

NEGOTIATING COMMERCIAL LOAN DOCUMENTS

TERRANCE HENDERSON

Comerica Bank
Senior Vice President
Assistant General Counsel
Corporate Legal Department
1717 Main Street, 4th Floor
Dallas, Texas 75201
tfhenderson@comerica.com

SCOTT G. NIGHT

Partner
Haynes and Boone, LLP
2323 Victory Avenue, Suite 700
Dallas, Texas 75219
scott.night@haynesboone.com

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TERRANCE F. HENDERSON

**Senior Vice President, Assistant General Counsel
Corporate Legal Department
Comerica Bank**

TERRANCE F. HENDERSON is a Senior Vice President and Assistant General Counsel for Comerica, Inc., a Dallas based financial services company that is the holding company for Comerica Bank. Terrance represents Comerica in negotiating, structuring and documenting commercial lending transactions for its Retail, Business and Wealth & Institutional Management units in the Texas region. In addition, he provides counsel and training to the Bank's executive managers, lending, trust, and treasury management officers, retail banking center and other personnel on various legal, regulatory, strategic, operational, risk management and compliance issues. He also manages the legal team that supports Comerica Bank's national Small Business Banking group in Arizona, California, Florida, Michigan and Texas.

Prior to joining Comerica, Mr. Henderson was an associate in the Business Transactions Section of Jackson Walker, LLP in their Houston and Dallas offices, where he handled various business and financial transactions for REITs, financial institutions, public and private companies and individuals. Prior to joining Jackson Walker, he was an associate with the New Orleans based law firm of Adams & Reese, LP in their Commercial Litigation and Commercial Transactions groups. Before commencing his legal career, Mr. Henderson was a commercial lending officer with North Park National Bank in Dallas, Texas, a credit analyst with Bank of America (then NCNB) and a field radio operator in the United States Marine Corps Reserves.

He is a member of the 2002 class of Leadership Dallas and serves on the board of the Southern Dallas Development Corporation, the AT&T Cotton Bowl Council, the Southlake Business Council and the Dallas/Fort Worth Minority Supplier Development Council, Inc. He previously served on the boards of UJAMAA Community Development Corporation in New Orleans, Louisiana, the Dallas Wind Symphony and the Texas Association of Bank Counsel. Mr. Henderson was the 2007 Chairman of Comerica Bank's United Way Campaign in the Texas market. Among his teaching pursuits, he has served as an adjunct professor for the University of Dallas' MBA program and has taught courses in financial analysis, banking, law and accounting for the American Banking Association's American Institute of Banking. In addition, he created and taught a quarterly seminar entitled "Contracts, Writing and Negotiating" for the University of Houston's Small Business Development Center at the University of Houston. Mr. Henderson has provided pro bono legal services as a participant and supporter of the Dallas Volunteer Attorney Project and the Louisiana State Bar Access to Justice program.

Mr. Henderson received his J.D. from Notre Dame Law School, an MBA from Tulane University's A.B. Freeman School of Business and a Bachelor of Science degree in Finance from the University of New Orleans. He is licensed to practice law in Louisiana and Texas and is a member of the Texas, Louisiana and Dallas Bar Associations, the American Corporate Counsel Association and the Texas Association of Bank Counsel. He was the recipient of the 1990 Beta Gamma Sigma Mary S. Faulk Award from Tulane University, received a Meritorious Mass for Service Above and Beyond the Call of Duty while in the U.S. Marine Corps Reserves and was selected by "Super Lawyers" magazine as a Texas Rising Star in 2005 and 2006.

Address: 1717 Main St. 4th floor, Dallas, TX 75201 **Tel:** 817-937-4960 **Profile:** <http://www.linkedin.com/in/terrancehenderson>



Scott G. Night

Partner

scott.night@haynesboone.com

Dallas
2323 Victory Avenue
Suite 700
Dallas, Texas 75219

T +1 214.651.5523

F +1 214.200.0564

Areas of Practice

- Finance
- Energy Finance
- Multi-Currency/Cross Border Financings
- Real Estate Finance
- Crisis Management
- Restructuring, Workouts, and Recapitalizations

Education

- J.D., Southern Methodist University, 1989, *cum laude*; Order of the Coif
- B.B.A., University of Texas, 1983, *with honors*

Bar Admissions

- Texas

Scott Night is the chair of the firm's Finance section. He has experience in corporate, commercial, and real estate lending and workouts. He has represented lenders and borrowers in loan transactions including structuring and documenting syndicated credit facilities, real estate secured loans, commercial loans, acquisition facilities, multi-currency loan facilities, and debtor in possession ("DIP") credit facilities. His representation has also included lenders and borrowers in subordinated or mezzanine financing transactions. He is also a frequent speaker on Texas usury law, guaranties, and other finance-related issues. In 2010, Scott was recognized by *Chambers USA* as a leading lawyer in banking and finance. In 2009 and 2010, he was named a Texas Super Lawyer by *Texas Monthly* and in 2005 was listed as one of the top attorneys in bank lending in Dallas by *D Magazine*.

Scott has completed finance transactions including:

- US\$3.4 billion equivalent global credit facility to publicly traded REIT involving U.S., Canada, Euro, Japan, Korea, and China tranches.
- \$1.5 billion revolving credit and letter of credit facilities to publicly traded national homebuilder.
- \$1.21 billion revolving credit facility to publicly traded national homebuilder.
- €900 million equivalent senior unsecured credit facility to European property fund.
- \$700 million revolving credit and term loan facility secured by 16 hotel properties in multiple states.
- \$500 million revolving credit facility for acquisition, construction, and development of multiple real property projects.
- \$450 million revolving credit facility to publicly traded national homebuilder.
- \$320 million advancing term loan facility to facilitate acquisition financing and refinancing of publicly traded senior notes secured by multiple hotel properties.

- \$300 million unsecured revolving credit facility to publicly traded real estate investment trust and its operating partnership.
- \$300 million multi-currency revolving line of credit to publicly traded oil and gas production and marketing company.
- \$200 million revolving credit facility secured by 25 hotel properties in multiple states.
- \$140 million term loan facility secured by 8 hotel properties in multiple states.
- \$135 million revolving line of credit secured by 36 self-storage properties located in multiple states.
- \$45 million revolving credit loan and \$5 million term loan to National Basketball Association franchise.

Memberships

- Past Chair: Business Law Section, State Bar of Texas
- Member: Commercial Financial Services Committee, Business Law Section, State Bar of Texas
- Member: Opinions Law Committee, Business Law Section, State Bar of Texas
- Member: Dallas Financial Institutions Legal Counsel Network
- Member: Texas Association of Bank Counsel

TABLE OF CONTENTS

1. INTRODUCTION:	1
2. PRICING:	1
3. PREPAYMENTS:	3
4. ACCORDION:	4
5. BORROWING BASE:	4
6. CONDITIONS PRECEDENT TO FUTURE ADVANCES:	6
7. REPRESENTATIONS:	6
8. DELIVERY OF FINANCIAL INFORMATION:	7
9. NEGATIVE COVENANTS:	7
10. FINANCIAL COVENANTS:	8
11. DEFAULTS:	9
12. SPECIFIC ISSUES FOR SYNDICATED LOANS:	10

NEGOTIATING COMMERCIAL LOAN DOCUMENTS

1. INTRODUCTION:

- a. Distinguish types of loan and borrowers:
 - (i) Leveraged v. investment grade deals
 - (ii) Cash flow v. asset-based loans
 - (iii) Public debt v. institutional loans
- b. Market:
 - (i) Lenders are quick to follow market trends
 - (ii) Borrowers want “market” terms
- c. Important to note that every deal is different
- d. Important to understand borrower’s business and objectives
- e. Structures:
 - (i) Borrower and subsidiaries as co-borrower
 - (ii) Borrower with subsidiaries as guarantors
 - (iii) Foreign subsidiaries (not guarantors; pledge of 66-2/3rd of stock)
 - (iv) Special purposes or unrestricted subsidiaries
- f. Typical Loan Documents:
 - (i) Credit agreement or loan agreement
 - (ii) Notes
 - (iii) Guaranty agreements
 - (iv) Security agreements
 - (v) Pledge agreements
 - (vi) Real property collateral documents (deeds of trust, mortgages, assignments of rents, environmental indemnity agreements, etc.)
 - (vii) UCC Financing Statements
 - (viii) Third party documents (deposit account control agreements, landlord lien waivers, bailee agreements, etc.)
 - (ix) Miscellaneous documents (solvency certificates, accountant’s letters, perfection certificates, closing certificates, etc.)

2. PRICING:

- a. Interest rate floors
- b. Effective date of rate changes based on change in ratings or performance pricing

Example:

“**Applicable Margin**” means the applicable rate per annum corresponding to the applicable Total Debt to EBITDA Ratio, all as set forth in the following table:

Total Debt to EBITDA Ratio	Base Rate	LIBOR Rate
≥ 2.50 to 1.00	2.00%	3.00%
< 2.50 to 1.00	1.50%	2.50%

The Applicable Margin shall be adjusted quarterly, to the extent applicable, on the date financial statements are required to be delivered pursuant to **Section 6.1.2** (or, in the case of the last Fiscal Quarter of each Fiscal Year, **Section 6.1.1**) after the end of each related Fiscal Quarter based on the Total Debt to EBITDA Ratio as of the last day of such Fiscal Quarter. Notwithstanding the foregoing, (a) until the date that the financial statements for the Fiscal Quarter ending September 30, 2011 are required to be delivered pursuant to **Section 6.1.2**, the Applicable Margin shall be the rates corresponding to the Total Debt to EBITDA Ratio of ≥ 2.50 to 1.00 in the foregoing table, and (b) if Borrower fails to deliver the financial statements required by **Section 6.1.1** or **6.1.2**, as applicable, and the related Compliance Certificate required by **Section 6.1.3**, by the respective date required thereunder after the end of any related Fiscal Quarter, the Applicable Margin shall be the rates corresponding to the Total Debt to EBITDA Ratio of ≥ 2.50 to 1.00 in the foregoing table until such financial statements and Compliance Certificate are delivered, ~~and (c) no reduction to the Applicable Margin shall become effective at any time when an Event of Default has occurred and is continuing.~~

If, as a result of any restatement of or other adjustment to the financial statements of the Loan Parties or for any other reason, Agent determines that (a) the Total Debt to EBITDA Ratio as calculated by Borrower as of any applicable date was inaccurate and (b) a proper calculation of the Total Debt to EBITDA Ratio would have resulted in different pricing for any period, then (I) if the proper calculation of the Total Debt to EBITDA Ratio would have resulted in higher pricing for such period, Borrower shall automatically and retroactively be obligated to pay to Agent, for the benefit of the applicable Lenders, within five (5) Business Days following written demand by Agent, an amount equal to the excess of the amount of interest and fees that should have been paid for such period over the amount of interest and fees actually paid for such period; and (ii) if the proper calculation of the Total Debt to EBITDA Ratio would have resulted in lower pricing for such period, ~~neither Agent nor any Lender shall have any obligation to repay any interest or fees to Borrower~~ Agent and Lenders shall repay to Borrower any overpayments of interest or fees by Borrower.

- c. Automatic highest applicable margin upon certain events (e.g., default, failure to deliver financial statements, etc.)
- d. Default interest:
 - (i) Rate of interest (e.g., additional basis points v. highest lawful rate)
 - (ii) All obligations v. past due obligations

Example 1 (Past Due Obligations):

All past due Obligations shall bear interest at a fluctuating interest rate per annum at all times equal to the Default Rate to the fullest extent permitted by applicable Laws.

Example 2 (All Obligations):

At the election of Lender, while any ~~Default or~~ Event of Default exists, Borrower shall pay interest on the principal amount of all outstanding Obligations hereunder at a fluctuating interest rate per annum at all times equal to the Default Rate to the fullest extent permitted by applicable Laws.

- e. Changes in law, reserves, taxes, and yield protection provisions:
 - (i) Limit to changes of law after the closing date

- (ii) Require lenders to represent that no withhold taxes are necessary and to provide necessary tax forms to establish exemption; no “gross up” unless as a change in law

Example 1:

Notwithstanding the foregoing, no Borrower shall be obligated to make any portion of the Gross-Up Payment that is attributable to any withholding or deductions that would not have been paid or claimed had the applicable Payee or Payees properly claimed a complete exemption with respect thereto pursuant to *Section 3.11*.

Example 2:

Each Lender represents and warrants (such Lender’s “*Exemption Representation*”) to Borrower that, as of the date of this Agreement or, in the case of a Person that becomes a Lender after the Closing Date, as of the date such Person becomes a party hereto (and, in the case of a Lender that agrees to make Loans under a Tranche, as of the date such agreement become effective), except as specified in writing to Administrative Agent and Borrower prior to the date of the applicable Exemption Representation, it is entitled to receive payments from Borrower without any reduction or withholding in respect of any Indemnified Taxes or Other Taxes and without any amount being required to be paid by Borrower pursuant to *Section 9.1.2*. Notwithstanding any other provision of this Agreement, Borrower shall not be obligated to pay any amount under this *Section 9.1* to, or for the benefit of, any Lender to the extent that such amount would not have been required to be paid if (i) such Lender’s Exemption Representation had been accurate or (ii) such Lender had complied with its obligations under *Section 9.1.4*.

- (iii) Require lender to substantiate additional costs, reserves, and breakage costs

Example:

Certificates for Reimbursement. Any Lender that requests compensation pursuant to this *Section 9.4* shall, as soon as practicable **(but in any event within one hundred and twenty (120) days after such Lender determines that the compensation pursuant to this Section 9.4 is required)** after such Lender obtains actual knowledge of the event or condition prompting such Lender to make such determination, and, deliver to Borrower (with a copy to Administrative Agent) a certificate setting forth in reasonable detail the basis for such request and a calculation of the amount necessary to compensate such Lender, as specified in *Section 9.4.1* or *9.4.2*, and any such certificate shall be conclusive absent **manifest demonstrable** error. Borrower shall pay such Lender the amount shown as due on any such certificate within fifteen (15) days after receipt thereof; **provided that Borrower shall not be liable for any such amount or amounts that accrue between the date that the notification described above was required to be given and the date notice was actually given.**

- (iv) Exclude FATCA withholding from tax indemnity/gross-up¹

3. PREPAYMENTS:

- a. Mandatory prepayments tied to certain events (e.g., asset sales, equity issuance, incurrence of debt, etc.):
 - (i) Baskets

Example:

Immediately upon the receipt thereof, Borrower shall prepay the Loans in an amount equal to fifty percent (50%) of any Net Proceeds received by any Company from (a) any Equity Issuance, and (ii) any Disposition **(other than (A) sales and other transfers of Inventory in the ordinary course of business and (v) Dispositions in any Fiscal Year, the Net Cash Proceeds of which do not in the aggregate exceed \$250,000).**

- (ii) Right to rebuild with casualty/condemnation proceeds

¹ FATCA generally will impose a 30% withholding tax on all withholdable payments made to foreign financial institutions or nonfinancial foreign entities (NFFEs) beginning on January 1, 2013.

Example:

All loss recoveries received by Agent upon any insurance may be applied to the Obligations in such order as Agent in its sole discretion shall determine; **provided that, so long as no Event of Default shall have occurred and be continuing, if Borrower deliver a written request to Agent to use the loss recoveries to repair, replace or restore the insured property which was the subject of the insurable loss to a condition better than or at least as good as the condition of such insured property immediately prior to such loss (a "Restoration"), then such loss recoveries shall be applied by Agent to the Revolving Advances and Agent shall implement a reserve equal to the amount of such loss recoveries pursuant to Section 2.1(a)(y)(iv). Borrower may request Revolving Advances in the amount of the loss recoveries (or such portion thereof) to pay the actual cost of the Restoration and the reserve with respect to such amount shall be released and shall be available to Borrower as a Revolving Advance, so long as (i) Borrower has sufficient Undrawn Availability (after giving effect to the release of the reserve for such amount) to cause such Revolving Advances to be made, (ii) all conditions to funding set forth in Section 8.2 of this Agreement have been satisfied and (iii) Borrower agrees to use the proceeds of the Revolving Advances to pay the cost of such Restoration.**

- (iii) Right to reinvest asset sale proceeds (including status of proceeds pending reinvestment; time period to reinvest)

Example:

Borrower shall prepay the Loans not later than the third (3rd) Business Day after the date of receipt of any Net Cash Proceeds by any Loan Party from a Disposition (other than (x) sales and other transfers of Inventory in the ordinary course of business and (y) Dispositions in any Fiscal Year, the Net Cash Proceeds of which do not in the aggregate exceed \$250,000), in an amount equal to 100% of such Net Cash Proceeds; **provided that such Net Cash Proceeds may be retained by Borrower and used to purchase other assets useful in the conduct of the applicable Loan Party's business, so long as (A) no Event of Default exists on the date of such disposition or proposed expenditure, (B) Borrower delivers a certificate to Agent on or prior to the date of such Disposition stating that such Net Cash Proceeds shall be used to purchase assets useful in the conduct of the business of the applicable Loan Party within 180 days following the date of such Disposition (which certificate shall set forth the estimates of the proceeds to be so expended) and (C) any such amounts in excess of \$1,000,000 shall be deposited in escrow with Agent, to be released (x) at Borrower's discretion, during such 180 day period to prepay the Term Loans or to be used as set forth above or (y) at the end of such 180 day period if not so used by such date as set forth above to prepay the Term Loans; provided, that in the event the Obligations have become due prior to the end of such 180 day period pursuant to Section 8.2, then any such amount held in escrow may be applied to prepay the Obligations.**

- b. Optional prepayments credited against mandatory prepayments
- c. Optional prepayments applied in direct order of maturity or pro rata (as opposed to inverse order of maturity)

4. ACCORDION:

- a. Agreement by agent to arrange for additional commitments on some basis (i.e. best efforts)
- b. Limit on time to exercise
- c. Phase in

5. BORROWING BASE:

- a. Focus on "ineligibles" in light of particular borrower or business; limit agent/lender discretion to exclude items from the Borrowing Base; use of "Credit Judgment" in lieu of "sole discretion"

Example:

“**Credit Judgment**” shall mean, with respect to any Person, a determination or judgment made by such Person in the exercise of reasonable (in the business of secured-asset based lending) credit or business judgment and in good faith.

“**Eligible Receivables**” shall mean and include with respect to Borrower and its Subsidiaries, each Receivable of Borrower and its Subsidiaries arising in the Ordinary Course of Business and which Agent, in its ~~sole credit judgment~~ **Credit Judgment**, shall deem to be an Eligible Receivable, based on such considerations as Agent may from time to time deem appropriate. A Receivable shall not be deemed eligible unless such Receivable is subject to Agent’s first priority perfected security interest and no other Lien (other than Permitted Encumbrances), and is evidenced by an invoice or other documentary evidence satisfactory to Agent in its Credit Judgment. In addition, no Receivable shall be an Eligible Receivable if:

- (a) it arises out of a sale made by Borrower to an Affiliate of Borrower or to a Person controlled by an Affiliate of Borrower;
- (b) it is due or unpaid more than (i) sixty (60) days after the original due date or (ii) ninety (90) days after the original invoice date;
- (c) fifty percent (50%) or more of the Receivables from such Customer are not deemed Eligible Receivables hereunder;
- (d) any covenant, representation or warranty contained in this Agreement with respect to such Receivable has been breached **that has not been remedied to the satisfaction of Agent or waived in writing**;
- (e) the Customer shall (i) apply for, suffer, or consent to the appointment of, or the taking of possession by, a receiver, custodian, trustee or liquidator of itself or of all or a substantial part of its property or call a meeting of its creditors, (ii) admit in writing its inability, or be generally unable, to pay its debts as they become due or cease operations of its present business, (iii) make a general assignment for the benefit of creditors, (iv) commence a voluntary case under any state or federal bankruptcy laws (as now or hereafter in effect), (v) be adjudicated a bankrupt or insolvent, (vi) file a petition seeking to take advantage of any other law providing for the relief of debtors, (vii) acquiesce to, or fail to have dismissed, any petition which is filed against it in any involuntary case under such bankruptcy laws, or (viii) take any action for the purpose of effecting any of the foregoing;
- (f) the sale is to a Customer outside the continental United States of America or Canada, unless the sale is on letter of credit, guaranty or acceptance terms, in each case acceptable to Agent in its ~~sole discretion~~ **Credit Judgment**;
- (g) the sale to the Customer is on a bill-and-hold, guaranteed sale, sale-and-return, sale on approval, consignment or any other repurchase or return basis or is evidenced by chattel paper;
- (h) Agent believes, in its ~~sole judgment~~ **Credit Judgment**, that collection of such Receivable is insecure or that such Receivable may not be paid by reason of the Customer’s financial inability to pay;
- (i) the Customer is the United States of America, any state or any department, agency or instrumentality of any of them, unless the applicable Borrower assigns its right to payment of such Receivable to Agent pursuant to the Assignment of Claims Act of 1940, as amended (31 U.S.C. Sub-Section 3727 et seq. and 41 U.S.C. Sub-Section 15 et seq.) or has otherwise complied with other applicable statutes or ordinances;
- (j) the goods giving rise to such Receivable have not been delivered to and accepted by the Customer or the services giving rise to such Receivable have not been performed by the applicable Borrower and accepted by the Customer or the Receivable otherwise does not represent a final sale;
- (k) ~~the Receivables of the Customer exceed a credit limit determined by Agent, in its sole discretion, to the extent such Receivable exceeds such limit;~~
- (l) the Receivable is subject to any offset, deduction, defense, dispute, or counterclaim, the Customer is also a creditor or supplier of a Borrower or the Receivable is contingent in any respect or for any reason; *provided that*, with respect to Receivables subject to any offset or deduction, only to the extent of the maximum potential amount of such offset or deduction against such Receivable;
- (m) the applicable Borrower has made any agreement with any Customer for any deduction therefrom, except for discounts or allowances made in the Ordinary Course of Business for prompt payment, all of which discounts or allowances are reflected in the calculation of the face value of each respective invoice related thereto; *provided that*, with respect to Receivables subject to any discounts or allowances, only to the extent of the maximum potential amount of such discounts or allowances against such Receivable;

- (am) any return, rejection or repossession of the merchandise has occurred or the rendition of services has been disputed;
- (en) such Receivable is not payable to a Borrower; or
- (po) such Receivable is not otherwise satisfactory to Agent as determined by Agent in its ~~sole discretion~~ **Credit Judgment**.

b. Limit agent/lender discretion to adjust advance rates, establish reserves, etc.

Example:

Reserves; Discretionary Rights.² Agent may, from time to time, establish such reserves with respect to the Borrowing Base as Agent may deem proper and necessary from time to time in its ~~sole discretion~~ **Credit Judgment**. The Advance Rates may be increased or decreased by Agent at any time and from time to time in the exercise of its ~~sole discretion~~ **Credit Judgment**. Borrower consents to any such increases or decreases and acknowledges that decreasing the Advance Rates or increasing or imposing reserves may limit or restrict Advances requested by Borrowing Agent. **At all times prior to the occurrence and continuance of an Event of Default, Agent shall give the Borrowing Agent notice of any modification of the Advance Rates at least three (3) Business Days prior to the Agent's implementation of such modification thereof.**

6. CONDITIONS PRECEDENT TO FUTURE ADVANCES:

- a. No "MAC" condition to advances
- b. Representations and warranties true and correct "in all material respects" with exceptions for:
 - (i) Representations as of specific date
 - (ii) Updating of schedules
 - (iii) Exceptions resulting from permitted events

Example:

The representations and warranties of Borrower contained in *Article V* or any other Loan Document, or which are contained in any document furnished at any time under or in connection herewith or therewith, shall be true and correct **in all material respects** on and as of the date of such Credit Extension, **except to the extent that such representations and warranties (a) specifically refer to an earlier date, in which case they shall be true and correct in all material respects as of such earlier date or (b) have changed due to an event or transaction otherwise permitted by this Agreement.**

- c. No conditions to rollovers of, and conversion to, LIBOR borrowings other than absence of a default

7. REPRESENTATIONS:

- a. Limit certain representations to as of the closing date

Example:

~~No~~**As of the Closing Date**, Borrower has no Subsidiaries other than those listed on *Schedule 6.13*, and *Schedule 6.13* sets forth the jurisdiction of incorporation or organization of each such Subsidiary and the percentage of Borrower's ownership interest in such Subsidiary. All of the outstanding capital stock or other equity interests of each Subsidiary described on *Schedule 6.13* has been validly issued, is fully paid, and is nonassessable. ~~There~~**Except as set forth on Schedule 6.13, on the Closing Date, there** are no outstanding subscriptions, options, warrants, calls, rights or other agreements or commitments of any nature relating to any equity interests of Borrower or any Subsidiary.

² From the borrower's perspective, this entire provision is concerning (even with the suggested changes). Unfortunately, a provision similar to this one is present in virtually all "asset based" credit facilities and many commercial loan facilities that have Borrowing Bases.

- b. Materiality qualifiers

Example:

~~Each~~ **Except where non-compliance could not reasonably be expected to result in a Material Adverse Event,** Borrower, each Subsidiary, and all of their respective Properties, assets, and operations are in compliance with all Laws.

- c. Knowledge qualifiers

Example:

Borrower and its Subsidiaries possess all licenses, permits, franchises, patents, copyrights, trademarks, and trade names, or rights thereto, necessary to conduct its respective businesses substantially as now conducted and as presently proposed to be conducted **other than where such failure to possess would not reasonably be expected to result in a Material Adverse Event, and, to the actual knowledge of Borrower,** neither Borrower nor any of its Subsidiaries is in violation of any valid rights of others with respect to any of the foregoing.

- d. Schedules and updates
- e. Limit making of representations to new borrowings (i.e., not required when rolling over or continuing LIBOR borrowings; not included in quarterly compliance certificate)

8. DELIVERY OF FINANCIAL INFORMATION:

- a. Time to deliver financial statements
- b. Consolidated v. consolidating statements
- c. No longer requiring auditor's certification that in conducting their examination, the auditors did not find a default

Example:

(a) as soon as available, but in any event within ~~90~~ **120** days after the end of each fiscal year of Borrower, a consolidated ~~and consolidating~~ balance sheet of Borrower and its Subsidiaries as at the end of such fiscal year, and the related consolidated ~~and consolidating~~ statements of income or operations, changes in shareholders' equity, and cash flows for such fiscal year, setting forth in each case in comparative form the figures for the previous fiscal year, all in reasonable detail and prepared in accordance with GAAP, **such consolidated and consolidating statements to be** audited and accompanied by a report and opinion of an independent certified public accountant of nationally recognized standing reasonably acceptable to Lender, which report and opinion shall be prepared in accordance with generally accepted auditing standards to the effect that ~~(i) such consolidated and consolidating financial statements have been prepared in accordance with GAAP (except for changes in which such accountants concur), and (ii) in making their audit, such accountants have not become aware of any condition or event which would constitute a Potential Default or an Event of Default under any of the terms or provisions of this Agreement (insofar as any such terms or provisions pertain to accounting matters) and, if any such condition or event then exists, specifying the nature and period of existence thereof;~~

9. NEGATIVE COVENANTS:

- a. Allow transactions between borrower and subsidiaries: guarantor and wholly-owned distinctions

Example:

Notwithstanding anything contained herein to the contrary, (a) any Subsidiary of Borrower may be merged, liquidated or dissolved into, or consolidated with, Borrower or a wholly-owned Subsidiary of Borrower, or may consolidate with a wholly-owned Subsidiary of Borrower, so long as Borrower or a wholly-owned Subsidiary of Borrower is the survivor, (b) any Loan Party may sell or otherwise transfer assets to any other Loan Party, (c) any

Loan Party may make investments in any other Loan Party, and (d) any Subsidiary of Borrower may pay dividends or distributions to Borrower or another Loan Party.³

- b. Allow management fees (in private equity sponsored deals); distributions for taxes; other known distribution requirements

Example (Sponsor Management Fees):

Borrower shall not, nor shall Borrower permit any Subsidiary to, pay any management fee; **provided however that Borrower may pay a management fee, in quarterly installments in advance, to [Sponsor] in an aggregate amount during each fiscal year not to exceed the lesser of (a) an amount equal to the result of (x) percent (%) times (y) net income of Borrower for the trailing four (4) fiscal quarters as of the date of determination, or (b) \$, so long as (i) no Event of Default exists or would result thereby, (ii) payment of such fee is subordinated to the payment of the Obligations subject to a Management Fee Subordination Agreement reasonably acceptable to Lender, and (iii) prior to each such payment, Borrower shall have demonstrated to the reasonable satisfaction of Lender that Borrower is in compliance with all covenants of Borrower under this Agreement. Management Fees which are not permitted to be paid pursuant to this Section may be accrued and such accrued amounts may be paid at such time as the payment is not otherwise blocked by this Section or the Management Fee Subordination Agreement.**

Example (Tax Distributions):

- (c) Borrower may pay Permitted Tax Distributions.
“Permitted Tax Distributions” means, with respect to any Person, any dividend or distribution to any holder of such Person’s stock or other equity interests to permit such holders to pay federal income taxes and all relevant state and local income taxes at a rate equal to the highest marginal applicable tax rate for the applicable tax year, however denominated (together with any interest, penalties, additions to tax, or additional amounts with respect thereto) imposed as a result of taxable income attributed to such holder as a partner of such Person under federal, state, and local income tax laws, determined on a basis that combines those liabilities arising out of the net effect of the income, gains, deductions, losses, and credits of such Person and attributable to it in proportion and to the extent in which such holders hold stock or other equity interests of such Person.
- c. Typical baskets and exceptions for debt, liens, restricted payments, asset sales, investments, etc.
- d. Calculation impact of: returns of investments; capitalized interest; netting stock sales proceeds; and netting insurance/asset sales proceeds
- e. Purchase money debt and capital lease obligations, as exceptions to debt, negative pledge, negative-negative pledge, and prepayment restrictions
- f. Miscellaneous:
 - (i) “Acquired debt”
 - (ii) “Stock” acquisitions
 - (iii) “At any time outstanding” versus “in any fiscal period”
 - (iv) Guaranties of obligations not constituting “Indebtedness”

10. FINANCIAL COVENANTS:

- a. Tested only quarterly (not as of any date)
- b. Matching periods and annualizing concepts

Example:

Borrower shall not permit ~~as of any date~~ **as of the last day of any fiscal quarter** the ratio of all Debt of Borrower and its Subsidiaries, on a consolidated basis, as of such date, to EBITDA, for Borrower and its

³ Other possibilities include allowing intercompany debt and liens.

Subsidiaries, on a consolidated basis, for the four (4) fiscal quarters ending on ~~or before~~ such date (except for the quarter ending December 31, 2010, which shall be annualized based upon the three (3) month period then ended, the quarter ending March 31, 2011, which shall be annualized based upon the six (6) month period then ended, and the quarter ending June 30, 2011, which shall be annualized based upon the nine (9) month period then ended), to be greater than ____ to 1.0.

- c. Changes in GAAP; use of non-GAAP accounting principles
- d. Use of unrestricted cash to offset debt in leverage ratio
- e. "Pro forma" adjustments; subordinated debt adjustments
- f. Right to cure with equity

Example:

Fixed Charge Coverage Ratio. Cause to be maintained, as of the last day of any fiscal quarter, a Fixed Charge Coverage Ratio of not less than 1.0 to 1.0; *provided, however*, (i) Borrower may, within thirty (30) days following an Event of Default caused by non-compliance with this **Section 6.5(a)**, cure such Event of Default by causing Equity Investors to purchase additional Equity Interests of Borrower, the proceeds of which shall be in cash and in an amount sufficient to bring Borrower into compliance with such provision (each, a "**Covenant Cure Payment**"). Solely for purposes of calculating the covenant contained in this **Section 6.5(a)**, after a Covenant Cure Payment, the amount of such Covenant Cure Payment shall be deemed added to clause (a) of the definition of "Fixed Charge Coverage Ratio" for purposes of determining compliance with the covenant in this **Section 6.5(a)** solely for the period in which the Event of Default occurred and not for any other period, including the period in which such payment was actually made. For avoidance of doubt, any Covenant Cure Payment received by Agent (for distribution to the Lenders) shall reduce the Obligations by the amount of such payment on the date the payment is received by Agent (for distribution to the Lenders). Notwithstanding the foregoing, the right to cure an event of Default under this Section 6.5(a) may not be exercised (i) by Borrower more than two (2) times in any twelve month period or (ii) in any amount in excess of \$5,000,000 in any period or in an aggregate amount in excess of \$10,000,000.

- g. Unused cap-X rollover

Example:

Borrower shall not permit the aggregate Capital Expenditures of Borrower and its Subsidiaries to exceed \$1,000,000 in the aggregate during the fiscal year ending December 31, 2011 and each fiscal year thereafter; provided that, to the extent that the amount of Capital Expenditures made by Borrower and its Subsidiaries during any fiscal year is less than the aggregate amount permitted (including after giving effect to this proviso) for such fiscal year, then such unutilized amount may be carried forward and utilized by Borrower and its Subsidiaries to make Capital Expenditures in the immediately succeeding fiscal year.

11. DEFAULTS:

- a. Notice and cure periods

Example:

(d) Borrower, any of its Subsidiaries, or any other Obligated Party shall fail to perform, observe, or comply with any covenant, agreement, or term contained in this Agreement or any other Loan Document and such failure continues for more than thirty (30) days following the date Borrower receives notice of such failure from Lender; provided that if such failure is of such a nature that can be cured but cannot with reasonable effort be completely cured within thirty (30) days, then such thirty (30) day period shall be extended for such additional period of time (not exceeding thirty (30) additional days) as may be reasonably necessary to cure such failure so long as Borrower commences such cure within such thirty (30) day period and diligently prosecutes same until completion;

- b. Judgment defaults exclude judgments covered by insurance regardless of amount

Example:

(h) There is entered against any Loan Party one or more final judgments or orders for the payment of money **not covered by independent third-party insurance as to which the insurer does not dispute coverage** in an aggregate amount (as to all such judgments or orders) exceeding \$_____, and, (i) enforcement proceedings are commenced by any creditor upon such judgment or order, or (ii) there is a period of ten (10) consecutive days during which a stay of enforcement of such judgment, by reason of a pending appeal or otherwise, is not in effect;

- c. Cross-acceleration rather than cross default

Example:

(f) Any default shall occur under the terms applicable to any Debt of any Loan Party in an aggregate amount (for all such Debt so affected and including undrawn committed or available amounts and amounts owing to all creditors under any combined or syndicated credit arrangement) exceeding \$500,000 **and such default shall (a) consist of the failure to pay such Debt when due, whether by acceleration or otherwise, or (b) result in the acceleration of the maturity of such Debt prior to its expressed maturity.**

- d. “Change of control” default
- e. Change in management default

Example:

(j) _____ shall fail to be involved in the day to day management of Borrower **and a replacement reasonably acceptable to Lender is not hired by Borrower within one hundred twenty (120) days (or such longer period as may be agreed to by Lender in its sole discretion);**

- f. MAC default

12. SPECIFIC ISSUES FOR SYNDICATED LOANS:

- a. Voting on amendments:
 - (i) Limit types of amendments that require 100% lender approval
 - (ii) Voting by lenders “affected thereby”
 - (iii) Tranche/class voting; when does “only” class voting make sense
 - (iv) Specifying certain amendments that do NOT constitute commitment increases
- b. Assignment provisions
 - (i) Borrower right to approve assignments pre-default

Example:

The consent of Borrower to any proposed assignment (such consent not to be unreasonably withheld) shall be required unless (a) an Event of Default has occurred and is continuing at the time of such assignment or (b) such assignment is to a Lender, an Affiliate of a Lender or an Approved Fund.

- (ii) “Deemed” consent
 - (iii) Minimum increments/hold positions
- c. Right to remove lenders:
 - (i) Increased costs
 - (ii) Defaulting lenders
 - (iii) Non-consenting lenders

Example:

If (i) any Lender requests compensation under *Section 3.04*, (ii) Borrower is required to pay any additional amount to any Lender or any Governmental Authority for the account of any Lender pursuant to *Section 3.01*, (iii) any Lender is a Defaulting Lender, or (iv) any Lender has, within the preceding sixty (60) days, failed to agree to an amendment, waiver, or consent that was (A) requested by Borrower and (B) approved by Required Lenders, then Borrower may, at its sole expense and effort, upon notice to such Lender and Administrative Agent, require such Lender to assign and delegate, without recourse (in accordance with and subject to the restrictions contained in, and consents required by, *Section 10.06*), all of its interests, rights and obligations under this Agreement and the related Loan Documents to an assignee that shall assume such obligations (which assignee may be another Lender, if a Lender accepts such assignment).⁴

d. Defaulting Lenders:

- (i) Voting rights
- (ii) Right to receive payments of fees
- (iii) Right to share in recoveries
- (iv) Borrowing and letter of credit mechanics if there is a Defaulting Lender

- e. Indemnify agent for all costs; lenders only in event of enforcement/remedies
- f. Ability of borrower or affiliates to purchase loans on a non-voting basis

⁴ In addition to replacing a lender with another lender, a borrower may want the right to terminate the commitment and repay the loans of a lender (without having to make prorate payments to all lenders).

