bankruptcy, liquidation or dissolution of one or more of them shall not discharge or affect the liabilities of Guarantor under this Guarantee.

7. **No Waiver, Cumulative Rights.** No failure on the part of Seller to exercise, and no delay in exercising, any right, remedy or power hereunder shall operate as a waiver thereof, nor shall any single or partial exercise by Seller of any right, remedy or power hereunder preclude any other or future exercise of any right, remedy or power. Each and every right, remedy and power hereby granted to Seller or allowed it by law or other agreement shall be cumulative and not exclusive of any other, and may be exercised by Seller from time to time.

8. **Waiver of Notice.** Guarantor waives presentment to, demand of payment, diligence, filing of claims with any court, proceeding to enforce any provisions of this Guarantee, or to exhaust any security for the performance of Borrower's Obligations, notice of any sale of collateral security, notice of dishonor, protest, and all other notices that

may otherwise be required by law from anyone liable for any of the Obligations.

9. **Representations and Warranties.** Guarantor represents and warrants to Seller the following:

(a) Guarantor is duly organized, validity existing, and in good standing under the laws of Delaware and has full corporate power to execute, deliver and perform this Guarantee.

(b) The execution, delivery and performance of this Guarantee has been and remains duly authorized by all necessary corporate action and does not contravene any provision of Guarantor's charter or by-laws, as amended to date, or any law, regulation, rule, decree, order, judgment, or contractual restriction binding on Guarantor or its assets.

(c) All consents, licenses, clearances, authorizations and approvals of, and registrations and declarations with, any governmental authority or regulatory body necessary for the due execution, delivery and performance of this Guarantee have been obtained and remain in full force and effect, and all conditions thereof have been duly complied with, and no other action by, and no notice of or filing with any governmental authority or regulatory body is required in connection with the execution, delivery or performance of this Guarantee.

(d) This Guarantee constitutes the legal, valid and binding obligation of Guarantor enforceable against Guarantor in accordance with its terms, subject, as to enforceability to bankruptcy, insolvency, reorganization, moratorium and other laws of general applicability relating to or affecting creditor's rights and to equitable principles of general application.

(e) This Guarantee ranks at least *pari passu* with all its other unsecured obligations.

(f) No statement made, or other information furnished and delivered, by or on behalf of such Guarantor to Seller, in any document furnished from time to time by or on behalf of such Guarantor in connection herewith or therewith contains any untrue statement of a material fact or omits to state (as of the date made or furnished) any material fact necessary to make the statements herein or therein not misleading in light of the circumstances under which they were made. There is no fact known to Guarantor that has not been disclosed in writing to Seller and which has had, or which could reasonably be expected in the future to have, a material adverse

effect on the financial condition, business, operations or prospects taken as a whole of Guarantor or Borrower.

10. **Payment.** All sums payable under this Guarantee shall be paid in full without set-off or counterclaim and free and clear of and without deduction of or withholding for or on account of any present or future taxes, duties and/or other charges. If Guarantor is compelled to make any deduction, it shall pay additional amounts to ensure receipt by Seller of the full amount Seller would have received but for the deduction.

11. **Assignment.** Guarantor may not assign its rights, interest or obligations hereunder to any other person without the prior written consent of Seller. Guarantor agrees that the Obligations guaranteed hereunder may be exchanged sold or surrendered by Seller or any legitimate holder of such Obligations, all without impairing or affecting in any way the obligations of Guarantor hereunder.

12. **Jurisdiction, Choice of Law, and Waiver of Jury Trial.** Guarantor agrees, for the benefit of Seller and without prejudice to the right of Seller to take proceedings before any other court of competent jurisdiction, that the courts of the state of Illinois, United States of America, more specifically the courts of Cook County, Illinois, or a U.S federal court located within Cook County, Illinois, have jurisdiction to settle any disputes in connection with this Guarantee. For this purpose Guarantor irrevocably submits to the jurisdiction of these courts and irrevocably appoints Buyer Corporation of _____ as its agent for service of process. The Guarantor agrees that process will be effectively served on it if delivered to that agent at that address.

This Guarantee shall be governed by, and construed in accordance with, the laws of the State of Illinois, United States of America, without giving effect to any conflicts of laws principles thereof which would result in the application of the laws of another jurisdiction.

FOR PURPOSES OF THIS GUARANTEE AND ANY RELATED DOCUMENT, GUARANTOR AND SELLER HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHTS ANY MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS GUARANTEE OR ANY OTHER RELATED DOCUMENT, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN), OR ACTIONS OR OMISSIONS OF ANY PARTY HERETO, OR ANY OTHER PERSON, RELATING TO THIS GUARANTEE OR ANY OTHER RELATED DOCUMENT.

13. **Financial Information.** Guarantor represents and warrants to Seller that the financial information and statements regarding Guarantor, which have been heretofore furnished to Seller, accurately and fairly represent the financial condition of Guarantor as of the date of each such report, and that since the date of such financial report, there has been no material change to the business, financial condition or operations of Guarantor. In addition, Guarantor shall

furnish Seller with such other financial information and reports as Seller may reasonably request.

14. **Amendments.** Any provision of this Guarantee may be amended or modified only by an instrument in writing signed by Guarantor and Seller, and the provisions of this Guarantee may be waived only by an instrument in writing signed by Seller and Guarantor.

15. **Severability.** If any provision of this Guarantee is invalid or unenforceable in any jurisdiction, then, to the fullest extent permitted by law, (a) the other provisions hereof shall remain in full force and effect in such jurisdiction, (b) such invalidity or unenforceability shall not affect the validity or enforceability of such provision in any other jurisdiction and (c) the parties hereto shall negotiate in good faith to substitute therefore a provision in accordance with the spirit and purpose of this Guarantee.

16. **English Language.** All documents to be delivered by any party hereto pursuant to the terms hereof shall be in the English language or, if originally written in another language, shall be accompanied by an accurate English translation upon

which the other parties hereto shall have the right to rely for all purposes under this Guarantee.

17. **Notices.** All notices concerning this Guarantee or demands on Guarantor shall be deemed made when given, and shall be in writing and sent by facsimile transmission ("fax"), confirmed by registered mail, and addressed as follows:

To Guarantor:

 Attn: _____
 Fax: _____

To Seller:

 Attn: _____
 Fax: _____
 c . c . G e n e r a l C o u n s e l

Each party may amend its address for notice by giving notice hereunder to the other party.

IN WITNESS WHEREOF, this Guarantee has been duly executed and delivered by each of Guarantor and Seller as of the date first above written.

GUARANTOR	SELLER
Signature:	Signature:
Name:	Name:
Title:	Title:

ATTACHMENT D
SAMPLE LETTER OF CREDIT

Date:

Beneficiary:
Your Company
123 Easy Street
Anywhere, USA

Letter of Credit No. _____

Gentlemen:

By order of our client [Your Customer] (the "Applicant"), we hereby open our irrevocable Standby Letter of Credit No. _____, in your favor for an amount not to exceed in aggregate USD \$_____, effective immediately and expiring at the office of our Servicer, [Issuing Bank, 333 Iceberg Lane, Barrow, Alaska] Attn: [Standby Letter of Credit Unit] or such other office as we may advise you from time to time (the "Office"), on _____, 200_.

Funds hereunder are available to you against presentation of the original irrevocable Standby Letter of Credit, accompanied by your Sight Draft(s), drawn on us, mentioning thereon our Letter of Credit Number _____, in the form of Annex A, attached hereto, and by your written and dated Statement in the form Annex B, attached hereto.

We hereby agree to honor each Draft drawn under and in compliance with the terms and conditions of this Letter of Credit if presented, as specified, at our Office on or before expiration date.

Should you have occasion to communicate with us regarding this Letter of Credit, please direct your correspondence to our Office, making specific mention of the Letter of Credit number indicated above.

Except as far as otherwise expressly stated herein, this Standby Letter of Credit is subject to the International Standby Practices ("ISP98"), International Chamber of Commerce, Publication No. 590, and as to matters not governed by the ISP98 shall be governed by and construed in accordance with the laws of the State of New York and applicable U.S. Federal Law.

ANNEX A
FORM OF SIGHT DRAFT

Date: _____ [Print date]

To: Issuing Bank
333 Iceberg Lane
Barrow, Alaska

At sight, pay to order of _____ [Print Name of Beneficiary]

the sum of _____ Dollars (\$_____).

Drawn under Letter of Credit No. _____, dated _____ [date of issuance of Letter of Credit].

BENEFICIARY:

_____ [Print name of Beneficiary]

_____ [Beneficiary's Signature]

BY: _____ [Print name of signatory]

ANNEX B
FORM OF WRITTEN STATEMENT

To: Issuing Bank
333 Iceberg Lane
Barrow, Alaska

Date: []

Dear Sirs:

Irrevocable Letter of Credit No. [_____]

We refer to the above-entitled letter of credit (the "Letter of Credit") dated as of October 29, 2002 by and between [Your Company] and [Issung Bank].

In connection with our drawing under the Letter of Credit we hereby certify to you that [Your Customer] has failed to pay when due certain invoices, and [Your Company] has requested payment of the amount of this drawing under the Letter of Credit but [Your Customer] has not paid such amount by the date required for such payment.

Payment under the above-referenced Letter of Credit should be made to our account No.[_____] with [_____].

Beneficiary:

_____ [Print name of Beneficiary]

_____ [Signature of Beneficiary]

By: _____ [Print name of signatory]

ATTACHMENT E

[YOUR LETTERHEAD]

_____, 2003

[Addressee]

Re: Demand for Adequate Assurances of Performance

Dear _____:

We are suspending all further performance and delivery of goods to you under our agreement(s) dated _____, including but not limited to your P.O. No. _____ for the sale of the goods described herein.

This action is taken by us pursuant to UCC 2-609, 2-702(1) and 2-703, as adopted in [state] under [state law citation], due to your failure to pay us for goods heretofore shipped and delivered to you, as well as information we have received suggesting you are faced with and have cash flow and financial problems.

If you provide us with adequate assurance of payment and due performance, we shall be happy to resume deliveries. Such assurance may be by way of prepayment, irrevocable letter of credit issued by a reputable bank, a bond issued by a reputable insurance company, or such other adequate assurances as may be reasonable acceptable to us.

Sincerely,

cc:

Certified Mail No.
Return Receipt Requested

ATTACHMENT F
FORM RECLAMATION LETTER

Via Facsimile and Federal Express

Re: Reclamation of Goods of Seller, Inc. ("Seller")

Dear Sir or Madam:

Please be advised that pursuant to Section 2-702 of the Uniform Commercial Code, Section 546 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 et seq., and other applicable law, you are hereby notified that Seller reclaims all of the goods described in the Schedule attached hereto (collectively, the "Goods"). Please call the undersigned to arrange for the immediate return of the Goods. In the interim, please segregate the Goods and provide us with written confirmation that the Goods are on your premises.

Seller hereby expressly reserves every right, power, remedy, claim and defense now or hereinafter existing at law, in equity or by statute, and the exercise or non-exercise of any such right, power, remedy, claim or defense shall not be construed as a waiver of the right to exercise, at the same time or thereafter, such right, power, remedy, claim or defense.

Very truly yours,

[NOTE: ATTACH SCHEDULE OF GOODS RECLAIMED]

ATTACHMENT G**SAMPLE MANUFACTURING RIGHTS PROVISION****MANUFACTURING RIGHTS**

x.1. Customer's Right to Manufacture. Supplier hereby grants to Customer the Manufacturing Rights, which Customer may exercise at any time upon the occurrence of any of the following events or circumstances:

(i) If Supplier fails consistently or continuously to supply Customer with Products meeting the applicable Specifications.

(ii) If Supplier fails consistently or continuously to supply Customer with Products in the quantities required in accordance with Customer purchase orders.

(iii) If Supplier discontinues manufacturing the Product and does not make a substitute product available to Customer that, in Customer's sole discretion, is equivalent in form, fit and function to the applicable Product.

(iv) If Supplier at any time refuses to or does not make the Products available at the Product Prices.

(v) If Supplier assigns, transfers or delegates its rights and obligations under this Agreement to another party without Customer's prior written consent, including without limitation any transfer by sale, merger or other working combination of ownership of or control over more than twenty percent (20%) of the voting securities or control of Supplier.

(vi) Upon the occurrence of any one of the following events: (i) a receiver is appointed for either Supplier or its property; (ii) Supplier makes a general assignment for the benefit of its creditors; (iii) Supplier commences, or has commenced against it, proceedings under any bankruptcy, insolvency or debtor's relief law, which proceedings are not dismissed within sixty (60) days; or (iv) Supplier is liquidated, dissolved or ceases to do business.

(vii) Upon notice due to Supplier's breach of its obligations of confidentiality pursuant to Section XX.

(viii) Upon thirty (30) days notice, if Supplier has failed to deliver Products for a minimum of thirty (30) days due to force majeure causes as set forth in Section XXX.

x.2. Manufacturing Information Escrow. The parties agree that simultaneously with execution of this Agreement, the parties, along with the escrow agent, shall execute the Escrow Agreement attached hereto as Exhibit XX and the Supplier shall promptly place into an escrow account the information and materials identified in Exhibit XX that are necessary for Customer to manufacture or have manufactured the Products ("Escrow Materials"). Customer shall select the escrow agent (subject to Supplier's reasonable approval), and be responsible for the

establishment, administration and cost of the escrow account. The Escrow Materials shall be released for use by Customer upon occurrence of any one or more of the events or circumstances in Section XX.1, only after notice to Supplier as set forth in the Escrow Agreement. On the first business day of each calendar quarter Supplier shall deposit into escrow any and all updates, enhancements and modifications to the Manufacturing Information.

x.3. Continuing Technical Support and Assistance. If Customer exercises its Manufacturing Rights hereunder, Supplier shall provide Customer, at a reasonable mutually agreed upon cost, such technical support and assistance as Customer may reasonably request in connection with the manufacture of the Products.

KLETT ROONEY LIEBER & SCHORLING
 A PROFESSIONAL CORPORATION
 ATTORNEYS AT LAW

**THE EFFECT OF BANKRUPTCY ON
 TECHNOLOGY LICENSES**

The number of bankruptcy filings has been on the rise, and many of these cases involve companies that use or distribute proprietary software and computer information systems in the course of doing business.¹ In most instances, these bankrupt debtors depend heavily on third party technology that they use in their internal operations. In many cases these companies also license or distribute technology to their own customers or through distribution channel partners. In light of the current economy, it is probably safe to predict that significant numbers of commercial bankruptcy proceedings will continue during the foreseeable future, thus raising the important question: How does bankruptcy affect existing technology and software licenses? The answer may surprise many. Bankruptcy laws drastically affect contract and property rights that usually apply between parties outside the bankruptcy context, and technology licenses are among those rights that can be most profoundly affected.

As discussed below, licensors and licensees of technology may lose important rights in a bankruptcy context. Both groups are well advised to be aware of these ramifications when negotiating license agreements, before a bankruptcy event occurs. In the event that it is too late and a bankruptcy proceeding is imminent or has already commenced, it may be critical to address the applicable issues early in the bankruptcy reorganization planning process.

INTELLECTUAL PROPERTY AND TECHNOLOGY LICENSES

Many successful companies have built their businesses around technology and software that are protected by patents and copyrights.² In most cases, intellectual property owners do not transfer ownership of their technology by selling or assigning it outright but instead grant other parties some type of license to use the intellectual property underlying the technology. Software license agreements rarely contain

license grant terms which specifically indicate that the licensor is licensing rights to its patents and copyrights under such technology, but that is essentially what the license does.

There are many different flavors and varieties of software and technology licenses. Licenses may be exclusive or non-exclusive, revocable or irrevocable, perpetual or limited in duration, broad in scope or restricted to a particular field of use or purpose, applicable for use throughout the world or only in a defined geographic territory, require ongoing royalty payments or just a one-time fee. Furthermore, a technology license may be limited to the licensee's internal use, or it may provide for the licensee's further commercial distribution or sublicensing to third parties, whether as a stand-alone product or as a component of another technology product.

Technology license agreements also usually include restrictions, duties and obligations for each party and may be accompanied by related agreements, such as a maintenance or support agreement. Regardless of the type of particular technology license, both the licensor and the licensee generally consider their respective rights under the license to be a valuable asset of the company.

Most off-the-shelf software and widely available technologies are subject to non-exclusive licenses, meaning that the licensor is free to license the same technology rights to many different licensees. In other circumstances, the technology owner agrees to grant an exclusive license to a particular licensee, thus restricting its ability to grant the same license rights to other licensees, and in some cases even restricting itself from using the technology in a similar manner as the exclusive licensee. A particular licensee can enjoy a broad exclusivity right or a narrowly tailored one. As discussed below, a broad exclusive license can be deemed equivalent to ownership, which may give the exclusive licensee greater

flexibility to dispose of its license rights in a bankruptcy case.

Carefully drafted license agreements will address the issue of the licensee's ability to assign its license rights under the agreement. Most commonly, the licensor will seek to expressly prohibit the licensee from assigning its license rights, citing such reasons as a reliance on the licensee's financial strength, reputation or complementary business model or a desire to keep the technology out of a competitor's hands. Sometimes a licensor will allow the license to be assigned in limited circumstances, such as, for example, to an affiliate of the licensee or in connection with the sale of the licensee's business. The licensee's right to transfer its rights and the licensor's countervailing interest in having a say in such transfers can become very important in the bankruptcy context, as discussed below.

TECHNOLOGY LICENSES IN BANKRUPTCY

While intellectual property laws are designed to reward inventors and authors to encourage the development of new inventions and arts for the common good of society, the bankruptcy laws rest upon drastically different fundamental principles. Bankruptcy law seeks to maximize the value of the debtor's asset pool or "estate" for the benefit of creditors, equity holders and other interested constituents, which is counterbalanced by the accompanying goal of permitting the debtor to emerge from bankruptcy with a fresh start.³

In furtherance of these primary objectives, the Bankruptcy Code gives the debtor or its representative in bankruptcy (known as a "trustee") tremendous powers that would not be available outside the bankruptcy context.⁴ Among the most powerful tools in the debtor's arsenal is the ability to reject or, alternatively, to assume and assign executory contracts and unexpired leases, regardless of whether they

have express contractual provisions that bar assignment.⁵ An executory contract is an agreement that has not been fully performed by both parties, which generally includes most technology licenses.⁶

When the debtor elects to "reject" an executory contract, it sheds its obligations (as well as rights) under the contract, leaving the other party with a claim for breach against the bankrupt's estate. In contrast, when choosing to "assume" an executory contract, the debtor is electing to retain its rights and obligations under the contract. In such an instance, the debtor is required to cure any existing defaults under the agreement and provide adequate assurance of the future performance of the agreement.⁷ In many instances, a debtor will assume an executory contract for the sole purpose of assigning it to a third party purchaser in order to generate some cash proceeds to distribute to creditors.

The bankrupt debtor's power to reject or assume and assign executory contracts can create several interesting scenarios depending on whether the debtor is the licensee of the technology (in which case the licensor may object to the assumption and assignment of its technology to some other party) or the debtor is the licensor (in which case the licensee may fear that it could lose its license rights if the licensor-debtor rejects the agreement).

When the Debtor is the Licensee

In most modern bankruptcies, the commercial debtor will to some degree depend upon the use of computer information systems and other proprietary technology in the course of conducting its business. Examples of such systems include accounting systems, inventory tracking and supply chain logistics management systems, customer relationship management systems, enterprise resource management systems and other types of information

management systems. Sometimes these technologies were developed specifically by or for the debtor, but in many instances these systems are licensed from a third party vendor. Generally, commercially available information systems such as those listed are subject to non-exclusive licenses, and the subject technology is protected by one or more patents and/or copyrights.

As noted above, the bankrupt debtor generally has the ability to pick and choose which of its executory contracts it will reject or assume and assign. This power is not absolute, however, and is limited by Section 365(c) of the Bankruptcy Code, which states that the debtor may not assume or assign any executory contract without the consent of the other party if applicable, non-bankruptcy law would excuse that other party from accepting performance from or rendering performance to an entity other than the debtor.

Non-Exclusive Licenses

When faced with the question of the assignability of non-exclusive patent and copyright licenses under non-bankruptcy law, as required under Section 365(c) analysis, courts have consistently held that such non-exclusive licenses are not assignable as a matter of federal law.⁸ This assumes, of course, that the license agreement does not expressly permit assignment in which case the issue is moot. For non-exclusive patents, courts base this conclusion on the fact that the underlying federal policy of U.S. patent law is to reward inventors by granting a limited time monopoly, and permitting licensees to assign their non-exclusive patent rights to another party without the patent owner's permission is inconsistent with this policy.⁹ Similarly, in cases involving copyrights, courts have recognized the common lineage of copyrights and patents and have decided that non-exclusive copyrights are not freely assignable for much the same reason.¹⁰

Therefore, the debtor in bankruptcy has the power to reject non-exclusive technology licenses where it is the licensee, but it does not have the right to assume and assign such licenses without the permission of the licensor of such technology (unless otherwise permitted in the license agreement). Thus, the debtor's flexibility in selling its assets can be significantly impaired if the prospective buyer is interested in acquiring non-exclusive technology license assets and the licensor seeks to obtain concessions prior to granting consent to such a transfer. Of course, there may be situations where the licensor would refuse to consent under any circumstances, such as when the purchaser is a competitor of the licensor.

Bankrupt debtors in some jurisdictions are even more profoundly affected by the fact that non-exclusive patent and copyright licenses are non-assignable as a matter of federal law. Some federal courts, including those in the Third Circuit, follow what is known as the "hypothetical test" when interpreting Section 365(c) of the Bankruptcy Code.¹¹ Under the hypothetical test, the court follows the literal wording of Section 365(c)(1) which says that a debtor may not "assume or assign" executory contracts that would not be assignable under applicable, non-bankruptcy law, unless the other party consents.¹² Accordingly, in such jurisdictions, a debtor is prohibited from even assuming its existing rights under a non-exclusive technology license, regardless of whether the debtor intends to actually assign its license to a third party. Needless to say, this theory can be quite shocking to debtors who depend on the continued use of licensed technology in their reorganization plans. Other federal courts do not prohibit a debtor from merely assuming its non-exclusive license rights if it does not actually intend to assign them.¹³

Exclusive Licenses

In contrast to the relatively clear consensus on the non-assignability of non-exclusive copyright and patent licenses, cases involving exclusive licenses are far murkier. Surprisingly, it appears that no court has specifically ruled on the assignability of an exclusive patent license, although a few reported decisions did seem to appreciate a distinction between non-exclusive and exclusive patent licenses in this regard.¹⁴ At least one commentator has described theoretical arguments both in favor of and against the assignability of exclusive patent rights.¹⁵ One recent bankruptcy court in Louisiana came close to deciding the issue but was able to render the matter irrelevant by finding that the licensor consented to the exclusive patent license assignment due to a contractual provision that permitted such an assignment in connection with a sale of the licensee's assets.¹⁶

There is slightly more judicial guidance in connection with the assignability of exclusive copyright licenses, although there is some split on the outcome. Based upon a provision in the Copyright Act, several courts have found that an exclusive copyright license is in fact a transfer of ownership rights in the copyright to the extent of the scope of exclusivity.¹⁷ Therefore, reason these courts, the owner of these exclusive license rights is free to assign those rights without the permission of the licensor. The Ninth Circuit, however, has reached an opposite conclusion based upon its reading of the same Copyright Act provision and affirmed a California court's decision that an exclusive copyright license was not assignable without the licensor's consent, even though the license agreement was silent on the issue.¹⁸ To illustrate the conflict on this issue, the Delaware Bankruptcy Court has issued a decision expressly rejecting the result and reasoning of

the California court case that was affirmed by the Ninth Circuit.¹⁹

When the Debtor is the Licensor

In many cases, a licensee will be dismayed to discover that the licensor of the technology it uses has filed for bankruptcy. The source of this dismay is usually a fear that the licensee will no longer receive improvements, updates, upgrades or error corrections to the software or other licensed technology, or that its personnel will no longer receive user support or training from the financially troubled licensor. In this context, it does not matter whether the license is exclusive or non-exclusive, because it is the debtor who is the intellectual property owner, and it is the debtor who has the power to reject or assume the license agreement. Historically, the licensor-debtor could (and did) reject licenses in such situations, while trying to force the licensee to renegotiate more favorable license or payment terms.²⁰ This power was determined to be so draconian to companies that depend on licensed technology that in 1988 Congress added Section 365(n) to the Bankruptcy Code.

Section 365(n) essentially states that if the bankrupt debtor rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee may elect to treat such contract as terminated or elect to retain its rights under such contract to the extent such rights existed immediately before the bankruptcy case commenced.²¹

This provision does have its shortcomings to the licensee, inasmuch as this only allows the licensee to maintain its license rights but does not prohibit the licensor-debtor from rejecting its other obligations under the license agreement or other agreements ancillary to the license agreement. For example, the licensor can reject the contract, and thereby get out of any required maintenance obligations or duties to provide upgrades or enhancements or bug fixes, or to

indemnify the licensee against third party claims of infringement, etc. If the licensee elected not to treat the rejection as a breach and pursue an unsecured claim for damages (i.e., be last in line with other unsecured creditors), it could only continue to use the existing technology product in accordance with the scope and duration it was entitled to immediately prior to the bankruptcy case. In addition, the licensee would still be required to pay any ongoing royalties for the license.

CONCLUSION

As the foregoing discussion explains, the effects of bankruptcy law on software and other technology licenses can be quite significant, whether the party in bankruptcy is the licensee or licensor. There is broad consensus that a bankrupt technology licensee cannot assume and assign a non-exclusive license without the licensor's consent, which may affect the bankrupt's ability to transfer assets for cash. The bankrupt technology licensee will want to consider its strategy as early as possible in the potential sale transaction regarding the approach of the licensor for consent.

Courts are unsettled as to the transferability of exclusive licenses, though. There has yet to be a decision rendered on exclusive patents, although there are some indications that such a license should be freely assignable. There is a conflict in the courts that have decided the issue of exclusive copyright transferability, but the law in some jurisdictions (including Delaware) is that an exclusive copyright license is assignable.

Since it is almost always preferable to avoid uncertainty by addressing the issue explicitly in the license agreement, parties should lay the assignability issue on the table during the negotiation of the license terms. The licensee will want to have the express right to assign its license without restriction, and the licensor will

strive to impose restrictions on such assignability.

Finally, in cases where the licensor is the bankrupt party, the licensee will be at risk of the bankrupt licensor rejecting its obligations to provide updates, ongoing support and other important duties relating to the licensed technology. However, the licensee can take some comfort in knowing that it can at least continue using the technology on essentially an *as is* basis until it can migrate to a new product, if necessary. There are some steps a cautious licensee can take to try to minimize the effects of a bankrupt licensor. First, the licensee should request the licensor to place the human readable source code and programmer documentation into escrow with a trusted third party. The escrowed materials would be released in the event of a bankruptcy and allow the licensee to attempt to support the software itself (the rights under this escrow agreement would be among the types of license rights that the bankruptcy court will allow the licensee to retain). Secondly, the licensee should keep an eye on the licensor's periodic financial reporting, if it is a public company. If the licensor is a private company and the license is a big ticket item or is very critical to the licensee's business functions, the licensee should require the licensor to provide periodic financial statements or other information that might give the licensee some advance warning of any drastic downturn in the licensor's economic position. Finally, the licensee should note any decline in support and maintenance services by the licensor, which is one of the first indicators that a technology company is cutting corners in order to keep itself afloat. With some forewarning, the licensee can hopefully consider its options and alternatives before a bankruptcy occurs.

¹For general information on bankruptcy statistics and news, see American Bankruptcy Institute's website at <http://www.abiworld.org>.

² Trade secrets and trademarks are usually considered within the “intellectual property” group. While these areas are undoubtedly important to many technology companies, this article focuses only on patent and copyright licenses.

³ See, e.g., *In re Patient Educ. Media, Inc.*, 210 B.R. 237 (Bankr. S.D.N.Y. 1997), quoting *In re CFLC, Inc.*, 174 B.R. 119, 123 (N.D. Cal. 1994).

⁴ References in this article to the Bankruptcy Code are to the U.S. Bankruptcy Code, as amended. For references to the Bankruptcy Code and various provisions and rights thereunder, see, generally, 11 U.S.C. §§ 101-1330.

⁵ BANKRUPTCY CODE, § 365(a).

⁶ See *In re Access Beyond Technologies, Inc.*, 237 B.R. 32 (Bankr. D. Del. 1999).

⁷ BANKRUPTCY CODE, § 365(b).

⁸ *In re Catapult Entm't, Inc.*, 165 F.3d 747 (9th Cir. 1999); *In re Access Beyond Techs., Inc.*, 237 B.R. 32 (Bankr. D. Del. 1999); *In re Patient Educ. Media, Inc.*, 210 B.R. 237 (Bankr. S.D.N.Y. 1997); *In re Golden Books Family Entm't, Inc.*, 269 B.R. 300 (Bankr. D. Del. 2001).

⁹ E.g., *Patient Educ. Media*, 210 B.R. at 241, 243.

¹⁰ *Id.* at p. 241, n. 8.

¹¹ The Third Circuit includes federal courts in Delaware, New Jersey, Pennsylvania and the Virgin Islands. While Circuits such as the Third Circuit, Fourth Circuit and Ninth Circuit have adopted the “hypothetical test”, other federal courts have rejected this approach in favor of the “actual test”. See, e.g., *In re Cajun Elec. Power Coop, Inc.*, 230 B.R. 693 (Bankr. M.D.La. 1999); *In re Lil' Things, Inc.*, 220 B.R. 583 (Bankr. N.D. Texas 1998); *In re Ontario Locomotive & Indus. Ry. Supplies (U.S.), Inc.*, 126 B.R. 146 (Bankr. W.D.N.Y. 1991). The “actual test” does not prohibit assumption by the debtor but only an assumption and assignment. See also *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997).

¹² *Cinicola v. Scharffenberger (In re AHERF)*, 248 F.3d 110 (3d Cir. 2001).

¹³ *Supra* note 11.

¹⁴ *Access Beyond Techs.*, at 44, 45.

¹⁵ Elaine D. Ziff, *The Effect of Corporate Acquisitions on the Target Company's License Rights*, 57 THE BUSINESS LAWYER (2002).

¹⁶ *Murray v. Franke-Misal Techs. Group, LLC (In re Supernatural Foods)*, 268 B.R. 759 (Bankr. M.D. La. 2001).

¹⁷ See *In re Patient Educ. Media, Inc.*, 210 B.R. 237 (Bankr. S.D.N.Y. 1997); *In re Golden Books Family Entm't, Inc.*, 269 B.R. 311 (Bankr. D. Del. 2001) (note that this is a companion case to the *Golden Books* case cited in note 8).

¹⁸ *Gardner v. Nike, Inc.*, 279 F.3d 774 (9th Cir. 2002), *aff'g*, 110 F. Supp.2d 1282 (C.D. Cal. 2000).

¹⁹ The Delaware Court's *Golden Books* (*supra* n. 17) decision was rendered prior to the Ninth Circuit's decision in *Gardner* (*supra* n. 18), and *Golden Books* expressly considered and rejected the California District Court's *Gardner* reasoning.

²⁰ See, e.g., *Lubrizol Ents., Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers)*, 756 F.2d 1043 (4th Cir. 1985) (statutorily overruled by the Intellectual Property Bankruptcy Protection Act of 1988, codified at 11 U.S.C. § 365(n)).

²¹ 11 U.S.C. § 365(n).

A PRACTITIONER'S GUIDE TO SECTION 365(N) OF THE U.S. BANKRUPTCY CODE

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Practitioners who draft license agreements that involve intellectual property are well advised to be familiar with the provisions of Section 365(n) of the U.S. Bankruptcy Code. Section 365(n) specifies certain rights and obligations of licensors and licensees with respect to licenses of intellectual property following a licensor's filing of bankruptcy. (For the purposes of this article, a licensor that has filed for bankruptcy is sometimes referred to as the "trustee".) Section 365(n) does not apply in the event a licensee files for bankruptcy.

Under U.S. bankruptcy law, the trustee has the right to assume or reject executory contracts (which include licenses of intellectual property). In order to assume an executory contract, the trustee must cure any defaults, compensate the licensee for any damages incurred by the licensee as a result of any defaults and provide adequate assurances of future performance. As to an intellectual property license, if the trustee assumes the license, the licensee's rights remain in effect as if the licensor had never commenced bankruptcy proceedings. Where Section 365(n) becomes relevant is during the period after the trustee files a bankruptcy petition (but prior to the trustee's election to accept or reject a license agreement) and, more importantly, after the trustee rejects a license agreement.

As a starting point for understanding the scope of Section 365(n), it is important first to examine the definition of "intellectual property" under U.S. bankruptcy law. Section 101(35A) defines "intellectual property" as including: (1) trade secret; (2) invention, process, design or plant protected under title 35; (3) patent application; (4) plant variety; (5) work of authorship protected under title 17; or (6) mask work protected under chapter 9 of title 17, to the extent protected by applicable non-bankruptcy law. Trademarks are not included in the definition of intellectual property. Also, although from a policy standpoint there would not seem to be any reason to exclude foreign patents, it is unclear whether foreign patents are included in this definition of intellectual property.

With respect to the period after the trustee files a bankruptcy petition (but prior to the trustee's election to accept or reject a license agreement), Section 365(n)(4) provides that, upon the licensee's written request, the trustee must, to the extent provided under the license agreement (or under any agreement supplementary to the license agreement), either perform its obligations under the license agreement or furnish the licensee with the licensed intellectual property (including any embodiment of the intellectual property). Also, during this period, the trustee may not interfere with the licensee's rights under the license

agreement (or under any agreement supplementary to the license agreement) to obtain the licensed intellectual property (or any embodiment of the intellectual property) from a third party, such as an escrow agent.

As a practice pointer directed toward the rights specified in Section 365(n)(4), the licensee should include in the license agreement (and, as applicable, in any supplementary agreement, such as an escrow agreement) a provision confirming that the licensed intellectual property is deemed to be "intellectual property" under U.S. bankruptcy law and expressly requiring the trustee to furnish the licensed intellectual property to the licensee upon the occurrence of specific performance-related breaches. An example of this type of provision is as follows: "The parties acknowledge that the Licensed Intellectual Property is "intellectual property" for purposes of Section 365(n) of the U.S. Bankruptcy Code and that Licensee will have the right to exercise all rights provided by Section 365(n) with respect to the Licensed Intellectual Property. In the event that the Licensor materially breaches its maintenance obligations under this Agreement, Licensee will have the right to require the delivery by Licensor (or in the event of a filing of bankruptcy by or against Licensor, by the trustee) to Licensee of all Licensed Intellectual Property (including all embodiments thereof)."

Section 365(n)(1) addresses the licensee's rights following the trustee's rejection of the license agreement. Specifically, upon such a rejection, the licensee may elect: (1) to treat the rejection as a termination of the license agreement, or (2) to retain its rights under the license agreement (or under any agreement supplementary to the license agreement) to the licensed intellectual property, as such rights existed immediately prior to the commencement of the bankruptcy case. If the licensee elects to treat the rejection as a termination of the license agreement, the licensee will lose its rights to the licensed intellectual property and will have the right to seek damages on a pre-petition, unsecured basis for a breach of contract claim -- this remedy existed pre-Section 365(n) and this provision does not alter a licensee's remedy.

Section 365(n)(1)(B) makes express that a licensee's retained rights include the right to enforce any exclusivity provisions of the license agreement, but exclude any rights under applicable non-bankruptcy law to obtain specific performance of the agreement. Moreover, a licensee's retained rights will remain in effect for the duration of the agreement and for any extension period to which the licensee is entitled under applicable non-bankruptcy law.

It cannot be overemphasized that under Section 365(n)(1)(B), the licensee is entitled to retain *only those rights that existed immediately prior to the commencement of the bankruptcy case*. The licensee will not be entitled to retain any rights that are contingent upon or are intended to come into effect upon the occurrence of events that did not occur prior to the commencement of the bankruptcy case. For example, if the licensee contemplates that it will require the right to modify the licensed intellectual property if the licensor fails to

maintain the licensed intellectual property, the license agreement must provide the licensee with a present grant of these rights (as opposed to providing that the licensor *will* grant these rights to the licensee upon the occurrence of the event in question).

Because a licensor often is reluctant to agree to an unconditional present grant of rights, as described above, it is common to combine a present grant of rights with a covenant not to exercise the rights until the occurrence of the event in question. An example of this type of provision is as follows: "Licensor hereby grants to Licensee a nonexclusive, nontransferable, royalty-free license to use, copy and modify the Licensed Intellectual Property for the purposes of maintaining and supporting the Licensed Intellectual Property. Licensee covenants and agrees that it will not exercise the license rights granted in this Section unless and until Licensor materially breaches its maintenance obligations under this Agreement."

It is very important for a licensee to remember that, although Section 365(n) provides the licensee with the right to retain its license rights and to obtain the licensed intellectual property, once the trustee rejects the license agreement, the trustee is relieved from any other performance obligations under the agreement. Thus, the trustee will no longer have an obligation to provide maintenance, support, consultation, further development, indemnification, etc., even if these benefits are provided to the licensee in the license agreement. Although in most instances it is likely that a licensee would desire to retain its rights, in considering whether to treat a trustee's rejection as a termination of the license agreement, a licensee should consider the practical ramifications and costs associated with using the licensed intellectual property, absent any further performance by the licensor.

Section 365(n)(2)(B) provides that, if the licensee elects to retain its rights, the licensee must make all royalty payments required under the license agreement for as long as it continues to exercise these rights. The term "royalty" is broadly construed, *i.e.*, it is deemed to include any payment for the use of the intellectual property, whether denominated as a royalty, license fee or otherwise. See *In re Prize Frize, Inc.*, 32 F.3d 426 (9th Cir. 1994).

A licensee would be well advised to have the license agreement clearly delineate any royalties or license fees that are payable with respect to the licensed intellectual property from other fees that the licensee may be required to pay for maintenance, training or other services. Without this delineation, the licensee may be required to pay amounts for services that it will no longer be entitled to receive from the licensor, as discussed above. The same concern is applicable to payments for intellectual property that is not included in the definition of "intellectual property" under U.S. bankruptcy law. For example, if a portion of a royalty payment is in consideration for the right to use the licensor's trademark, the licensee should ensure that the license agreement clearly identifies that portion of the royalty payment. Otherwise, although trademarks are not included

in the definition of intellectual property, the licensee may be required to pay that portion of the royalty attributable to the trademark rights (as part of the overall royalty payment that the licensee makes to retain its rights in the licensed intellectual property), even though the licensee's right to use the licensor's trademark will not be preserved under the Section 365(n) election.

Section 365(n)(1)(C) provides that, if the licensee elects to retain its rights, the licensee is deemed to waive any right of setoff it may have under applicable non-bankruptcy law. This waiver means that the licensee can no longer claim that its payment obligations should be reduced by the damages it has incurred as a result of the filing of bankruptcy by the licensor. The licensee is also deemed to waive any right to any claim for administrative expenses under Section 503(a), a category of expenses that a licensee of intellectual property would be unlikely to have incurred.

Finally, like Section 365(n)(4)(A), which addresses the licensee's right to obtain the licensed intellectual property during the period after the trustee files a bankruptcy petition (but prior to the trustee's election to accept or reject a license agreement), Section 365(n)(3)(A) provides the licensee with the right to obtain the licensed intellectual property from the trustee following the trustee's rejection of the license agreement. Also, like Section 365(n)(4)(B), Section 365(n)(3)(B) requires that the trustee not interfere with the licensee's rights under the agreement or a supplementary agreement to obtain the licensed intellectual property (or any embodiment of the intellectual property) from a third party. (The practice pointer discussed above with respect to Section 365(n)(4) is equally applicable to Section 365(n)(3).)

Section 365(n) leaves a number of issues unresolved. For example, it is unclear under Section 365(n) whether a licensee that elects to retain its rights is released from its non-royalty obligations, *e.g.*, confidentiality, marketing obligations and cross-licensing. Moreover, as previously discussed, the treatment of foreign patents following a licensor's filing of bankruptcy is unclear. Nevertheless, given the ever-growing reliance on technology, it is essential for practitioners who draft license agreements that involve intellectual property to be thoroughly familiar with the provisions of Section 365(n) in order to structure these agreements (and any supplementary agreements, such as escrow agreements) accordingly.

BASIC BUSINESS STRATEGIES -- AFTER THE BANKRUPTCY PETITION IS FILED

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I. THE TYPES OF BANKRUPTCY LIKELY TO BE FACED -

- A. **Chapter 11.** This is primarily used by businesses or individuals seeking to “reorganize” 11 U.S.C. §1101 et seq.
1. The term “reorganize” is a euphemism, which usually means the write-off or write-down of a substantial amount of unsecured debt and the re-structuring or “cramdown” of secured debt.
 2. The debtor usually remains in possession, and conducts the company’s reorganization. Trustees are not usually appointed in chapter 11. The term “trustee”, as used throughout the Code, refers to the debtor-in-possession, where no trustee has been appointed.
 3. Chapter 11 is used by some companies to achieve a court approved and supervised liquidation of assets. The primary difference between this and a chapter 7 liquidation is the use of a chapter 11 “plan” to guide the liquidation, and the usual absence of a trustee to conduct sales.
- B. **Chapter 7.** This is for liquidation of businesses or the liabilities of individuals conducted by a trustee appointed by the court. 11 U.S.C. §701 et seq.
1. No “plan” is used for a liquidation.
 2. The trustee is tasked to collect all the assets of the estate, and then to distribute them in accordance with an elaborate set of priorities.
- C. **Chapter 13.** This is used only by individuals with “regular income” who wish to reorganize or “adjust” their debts. 11 U.S.C. §1301 et seq.
1. Usually there is a “standing trustee” in a particular jurisdiction to oversee the chapter 13 proceedings.

2. The “reorganization” or “adjustment” takes place pursuant to a plan, which however (as opposed to chapter 11), must be filed with the petition or no later than 15 days later.

D. **Other Chapters.**

1. Chapter 12 (family farmer) and chapter 9 (municipality).
 - a. These chapters are infrequently used, and will not be covered here.
 - b. Some sewer or water districts are able to take advantage of chapter 9. Very debtor-friendly.
2. Chapter 20. This is a construct, referring to debtors who file both chapter 13 and chapter 7 successively, effectively to achieve the benefits of both.

E. **Conversion.**

1. The debtor may convert a chapter 11 case to a chapter 7 case, of right and without a hearing, unless a trustee has been appointed, the case was initiated as an involuntary bankruptcy, or the case was converted previously from a chapter 7 to a chapter 11. 11 U.S.C. §1112.
2. A “party in interest” may move for conversion from chapter 11 to chapter 7 for cause, including (a) continuing loss to or diminution of the estate; (b) inability to effectuate a plan; (c) unreasonable delay by the debtor that is prejudicial to creditors; (d) denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan; and (e) nonpayment of any fees or charges required under chapter 123 of title 28.
3. The debtor may convert a chapter 7 case to a chapter 11 case, if it hasn't been converted before. A party-in-interest may move for conversion upon notice and hearing. The Code provides no set grounds. 11 U.S.C. §706.

RECENT CASE: *In re Lupe R. Brown*, 293 B.R. 865 (Bankr. W.D. Mich. 2003). Held: Notwithstanding the clear permissive nature of 11 U.S.C. §706, the debtor's “absolute” right to convert does not extend to situations where the conversion is sought to thwart the chapter 7 trustee's attempts to administer the estate.

II. WHOE FILES BANKRUPTCY AND WHY?

- A. **Fresh Start.** The reason traditionally given for filing bankruptcy is to get a “fresh start” or breathing room.

1. This is accomplished by either liquidating all assets, making distributions to creditors, and then starting with a clean slate (chapter 7), or “reorganizing” by restructuring debt and coming out of bankruptcy with reduced obligations (chapter 11).

- B. **Pro Se Filings** Individuals may file pro se, but artificial entities such as corporations and LLC's may not under the common law rule that such entities may only appear in federal court (and consequently bankruptcy court) through counsel.

But see, **RECENT CASE:** In re Interiors of Yesterday LLC, 284 B.R. 19 (Bankr. D. Conn. 2002), where the court held that a petition filed by the manager of an LLC did not render the petition void ab initio, but could be cured by the subsequent appearance of counsel.

- C. **Bankruptcy Schedules** The Bankruptcy forms and schedules which the debtor must file (some of which are appended hereto as Exhibits) provide a wealth of information about the debtor. When a petition is filed, **READ THE SCHEDULES**. They are likely to inform you about the prospects of receiving a distribution.

- D. **“Bad Faith” filings.**

1. Developing case law suggests, especially in the single asset area, that where the debtor is a new entity created for the sole purpose of filing bankruptcy to avoid foreclosure of an insolvent property, the bankruptcy case may be dismissed. See e.g., In re Laguna Associates, 30 F.3d 734 (6th Cir. 1994).

RECENT CASE: In re Walden Ridge Development, LLC, 292 B.R. 58 (Bankr. D.N.J. 2003). Takes a more “traditional” approach, holding that various pre-filing transfers do not demonstrate “bad faith” since those transfers were made pursuant to routine real estate assignment clauses and were, in any event, motivated by a desire to preserve a valuable asset, a legitimate bankruptcy motivation.

- E. **“Pre-packaged” bankruptcies.**

1. There is no Code provision authorizing the filing of bankruptcies after the majority of claims and distributions have been consensually determined and resolved, but this is now done routinely.
2. Although the Code clearly specifies that acceptance of a Plan may not be solicited until after approval of a Disclosure Statement, 11 U.S.C. §1125, courts look the other way when a “pre-pack” is filed.
3. If you hear a “pre-pack” may be filed, get involved immediately if possible, and try to negotiate beneficial terms for payment of your claim as early as

possible. This is likely to maximize your recovery. Claimants coming to the table after a pre-pack is filed are likely to receive inferior treatment.

F. **The “automatic stay.”** 11 U.S.C. §362.

1. All bankruptcy filers want the same thing, i.e. the “automatic stay.” This is the heart and soul of debtor protection.
2. **Characteristics of the stay.**
 - a. Occurs immediately upon filing bankruptcy.
 - b. Automatically stays all lawsuits, the creation and enforcement of all liens, and any action to realize on a debt, except for a few specific items, perhaps most important of which is the exercise of governmental regulatory powers. So, although you may be stayed from enforcing a debt, an environmental control body may, nevertheless, be able to enforce clean up of toxic waste by the debtor. Although the action, to remain unstayed, cannot relate primarily to the “pecuniary” interest of the governmental body in the debtor’s property, In re Universal Life Church, Inc., 128 F.3^d 1294 (9th Cir. 1997) cert. denied, 524 U.S. 952 (1998), it has been held that government action to recover costs expended in response to environmental violations are not stayed. City of New York v. Exxon Corp., 932 F.2^d 1020 (2^d Cir. 1991).
3. Stays any act to gain possession of property.
4. Prevents any action to collect money. You cannot send an acceleration letter, a dunning letter or anything to the debtor. Do not even call. If you do, you are subject to severe penalties under the Code, including monetary sanctions or fines. 11 U.S.C. §362(h).
5. Need to get relief from the stay to file an action against the debtor. (This is dealt with in detail below.)
6. The automatic stay applies to the right of setoff. Compare 11 U.S.C. §553 with §362(a)(7). So, stay relief must be obtained to setoff. However, to protect its setoff rights, a creditor may temporarily withhold payment of a debt it owes without violating the stay. Citizens Bank v. Strumpf, 516 U.S. 16 (1995). Moreover, debts due under the same contract or transaction may be “recouped” without violating the stay. E.g. In re Gasmark, 193 F.3^d 371 (5th Cir. 1999).

RECENT CASE: In re Bonnie Lord, 284 B.R. 179 (Bankr.D. Mass. 2002).

Held: An insurer could withhold disability payments in order to recoup overpayments made to the debtor, since the mutual rights involved arose under the same “transaction” even if this was not a single contract.

III. INVOLUNTARY BANKRUPTCIES – THE “RELUCTANT DEBTOR”.

- A. Used when a financially-troubled entity does not wish to go into bankruptcy, but its creditors want it in bankruptcy. 11 U.S.C. §303.
1. Filed by three creditors holding more than \$10,775 in non-contingent, undisputed debts in excess of the value of the liens on any property securing those claims. Need only one creditor if there are less than 12 creditors holding non-contingent, undisputed debts. If the entity is a partnership, only one GP need file.

RECENT CASES: In re John Richards Homes Building Co., LLC, 291 B.R. 727 (Bankr. E.D. Mich. 2003). Creditor who filed an involuntary bankruptcy against his home builder after filing a lawsuit against the builder, which was contested by the builder on the underlying facts, was assessed \$4.1 million in compensatory damages and \$2.0 million in punitive damages for filing the action in bad faith because he “knew” the claims were subject to a bona fide dispute.

In re BDC 56 LLC, 330 F.3d 111 (2^d Cir. 2003), citing In re Busick, 831 F.2d 745 (7th Cir. 1987) approvingly, held that (i) whether a bona fide dispute exists must be determined on the basis of an objective test and (ii) the petitioning creditor has the initial burden of establishing a prime facie case that no bona fide dispute exists and, thereafter, the burden shifts to the debtor to demonstrate the existence of a bona fide dispute.

2. The petition filed does not become an “order for relief” until after the court issues an order effectively authorizing the bankruptcy. This contrasts with a voluntary bankruptcy where the petition constitutes the order for relief.
 - a. Grounds for order-
 - (i) Debtor not generally paying debts as they become due.
 - (ii) Custodian took possession of substantially all debtor property within last 120 days.
 - (iii) Petition not controverted. This provides the opportunity for self-dealing by the debtor. For example, many commercial loans are now credit-enhanced with “springing guaranties,” which go into effect upon various events, including the filing of a voluntary bankruptcy by the debtor. If the guarantor is

an insider (as is usually the case), it can get another insider to file an involuntary bankruptcy, not contest the filing, and consequently avoid "springing" the guaranty.

- B. The filing of an involuntary bankruptcy DOES trigger the automatic stay, see 11 U.S.C. §362(a), even if the debtor contests the filing.

IV. THE BANKRUPTCY CASELOAD.

- A. Total number of bankruptcies filed in the most recent 12-month period for which there are statistics (April 1, 2002 through March 31, 2003) again hits record:

	<u>April 1, 2001 through March 31, 2002</u>	<u>April 1, 2002 through March 31, 2003</u>
Total Cases	1,504,806	1,611,268
Chapter 7	1,059,777	1,135,436
Chapter 11	11,477	10,722
Chapter 13	433,107	464,369
Total Business Filings	39,845	37,548
Ch. 7 Business	23,367	21,649
Ch. 11 Business	10,623	9,762
Ch. 12 Business	389	632
Ch. 13 Business	5,414	5,404

- B. Total Bankruptcies up 7.1%; business bankruptcies down 5.8%.
- C. One of the reason things are so slow in bankruptcy court: No new bankruptcy judgeship has been created since 1992.
1. 1992 – 2965 filings per judge.
 2. March 2003 – 4973 filings per judge.
- D. Bankruptcy filings way up: E.D. Mich., Colorado, E.D. Wisc., W.D. Mo., E.D. Okla., Arizona, S.D. Texas, M.D. Ala., N.D. Okla., W.D. Mich. (All up between 15 and 23 percent).
- E. Bankruptcy filings down the most: N. Mariana Islands, Hawaii, Delaware, C.D. Cal., S.D. Cal., D.C., E.D. La., Maine, South Dakota, Wyoming (most down single digits).

V. THE FIRST WEEKS OF BANKRUPTCY.

- A. **“First Day Orders”**. These were pioneered in Delaware, but their use is waning somewhat. There is no provision in the Code for them anywhere, but they are so important, they must be considered and addressed in any large bankruptcy.
1. They were originally designed to provide a procedural blueprint for the rest of the bankruptcy case.
 2. Substantive relief was then granted with little or no scrutiny by creditors, creditors' committees, or the U.S. Trustee.
 3. “First Day Orders” may now extend over several days.
 4. Orders now typically considered and often entered in the first days of large chapter 11's:
 - a. Cash Collateral Orders.
 - b. Orders to allow payments to key vendors, e.g., utilities and suppliers.
 - c. Orders authorizing payment of employee pre-petition claims.
 - d. Incentives for key employees to remain with the debtor during the reorganization process.
 - e. Orders approving debtor-in-possession financing.
 5. Jurisdictions are beginning to provide in local rules for what types of orders are appropriate for first day relief. This is a bankruptcy trend.
- B. **Cash Collateral Orders**.
1. Two of the first issues that must be addressed in any bankruptcy involving commercial real estate are generally:
 - a. The extent to which the debtor will have use of the rents during pendency of the case, and
 - b. Whether the mortgagee will receive any post-petition debt service.
 2. Resolution of these issues is normally achieved through a negotiated “cash collateral” stipulation, which allows the debtor to use the rents for ordinary operating expenses in exchange for regular payments to the mortgagee and certain other protections such as a tax and insurance escrow and regular financial reporting.

- a. Bankruptcy judge does not dictate terms. If the parties cannot agree, an evidentiary hearing must be held to provide a basis in law and fact for the judge to choose between contentions of the parties. Judges do not like to hold a trial to resolve cash collateral disputes.
 - b. Although cash collateral orders may be of most importance to secured creditors, they are also extremely important to unsecured creditors because they determine how much “free” cash the debtor will have available to carry on its business and because the order will usually include a detailed budget, establishing what the debtor will and will not be purchasing while in bankruptcy.
3. **What is “Cash Collateral”? 11 U.S.C §363(a).**
- a. Cash or cash equivalents (negotiable instruments, securities, deposit accounts) whenever acquired in which the debtor and another entity have an interest.
 - b. Cash collateral includes post-petition rents or profits of property subject to a security interest to the extent provided by the security agreement and by state law.
4. **Absolute assignments of rents.**
- a. Many lenders use standard mortgage terms containing language purporting to grant an absolute assignment of rents. An absolute assignment means that the lender owns the rents at all times. It is more than a mere lien on the rents.
 - b. The lender lets the borrower use rents so long as it does not default. Whether the court will recognize and enforce an absolute assignment is still an issue of state law. No consistent rule. Most state law decisions bend over backwards to find that a purported absolute assignment is in reality merely a security interest. But see, In re Jason Realty, L.P., 59 F.3^d 423 (3^d Cir. 1995), holding that an absolute assignment vests title to the rents in the lender. Consequently, the rents are not part of the estate, are not cash collateral, and may not be used by the debtor for reorganization purposes.

5. **“Adequate Protection”.**

- a. Bankruptcy Code provides that a Debtor may not use the secured creditor's cash collateral unless the creditor consents or the Bankruptcy Court, after notice and a hearing, authorizes such use. 11 U.S.C. §363(c).
 - (i) Debtor must obtain consent or move Court for authority to use cash collateral.
 - (ii) Court may condition the debtor's use of the cash collateral on providing “adequate protection” of the secured creditor's interest in the collateral.
- b. Adequate protection may be provided by (i) segregating the cash, (ii) cash payments or replacement liens to cover any decline in value, or (iii) anything else that is the “indubitable equivalent” of the creditor's interest.
 - (i) **Over-secured Creditor – “Equity Cushion”**. Many courts will not order payments if there is any significant value in the collateral in excess of the secured creditor's lien, or if the debtor can prove that the creditor's interest will not decrease in value by debtor's use of cash collateral.
 - (A) Courts are divided as to whether the real estate and the cash generated by it are two separate forms of collateral each entitled to adequate protection.
 - (B) As practical matter, most lenders generally negotiate payments regardless of equity since parties prefer not to litigate value of the property early in the case.
 - (C) Secured creditor not entitled to adequate protection for delay of foreclosure.
 - (ii) Bankruptcy Reform Act created new stay relief provision requiring court to grant stay relief in single asset real estate cases under \$4 million unless, within 90 days of filing, debtor begins making monthly payments to mortgagee equal to interest only at fair market interest rate on the value of the secured creditor's interest in the real estate, or a plan with a reasonable possibility of confirmation is filed. Debtors take the position that this means they are under no obligation to make adequate protection payments during the first 90 days.

c. **Other Provisions of Cash Collateral Order.**

- (i) Separate bank accounts – rents, security deposits, payroll taxes.
- (ii) Line-item Expense Budget.
- (iii) Property Manager.
- (iv) Authority for reasonable, ordinary and necessary operating expenses, but no capital expenditures.
- (v) Tax and insurance escrow maintained.
- (vi) Net operating income sweep to date of order; minimum monthly payment thereafter.
- (vii) Stay relief trigger for nonpayment.
- (viii) Regular financial reporting.
- (ix) Segregation of assets.

See **RECENT CASE: In re World Parts LLC**, 291 B.R. 248 (Bankr. W.D.N.Y. 2003). Held: Where debtor failed to segregate assets on which there were conflicting claims, where this was required by cash collateral order, the debtor's officers could be found in contempt of the order. Even if there were no actual damages, liability for consequential damages consisting of legal expenses in the amount of \$6,000 was permissible so that the officers could not commit contempt with impunity.

d. **Pre-Petition Receiver.**

- (i) A pre-petition receiver must vacate his custody of the property and deliver it all to the debtor-in-possession, and file an accounting. 11 U.S.C §543.
- (ii) However, the court may allow the receiver to remain in possession. To maintain receiver, creditor must either obtain consent of the mortgagor, or move for an order of the court, authorizing receiver to remain in place. See 11 U.S.C. 543 (d).
- (iii) Requires an evidentiary hearing to establish that maintaining the receiver is in the best interests of creditors. (E.g. show former mismanagement by debtor, what a mess the receiver found, what a great job receiver has done to date, no ability of debtor to reorganize).

- (iv) The presence of a receiver appointed, and in possession and control of the property, prior to the bankruptcy filing, and who is subsequently authorized by the bankruptcy court to remain in place, will obviate the need for a cash collateral stipulation.

C. **Meeting of the Creditors.** 11 U.S.C. §341.

1. Between 20 and 40 days after the order for relief (petition in voluntary bankruptcy; order in involuntary bankruptcy), the U.S. Trustee must set a Meeting of the Creditors. R. Bankr. Proc. 2003.
2. The U.S. Trustee conducts the meeting.
3. Creditors routinely avoid these meetings, but they can be a useful source of easy discovery, because creditor may ask whatever questions it wants regarding debtor's financial situation and its bankruptcy or liquidation plans.
4. Hearing date is very important in chapter 7 context because an objection to discharge in chapter 7 must be filed no later than 60 days after the first date set for the meeting of creditors. R. Bankr. Proc. 4004.

D. **Discharge v. Dischargeability.**

1. The debtor receives a discharge of its debts under chapter 7 upon expiration of 60 days after creditor's meeting. 11 U.S.C. §727. In chapter 11, the discharge comes upon confirmation of a plan. 11 U.S.C. §1141. In chapter 13, the debtor receives a discharge after all payments are made under the plan (usually 3-5 years). 11 U.S.C. §1328.
 - a. Discharge in Chapter 7 only applies to individuals. 11 U.S.C. §727(a)(1).
 - b. No discharge to chapter 11 debtors if they confirm a liquidating plan or do not engage in business after plan consummation.
2. **Certain debts are "non-dischargeable".** See 11 U.S.C. §523.
 - a. Money or property obtained by fraud.
 - b. Willful or malicious injury.
 - c. Alimony or child support.
 - d. Death or injury in motor vehicle accident.

- e. Condo fees.
 - f. Education loans, unless this would “impose an undue hardship on the debtor and the debtor’s dependents”. 11 U.S.C. 534(a)(8).
 - g. Debts not scheduled by the debtor, as required by 11 U.S.C. §521, and of which the creditor did not receive actual notice.
3. Creditor can file a complaint to determine the dischargeability of a debt. In both chapter 7 and 11, this must be done within 60 days of the first date set for the meeting of the creditors. R. Bankr. Proc. 4007(c).
 4. **RECENT CASES:** Archer v. Warner, 123 S. Ct. 1462 (U.S. 2003). Reducing a §523(a)(2) claim for money or property obtained by false pretenses to settlement does not render the debt non-dischargeable.

In re Roger M. DeTrano, 326 F.3^d 319 (2^d Cir. 2003). A debt under §523(a)(4) for fraud while acting in a fiduciary capacity remains non-dischargeable after a settlement agreement is entered into. Courts must look beyond the settlement agreement to determine whether the debt is actually based on fraud, even where releases are provided.

VI. THE ONGOING BANKRUPTCY CASE.

- A. Must decide initially whether to work with the debtor or take adversarial stance.
 1. In most instances, where the claim is small in relationship to the overall estate, it may make sense to work closely with the debtor in structuring treatment of your claim.
 2. **Creditors Committee.** Unsecured creditors can seek appointment in both chapter 7 and chapter 11 to a Creditor’s Committee. 11 U.S.C §§705, 1102, 1103. The U.S. Trustee often is unable to get sufficient volunteers to form such a committee. Yet those committees have potentially broad and expansive powers. For example, as provided in 11 U.S.C. §1103(c):
 - “(c) A committee appointed under section 1102 of this title may --
 - (1) consult with the trustee or debtor in possession concerning the administration of the case;
 - (2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor’s business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
 - (3) participate in the formulation of a plan, advise those represented by such committee of such committee’s

determination as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;
 (4) request the appointment of a trustee or examiner under section 1104 of this title; and
 (5) perform such other services as are in the interest of those represented.”

B. Stay Relief

1. A motion for relief from the automatic stay of 11 U.S.C. §362, seeks to excuse compliance with the stay, and allow the requester to recover on its debt in some other forum or by means other than awaiting a distribution in bankruptcy court.
2. Is stay relief automatic upon filing a motion? No.
 - a. Need to meet detailed legal and practical requirements.
 - b. Never automatic even in most egregious circumstances.
 - c. Only granted after evidentiary hearing.
3. **Legal requirements for stay relief.**
 - a. §362(d)(1) – “for cause, including lack of adequate protection”.
 - (i) Generally, secured creditor is adequately protected as long as the secured claim is protected from physical and economic depreciation.
 - (ii) The secured claim is not necessarily the loan amount or obligation amount. It is the value of the property if the value is lower than the loan amount.
 - (iii) Secured claim in real property is usually not deemed adequately protected if:
 - (A) Lapsed insurance.
 - (B) Serious physical deterioration (or threat thereof).
 - (C) Unpaid post-petition taxes.
 - b. §362(d)(2) – No equity and “property not necessary to an effective reorganization”.
 - (i) No equity – sum of all liens. Requester must prove this. If it does, then debtor must prove “property necessary to an effective reorganization”, which is defined in case law to

- mean reasonable chance of confirming a plan within a reasonable amount of time.
- (A) How decide? Completely subjective.
 - (B) Basically, if the requester can show that debtor cannot pay taxes, insurance and substantial rehabilitation, then get stay relief.
 - (C) If property is in good condition and is just not cash flowing sufficient to pay the debt, courts are willing to give debtor 6-10 months to attempt to confirm a plan, because only by trying to do so can court determine if there is a reasonable probability of confirming a plan.
- c. §362(d)(3) – Debtor fails to file plan with “reasonable possibility of being confirmed” or fails to start making debt payments based on market rate and value of collateral within 90 days of bankruptcy petition.
- (i) Applies only to “single asset real estate”.
 - (ii) 1994 Bankruptcy Code Amendment. This new section has not had the impact Congress intended.
4. You may want stay relief but it may be unattainable because the property is in good condition or you are over-secured. Some strategies to employ in this circumstance:
- a. Since the risk of having plan confirmed over your objection is greatest in this category, you may want to explore terms for a consensual plan to avoid the possibility of cramdown.
 - b. Can file stay relief motion for better bargaining position (even though it is likely to fail).
 - c. Can join hearing on stay relief with plan confirmation hearing. In commercial real estate context, stay relief is unlikely as long as the requester is being paid at least NOI post-petition and debtor is reasonably moving toward confirming a plan of reorganization. But if the plan is not confirmed, this automatically shows there is little likelihood of confirming a plan, and you may then receive stay relief without further action.
5. Alternatively, your primary desire may be to do a workout because stay relief, although legally possible, would not serve your business goals. A workout is achieved in bankruptcy by a “confirmed plan of reorganization”.

C. **“Confirmed Plan of Reorganization”**. 11 U.S.C. §1129.

1. **What do those terms mean?**

- a. “Confirmed” – accepted by court after hearings (may be 10 minutes or 2_ month trial) as complying with bankruptcy law and being financially feasible (meaning it can work or has a reasonable chance of doing so).
- b. “Plan” – Just that. A detailed blueprint for how the business will work outside of the bankruptcy.
- c. “Reorganization” – Modification to prior functionings or obligations. May keep some obligations the same and alter others (e.g. may leave one loan unchanged, but cut-off a second mortgagee).

2. In summary, a plan is an outline of the future operation of the business.

- a. A means to marshal all assets into one place and divide those assets.
- b. “Fresh start” for the business. This makes sense for multiple asset bankruptcy, but is less logically applicable to single asset real estate bankruptcies.
 - (i) In a two-party dispute, why should contract rights be altered?
 - (ii) This contrasts with bankruptcies involving multiple parties/multiple claims.

3. Must deal with all claims against the estate.

- a. You will probably be one of dozens or even thousands of claimants.
- b. Your bargaining power in bankruptcy is related, in large part, to the size of your claim. But this is not exclusively so. A second mortgagee may, in some instances, have greater leverage than a first mortgagee because of its ability to provide the debtor with the required impaired consenting class. See 11 U.S.C. §1129(a)(10) and further discussion below.

4. **Plan may be filed at any time.** 11 U.S.C. §1121.

- a. During “exclusivity period” only debtor may file.
 - (i) 120 days in most cases, subject to extension.

- (ii) If a debtor chooses treatment as a “small business” (a non-real estate business with liabilities not exceeding \$2 million), the exclusivity period is 100 days, and all plans must be filed within 160 days. (Grounds for extension are very limited.)
- b. Thereafter any proponent may file a plan. However, doing so may be extremely expensive from the standpoint of legal fees, and stay relief may often accomplish the same goals. But competing plans HAVE been confirmed and, at a minimum, they provide the proponent with additional leverage.

5. **Disclosure Statement.** 11 U.S.C. §1125.

- a. First part of plan reorganization. First battleground.
- b. Must fully explain Plan so the any ordinary creditor can decide whether to vote for or against the Plan.
- c. Must be approved by court before Plan is distributed for voting.
 - (i) 11 U.S.C. §1125(b) provides as follows:

“An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest unless, at the time on or before such solicitation, there is transmitted to such holder the plan or summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtors’ assets.”
 - (ii) **RECENT CASE:** In In re NII Holdings, 288 B.R. 356 (Bankr. D. Del. 2002), the court disqualified various creditor votes which had been “locked-up”, now a routine practice of dubious validity, allowing debtors to secure the affirmative agreements to plan treatment prior to any solicitation.
- d. Disclosure Statement is less important in a single asset bankruptcy.
 - (i) Spending litigation dollars to oppose approval of a Disclosure Statement may be a bad investment. You may know as much about the debtor as the debtor does.
 - (ii) Can use hearings as informal discovery device.

6. **The §1111(b) Election.** 11 U.S.C. §1111(b)

- a. This obscure rule provides a secured creditor with an election regarding recourse treatment of its claims. The election, if made, must be made before the conclusion of the Disclosure Statement hearing.
- b. Without the election, the creditor is secured up to the value of the property and the loan becomes recourse for any deficiency. The creditor gets both a secured and unsecured claim. This is one of the few benefits to the creditor of a bankrupt entity.
- c. With the election, the creditor retains its lien in the full amount of the claim, but:
 - (i) The loan reverts to non-recourse status; creditor loses virtually all of its objections to confirmation of the Plan, except for feasibility.
 - (ii) Creditor remains entitled to debt service based on the value of the property, rather than the amount of the loan, as if it had not elected. But the creditor may be able to recover the full amount of the claim if the property is ultimately sold at an appreciated value.

7. The Ballot – Voting on the Plan.

- a. Each “class” votes on the Plan.
- b. A class accepts the Plan if 2/3 in value and more than in number of those voting accepts the Plan.
 - (i) Only impaired classes vote.
 - (ii) Very few unsecured claimants usually vote.
- c. The purchase of unsecured claims may be attempted by a creditor. This occurs sometimes as part of a high-risk strategy to control the bankruptcy. As noted below, plan confirmation requires the acceptance of at least one impaired class of claims. If the unsecured class is the only potentially consenting class, purchasing those claims will give the secured creditor doing so effective control over the bankruptcy. Courts take a dim view of this sometimes. To avoid a bad faith challenge (which would invalidate the secured creditors’ “no” vote), it is best to attempt to purchase all claims if possible.

8. Confirmation of the Plan.

- a. The Plan is both a litigation device and a settlement tool for both the debtor and creditor.

- b. The plan is always a moving target. Debtors amend the Plan up to and including the day of a confirmation hearing.
- c. Amendment of the Plan does not necessarily require re-noticing and re-balloting unless the revised language is likely to have caused an accepting class to reject the Plan.

9. **Requirements of Confirmation.**

- a. One “impaired” class must vote in favor of the Plan.
 - (i) Claimant is impaired unless it is paid in full in accordance with the original terms.
 - (ii) Unsecured trade creditors must generally be paid in full on the “effective date” of the plan in order not to be impaired.
 - (A) “Artificial impairment”. If, in order to get an impaired consenting class, the debtor impairs the trade creditor class by, for example, delaying payment by one day, courts may ignore this “impairment” and deem the class unimpaired.
 - (iii) Restructuring of a secured claim constitutes “impairment” even if it ultimately will be paid in full.
 - (iv) Payment in cash on a mortgage for a term of years constitutes impairment in most jurisdictions.
- b. **Proper classification of claims.**
 - (i) “Substantially similar” claims must be classified together.
 - (ii) Secured claims are almost never “substantially similar” because they relate to different properties and have different priorities.
- c. **Absolute priority rule must be complied with.**
 - (i) No lower priority class can have its claim paid unless the next higher priority class is paid in full.
 - (ii) “New value” exception. Traditional rule was that owners may put in “money or money’s worth” to retain their equity interest even if some claimants are not paid in full.
 - (iii) Bank of America National Trust and Savings Ass’n v. 203 North LaSalle Street Partners, 526 U.S. 434 (1999) has cast doubt on continuing validity of the “new value” exception. As stated in LaSalle, 526 U.S. at 458:

“It is enough to say, assuming a new value corollary, that plans providing junior interest holders with exclusive opportunities free from competition and without benefit of market valuation fall within the prohibition of §1129(b)(2)(B)(ii).”

- (iv) More importantly, LaSalle has changed many bankruptcy proceedings into bidding wars for the “equity” in the estate. These auctions may effectively render the plan confirmation process mere “window dressing”.
- d. Need a valuation of the property to determine the amount of your secured claim and your unsecured deficiency claim, if any.
 - (i) May occur at confirmation or in a separate prior hearing.
 - (ii) “Valuation” for stay relief purposes maynot be applicable for confirmation.
- e. The Plan must be “fair and equitable”.
 - (i) Any “secured claim” must be paid in full up to the value of the property, but the terms of Note and Mortgage may be altered.
 - (ii) Must give stream of payments with present value equal to the value of the property.
- f. “Interest rate” must be “market rate”.
 - (i) Courts vary widely on what is “market rate”.
 - (ii) Can have battle of experts on appropriate rate.
 - (iii) Market rate is to reflect risks, but Courts reject notion that there is no “market rate” for a bankrupt property.
 - (iv) Usually adopt a practical approach.
- g. Creditor must be paid post-petition interest if, and only if, it is over-secured. 11 U.S.C. §502(b)(2). If the creditor is undersecured, debtor can seek to apply cash collateral payments to principal.
- h. Reorganization another time in the future must not be likely.
- i. Plan must be “feasible”. This is a business/economic concept. Basically, the plan must be likely to work.

- (i) Projected cash flows and expected revenues must be sufficient to fund the business going forward, and any deteriorated property must be rehabilitated.
- (ii) For the debtor, prosperity is always just around the corner.
- j. Stay relief does not preclude consideration of a cramdown plan. If you get stay relief, proceed quickly to execute or recover because the debtor may still try to cram down your claim.

10. **Development and Confirmation of Consensual Plan.**

- a. Often occurs within context of debtor threats to cramdown a non-consensual plan and creditor threats to seek and obtain stay relief. This often results in consensual terms, derived from the leverage of the various parties.
- b. Can negotiate before or after a debtor plan is filed, but do not delay the initiation of negotiations if the court decides to conduct a pre-plan auction of estate assets.
- c. Creditor can seek (although it may not receive) anything and more than it would seek in non-bankruptcy workout.
 - (i) Treatment of entire claim as secured, even if the value of the property is less than the loan amount.
 - (ii) "Springing" guarantee.
 - (iii) "Refiling bars".
 - (iv) Plan default provisions.
 - (v) Large "new value" contributions to rehabilitate property.
 - (vi) Higher than market rate interest.
- d. What borrowers will almost always seek to avoid paying.
 - (i) Default interest and late charges.
 - (ii) Attorneys' fees (especially in-house fees).
 - (iii) **RECENT CASES:** In re Pride Companies, L.P., 285 B.R. 366 (Bankr. N.D. Tex. 2002). Held: Unsecured creditors may not recover attorneys' fees. This is determined by negative inference: Since 11 U.S.C. §506(b) provides for attorneys' fees for oversecured creditors, by implication unsecured creditors are not entitled.

In re Elk Creek Salers, Ltd, 290 B.R. 712 (Bankr. W.D. Mo. 2003). [BAD DECISION]: The court held that an over-secured creditor could not recover its attorneys' fees under §506(b) because the note provided for fees only for actions taken to collect the debt. The creditor's adversary proceeding here, to establish the validity and priority of its lien, was not such an action, the court held.

In re Mark and Mikaleena Atwood, 293 B.R. 227 (9th Cir. BAP 2003). Held: A secured creditor may assert its claim for attorneys' fees either by Proof of Claim or pursuant to a R. Bankr. Proc. 2016 application for reimbursement.

- e. If you have loan documents, you can amend the loan documents by Plan or at closing thereafter. Pluses and minuses either way; on balance, it may be preferable, even though more complicated, to require a closing.
- f. Can provide for assumption of a loan in confirmed Plan.
- g. Can bargain for consensual Plan after obtaining stay relief.

VII. PROOF OF CLAIM.

- A. In order to have a claim considered in bankruptcy, the creditor must file a Proof of Claim.
- B. In chapter 7, this must be done within 90 days after the first date set for the meeting of the creditors. But a claim arising from the rejection of a executory contract may be filed within such time as the court may direct. See R. Bankr. Proc. 3002.
- C. In chapter 11, unless and until the court sets a date for filing the Proof of Claim, no Proof of Claim need to be filed. R Bankr. Proc. 3003.
- D. In chapter 11, the creditor need not file a Proof of Claim if it is listed on the schedule of liabilities filed by the debtor pursuant to §521(1), and is not listed as disputed, contingent, or unliquidated.
- E. Debtor has an opportunity to object to claims. R. Bank. Proc. 3007. If debtor objects, there will be hearing upon notice to determine the validity of the claim. If no "party in interest" (including the debtor and a creditor of a general partner in a partnership debtor) objects, the claim is "deemed allowed". 11 U.S.C. §502.

RECENT CASES: In re Dynamic Brokers, Inc, 293 B.R. 489 (9th Cir. BAP 2003). Held: Debtor cannot utilize the plan as a means to object to a claim, unless the

debtor complies fully with the notice and hearing requirements of R. Bankr. Proc. 3007. Such notice cannot be buried in a disclosure statement or plan provision.

In re Papercraft Corp., 323 F.3^d 228 (3^d Cir. 2003). A creditor's claim may be equitably subordinated by an amount (\$2.9 million) representing the attorneys' fees incurred by the debtor and creditor's committee in connection with responding to issues repeatedly re-litigated in bad faith by the creditor. This does not violate the "American" rule of not ordinarily allowing the prevailing litigant to collect attorneys' fees from the loser.

VIII. ASSUMPTION AND REJECTION OF EXECUTORY CONTRACTS IN BANKRUPTCY.

- A. Trustee or debtor-in-possession must assume or reject executory contracts or unexpired leases of the debtor. 11 U.S.C. §365.
1. Executory contracts are contracts pursuant to which performance is still due by both parties. In re Robert L. Helms Construction & Dev. Co., Inc., 139 F.3^d 702 (9th Cir. 1998). Accordingly, simple notes and mortgages with no remaining duties on part of lender are not usually deemed executory.
 2. Court must approve the rejection or assumption. 11 U.S.C. §365(a).
 3. Court approval of assumption, rejection or assignment is based upon a "business judgment" standard. In re G. I. Industries, 204 F.3^d 1276 (9th Cir. 2000).
 4. In the event of rejection, the contracting party has a claim for breach of contract, which must be presented pursuant to the Code's standard Proof of Claim process, which claim may still be disallowed pursuant to ordinary state law contract defenses, such as lack of consideration, etc.
 5. In order to assume an executory contract, the trustee or debtor-in-possession must cure any default, compensate the contracting party or provide "adequate assurance" that compensation will be provided, and provide adequate assurance of future performance. 11 U.S.C. §365(b).
 6. Chapter 7: Rejection or assumption must take place within 60 days after the order for relief, or the contract is deemed rejected.
 7. Chapter 11: Rejection or assumption can take place up to the time of confirmation of a Plan. But, a creditor can request the court to set an earlier deadline. 11 U.S.C. §365(d).

8. If the debtor-in-possession is a lessee (tenant) under a lease of non-residential real property, it must reject or assume the lease within 60 days after the order for relief. If no action is taken within 60 days, the lease is deemed rejected and the property must be surrendered immediately.
9. Contract provisions purporting to terminate or modify contractual provisions or any rights or obligations under the contract after commencement of a bankruptcy case upon the filing of a bankruptcy or insolvency of the debtor are unenforceable in bankruptcy. 11 U.S.C. §365(e).
10. Contracts may be assigned by the trustee or debtor-in-possession notwithstanding strictures in the contract precluding this, if "adequate assurance" of future performance by the assignee is provided.
11. If the debtor rejects an unexpired lease under which it is a lessor (landlord) of real property (residential or nonresidential), the lessee (tenant) may either treat the lease as terminated under state law and vacate the premises or may retain possession of the property and offset against rent payable the amount of damages caused by the nonperformance of any obligations of the lessor under the lease. 11 U.S.C. §365(h).

B. Special Intellectual Property Considerations. 11 U.S.C. §365(n).

1. This section permits a holder of a license (licensee) to intellectual property which is rejected by the debtor licensor to retain the rights "as such rights existed immediately before the case commenced."
2. But, this must be read in conjunction with §365(e), which voids any contractual provision terminating or modifying a contractual right or obligation upon bankruptcy.
 - a. Thus, a provision providing for immediate access to the "source code" upon bankruptcy may not be enforceable.
 - b. §365(n)(3) purports to cure this problem by specifically requiring the debtor-in-possession to hand over the source code under these circumstances.
3. Subsection (n)(3) may not be a cure-all, however, because it only applies to rights "as such rights existed immediately before the case commenced." If the licensee did not have access to the source code prior to bankruptcy, it can be argued that subsection (n)(3) does not apply.
4. Even if subsection (n)(3) is deemed to apply, the debtor-in-possession may object to the turnover of the source code to delay turnover, knowing that

delay may seriously hurt licensee's business and such delay will create leverage enabling the debtor licensor to negotiate a better license deal.

5. To avoid this possibility, various strategies are available:
 - a. If possible, try to use "markers" for insolvency or bankruptcy, so as not to run afoul of §365(e), so that the right to the source code will be triggered prior to bankruptcy, such as: downgrade of the licensor by a rating agency, defaults in licensor's other obligations, licensor's failure to pay debts as they become due, or failure by licensor to meet set revenue or profit thresholds.
 - b. Try to structure the license as a perpetual, irrevocable, fully paid up license, if possible, thus at least arguably rendering the contract non-executory and, thus, not subject to §365.
 - c. Along with this, or even if this is not possible, try to have the source code held by the licensee or in the possession of an escrow agent under an agreement whereby the licensee forbears exercising the right to access the source code until some specified event, and requiring turnover of the source code upon unilateral demand of the licensee.

IX. PREFERENCES AND AVOIDANCE. 11 U.S.C. §547.

- A. "Preferences" are "avoidable" and recoverable by the state. A preference is generally a transfer of an interest in the debtor's property (including money or creation of a lien) made before the bankruptcy, which effectively "preferred" one creditor over another at a time when the debtor was having severe financial difficulty.
- B. In legal terms, a transfer is a preference if it is:
 1. To or "for the benefit of" a creditor;
 2. On account of an "antecedent debt." Debt arises when services are performed, not when bill is presented. In re First Jersey Securities, Inc, 180 F.3^d 504 (3^d Cir. 1999);
 3. Made when the debtor was insolvent. Court may apply either a "going concern analysis" or equitable insolvency test. In re DAK Industries, 170 F.3^d 1127 (9th Cir. 1999);
 4. Made 90 days before the petition date, or one year if the creditor is an "insider";
 5. That enables the creditor to receive more than if

- a. The transfer was not made.
 - b. The case were a case under chapter 7.
- C. Preferences, though still preferences, may not be avoided to the extent the transfer:
1. Was a “contemporaneous exchange for new value”; or
 2. Created security interest in property acquired by the debtor in return for “new value” provided by the creditor and used by the debtor to acquire the property (The modification of business terms may not automatically constitute “new value”, without a calculation of the value of the modification given in exchange for the transfer. In re Spada, 903 F.2^d 971 (3^d Cir. 1990)); or
 3. Was made in the “ordinary cause of business” according to “ordinary business terms”. (Courts may reference both a “horizontal dimension test”, looking to the types of transactions companies in debtor’s business routinely engage in, and a “vertical dimension test”, which looks at whether the transaction subjects the creditor to economic risk different from that accepted and reasonably expected when it extended credit. E.g. In re Roth American, Inc., 975 F.2^d 949 (3^d Cir. 1992). Greater variance from the industry norm may be permitted when the debtor and creditor have a long-term, well-established relationship. Advo-System, Inc. v. Maxway Corp., 37 F.3^d 1044 (4th Cir. 1994). **RECENT CASE:** In re Fulcrum Direct, Inc., 2003 Bankr. LEXIS 318, 41 BCD 37 (Bankr.D. Del. 2003). **Held:** preferential payments made to a creditor who for two years had required the debtor to adhere to a strict payment plan due to its poor payment history, were subject to the ordinary course of business defense due to the longstanding relationship between the parties and because the relationship did not depart grossly from industry norms); or
 4. Other less often referenced exceptions detailed in §547.
- D. **DePrizio.** This seminal case extended the application of the one-year insider preference period to non-insider creditors if an insider benefited from the transfer, such as when a borrower under a loan made a payment to a non-insider mortgagee for the benefit of an insider guarantor. See Levit v. Ingersoll Rand Financial Corp (In re DePrizio), 874 F.2^d 1186 (7th Cir. 1989).
- E. Bankruptcy Reform Act of 1994 attempted to overrule DePrizio by adding subsection (c) to 11 U.S.C. §550 (“Liability of transferee of avoided transfer”) to preclude a DePrizio-type preferential transfer from being recovered from a non-insider transferee, such as a mortgagee. But some cases and commentators suggest that DePrizio may still have some life.

F. Other Avoidance Requirements. 11 U.S.C. §550

1. Except as provided above, the transfer may be recovered from
 - a. The initial transferee.
 - b. Any subsequent transferee, unless it takes for value, in good faith, and without knowledge of voidability of the transfer. (When a bank acts merely as a conduit for funds transferred from the debtor to a third-party, it is not the initial transferee. Rupp v. Markgraf, 95 F.3^d 936 (10th Cir. 1996)).

RECENT CASE: In re Andrew E. Bressman, 327 F.3^d 229 (3^d Cir. 2003). **Held:** Law firms which were subsequent transferees could raise the “good faith/no knowledge” defense, despite the trustee’s notification to them that the original transfer may have been voidable. This notification did not give the law firms “knowledge of the voidability” of the transfer or impose a duty on them to initiate their own investigation.

2. Avoidance actions are usually brought by the trustee, debtor-in-possession, or creditor’s committees, and much less frequently by creditors.

See, **RECENT CASE:** Jefferson Co. Board of Commissioners v. Voinovich (In re The V Companies), 292 B.R. 290 (6th Cir. BAP 2003). **Held:** In re Gibson Group, 66 F.3^d 1436 (6th Cir. 1995), which provides that creditors have derivative standing to file an avoidance action, remains good law in the 6th Circuit, notwithstanding Hartford Underwriters Insurance Co. v. Union Planters Bank, 530 U.S. 1 (2000).

X. SECTION 363 ASSET SALES. 11 U.S.C. §363(f).

- A. This section permits the sale of property of the estate free and clear of any interests in the property. The “traditional” rule was that the §363 sale could not be used as a disguised plan to sell substantially all the assets of the estate without going through the disclosure statement/plan process. See e.g., Braniff Airways, Inc., 700 F.2^d 935 (5th Cir. 1983). However, this traditional rule is being seriously eroded with full asset auction sales proceeding prior to plan approval, which then rubber-stamps the asset auction previously concluded.
- B. Property may be sold pursuant to subsection (f) only if:
 1. Applicable non-bankruptcy law permits free and clear sales; or
 2. The owner of the interest consents; or

3. The interest is a lien and the price at which the property is sold exceeds the value of all liens on the property. (General rule is that the price must be greater than the value of the collateral, rather than the face amount of the debt. In re Beker Indus. Corp., 63 B.R. 474 (Bankr. S.D.N.Y. 1986). Contra In re Terrace Chalet Apartments, Ltd., 159 B.R. 821 (N.D. Ill. 1993) (the price must exceed the total debt)); or
4. The property interest is in bona fide dispute; or
5. The interest owner could be compelled to accept a money satisfaction of its interest.

RECENT CASE: EEOC v. Knox-Schillinger (In re Trans World Airlines, Inc.), 3: the meaning of §363, and (ii) the claims were such that the creditor could have been compelled to accept a money satisfaction, since upon a liquidation of TWA's assets, the claims would have been converted to dollar amounts.

SELECTED CREDITOR FORM DOCUMENTS

- Proof of Claim
- Ballot for Accepting or Rejecting Plan of Reorganization
- Stipulation and Order Permitting Use of Cash Collateral

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____		PROOF OF CLAIM
Name of Debtor	Case Number	THIS SPACE IS FOR COURT USE ONLY
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor (The person or other entity to whom the debtor owes money or property):	<input type="checkbox"/> Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.	
Name and address where notices should be sent:	<input type="checkbox"/> Check box if you have never received any notices from the bankruptcy court in this case. <input type="checkbox"/> Check box if the address differs from the address on the envelope sent to you by the court.	
Telephone number:		
Account or other number by which creditor identifies debtor:	Check here if this claim <input type="checkbox"/> replaces a previously filed claim, dated: _____ <input type="checkbox"/> amends	
1. Basis for Claim <input type="checkbox"/> Goods sold <input type="checkbox"/> Services performed <input type="checkbox"/> Money loaned <input type="checkbox"/> Personal injury/wrongful death <input type="checkbox"/> Taxes <input type="checkbox"/> Other _____		
<input type="checkbox"/> Retiree benefits as defined in 11 U.S.C. § 1114(a) <input type="checkbox"/> Wages, salaries, and compensation (fill out below) Your SS #: _____ Unpaid compensation for services performed from _____ (date) to _____ (date)		
2. Date debt was incurred:	3. If court judgment, date obtained:	
4. Total Amount of Claim at Time Case Filed: \$ _____ If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below. <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.		
5. Secured Claim. <input type="checkbox"/> Check this box if your claim is secured by collateral (including a right of setoff). Brief Description of Collateral: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other _____ Value of Collateral: \$ _____ Amount of arrearage and other charges at time case filed included in secured claim, if any: \$ _____	6. Unsecured Priority Claim. <input type="checkbox"/> Check this box if you have an unsecured priority claim Amount entitled to priority \$ _____ Specify the priority of the claim: <input type="checkbox"/> Wages, salaries, or commissions (up to \$4,650)* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3). <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4). <input type="checkbox"/> Up to \$2,100* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6). <input type="checkbox"/> Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8). <input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(____). <small>*Amounts are subject to adjustment on 4/1/04 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</small>	
7. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.		THIS SPACE IS FOR COURT USE ONLY
8. Supporting Documents: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.		
9. Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.		
Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):	

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In particular types of cases or circumstances, such as bankruptcy cases that are not filed voluntarily by a debtor, there may be exceptions to these general rules.

DEFINITIONS

Debtor

The person, corporation, or other entity that has filed a bankruptcy case is called the debtor.

Creditor

A creditor is any person, corporation, or other entity to whom the debtor owed a debt on the date that the bankruptcy case was filed.

Proof of Claim

A form telling the bankruptcy court how much the debtor owed a creditor at the time the bankruptcy case was filed (the amount of the creditor's claim). This form must be filed with the clerk of the bankruptcy court where the bankruptcy case was filed.

Secured Claim

A claim is a secured claim to the extent that the creditor has a lien on property of the debtor (collateral) that gives the creditor the right to be paid from that property before creditors who do not have liens on the property.

Examples of liens are a mortgage on real estate and a security interest in a car, truck, boat, television set, or other item of property. A lien may have been obtained through a court proceeding before the bankruptcy case began; in some states a court judgment is a lien. In addition, to the extent a creditor also owes money to the debtor (has a right of setoff), the creditor's claim may be a secured claim. (See also *Unsecured Claim*.)

Unsecured Claim

If a claim is not a secured claim it is an unsecured claim. A claim may be partly secured and partly unsecured if the property on which a creditor has a lien is not worth enough to pay the creditor in full.

Unsecured Priority Claim

Certain types of unsecured claims are given priority, so they are to be paid in bankruptcy cases before most other unsecured claims (if there is sufficient money or property available to pay these claims). The most common types of priority claims are listed on the proof of claim form. Unsecured claims that are not specifically given priority status by the bankruptcy laws are classified as *Unsecured Nonpriority Claims*.

Items to be completed in Proof of Claim form (if not already filled in)

Court, Name of Debtor, and Case Number:

Fill in the name of the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the name of the debtor in the bankruptcy case, and the bankruptcy case number. If you received a notice of the case from the court, all of this information is near the top of the notice.

Information about Creditor:

Complete the section giving the name, address, and telephone number of the creditor to whom the debtor owes money or property, and the debtor's account number, if any. If anyone else has already filed a proof of claim relating to this debt, if you never received notices from the bankruptcy court about this case, if your address differs from that to which the court sent notice, or if this proof of claim replaces or changes a proof of claim that was already filed, check the appropriate box on the form.

1. Basis for Claim:

Check the type of debt for which the proof of claim is being filed. If the type of debt is not listed, check "Other" and briefly describe the type of debt. If you were an employee of the debtor, fill in your social security number and the dates of work for which you were not paid.

2. Date Debt Incurred:

Fill in the date when the debt first was owed by the debtor.

3. Court Judgments:

If you have a court judgment for this debt, state the date the court entered the judgment.

4. Total Amount of Claim at Time Case Filed:

Fill in the total amount of the entire claim. If interest or other charges in addition to the principal amount of the claim are included, check the appropriate place on the form and attach an itemization of the interest and charges.

5. Secured Claim:

Check the appropriate place if the claim is a secured claim. You must state the type and value of property that is collateral for the claim, attach copies of the documentation of your lien, and state the amount past due on the claim as of the date the bankruptcy case was filed. A claim may be partly secured and partly unsecured. (See DEFINITIONS, above).

6. Unsecured Priority Claim:

Check the appropriate place if you have an unsecured priority claim, and state the amount entitled to priority. (See DEFINITIONS, above). A claim may be partly priority and partly nonpriority if, for example, the claim is for more than the amount given priority by the law. Check the appropriate place to specify the type of priority claim.

7. Credits:

By signing this proof of claim, you are stating under oath that in calculating the amount of your claim you have given the debtor credit for all payments received from the debtor.

8. Supporting Documents:

You must attach to this proof of claim form copies of documents that show the debtor owes the debt claimed or, if the documents are too lengthy, a summary of those documents. If documents are not available, you must attach an explanation of why they are not available.

Form B14 (Official Form 14)
(9/97)

Form 14. BALLOT FOR ACCEPTING OR REJECTING A PLAN

[Caption as in Form 16A]

CLASS [] BALLOT FOR ACCEPTING OR REJECTING PLAN OF REORGANIZATION

[Proponent] filed a plan of reorganization dated *[Date]* (the "Plan") for the Debtor in this case. The Court has *[conditionally]* approved a disclosure statement with respect to the Plan (the "Disclosure Statement"). The Disclosure Statement provides information to assist you in deciding how to vote your ballot. If you do not have a Disclosure Statement, you may obtain a copy from *[name, address, telephone number and telecopy number of proponent/proponent's attorney.]* Court approval of the disclosure statement does not indicate approval of the Plan by the Court.

You should review the Disclosure Statement and the Plan before you vote. You may wish to seek legal advice concerning the Plan and your classification and treatment under the Plan. Your *[claim] [equity interest]* has been placed in class [] under the Plan. If you hold claims or equity interests in more than one class, you will receive a ballot for each class in which you are entitled to vote.

If your ballot is not received by *[name and address of proponent's attorney or other appropriate address]* on or before *[date]*, and such deadline is not extended, your vote will not count as either an acceptance or rejection of the Plan.

If the Plan is confirmed by the Bankruptcy Court it will be binding on you whether or not you vote.

ACCEPTANCE OR REJECTION OF THE PLAN

[At this point the ballot should provide for voting by the particular class of creditors or equity holders receiving the ballot using one of the following alternatives:]

[If the voter is the holder of a secured, priority, or unsecured nonpriority claim:]

The undersigned, the holder of a Class [] claim against the Debtor in the unpaid amount of Dollars (\$)

[or, if the voter is the holder of a bond, debenture, or other debt security:]

The undersigned, the holder of a Class [] claim against the Debtor, consisting of Dollars (\$) principal amount of *[describe bond, debenture, or other debt security]* of the Debtor (For purposes of this Ballot, it is not necessary and you should not adjust the principal amount for any accrued or unmatured interest.)

Form B14 continued
(9/97)

[or, if the voter is the holder of an equity interest:]

The undersigned, the holder of Class [] equity interest in the Debtor, consisting of _____ shares or other interests of *[describe equity interest]* in the Debtor

[In each case, the following language should be included:]

(Check one box only)

[] ACCEPTS THE PLAN

[] REJECTS THE PLAN

Dated: _____

Print or type name: _____

Signature: _____

Title (if corporation or partnership) _____

Address: _____

RETURN THIS BALLOT TO:

[Name and address of proponent's attorney or other appropriate address]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In Re:)	Chapter 11
)	
ALTERRA HEALTHCARE)	Case No. 03-10254 (MFW)
CORPORATION,)	
)	
Debtor)	

**STIPULATION AND ORDER PERMITTING USE
OF CASH COLLATERAL OF FEDERAL
HOME LOAN MORTGAGE CORPORATION**

WHEREAS, Alterra Healthcare Corporation, the above-captioned debtor and debtor in possession ("Alterra or the "Debtor") filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code on January 22, 2003 (the "Petition Date"); and

WHEREAS, the Debtor is continuing in possession of its property and operating and managing its business as a debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code; and

WHEREAS, the Debtor leases from its wholly owned subsidiary ALS Financing II, Inc. ("ALS Financing II") each of the nine (9) assisted living facilities listed on Exhibit A hereto (the "Properties"). The Debtor operates and manages the Properties pursuant to certain operating leases between the Debtor and ALS Financing II (the "Operating Leases," hereafter defined); and

WHEREAS, the Federal Home Loan Mortgage Corporation ("Freddie Mac") asserts that it is the holder of first priority mortgages or deeds of trust covering the Properties, and first priority liens on, and assignments of, the Operating Leases, which liens secure certain promissory notes made by ALS Financing II (and guaranteed by the Debtor) in connection with certain loans extended to ALS Financing II (the "Freddie Mac Loans"), the aggregate unpaid

balance of which (exclusive of attorneys fees and costs) was not less than \$51,820,125.32, as of the Petition Date.

WHEREAS, as additional security for the Freddie Mac Loans, pursuant to certain assignments and other agreements by and among Alterra, ALS Financing II, GMAC Commercial Mortgage ("GMAC," the loan servicer for the Freddie Mac Loans), and Freddie Mac, Freddie Mac asserts that it holds assignments of, and properly perfected first priority security interests in (i) all tenant level leases and rents, (ii) all personal property and fixtures located on and/or used in connection with the Properties; (iii) all permits, licenses, certificates of need, and all other agreements related to the ownership, use and occupancy of the Properties; and (iv) any and all proceeds, products, issues, rents and profits, admission fees, levels of care revenue, and generally all other income generated by the operation of the Properties (collectively, the "Debtor Collateral").

WHEREAS, Debtor requires use of the Cash Collateral generated from the Properties (as such term is defined in Section 363 of the Bankruptcy Code) to continue operating and managing the Properties and its business; and

WHEREFORE, the Debtor and Freddie Mac have reached the agreement set forth herein on the consensual use of such Cash Collateral.

NOW, THEREFORE, it is hereby stipulated and agreed, by and between the undersigned, subject to the approval of this Court, that the Debtor is authorized to use the Cash Collateral on the following terms and conditions:

(1) The Pre-petition Documents. The Debtor hereby ratifies and reaffirms all its duties and obligations under the following documents related to the Freddie Mac Loans:

- (a) The separate Lease Agreements for each Property made by and between the Debtor and ALS Financing II, effective as of March 23, 1999 (collectively, the "Operating Leases"); and
- (b) The separate Exceptions to Nonrecourse and Additional Collateral Guaranty agreements for each Property, dated March 23, 1999, and made by the Debtor for the benefit of GMAC Commercial Mortgage and subsequently assigned to Freddie Mac; and
- (c) The separate Assignment of Leases and Rents for each Property, dated March 23, 1999, and made by the Debtor for the benefit of ALS Financing II and subsequently assigned to GMAC and to Freddie Mac; and
- (d) The separate Subordination and Attornment Agreement for each Property, dated March 23, 1999, and made by and among the Debtor, ALS Financing II and GMAC and subsequently assigned to Freddie Mac; and
- (e) The separate Lessee Security Agreements for each Property, dated March 23, 1999, made by and between the Debtor and ALS Financing II, and subsequently assigned to GMAC and to Freddie Mac; and
- (f) The separate Lessee Environmental Indemnity Agreements for each Property, dated March 23, 1999, made by the Debtor for the benefit of GMAC and subsequently assigned to Freddie Mac; and
- (g) The separate Collateral Assignments of Licenses, Permits and Contracts for certain of the Properties, dated March 23, 1999, by and between the Debtor and ALS Financing II, and subsequently assigned to GMAC and to Freddie Mac; and
- (h) All other agreements entered into by the Debtor in connection with the Freddie Mac Loans.

Freddie Mac's agreement for the use of Cash Collateral is contingent on the Debtor meeting its obligations under the above documents. To the extent the Debtor fails to meet its obligations under these documents or takes any action to modify, alter or discharge its obligations under any of the foregoing documents without the written consent of Freddie Mac, it shall constitute a default under this Stipulation and Order and shall entitle Freddie Mac to the relief set forth in paragraph 7. Nothing herein shall constitute an assumption by the Debtor of any of the above-referenced documents.

(2) Operating Budgets. Attached hereto as Exhibit B are budgets for each of the Properties through December 31, 2003, showing monthly cash receipts, disbursements and expenses (the "Budgets"). The Debtor is hereby authorized and directed to use the Cash Collateral for the purpose of paying the reasonable, necessary and ordinary expenses of operating and maintaining the Properties (including corporate overhead) to the extent such expenses are set forth in the Budgets (the "Total Operating Expenses") and in amounts consistent with historical operations. Not more than twenty (20) business days after the end of each month, the Debtor shall deliver to Freddie Mac a report indicating the Debtor's actual operating results compared to the Budgets and such report shall contain a written explanation to the extent the total revenues and Total Operating Expenses in the aggregate vary by more than 10%. The Budgets may be adjusted from time to time to take into account any operational changes, emergency expenses or unanticipated capital expenditures provided Freddie Mac approves such adjustments in writing.

(3) Reserve Account. The Debtor is hereby authorized and ordered to segregate, remit and deposit from the Cash Collateral in the Debtor's possession, custody or control the sum of **\$180,000.00** into an adequate protection reserve account established for the Properties which

account shall be held by GMAC in a special interest bearing account pursuant to terms and provisions reasonably acceptable to Freddie Mac (the "Reserve Account). The Reserve Account shall be funded by the Debtor in two equal installments as follows: **\$90,000.00** upon execution of this Stipulation and Order and **\$90,000.00** on March 1, 2003. In the event that based on the income and expense information provided monthly pursuant to paragraph (2), *supra*, the aggregate debt coverage ratio for the nine (9) Freddie Mac Loans as calculated each month for the immediate 12 month period should fall below 1.35, then the Debtor shall deposit an additional **\$90,000.00** into the Reserve Account. The Debtor shall be prohibited from withdrawing funds from the Reserve Account except at the direction of Freddie Mac to make payments in accordance with this Stipulation and Order. To the extent funds are withdrawn from the Reserve Account at the direction of Freddie Mac, the Reserve Account shall be promptly replenished from Cash Collateral in the Debtor's possession, custody and control that is currently existing or that the Debtor may receive in the future immediately upon receipt. As soon as practicable after the effective date of a confirmed plan of reorganization that does not impair the Debtor's obligations to Freddie Mac under the Freddie Mac Loans, the Reserve Account shall be closed and all funds (including any interest earned thereon) shall be refunded to the Debtor.

(4) Hazard Insurance. The Debtor shall at all times be responsible for maintaining hazard insurance on each Property, and shall upon request furnish evidence of such insurance to counsel for Freddie Mac. Any violation of this paragraph shall constitute a default under this Stipulation and Order and shall entitle Freddie Mac to the relief set forth in paragraph 7.

(5) Tax Escrow Payments. The Debtor shall not retain rental collections for the purpose of maintaining separate escrow accounts for property taxes. The Debtor shall pay all property tax escrow payments relating to each Property in accordance with this Stipulation and Order and the applicable loan documents. On or before the first day of each month, escrow

payments for property taxes for each Property (the "Tax Escrow Payments") in the amounts listed on the Schedule of Loan Payments attached hereto as Exhibit C shall be made by wire transfer to GMAC Commercial Mortgage, 200 Witmer Road, P.O. Box 1015, Horsham PA 19044-8015; Attention: Sheila Gillespie. GMAC shall continue to maintain the tax escrow accounts for each Property in accordance with the applicable loan documents; provided that to the extent that any escrow account has insufficient funds to pay any total tax payment then due, Freddie Mac is under no obligation to pay any deficiency and the failure of the Debtor to promptly provide sufficient funds to cover any deficiency after request shall constitute a default under this Stipulation and Order and shall entitle Freddie Mac to the relief set forth in paragraph 7.

(6) Distribution of Cash Collateral/Adequate Protection. All revenue generated by operation of the Properties (including all cash, checks and funds on hand on the Petition Date) in excess of expenses for which payment is authorized as set forth above (the "Net Operating Income"), less an amount sufficient to maintain the Reserve Account, shall be distributed as follows:

(a) On or before the first day of each month (and in addition to the Tax Escrow Payments), monthly payments of principal and interest for each Property (the "Monthly P&I Payments") in the amounts listed on the Schedule of Loan Payments attached hereto as Exhibit C shall be made to GMAC.¹ In no event shall the minimum monthly payments to GMAC under this paragraph 6(a) be less than the sum of the Tax Escrow Payments and the Monthly P&I Payments (collectively, the "Minimum Monthly Payments").

(b) Any Net Operating Income for the preceding calendar month in excess of the Minimum Monthly Payments (the "Excess NOI") for the Properties shall be distributed in the ordinary course as follows:

¹ All Tax Escrow Payments and Monthly P&I Payments shall be made by the Debtor directly to GMAC in accordance with the Debtor's customary procedures and obligations under the Operating Leases.

- (i) First, to fund any amounts needed to replenish the Reserve Account;
- (ii) Second, to fund any amounts needed to pay the Minimum Monthly Payment for any of the Properties that failed in the preceding month to generate sufficient revenue to cover its Minimum Monthly Payment;
- (iii) Third, to Freddie Mac in an amount sufficient to pay the reasonable monthly attorneys fees and costs incurred by Freddie Mac and GMAC in the Debtor's bankruptcy case, not to exceed **\$10,000.00** per month; and
- (iv) Fourth, the balance, if any, to Alterra to be used in its general operations.
- (c) Payments under this Stipulation and Order shall be made by bank or certified check or other immediately available funds. All payments required under this Stipulation and Order shall be deemed made when received by GMAC.
- (d) As adequate protection for the use of Cash Collateral, and in addition to the payments provided herein and the other provisions contained herein, Freddie Mac is granted, to the extent that it possessed valid, enforceable, perfected and unavoidable liens in the Debtor Collateral as of the Petition Date, security interests in and replacement liens on the postpetition Debtor Collateral and the proceeds thereof, which replacement liens and security interests shall have the same order of priorities as the security interests and liens held by Freddie Mac in the Debtor Collateral prior to the filing of the Debtor's voluntary petition. In addition, Freddie Mac is hereby granted a superpriority administrative expense claim under Sections 503(b)(1), 507(a) and 507(b) of the Bankruptcy Code for the amount of any diminution in the value of the Debtor Collateral from and after the Petition Date, including as a result of the use of Cash Collateral authorized hereby; provided, however, that such priority administrative claim shall be subordinate to any claims of the DIP Lenders under section 364(c)(1) of the Bankruptcy Code. The Debtor also acknowledges that its obligations under the Operating Leases are governed by section 365(d)(3) of the Bankruptcy Code.

(7) Default Remedies. If at any time the Debtor shall fail to make any payment required under this Stipulation and Order within the time set forth herein for such payment, or violate any provision of this Stipulation and Order, then Freddie Mac shall be entitled to give notice of said default to counsel for the Debtor. If the Debtor fails to cure the default within seven business (7) days of receipt by Debtor's counsel of said notice, the Debtor's authority to use Cash Collateral under this Stipulation and Order shall terminate. In addition, Freddie Mac shall be entitled to file a motion or motions to modify the automatic stay (the "Stay Relief Motion"). The Debtor and other parties in interest shall have ten (10) calendar days to respond to the Stay Relief Motion, whereupon the Court may hold an expedited hearing to consider the Stay Relief Motion. If a Stay Relief Motion is thereafter granted, then Freddie Mac shall be entitled to immediate relief from the automatic stay pursuant to Section 362 of the Bankruptcy Code, to allow Freddie Mac to pursue any and all its remedies under the applicable loan documents and pursuant to state law, or otherwise.

(8) Information and Inspection. The Debtor shall upon request provide counsel for Freddie Mac with such financial information as is deemed necessary by Freddie Mac. In addition, the Debtor shall provide counsel for Freddie Mac on or before the thirtieth (30th) day of each month with copies of all monthly reports filed with the United States Bankruptcy Court and/or the United States Trustee, complete rent rolls, and other monthly reports with respect to these Properties as may reasonably be requested. The Debtor shall serve counsel for Freddie Mac with copies of any and all pleadings or other documents filed in this case, including operating reports. The Debtor shall permit Freddie Mac and GMAC, by and through their professionals, representative, agents and/or employees reasonable access to the Properties and their business records during normal business hours (without unreasonable interference with the Debtor's operations) and shall cooperate, consult with, and provide to such persons all such non-privileged information as they may reasonably request.

(9) Reimbursement of Expenses. The Debtor shall reimburse Freddie Mac and GMAC for their reasonable out-of-pocket costs and expenses (including attorneys fees and costs)

on a monthly basis, not to exceed \$10,000.00 per month. Freddie Mac and GMAC will provide copies of invoices for such costs and expenses to the Debtor, the United States Trustee and any statutory committee formed in these cases (the "Committee"). If no timely objection is made in writing to the reasonableness of the requested costs and expenses, such costs and expenses shall be paid as provided herein. In the event that the Debtor, the United States Trustee or any Committee believes any such invoice is unreasonable, and if a resolution cannot be reached between the parties, the Court after notice and hearing shall determine the reasonableness of such costs and expenses.

(10) No Waiver. Nothing contained within this Stipulation and Order shall be construed to be a waiver or admission by Freddie Mac that any funds received from the Debtor pursuant to this Stipulation and Order shall be sufficient to provide adequate protection of Freddie Mac's interest in the Properties, nor shall anything in this Stipulation and Order waive or otherwise affect Freddie Mac's right to seek any further relief, and the terms of this Stipulation and Order shall not constitute evidence concerning issues of value of collateral or adequate protection in the event such issues are raised at a later date. No delay or failure by Freddie Mac or the Debtor in exercising any right, power or privilege under this Stipulation and Order, and no single or partial exercise thereof, or any abandonment or discontinuance of steps to enforce such right, power or privilege, shall affect, impair or be deemed a waiver of later enforcement of such right, power or privilege of Freddie Mac or the Debtor.

(11) Notices. All notices, demands, requests and other communications required under or give pursuant to this Stipulation shall be in writing and sent via facsimile transmission and first class mail to the parties at the following addresses:

To the Debtor: Mark Ohlendorf
 Alterra Healthcare Corporation
 10000 Innovation Drive
 Milwaukee, WI 53226
 Fax Number: (414) 918-5055

with copy to: Robert S. Brady, Esq.
Young, Conaway, Stargatt & Taylor, LLP
The Brandywine Building, 17th Floor
1000 West Street
Wilmington, DE 19801
Telephone: (302) 571-6690
Fax Number: (302) 571-1253

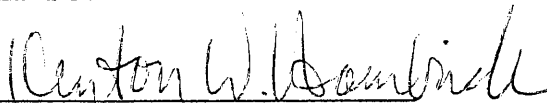
To Freddie Mac: Kenton Hambrick, Assistant General Counsel
Federal Home Loan Mortgage Corp.
8200 Jones Branch Drive (Mail Stop 202)
McLean, Virginia 22102
Fax Number: (703) 903-3691

with copy to: Howard A. Cohen
Reed Smith, LLP
1201 Market Street, Suite 1500
Wilmington, Delaware 19801
Telephone: (302) 778-7500
Fax: (302) 778-7575

(12) Compliance with Local Rules. The provisions of this Stipulation and Order do not include the types of provisions to be highlighted pursuant to Local Rule 4001-2.

IN WITNESS WHEREOF, intending to be legally bound hereby, the parties have caused this Stipulation and Order to be executed on the date set forth above.

SO STIPULATED AND CONSENTED TO:

Dated: 2/12/03 
KENTON W. HAMBRICK
Assistant General Counsel
Federal Home Loan Mortgage Corp.
8200 Jones Branch Drive
McLean, Virginia 22102
Telephone: (703) 903-2473
Fax: (703) 903-3691

Freddie Mac Local Counsel: _____
HOWARD A. COHEN (4082)
Reed Smith, LLP
1201 Market Street, Suite 1500
Wilmington, Delaware 19801

FEB-07-03 03:30PM FROM-ALTERRA

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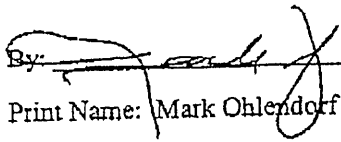
T-300 P 14/14 F-810

Telephone: (302) 778-7500
Fax: (302) 778-7575

Attorneys for the Federal Home
Loan Mortgage Corporation

ALTERRA HEALTHCARE CORPORATION

Dated: _____

By:  _____

Print Name: Mark Ohlendoff

Title: Senior Vice President

Dated: _____

ROBERT S. BRADY, Esq.
Young, Conaway, Stargatt & Taylor, LLP
The Brandywine Building, 17th Floor
1000 West Street
Wilmington, DE 19801
Telephone: (302) 571-6690
Fax: (302) 571-1253

Attorneys for Debtor

AltterraBankruptcy\KWH3CCO doc

Telephone: (302) 778-7500
Fax: (302) 778-7575

Attorneys for the Federal Home
Loan Mortgage Corporation

ALTERRA HEALTHCARE CORPORATION

Dated: _____

By: _____

Print Name: _____

Title: _____

Dated: _____



ROBERT S. BRADY, Esq.
Young, Conaway, Stargatt & Taylor, LLP
The Brandywine Building, 17th Floor
1000 West Street
Wilmington, DE 19801
Telephone: (302) 571-6690
Fax: (302) 571-1253

Attorneys for Debtor

AlterraBankruptcy/KWH3CCO doc

ACCA's 2003 ANNUAL MEETING

Residence Name:	Northville
State:	MI
Residence #:	02060
Residence Type:	Wynwood
Care Type:	Assisted
Phase:	Stablized
Resident Capacity:	72

2003 RESIDENCE OPERATING BUDGET

CHARTING A NEW COURSE

		45.00	45.50	46.00	46.50	47.00	47.50	47.50	48.00	48.00	48.50	48.50	49.00		
Budgeted # Residents		45.00	45.50	46.00	46.50	47.00	47.50	47.50	48.00	48.00	48.50	48.50	49.00		
Budgeted Occupancy %		62.5%	63.2%	63.9%	64.6%	65.3%	66.0%	66.0%	66.7%	66.7%	67.4%	67.4%	68.1%	65.6%	
Resident Days		1,395	1,274	1,426	1,395	1,457	1,425	1,473	1,488	1,440	1,504	1,455	1,519	17,250	
Ave Rent & LOC Rev		\$3,356	\$3,356	\$3,356	\$3,356	\$3,356	\$3,405	\$3,405	\$3,405	\$3,405	\$3,405	\$3,405	\$3,405	3,385	
Month	Jan-03	Feb-03	Mar-03	Apr-03	May-03	Jun-03	Jul-03	Aug-03	Sep-03	Oct-03	Nov-03	Dec-03	Total	% Rev	
Revenues:															
Rent	127,040	128,451	129,863	131,274	132,686	136,427	136,427	137,863	137,863	139,299	139,299	140,735	1,617,228	84%	
Level of Care	24,000	24,267	24,533	24,800	25,067	25,333	25,333	25,600	25,600	25,867	25,867	26,133	302,400	16%	
Rent and LOC Revenue	151,040	152,718	154,396	156,074	157,752	161,760	161,760	163,463	163,463	165,166	165,166	166,869	1,919,628	99.31%	
Admission Fees	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	12,000	1%	
Other Revenue	111	111	111	111	111	111	111	111	111	111	111	111	1,335	0%	
Total Revenues	152,151	153,829	155,507	157,185	158,864	162,872	162,872	164,574	164,574	166,277	166,277	167,980	1,932,963	100.00%	
Controllable Operating Expense															
Salaries	56,665	51,181	56,665	54,837	56,665	56,756	58,648	58,648	56,756	58,648	56,756	58,648	680,875	35.22%	
Payroll Costs	18,978	16,542	18,314	17,723	18,314	18,344	18,955	18,955	18,344	18,955	18,344	18,955	220,724	11.42%	
Food	\$ 5,580	5,096	5,704	5,580	5,828	5,700	5,890	5,952	5,760	6,014	5,820	6,076	69,000	3.57%	
Supplies	\$ 2,581	2,357	2,638	2,581	2,695	2,636	2,724	2,753	2,664	2,781	2,692	2,810	31,913	1.65%	
Recreational Materials	500	500	500	500	500	500	500	500	500	500	500	500	6,000	0.31%	
Travel & Meals	250	250	250	250	250	250	250	250	250	250	250	250	3,000	0.16%	
Residence Maintenance	1,600	1,600	1,600	1,600	1,600	1,600	1,600	1,600	1,600	1,600	1,600	1,600	19,200	0.99%	
Communications	1,270	1,270	1,270	1,270	1,270	1,270	1,270	1,270	1,270	1,270	1,270	1,270	15,240	0.79%	
Grounds Maintenance	1,500	1,500	1,500	1,500	1,500	1,500	1,500	1,500	1,500	1,500	1,500	1,500	18,000	0.93%	
Advertising	723	723	723	723	723	723	723	723	723	723	723	723	8,674	0.45%	
Professional Fees	150	150	150	150	150	150	150	150	150	150	150	150	1,800	0.09%	
Staff Development	500	500	500	500	500	500	500	500	500	500	500	500	6,000	0.31%	
Bad Debt	761	769	778	786	794	814	814	823	823	831	831	840	9,665	0.50%	
Miscellaneous	800	800	800	800	800	800	800	800	800	800	800	800	9,600	0.50%	
Total Controllable Operating Expense	91,857	83,238	91,392	88,800	91,590	91,544	94,325	94,424	91,640	94,523	91,736	94,622	1,099,690	56.89%	
NOI Before Non Controllables	60,294	70,591	64,116	68,385	67,274	71,328	68,547	70,150	72,935	71,754	74,541	73,358	833,272	43.11%	
NOI % Before Non-Controllables	39.63%	45.89%	41.23%	43.51%	42.35%	43.79%	42.09%	42.63%	44.32%	43.15%	44.83%	43.67%	43.11%	43.11%	
Non Controllable Operating Expense															
Electric	6,165	6,165	6,165	6,165	6,165	6,165	6,165	6,165	6,165	6,165	6,165	6,165	73,980	3.83%	
Gas	803	803	803	803	803	803	803	803	803	803	803	803	9,636	0.50%	
Water	1,166	1,166	1,166	1,166	1,166	1,166	1,166	1,166	1,166	1,166	1,166	1,166	13,992	0.72%	
Property Taxes	7,974	7,974	7,974	7,974	7,974	7,974	7,974	7,974	7,974	7,974	7,974	7,974	95,688	4.95%	
Insurance	6,122	6,122	6,122	6,122	6,122	6,122	6,482	6,482	6,482	6,482	6,482	6,482	75,626	3.91%	
Total Non Controllable Operating Exp	22,230	22,230	22,230	22,230	22,230	22,230	22,590	22,590	22,590	22,590	22,590	22,590	268,922	13.91%	
Total Operating Expense	114,087	105,468	113,622	111,030	113,820	113,774	116,915	117,014	114,230	117,114	114,326	117,213	1,368,612	70.80%	
EBITDAR	38,064	48,361	41,886	46,155	45,044	49,098	45,957	47,560	50,344	49,164	51,951	50,767	564,350	29.20%	
EBITDAR %	25.02%	31.44%	26.93%	29.36%	28.35%	30.15%	28.22%	28.90%	30.59%	29.57%	31.24%	30.22%	29.20%	29.20%	
Non Operating Expenses (Income)															
Management Fees 7.5%	11,411	11,537	11,663	11,789	11,915	12,215	12,215	12,343	12,343	12,471	12,471	12,598	144,972	7.50%	
Mortgage Interest	30,309	30,309	30,309	30,157	30,157	30,157	30,002	30,002	30,002	29,844	29,844	29,844	360,935	18.67%	
Facility Lease Expense	0	0	0	0	0	0	0	0	0	0	0	0	0	0.00%	
Depreciation	17,285	17,285	17,285	17,285	17,285	17,285	17,285	17,285	17,285	17,285	17,285	17,285	207,416	10.73%	
Amortization	1,403	1,403	1,403	1,403	1,403	1,403	1,403	1,403	1,403	1,403	1,403	1,403	16,840	0.87%	
Total Non Operating Exp	60,408	60,534	60,660	60,634	60,759	61,060	60,905	61,033	61,033	61,003	61,003	61,131	730,163	37.77%	
Net Income(Loss) before Income Taxes	(22,344)	(12,173)	(10,774)	(14,478)	(15,716)	(11,962)	(14,949)	(13,473)	(10,689)	(11,839)	(9,052)	(10,363)	(165,812)	(8.58%)	
Margin	(14.69%)	(7.91%)	(12.07%)	(9.21%)	(9.89%)	(7.34%)	(9.18%)	(8.19%)	(6.49%)	(7.12%)	(5.44%)	(6.17%)	(8.58%)	(8.58%)	

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**Alterra Healthcare Corporation
2003 Residence Allocations
Final**

	2003 Budget	2003 Allocation Method								
Paid Time Off (PTO)	Each residence is budgeted 7% of salaries for PTO expense.	1 st Quarter – Residences will be charged 7% of actual salaries for PTO expense. 2 nd Quarter – PTO expense will be allocated to residences based on actual accrual rates of employees at the residence.								
Health Benefits	Each residence is budgeted 7% of salaries for health benefits expense.	Health benefits expense will be allocated to residences based on actual enrollment of employees at the residence.								
Workers Compensation	California residences are budgeted 31.5% of salaries for WC expense. Ohio residences are budgeted 10.8% of salaries for WC expense. All other residences are budgeted 7% of salaries for WC expense.	Residences will be charged the following % of actual salaries for fixed costs: California residences = 29.5% Ohio residences = 9.5% All other residences = 5.2% In addition, residences will be charged for actual reserved and paid claims as follows: <table border="1"> <thead> <tr> <th><u>Claim Amount</u></th> <th><u>Charge</u></th> </tr> </thead> <tbody> <tr> <td>\$1 to \$2,499</td> <td>\$1,000</td> </tr> <tr> <td>\$2,500 to \$7,499</td> <td>\$5,000</td> </tr> <tr> <td>\$7,500 and over</td> <td>\$15,000</td> </tr> </tbody> </table>	<u>Claim Amount</u>	<u>Charge</u>	\$1 to \$2,499	\$1,000	\$2,500 to \$7,499	\$5,000	\$7,500 and over	\$15,000
<u>Claim Amount</u>	<u>Charge</u>									
\$1 to \$2,499	\$1,000									
\$2,500 to \$7,499	\$5,000									
\$7,500 and over	\$15,000									
General Liability Insurance	Each residence is budgeted \$60 per bed per month.	Residences will be charged \$60 per bed per month.								
Bad Debt Expense	Each residence is budgeted 0.5% of revenue for bad debt expense.	Residences will be charged 100% of accounts receivable balances that become greater than 60 days outstanding during the month. Residences will be credited for amounts that are subsequently collected.								
Legal Fees	Each residence is budgeted \$5 per bed per month for legal fees.	Residences will be charged their actual legal fees for employee matters and regulatory issues.								
Staffing Expenses	Each residence is budgeted \$6 per bed per month for staff recruitment costs.	Residences will be charged \$1.47 per bed per month for fixed staffing costs. In addition, residences will be charged their actual costs for direct advertising in their market, Calipers/FirSteps testing, background checks and candidate travel. Field recruiters will be charged to the applicable residences at \$320 per day.								
Management Fee	Each residence is budgeted for a management fee equal to 7.5% of total revenues for each month.	Residences will be charged 7.5% of actual revenue for each month.								

SELECTED DEBTOR FORM DOCUMENTS

- Voluntary Petition
- Involuntary Petition
- Form 4. List of Creditors Holding 20 Largest Unsecured Claims
- Summary of Schedules
- Schedule C – Property Claimed as Exempt
- Schedule D – Creditors Holding Secured Claims
- Schedule F – Creditors Holding Unsecured Non-priority Claims
- Schedule G – Executory Contracts and Unexpired Leases
- Form 7. Statement of Financial Affairs
- Form 8. Individual Debtor's Statement of Intention

FORM B1	United States Bankruptcy Court District of _____	Voluntary Petition
Name of Debtor (if individual, enter Last, First, Middle):		Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 6 years (include married, maiden, and trade names):		All Other Names used by the Joint Debtor in the last 6 years (include married, maiden, and trade names):
Soc. Sec./Tax I.D. No. (if more than one, state all):		Soc. Sec./Tax I.D. No. (if more than one, state all):
Street Address of Debtor (No. & Street, City, State & Zip Code):		Street Address of Joint Debtor (No. & Street, City, State & Zip Code):
County of Residence or of the Principal Place of Business:		County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address):		Mailing Address of Joint Debtor (if different from street address):
Location of Principal Assets of Business Debtor (if different from street address above):		

Information Regarding the Debtor (Check the Applicable Boxes)

Venue (Check any applicable box)

- Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.
- There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

Type of Debtor (Check all boxes that apply)

- | | |
|--|---|
| <input type="checkbox"/> Individual(s) | <input type="checkbox"/> Railroad |
| <input type="checkbox"/> Corporation | <input type="checkbox"/> Stockbroker |
| <input type="checkbox"/> Partnership | <input type="checkbox"/> Commodity Broker |
| <input type="checkbox"/> Other _____ | <input type="checkbox"/> Clearing Bank |

Chapter or Section of Bankruptcy Code Under Which the Petition is Filed (Check one box)

- | | | |
|--|-------------------------------------|-------------------------------------|
| <input type="checkbox"/> Chapter 7 | <input type="checkbox"/> Chapter 11 | <input type="checkbox"/> Chapter 13 |
| <input type="checkbox"/> Chapter 9 | <input type="checkbox"/> Chapter 12 | |
| <input type="checkbox"/> Sec. 304 - Case ancillary to foreign proceeding | | |

Nature of Debts (Check one box)

- Consumer/Non-Business Business

Chapter 11 Small Business (Check all boxes that apply)

- Debtor is a small business as defined in 11 U.S.C. § 101
- Debtor is and elects to be considered a small business under 11 U.S.C. § 1121(e) (Optional)

Filing Fee (Check one box)

- Full Filing Fee attached
- Filing Fee to be paid in installments (Applicable to individuals only) Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form No. 3.

Statistical/Administrative Information (Estimates only)

- Debtor estimates that funds will be available for distribution to unsecured creditors.
- Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE IS FOR COURT USE ONLY

Estimated Number of Creditors	1-15	16-49	50-99	100-199	200-999	1000-over
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Estimated Assets							
\$0 to \$50,000	\$50,001 to \$100,000	\$100,001 to \$500,000	\$500,001 to \$1 million	\$1,000,001 to \$10 million	\$10,000,001 to \$50 million	\$50,000,001 to \$100 million	More than \$100 million
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Estimated Debts							
\$0 to \$50,000	\$50,001 to \$100,000	\$100,001 to \$500,000	\$500,001 to \$1 million	\$1,000,001 to \$10 million	\$10,000,001 to \$50 million	\$50,000,001 to \$100 million	More than \$100 million
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Voluntary Petition <i>(This page must be completed and filed in every case)</i>		Name of Debtor(s):	
Prior Bankruptcy Case Filed Within Last 6 Years (If more than one, attach additional sheet)			
Location Where Filed:	Case Number:	Date Filed:	
Pending Bankruptcy Case Filed by any Spouse, Partner or Affiliate of this Debtor (If more than one, attach additional sheet)			
Name of Debtor:	Case Number:	Date Filed:	
District:	Relationship:	Judge:	

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
 [If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
 I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

Signature of Debtor

Signature of Joint Debtor

Telephone Number (If not represented by attorney)

Date

Signature of Attorney

Signature of Attorney for Debtor(s)

Printed Name of Attorney for Debtor(s)

Firm Name

Address

Telephone Number

Date

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.
 The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

Signature of Authorized Individual

Printed Name of Authorized Individual

Title of Authorized Individual

Date

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11)

Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter.

_____ Date
Signature of Attorney for Debtor(s)

Exhibit C

Does the debtor own or have possession of any property that poses a threat of imminent and identifiable harm to public health or safety?

Yes, and Exhibit C is attached and made a part of this petition.
 No

Signature of Non-Attorney Petition Preparer

I certify that I am a bankruptcy petition preparer as defined in 11U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

Printed Name of Bankruptcy Petition Preparer

Social Security Number

Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

Signature of Bankruptcy Petition Preparer

Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U.S.C. §110; 18 U.S.C. §156.

Form B1, Exh.A (9/97)

Exhibit "A"

[If debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11 of the Bankruptcy Code, this Exhibit "A" shall be completed and attached to the petition.]

[Caption as in Form 16B]

Exhibit "A" to Voluntary Petition

1. If any of the debtor's securities are registered under Section 12 of the Securities Exchange Act of 1934, the SEC file number is _____.

2. The following financial data is the latest available information and refers to the debtor's condition on _____.

- a. Total assets \$ _____
- b. Total debts (including debts listed in 2.c., below) \$ _____

Approximate
number of
holders

c. Debt securities held by more than 500 holders.

secured / /	unsecured / /	subordinated / /	\$ _____	
secured / /	unsecured / /	subordinated / /	\$ _____	
secured / /	unsecured / /	subordinated / /	\$ _____	
secured / /	unsecured / /	subordinated / /	\$ _____	
secured / /	unsecured / /	subordinated / /	\$ _____	

d. Number of shares of preferred stock _____

e. Number of shares common stock _____

Comments, if any: _____

3. Brief description of debtor's business: _____

4. List the names of any person who directly or indirectly owns, controls, or holds, with power to vote, 5% or more of the voting securities of debtor:

**Form B1, Exhibit C
(9/01)**

Exhibit "C"

[If, to the best of the debtor's knowledge, the debtor owns or has possession of property that poses or is alleged to pose a threat of imminent and identifiable harm to the public health or safety, attach this Exhibit "C" to the petition.]

[Caption as in Form 16B]

Exhibit "C" to Voluntary Petition

1. Identify and briefly describe all real or personal property owned by or in possession of the debtor that, to the best of the debtor's knowledge, poses or is alleged to pose a threat of imminent and identifiable harm to the public health or safety (attach additional sheets if necessary):

.....
.....
.....
.....

2. With respect to each parcel of real property or item of personal property identified in question 1, describe the nature and location of the dangerous condition, whether environmental or otherwise, that poses or is alleged to pose a threat of imminent and identifiable harm to the public health or safety (attach additional sheets if necessary):

.....
.....
.....
.....

United States Bankruptcy Court	INVOLUNTARY PETITION
District of _____	

IN RE (Name of Debtor - If Individual: Last, First, Middle)	ALL OTHER NAMES used by debtor in the last 6 years (Include married, maiden, and trade names.)
SOC. SEC./TAX I.D. NO. (If more than one, state all.)	

STREET ADDRESS OF DEBTOR (No. and street, city, state, and zip code)	MAILING ADDRESS OF DEBTOR (If different from street address)	
<table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="padding: 2px;">COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS</td> </tr> </table>	COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS	
COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS		

LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (If different from previously listed addresses)

CHAPTER OF BANKRUPTCY CODE UNDER WHICH PETITION IS FILED

Chapter 7 Chapter 11

INFORMATION REGARDING DEBTOR (Check applicable boxes)

Petitioners believe:

Debts are primarily consumer debts

Debts are primarily business debts (complete sections A and B)

TYPE OF DEBTOR

Individual Corporation Publicly Held

Partnership Corporation Not Publicly Held

Other: _____

A. TYPE OF BUSINESS (Check one)

<input type="checkbox"/> Professional	<input type="checkbox"/> Transportation	<input type="checkbox"/> Commodity Broker
<input type="checkbox"/> Retail/Wholesale	<input type="checkbox"/> Manufacturing/	<input type="checkbox"/> Construction
<input type="checkbox"/> Railroad	<input type="checkbox"/> Mining	<input type="checkbox"/> Real Estate
	<input type="checkbox"/> Stockbroker	<input type="checkbox"/> Other

B. BRIEFLY DESCRIBE NATURE OF BUSINESS

VENUE

Debtor has been domiciled or has had a residence, principal place of business, or principal assets in the District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

A bankruptcy case concerning debtor's affiliate, general partner or partnership is pending in this District.

**PENDING BANKRUPTCY CASE FILED BY OR AGAINST ANY PARTNER
OR AFFILIATE OF THIS DEBTOR (Report information for any additional cases on attached sheets.)**

Name of Debtor	Case Number	Date
Relationship	District	Judge

<p style="text-align: center;">ALLEGATIONS (Check applicable boxes)</p> <p>1. <input type="checkbox"/> Petitioner(s) are eligible to file this petition pursuant to 11 U.S.C. § 303(b).</p> <p>2. <input type="checkbox"/> The debtor is a person against whom an order for relief may be entered under title 11 of the United States Code.</p> <p>3.a. <input type="checkbox"/> The debtor is generally not paying such debtor's debts as they become due, unless such debts are the subject of a bona fide dispute;</p> <p style="text-align: center;">or</p> <p>b. <input type="checkbox"/> Within 120 days preceding the filing of this petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.</p>	<p style="text-align: center;">COURT USE ONLY</p>
---	---

If a child support creditor or its representative is a petitioner, and if the petitioner files the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

FORM 5 Involuntary Petition
(12/02)

Name of Debtor _____
Case No. _____
(court use only)

TRANSFER OF CLAIM

Check this box if there has been a transfer of any claim against the debtor by or to any petitioner. Attach all documents evidencing the transfer and any statements that are required under Bankruptcy Rule 1003(a).

REQUEST FOR RELIEF

Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition.

Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief.

X _____
Signature of Petitioner or Representative (State title)

Name of Petitioner _____ Date Signed _____

Name & Mailing
Address of Individual _____
Signing in Representative
Capacity _____

X _____
Signature of Attorney _____ Date _____

Name of Attorney Firm (If any) _____

Address _____
Telephone No. _____

X _____
Signature of Petitioner or Representative (State title)

Name of Petitioner _____ Date Signed _____

Name & Mailing
Address of Individual _____
Signing in Representative
Capacity _____

X _____
Signature of Attorney _____ Date _____

Name of Attorney Firm (If any) _____

Address _____
Telephone No. _____

X _____
Signature of Petitioner or Representative (State title)

Name of Petitioner _____ Date Signed _____

Name & Mailing
Address of Individual _____
Signing in Representative
Capacity _____

X _____
Signature of Attorney _____ Date _____

Name of Attorney Firm (If any) _____

Address _____
Telephone No. _____

PETITIONING CREDITORS

Name and Address of Petitioner	Nature of Claim	Amount of Claim

Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's signature under the statement and the name of attorney and petitioning creditor information in the format above. Total Amount of Petitioners' Claims

_____ continuation sheets attached

Form B4
11/92

Form 4. LIST OF CREDITORS HOLDING 20 LARGEST UNSECURED CLAIMS

[Caption as in Form 16B]

LIST OF CREDITORS HOLDING 20 LARGEST UNSECURED CLAIMS

Following is the list of the debtor's creditors holding the 20 largest unsecured claims. The list is prepared in accordance with Fed. R. Bankr. P. 1007(d) for filing in this chapter 11 [or chapter 9] case. The list does not include (1) persons who come within the definition of "insider" set forth in 11 U.S.C. § 101, or (2) secured creditors unless the value of the collateral is such that the unsecured deficiency places the creditor among the holders of the 20 largest unsecured claims.

(1)	(2)	(3)	(4)	(5)
<i>Name of creditor and complete mailing address including zip code</i>	<i>Name, telephone number and complete mailing address, including zip code, of employee, agent, or department of creditor familiar with claim who may be contacted</i>	<i>Nature of claim (trade debt, bank loan, government contract, etc.)</i>	<i>Indicate if claim is contingent, unliquidated, disputed or subject to setoff</i>	<i>Amount of claim [if secured also state value of security]</i>

Date: _____

Debtor

[Declaration as in Form 2]

FORM B6-Cont.
(6/90)

UNITED STATES BANKRUPTCY COURT

District of _____

In re _____,
Debtor

Case No. _____
(If known)

SUMMARY OF SCHEDULES

Indicate as to each schedule whether that schedule is attached and state the number of pages in each. Report the totals from Schedules A, B, D, E, F, I, and J in the boxes provided. Add the amounts from Schedules A and B to determine the total amount of the debtor's assets. Add the amounts from Schedules D, E, and F to determine the total amount of the debtor's liabilities.

AMOUNTS SCHEDULED

NAME OF SCHEDULE	ATTACHED (YES/NO)	NO. OF SHEETS	ASSETS	LIABILITIES	OTHER
A - Real Property			\$		
B - Personal Property			\$		
C - Property Claimed as Exempt					
D - Creditors Holding Secured Claims				\$	
E - Creditors Holding Unsecured Priority Claims				\$	
F - Creditors Holding Unsecured Nonpriority Claims				\$	
G - Executory Contracts and Unexpired Leases					
H - Codebtors					
I - Current Income of Individual Debtor(s)					\$
J - Current Expenditures of Individual Debtor(s)					\$
Total Number of Sheets of ALL Schedules >					
			Total Assets >	\$	
				Total Liabilities >	\$

FORM B6C
(6/90)

In re _____,
Debtor

Case No. _____
(If known)

SCHEDULE C - PROPERTY CLAIMED AS EXEMPT

Debtor elects the exemptions to which debtor is entitled under:
(Check one box)

- 11 U.S.C. § 522(b)(1): Exemptions provided in 11 U.S.C. § 522(d). **Note: These exemptions are available only in certain states.**
- 11 U.S.C. § 522(b)(2): Exemptions available under applicable nonbankruptcy federal laws, state or local law where the debtor's domicile has been located for the 180 days immediately preceding the filing of the petition, or for a longer portion of the 180-day period than in any other place, and the debtor's interest as a tenant by the entirety or joint tenant to the extent the interest is exempt from process under applicable nonbankruptcy law.

DESCRIPTION OF PROPERTY	SPECIFY LAW PROVIDING EACH EXEMPTION	VALUE OF CLAIMED EXEMPTION	CURRENT MARKET VALUE OF PROPERTY WITHOUT DEDUCTING EXEMPTION

In re _____,
Debtor

Case No. _____
(If known)

SCHEDULE D - CREDITORS HOLDING SECURED CLAIMS

State the name, mailing address, including zip code, and account number, if any, of all entities holding claims secured by property of the debtor as of the date of filing of the petition. List creditors holding all types of secured interests such as judgment liens, garnishments, statutory liens, mortgages, deeds of trust, and other security interests. List creditors in alphabetical order to the extent practicable. If all secured creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Code debtor," include the entity on the appropriate schedule of creditors, and complete Schedule H - Code debtors. If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of all claims listed on this schedule in the box labeled "Total" on the last sheet of the completed schedule. Report this total also on the Summary of Schedules.

Check this box if debtor has no creditors holding secured claims to report on this Schedule D.

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED, NATURE OF LIEN, AND DESCRIPTION AND MARKET VALUE OF PROPERTY SUBJECT TO LIEN	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL	UNSECURED PORTION, IF ANY
ACCOUNT NO.								
			VALUE \$					
ACCOUNT NO.								
			VALUE \$					
ACCOUNT NO.								
			VALUE \$					
ACCOUNT NO.								
			VALUE \$					

_____ continuation sheets attached

Subtotal ▶ (Total of this page)	\$
Total ▶ (Use only on last page)	\$

(Report total also on Summary of Schedules)

In re _____,
Debtor

Case No. _____
(If known)

SCHEDULE F- CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

State the name, mailing address, including zip code, and account number, if any, of all entities holding unsecured claims without priority against the debtor or the property of the debtor, as of the date of filing of the petition. Do not include claims listed in Schedules D and E. If all creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H - Codebtors. If a joint petition is filed, state whether husband, wife, both of them, or the marital community maybe liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report total of all claims listed on this schedule in the box labeled "Total" on the last sheet of the completed schedule. Report this total also on the Summary of Schedules.

Check this box if debtor has no creditors holding unsecured claims to report on this Schedule F.

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE.	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
_____ continuation sheets attached				Subtotal ▶		\$	
				Total ▶		\$	

(Report also on Summary of Schedules)

In re _____,
Debtor

Case No. _____
(if known)

SCHEDULE G - EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Describe all executory contracts of any nature and all unexpired leases of real or personal property. Include any timeshare interests.

State nature of debtor's interest in contract, i.e., "Purchaser," "Agent," etc. State whether debtor is the lessor or lessee of a lease.

Provide the names and complete mailing addresses of all other parties to each lease or contract described.

NOTE: A party listed on this schedule will not receive notice of the filing of this case unless the party is also scheduled in the appropriate schedule of creditors.

Check this box if debtor has no executory contracts or unexpired leases.

NAME AND MAILING ADDRESS, INCLUDING ZIP CODE, OF OTHER PARTIES TO LEASE OR CONTRACT.	DESCRIPTION OF CONTRACT OR LEASE AND NATURE OF DEBTOR'S INTEREST. STATE WHETHER LEASE IS FOR NONRESIDENTIAL REAL PROPERTY. STATE CONTRACT NUMBER OF ANY GOVERNMENT CONTRACT.

Form 7
(9/00)

FORM 7. STATEMENT OF FINANCIAL AFFAIRS
UNITED STATES BANKRUPTCY COURT

_____ **DISTRICT OF** _____

In re: _____, Case No. _____
(Name) Debtor (if known)

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs.

Questions 1 - 18 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions 19 - 25. **If the answer to an applicable question is "None," mark the box labeled "None."** If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within the six years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or owner of 5 percent or more of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any owner of 5 percent or more of the voting or equity securities of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; any managing agent of the debtor. 11 U.S.C. § 101.

1. Income from employment or operation of business

None State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the **two years** immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT

SOURCE (if more than one)

2. Income other than from employment or operation of business

None

State the amount of income received by the debtor other than from employment, trade, profession, or operation of the debtor's business during the **two years** immediately preceding the commencement of this case. Give particulars. If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income for each spouse whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT	SOURCE
--------	--------

3. Payments to creditors

None

a. List all payments on loans, installment purchases of goods or services, and other debts, aggregating more than \$600 to any creditor, made within **90 days** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATES OF PAYMENTS	AMOUNT PAID	AMOUNT STILL OWING
------------------------------	-------------------	-------------	--------------------

None

b. List all payments made within **one year** immediately preceding the commencement of this case to or for the benefit of creditors who are or were insiders. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR AND RELATIONSHIP TO DEBTOR	DATE OF PAYMENT	AMOUNT PAID	AMOUNT STILL OWING
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4. Suits and administrative proceedings, executions, garnishments and attachments

None

a. List all suits and administrative proceedings to which the debtor is or was a party within **one year** immediately preceding the filing of this bankruptcy case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

CAPTION OF SUIT AND CASE NUMBER	NATURE OF PROCEEDING	COURT OR AGENCY AND LOCATION	STATUS OR DISPOSITION
---------------------------------	----------------------	------------------------------	-----------------------

- None b. Describe all property that has been attached, garnished or seized under any legal or equitable process within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON FOR WHOSE BENEFIT PROPERTY WAS SEIZED	DATE OF SEIZURE	DESCRIPTION AND VALUE OF PROPERTY
--	--------------------	---

5. Repossessions, foreclosures and returns

- None List all property that has been repossessed by a creditor, sold at a foreclosure sale, transferred through a deed in lieu of foreclosure or returned to the seller, within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR OR SELLER	DATE OF REPOSSESSION, FORECLOSURE SALE, TRANSFER OR RETURN	DESCRIPTION AND VALUE OF PROPERTY
---	--	---

6. Assignments and receiverships

- None a. Describe any assignment of property for the benefit of creditors made within **120 days** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include any assignment by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF ASSIGNEE	DATE OF ASSIGNMENT	TERMS OF ASSIGNMENT OR SETTLEMENT
---------------------------------	-----------------------	---

- None b. List all property which has been in the hands of a custodian, receiver, or court-appointed official within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CUSTODIAN	NAME AND LOCATION OF COURT CASE TITLE & NUMBER	DATE OF ORDER	DESCRIPTION AND VALUE OF PROPERTY
----------------------------------	--	------------------	---

7. Gifts

None

List all gifts or charitable contributions made within **one year** immediately preceding the commencement of this case except ordinary and usual gifts to family members aggregating less than \$200 in value per individual family member and charitable contributions aggregating less than \$100 per recipient. (Married debtors filing under chapter 12 or chapter 13 must include gifts or contributions by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON OR ORGANIZATION	RELATIONSHIP TO DEBTOR, IF ANY	DATE OF GIFT	DESCRIPTION AND VALUE OF GIFT
--	--------------------------------------	-----------------	-------------------------------------

8. Losses

None

List all losses from fire, theft, other casualty or gambling within **one year** immediately preceding the commencement of this case **or since the commencement of this case**. (Married debtors filing under chapter 12 or chapter 13 must include losses by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

DESCRIPTION AND VALUE OF PROPERTY	DESCRIPTION OF CIRCUMSTANCES AND, IF LOSS WAS COVERED IN WHOLE OR IN PART BY INSURANCE, GIVE PARTICULARS	DATE OF LOSS
---	--	-----------------

9. Payments related to debt counseling or bankruptcy

None

List all payments made or property transferred by or on behalf of the debtor to any persons, including attorneys, for consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS OF PAYEE	DATE OF PAYMENT, NAME OF PAYOR IF OTHER THAN DEBTOR	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY
------------------------------	---	--

10. Other transfers

None

List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF TRANSFEREE, RELATIONSHIP TO DEBTOR	DATE	DESCRIBE PROPERTY TRANSFERRED AND VALUE RECEIVED
---	------	--

11. Closed financial accounts

None

List all financial accounts and instruments held in the name of the debtor or for the benefit of the debtor which were closed, sold, or otherwise transferred within **one year** immediately preceding the commencement of this case. Include checking, savings, or other financial accounts, certificates of deposit, or other instruments; shares and share accounts held in banks, credit unions, pension funds, cooperatives, associations, brokerage houses and other financial institutions. (Married debtors filing under chapter 12 or chapter 13 must include information concerning accounts or instruments held by or for either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF INSTITUTION	TYPE AND NUMBER OF ACCOUNT AND AMOUNT OF FINAL BALANCE	AMOUNT AND DATE OF SALE OR CLOSING
------------------------------------	--	--

12. Safe deposit boxes

None

List each safe deposit or other box or depository in which the debtor has or had securities, cash, or other valuables within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include boxes or depositories of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF BANK OR OTHER DEPOSITORY	NAMES AND ADDRESSES OF THOSE WITH ACCESS TO BOX OR DEPOSITORY	DESCRIPTION OF CONTENTS	DATE OF TRANSFER OR SURRENDER, IF ANY
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13. Setoffs

None

List all setoffs made by any creditor, including a bank, against a debt or deposit of the debtor within **90 days** preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATE OF SETOFF	AMOUNT OF SETOFF
------------------------------	-------------------	---------------------

14. Property held for another person

None

List all property owned by another person that the debtor holds or controls.

NAME AND ADDRESS OF OWNER	DESCRIPTION AND VALUE OF PROPERTY	LOCATION OF PROPERTY
------------------------------	--------------------------------------	----------------------

15. Prior address of debtor

None

If the debtor has moved within the **two years** immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case. If a joint petition is filed, report also any separate address of either spouse.

ADDRESS	NAME USED	DATES OF OCCUPANCY
---------	-----------	--------------------

16. Spouses and Former Spouses

None

If the debtor resides or resided in a community property state, commonwealth, or territory (including Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, or Wisconsin) within the **six-year period** immediately preceding the commencement of the case, identify the name of the debtor's spouse and of any former spouse who resides or resided with the debtor in the community property state.

NAME

17. Environmental Information.

For the purpose of this question, the following definitions apply:

"Environmental Law" means any federal, state, or local statute or regulation regulating pollution, contamination, releases of hazardous or toxic substances, wastes or material into the air, land, soil, surface water, groundwater, or other medium, including, but not limited to, statutes or regulations regulating the cleanup of these substances, wastes, or material.

"Site" means any location, facility, or property as defined under any Environmental Law, whether or not presently or formerly owned or operated by the debtor, including, but not limited to, disposal sites.

"Hazardous Material" means anything defined as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, or contaminant or similar term under an Environmental Law

None

a. List the name and address of every site for which the debtor has received notice in writing by a governmental unit that it may be liable or potentially liable under or in violation of an Environmental Law. Indicate the governmental unit, the date of the notice, and, if known, the Environmental Law:

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW
--------------------------	--	-------------------	----------------------

None

b. List the name and address of every site for which the debtor provided notice to a governmental unit of a release of Hazardous Material. Indicate the governmental unit to which the notice was sent and the date of the notice.

SITE NAME	NAME AND ADDRESS	DATE OF	ENVIRONMENTAL
-----------	------------------	---------	---------------

AND ADDRESS OF GOVERNMENTAL UNIT NOTICE LAW

- None c. List all judicial or administrative proceedings, including settlements or orders, under any Environmental Law with respect to which the debtor is or was a party. Indicate the name and address of the governmental unit that is or was a party to the proceeding, and the docket number.

NAME AND ADDRESS OF GOVERNMENTAL UNIT DOCKET NUMBER STATUS OR DISPOSITION

18 . Nature, location and name of business

- None a. If the debtor is an individual, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partnership, sole proprietorship, or was a self-employed professional within the **six years** immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within the **six years** immediately preceding the commencement of this case.
- If the debtor is a partnership, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities, within the **six years** immediately preceding the commencement of this case.
- If the debtor is a corporation, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities within the **six years** immediately preceding the commencement of this case.

NAME	TAXPAYER I.D. NUMBER	ADDRESS	NATURE OF BUSINESS	BEGINNING AND ENDING DATES
------	----------------------	---------	--------------------	----------------------------

- None b. Identify any business listed in response to subdivision a., above, that is "single asset real estate" as defined in 11 U.S.C. § 101.

NAME	ADDRESS
------	---------

The following questions are to be completed by every debtor that is a corporation or partnership and by any individual debtor who is or has been, within the **six years** immediately preceding the commencement of this case, any of the following: an officer, director, managing executive, or owner of more than 5 percent of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or otherwise self-employed.

*(An individual or joint debtor should complete this portion of the statement **only** if the debtor is or has been in business, as defined above, within the six years immediately preceding the commencement of this case. A debtor who has not been in business within those six years should go directly to the signature page.)*

19. Books, records and financial statements

None

- a. List all bookkeepers and accountants who within the **two years** immediately preceding the filing of this bankruptcy case kept or supervised the keeping of books of account and records of the debtor.

NAME AND ADDRESS DATES SERVICES RENDERED

None

- b. List all firms or individuals who within the **two years** immediately preceding the filing of this bankruptcy case have audited the books of account and records, or prepared a financial statement of the debtor.

NAME ADDRESS DATES SERVICES RENDERED

None

- c. List all firms or individuals who at the time of the commencement of this case were in possession of the books of account and records of the debtor. If any of the books of account and records are not available, explain.

NAME ADDRESS

None

- d. List all **financial institutions**, creditors and other parties, including mercantile and trade agencies, to whom a **financial statement** was issued within the **two years** immediately preceding the commencement of this case by the debtor.

NAME AND ADDRESS DATE ISSUED

20. Inventories

None

- a. List the dates of the last two inventories taken of your property, the name of the person who supervised the taking of each inventory, and the dollar amount and basis of each inventory.

DATE OF INVENTORY INVENTORY SUPERVISOR DOLLAR AMOUNT OF INVENTORY
(Specify cost, market or other basis)

None

- b. List the name and address of the person having possession of the records of each of the two inventories reported in a., above.

DATE OF INVENTORY NAME AND ADDRESSES OF CUSTODIAN
OF INVENTORY RECORDS

21 . Current Partners, Officers, Directors and Shareholders

None

a. If the debtor is a partnership, list the nature and percentage of partnership interest of each member of the partnership.

NAME AND ADDRESS	NATURE OF INTEREST	PERCENTAGE OF INTEREST
------------------	--------------------	------------------------

None

b. If the debtor is a corporation, list all officers and directors of the corporation, and each stockholder who directly or indirectly owns, controls, or holds 5 percent or more of the voting or equity securities of the corporation.

NAME AND ADDRESS	TITLE	NATURE AND PERCENTAGE OF STOCK OWNERSHIP
------------------	-------	--

22 . Former partners, officers, directors and shareholders

None

a. If the debtor is a partnership, list each member who withdrew from the partnership within **one year** immediately preceding the commencement of this case.

NAME	ADDRESS	DATE OF WITHDRAWAL
------	---------	--------------------

None

b. If the debtor is a corporation, list all officers, or directors whose relationship with the corporation terminated within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS	TITLE	DATE OF TERMINATION
------------------	-------	---------------------

23 . Withdrawals from a partnership or distributions by a corporation

None

If the debtor is a partnership or corporation, list all withdrawals or distributions credited or given to an insider, including compensation in any form, bonuses, loans, stock redemptions, options exercised and any other perquisite during **one year** immediately preceding the commencement of this case.

NAME & ADDRESS OF RECIPIENT, RELATIONSHIP TO DEBTOR	DATE AND PURPOSE OF WITHDRAWAL	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY
---	--------------------------------	--

24. Tax Consolidation Group.

None

If the debtor is a corporation, list the name and federal taxpayer identification number of the parent corporation of any consolidated group for tax purposes of which the debtor has been a member at any time within the **six-year period** immediately preceding the commencement of the case.

NAME OF PARENT CORPORATION TAXPAYER IDENTIFICATION NUMBER

25. Pension Funds.

None

If the debtor is not an individual, list the name and federal taxpayer identification number of any pension fund to which the debtor, as an employer, has been responsible for contributing at any time within the **six-year period** immediately preceding the commencement of the case.

NAME OF PENSION FUND TAXPAYER IDENTIFICATION NUMBER

* * * * *

[If completed by an individual or individual and spouse]

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct.

Date _____

Signature _____
of Debtor

Date _____

Signature _____
of Joint Debtor
(if any)

[If completed on behalf of a partnership or corporation]

I, declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct to the best of my knowledge, information and belief.

Date _____

Signature _____

Print Name and Title

[An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor.]

____ continuation sheets attached

Penalty for making a false statement: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. § 152 and 3571

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

Printed or Typed Name of Bankruptcy Petition Preparer

Social Security No.

Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

X _____
Signature of Bankruptcy Petition Preparer

Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 18 U.S.C. § 156.

Form B8 (Official Form 8)
(9/97)

Form 8. INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION
[Caption as in Form 16B]

CHAPTER 7 INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION

1. I have filed a schedule of assets and liabilities which includes consumer debts secured by property of the estate.
2. I intend to do the following with respect to the property of the estate which secures those consumer debts:
 - a. *Property to Be Surrendered.*

Description of Property

Creditor's name

b. Property to Be Retained

[Check any applicable statement.]

Description of Property	Creditor's Name	Property is claimed as exempt	Property will be redeemed pursuant to 11 U.S.C. § 722	Debt will be reaffirmed pursuant to 11 U.S.C. § 524(c)

Date: _____

Signature of Debtor

CERTIFICATION OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

Printed or Typed Name of Bankruptcy Petition Preparer

Social Security No.

Address

Names and Social Security Numbers of all other individuals who prepared or assisted in preparing this document.

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

X _____
Signature of Bankruptcy Petition Preparer

Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

SELECTED BANKRUPTCY COURT NOTICES

- Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, and Deadlines [Form B9D – Asset Case]
- Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, and Deadlines [Form B9B – No Asset Case]
- Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, and Deadlines
- Form 13. Order Approving Disclosure Statement and Fixing Time for Filing Acceptance or Rejection of Plan, Combined with Notice Thereof

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor [corporation] or [partnership] listed below was filed on _____ (date).]
 or [A bankruptcy case concerning the debtor [corporation] or [partnership] listed below was originally filed under chapter ____
 on _____ (date) and was converted to a case under chapter 7 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
 NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor (name(s) and address):	Case Number:
	Taxpayer ID Nos.:
Attorney for Debtor (name and address):	Bankruptcy Trustee (name and address):
Telephone number:	Telephone number:

Meeting of Creditors:

Date: / /	Time: () A.M.	Location:
	() P.M.	

Deadline to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:

For all creditors (except a governmental unit):	For a governmental unit:
---	--------------------------

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office:	For the Court:
	Clerk of the Bankruptcy Court:
Telephone number:	
Hours Open:	Date:

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
 or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on
 _____ (date) and was converted to a case under chapter 7 on _____.]

You may be a creditor of the debtor. You may want to consult an attorney to protect your rights.
 All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
 NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor (name(s) and address):	Case Number:
	Taxpayer ID Nos.:
Attorney for Debtor (name and address):	Bankruptcy Trustee (name and address):
Telephone number:	Telephone number:

Meeting of Creditors:

Date: / /	Time: () A.M.	Location:
	() P.M.	

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Please Do Not File A Proof of Claim Unless You Receive a Notice To Do So.

Address of the Bankruptcy Clerk's Office:	For the Court:
	Clerk of the Bankruptcy Court:
Telephone number:	
Hours Open:	Date:

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was filed on _____ (date).] *or* [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 11 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor (name(s) and address):	Case Number:
	Taxpayer ID Nos.:
Attorney for Debtor (name and address):	Telephone number:

Meeting of Creditors:

Date: / /	Time: () A.M.	Location:
	() P.M.	

Deadline to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:
Notice of deadline will be sent at a later time.

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office:	For the Court:
Telephone number:	Clerk of the Bankruptcy Court:
Hours Open:	Date:

Form B13
6/90

Form 13. ORDER APPROVING DISCLOSURE STATEMENT AND FIXING TIME FOR FILING ACCEPTANCES OR REJECTIONS OF PLAN, COMBINED WITH NOTICE THEREOF

[Caption as in Form 16A]

ORDER APPROVING DISCLOSURE STATEMENT AND FIXING TIME FOR FILING ACCEPTANCES OR REJECTIONS OF PLAN, COMBINED WITH NOTICE THEREOF

A disclosure statement under chapter 11 of the Bankruptcy Code having been filed by _____, on _____ *[if appropriate,* and by _____, on _____], referring to a plan under chapter 11 of the Code filed by _____, on _____ *[if appropriate,* and by _____, on _____ respectively] *[if appropriate,* as modified by a modification filed on _____]; and

It having been determined after hearing on notice that the disclosure statement *[or statements]* contains[s] adequate information:

IT IS ORDERED, and notice is hereby given, that:

A. The disclosure statement filed by _____ dated _____ *[if appropriate,* and by _____, dated _____ is *[are]* approved.

B. _____ is fixed as the last day for filing written acceptances or rejections of the plan *[or plans]* referred to above.

C. Within _____ days after the entry of this order, the plan *[or plans]* *or* a summary *or* summaries thereof approved by the court, *[and [if appropriate] a summary approved by the court of its opinion, if any, dated _____, approving the disclosure statement [or statements]], the disclosure statement [or statements], and a ballot conforming to Official Form 14 shall be mailed to creditors, equity security holders, and other parties in interest, and shall be transmitted to the United States trustee, as provided in Fed. R. Bankr. P. 3017(d).*

D. If acceptances are filed for more than one plan, preferences among the plans so accepted may be indicated.

E. *[If appropriate]* _____ is fixed for the hearing on confirmation of the plan *[or plans]*.

F. *[If appropriate]* _____ is fixed as the last day for filing and serving pursuant to Fed. R. Bankr. P. 3020(b)(1) written objections to confirmation of the plan.

Dated: _____

BY THE COURT

United States Bankruptcy Judge

[If the court directs that a copy of the opinion should be transmitted in lieu of or in addition to the summary thereof, the appropriate change should be made in paragraph C of this order.]